REDUNDANCY CASE

OUTLINE OF CONTENTIONS

Australian Industry Group
Engineering Employers’ Association, South Australia

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1. Introduction

1.1 Ai Group

1. The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia, representing approximately 10,000 employers in the manufacturing, construction, information technology, telecommunications, labour hire, call centre, energy, aviation and other sectors.

2. Ai Group has had a strong and continuous involvement in the industrial relations system at the national and state levels for over 130 years.

3. This outline of contentions is filed by Ai Group and on behalf of its affiliated organisation, the Engineering Employers’ Association of South Australia (EEASA), in accordance with the Commission’s directions of 26 September 2002.

1.2 Scope of this Outline of Contentions

4. Consistent with Ai Group’s understanding of the Commission’s directions of 26 September 2002, this outline of contentions only deals with matters in respect of which Ai Group is pursuing changes to existing test case standards in its applications to the Commission.

5. Further, this outline does not provide a comprehensive account of all of the arguments which support the changes to the existing test case standards which were agreed upon between Ai Group, ACCI and the ACTU in the conciliation process referred to in section 2 below. This outline simply identifies the key variations which have been agreed upon and some of the key arguments in support of such variations.
6. Consistent with Ai Group’s understanding of the Commission’s directions of 26 September 2002, Ai Group is required to file a further outline of contentions and evidentiary materials by 11 April 2003 in respect of those areas where the ACTU is pursuing claims which have not been agreed upon. These include, but are not limited to the unions’ applications:

- To increase severance pay for employees up to age 45;
- For additional severance pay for employees over 45;
- To remove the small business exemption and to apply the agreed redundancy dispute settlement clause to small business;
- To extend notice of termination entitlements to casual employees, other than short-term casuals;
- To extend severance pay entitlements to casual employees, other than short-term casuals;
- To define “week’s pay” for the purposes of calculating severance pay to include shift loadings, allowances and various additional payments which are not currently included;
- To remove the “normal retirement date” limit on severance pay;
- In respect of the redundancy definition in LHMU awards; and
- For a professional services allowance.

1.3 Objects of the Workplace Relations Act

7. An important consideration for the Commission in this case is the consistency of the applications made by the various parties with the objects of the Workplace Relations Act 1996.

8. Such objects emphasise the importance of maintaining a strong economy - including high employment levels, low inflation and international competitiveness.
9. The objects also emphasise the safety net nature of the federal industrial relations award system. The nature of the federal award system today is very different to the nature of the federal award system in place in 1984 when the Commission handed down its *Termination, Change and Redundancy Decisions.* Such differences will be highly relevant when the Commission is considering the ACTU’s claims for significant increases in severance pay.

10. Also, the current safety net federal award system is very different to the award systems which are in place in states such as New South Wales and Queensland – where applications have been made in recent years for redundancy entitlements to be increased. The State Industrial Relations Commissions which heard these cases were operating within very different industrial relations systems and under legislation with different objects to the *Workplace Relations Act.*
2 Overview of Ai Group applications

2.1 An Adverse Redundancy Culture has Developed in Australia

11. Ai Group is very concerned about the adverse redundancy culture which has developed in Australia. For many years unions have been pressing for higher and higher redundancy payments at the enterprise level.

12. The unions have now decided to pursue claims for increased severance pay at the award level in this case. Ai Group strongly opposes such claims.

13. The imposition of higher and higher redundancy obligations on companies is fundamentally flawed and counterproductive. Such an approach is not in the interests of the community – including both employers and employees. Ai Group believes that the focus should be on retention of employment through the maintenance of a business environment where companies can operate profitably and competitively – not on making it more attractive for employees to lose their jobs.

14. Ai Group sees the adverse effects of excessive redundancy packages every day. Companies are very reluctant to engage full-time staff because of concerns about the costs of terminating their employment if demand for the company’s products or services changes. In the current business environment, demand often does change and the uncertainty associated with the environment is highly unlikely to change in the future.

15. To cope with the uncertainty and the already high cost of terminating full-time staff, companies typically choose to maintain a much higher pool of casuals, labour hire employees and contractors than they historically have.
16. Unions lament the “casualisation” of the Australian workforce but the increased redundancy entitlements which they have been pursuing at the enterprise level, and now the award level, have been a major contributing factor to the very significant increase in the number of casuals and contractors in Australia which has occurred over the past decade and the rapid expansion in the labour hire industry.

17. The unions’ response to these developments has been to endeavour to pursue legislative, award and enterprise agreement restrictions on the use of casuals, labour hire employees and contractors. To date they have had little success and this is unlikely to change. Companies cannot afford to lose their labour flexibility if they are to survive in a highly competitive global and domestic environment.

18. If the unions were to succeed in their multi-pronged strategy of: (1) Increasing redundancy payments for full-time staff; (2) Extending redundancy payments to casuals; and (3) Forcing companies to agree to restrict their use of casuals, labour hire and contractors – the effect would be to simply drive lower employment levels, more companies out of business and more decisions to shift company operations off-shore. If the unions were to succeed, a significant barrier would be created, which would deter companies from expanding their operations in Australia and employing more Australians.

19. High redundancy payments in Australia have created a situation whereby companies are inhibited in their ability to restructure their businesses to remain efficient. This factor has been observed in the field by insolvency practitioners: see Witness Statement of Mr Michael Dwyer, National President of the IPAA, Vol 1, Tab 1 at para 29 and 134.
20. A culture has been created whereby, in some circumstances, employees are pursuing the short-term gain of a redundancy payout rather than accepting other restructuring options which might retain jobs and improve business performance. A striking illustration of this is found in the Witness Statement of Mr Nicholas McGloin, the Managing Director of a textile manufacturing business which closed down after the employees and the union rejected a restructuring proposal in favour of the liquidation of the business and the payment of generous redundancy payments: see Vol 1, Tab 2.

21. An opinion-piece by the Minister for Employment and Workplace Relations, the Hon Tony Abbott MP which appeared in The Australian on 7 February 2002 is set out in Vol 2, Tab 4. The opinion piece highlights some of the negative cultural aspects of excessive redundancy packages.

22. The Commission does not have the powers or the applications before it to deal with all of these interrelated issues and problems. However, its decision in the Redundancy Case will be very important. The Commission’s decision will either assist in creating the environment for the problems to begin to be addressed or, if the ACTU’s claim is accepted, Ai Group believes that the existing significant problems will be exacerbated.

**Case Study: Plastyne Products Pty Ltd**

(from the Witness Statement of Mr Nicholas McGloin, Vol 1, Tab 2)

The Company was established in the early 1960s and was engaged in the manufacture of coated fabrics and acoustic noise barrier materials for domestic, commercial and industrial applications. The Company operated a manufacturing plant and administrative office located in the Smithfield industrial zone in Sydney’s southwest.
Prior to the appointment of the administrator, there were approximately 26 employees including the Company’s Managing Director.

The Company operated in a highly competitive market. Cheap imports from parts of Asia and Europe had forced many of the Company’s local competitors out of the market. By the mid-1990s, the Company was the last remaining Australian manufacturer of vinyl tarpaulin and upholstery materials.

Up until the mid-1990s, the severance pay arrangements at the Company were in line with the TCR standard established under the federal Metals Award. However, as the trading conditions for the business became more difficult, the Company faced claims for higher redundancy payments supported by industrial action. By the time the administrator was appointed, the Company’s enterprise agreement provided a basic entitlement to 3.75 weeks’ pay per year of service, payment of all unused sick leave and other benefits upon redundancy.

On 20 September 2001, the directors of the Company resolved to appoint an administrator by resolution under the Corporations Law, on the ground that in the opinion of the directors, the Company was insolvent or likely to become insolvent.

The administrator convened a first meeting of the Company’s creditors on or about 25 September 2001, as required by the Corporations Law.

The second meeting was held on 20 November 2001, as required by the Corporations Law, and for that meeting the administrator prepared a report to creditors dated 12 November 2001.
The administrator’s investigations into the affairs of the Company indicated that the high level of employee entitlements (including redundancy pay) and the Company’s inability to restructure in a cost-effective manner were major factors behind the Company’s financial difficulties.

The administrator formed the view that the value of the Company’s business as a going concern was higher than the value of its assets on a liquidation basis. This was partly due to the nature of the assets of the business, which included plant and equipment, raw materials, stock and work in progress, as well as an established brand name and business reputation. Indeed, the administrator estimated that as at 12 November 2001, there would be no more than six cents in the dollar (on an optimistic basis) for unsecured creditors other than employees on a liquidation basis.

The administrator expressed the opinion in his report that it would be in the creditors’ interests for a directors’ proposal to enter a deed of company arrangement to be approved, rather than returning control to the directors or having the company wound up. The administrator cited a number of reasons in favour of the restructuring proposal put forward by the directors including:

- The quantum of dividend to all classes of creditor (including employees) would be superior;
- The proposal would have ensured continued employment and an ability to restructure in the future;
- The maintenance of a customer to those creditors who continue to supply goods and services to the Company.
The proposal was approved by a majority at the second creditors’ meeting. However, in order for the deed of company arrangement to proceed, a valid majority of employees needed to agree to reduce the level of redundancy pay entitlements under the Company’s enterprise agreement (broadly into line with the existing TCR standard).

On 29 November 2001, the AMWU conducted a meeting of members at the Company’s site. The restructuring proposal was rejected by the union and the employees. Accordingly, the administrator was unable to proceed with the deed of company arrangement, and the business automatically proceeded into liquidation on 10 December 2001.

More than one year later, most employees are yet to receive their over-award severance pay entitlements and remain out of a job. The liquidator’s view is that the employees are only likely to receive about 50 cents in the dollar upon disposal of all company assets. Under the deed of company arrangement, half of the workforce would have maintained their jobs, and those made redundant would have received 54 cents in the dollar.

### 2.2 Negative Impact of the ACTU’s Claim on Employment

23. Consistent with the AIRC’s Directions, Ai Group will file evidence and materials in April 2003 to highlight the significant detrimental effects of the ACTU’s claims on employers – small and large – and the economy generally.

24. However, such evidence will only highlight the obvious – the ACTU’s claim will have a negative impact on employment. As stated by *The Australian Financial Review* Editorial on 2 September 2002, this case “pits workers in
jobs against the unemployed, who want jobs”. The following extracts are relevant:

“The minimum award standard has not been revisited since the Termination, Change and Redundancy decision was handed down in 1984. In the two decades since, workplace restructuring has continued apace, spurred on by the withdrawal of protection and the need for businesses to become internationally competitive. As well, workers in some industries have won up to four weeks’ severance pay for each year of service by exercising their industrial muscle.

Thus the temptation for the Australian Industrial Relations Commission to provide a better deal for vulnerable, low-paid workers will be immense. However, the judges must not let their natural compassion interfere with their duty to examine the impact of such a decision on the wider economy. They need to ask themselves whether, after a decade of strong economic growth that has nonetheless failed to create as many full-time as casual jobs, this is the right time to make it more costly – and less attractive – for businesses to employ low-skilled workers.

But the Commission’s duty is not just to those already in jobs, but also to the big pool of unemployed and long-term unemployed. There is no shortage of anecdotal evidence about the effect of generous redundancy arrangements on employment.

As a rule, imposing a regulatory straightjacket on employment options should be avoided, because it costs jobs which could be going to jobless households”. (see Vol 2, Tab 3).
2.3 Key Elements of Ai Group’s Application

25. Ai Group’s applications seek to address several very important issues, each of which are set out in later sections of this outline of contentions.

26. Transmission of business is one such issue. Ai Group was planning to mount a substantial case to convince the Commission that the existing transmission of business provisions needed urgent amendment. Fortunately, with the extensive assistance of Senior Deputy President Marsh, during the Conciliation process agreement was reached between Ai Group, the ACCI and the ACTU over a series of award changes in this area. Accordingly, Ai Group no longer intends to call witnesses in this area but will make submissions to stress the merits of the wording that has been agreed upon.

27. A very important element of Ai Group’s applications relates to the importance of distinguishing between redundancy in circumstances of insolvency and redundancy in other circumstances. Section 4.0 below deals with this issue.

28. Ai Group’s applications contain a detailed definition of “weeks’ pay” for severance pay purposes which, we submit, is consistent with the existing commonly accepted interpretation of the current simple test case standard definition. The proposed more detailed definition would provide greater clarity and assist in avoiding conflict over severance pay calculations. Refer to section 5.0.

29. Ai Group proposes that the existing “normal retirement date” severance pay cap be replaced with a cap based upon age 65. The reasons why this would be beneficial are set out in Section 6.0.
30. Finally, Ai Group’s applications seek the addition of a new subclause within the termination of employment and redundancy clauses to clarify that such clauses are intended to “cover the field”.

2.4 Structure of Ai Group’s Redundancy Clause

31. As set out in Section 3.0 below, the structure and order of various provisions within the redundancy test case clause has been agreed upon between the major parties. However, one area which has not been agreed between the employers and the ACTU is the structure and some of the content of Ai Group’s proposed subclauses 4.4.2 and 4.4.3.

32. These subclauses are structured to clearly set out the severance pay and job search entitlements of employees engaged by:

- Large employers (those who employ 15 or more employees) who are not insolvent (4.4.2(b));
- Small employers (those who employee less than 15 employees) who are not insolvent (4.4.2(c));
- Large employers who have become insolvent (defined to only include situations where a Liquidator etc has been appointed) (4.4.3(c));
- Small employers who have become insolvent (defined to only include situations where a Liquidator etc has been appointed) (4.4.3(d)).

33. The above structure enables the Commission to focus on what severance and other redundancy entitlements are appropriate for each of the four categories. It will be clear from the evidence and submissions that Ai Group will present, that circumstances are very different in each of the four cases.
34. Ai Group will strongly argue that the Commission should decide that the existing eight week severance pay limit should remain for large employers – both solvent and insolvent.

35. Ai Group will also argue strongly for the retention of the severance pay exemption for small businesses – both solvent and insolvent businesses.

36. The ACTU’s proposed application and the structure of its proposed redundancy clause are based on an “all or nothing” approach. Such an approach overlooks the inherent unfairness of not giving specific consideration to such facts as:

- If the AIRC grants the ACTU’s claim for the removal of the severance pay exemption for small businesses, such businesses will be moving from a situation where there is no requirement to pay severance pay to one where there is a requirement to pay a maximum of 20 weeks severance pay in one extremely large and costly step;

- If the AIRC grants the ACTU’s claim for the an increase in severance pay for larger insolvent businesses then the increased redundancy entitlements for employees of such businesses will be funded by taking funds away from other creditors, many of whom are typically independent contractors - often labour only contractors.

In addition to the above two special categories where there are strong arguments why the existing severance pay entitlements should not be increased, there are equally strong arguments against increasing severance pay for large employers who remain solvent.
3 Conciliation Process

3.1 Background

37. Ai Group, the ACCI and the ACTU (the “major parties”) have participated in an extensive conciliation process before Senior Deputy President Marsh. Conciliation Conferences were convened by the Commission on 26 September, 28 October, 11 November, 22 November, 2 December and 9 December 2002 and further discussions were held directly between the parties.

38. Eventually agreement was reached on the terms of two documents:

- A table which identifies the wording which Ai Group, the ACCI and the ACTU are each seeking as the test case standard award wording. This table is entitled: “Termination and Redundancy Test Case – Major Parties Positions at the Conclusion of Conciliation on 9 December 2002”; (Vol 2, Tab 1) and

- An agreement reached between Ai Group, the ACCI and the ACTU which identifies the agreed and non-agreed matters and the basis upon which various matters have been agreed. The agreement is dated 13 December 2002 and it is entitled: Termination and Redundancy Test Case – Agreement Arising from the Conciliation Process (Vol 2, Tab 2).

39. Ai Group understands that both of the agreed documents were incorporated within Senior Deputy President Marsh’s report to the Full Bench.

40. The negotiations between the major parties during the Conciliation process were lengthy and complicated and numerous concessions were made by each party.
Despite the fact that agreement was not reached on many items, the Conciliation process was worthwhile because, with Senior Deputy President Marsh’s extensive assistance, the parties eventually agreed upon:

- The ordering of the various subclauses within the termination of employment and redundancy clauses;

- The use of the *Metal, Engineering and Associated Industries Award 1998 – Part I* (the “Metals Award”) as the basis for determining the test case standard wording for the termination of employment and redundancy clauses. (However, importantly, as set out in clause 4 of Vol 2, Tab 2, Ai Group, the ACCI and the ACTU have reserved their rights to examine the wording which is eventually determined for the *Metals Award*, on an award by award basis, and to seek to tailor such wording to existing award structures and concepts); and

- On a significant number of specific items which are identified in clause 2 of Vol 2, Tab 2.

The understandings upon which the agreement between the major parties was reached are set out in clause 4 of the Agreement.

The matters not agreed between the major parties are set out in clause 3 of the Agreement.

It was agreed between the parties that Ai Group, the ACCI and the ACTU would communicate their commitment to the terms of the Agreement and attached table in Vol 2, Tab 1 and Vol 2, Tab 2 in writing to the Full Bench by
no later than 20 December 2002. Accordingly, Ai Group commits to the terms of the Agreement and attached table.

3.2 Agreed Matters

45. The matters agreed upon between the major parties include:

- A procedure for dealing with disputes which arise concerning redundancy;
- Amended wording for the termination of employment test case clause;
- A series of definitions relating to redundancy;
- A series of obligations applicable to employers in circumstances of insolvency;
- Amended wording for the redundancy test case clause dealing with the categories of employees exempted;
- An amended transmission of business test case subclause;
- An amended acceptable alternative employment test case provision;
- Minor wording changes to various existing provisions in the redundancy test case clause.

Each of the agreed matters is dealt with below.

3.3 A Procedure for Dealing with Disputes which Arise Concerning Redundancy

46. In subclauses 3.2.4, 3.2.5 and 3.2.6, an agreed procedure for dealing with redundancy disputes is set out. It is intended that these obligations, which relate exclusively to redundancy disputes, apply in addition to the requirements of the existing Metals Award avoidance of disputes procedure.
The agreement of Ai Group to the terms of subclauses 3.2.4, 3.2.5 and 3.2.6 is subject to the qualifications set out in clause 4 of Vol 2, Tab 2.

One important qualification relates to the interpretation of the word “contemplates” in 3.2.4. While Ai Group recognises that such term is used in Article 13 of the Convention Concerning Termination of Employment at the Initiative of the Employer, such term was not adopted by Parliament in ss.170FA or 170GA of the Act which only apply to situations where an employer “decides” to make employees redundant. Likewise, the definition of redundancy agreed upon between the major parties relates to situations where a “definite decision” has been made to make employees redundant. Ai Group submits that if the Full Bench decides to insert the word “contemplates” into the award test case clause then it should make a very clear and unambiguous statement in its Redundancy Case Decision that the Commission intends that such term be interpreted to apply where the employer has the intention or purpose of implementing redundancies and not a broader meaning, ie. where the employer has decided to make employees redundant. Ai Group is concerned that if the meaning of the word “contemplates” is not clarified by the Full Bench in the manner proposed above – far from assisting to resolve disputes, the new redundancy dispute provisions could lead to numerous disputes.

Another important qualification relates to the requirement for “relevant information” to be provided in 3.2.5. As set out in section 4.9 of Vol 2, Tab 2:

“..all parties accept that where a dispute arises regarding the provision of information which is confidential the Commission will (consistent with current practice) preserve that confidentiality. All parties will encourage the AIRC to make an express statement to this effect in any decision on these applications”.

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50. Ai Group submits that it is essential for the Full Bench to make a very clear and unambiguous statement within its Redundancy Decision ensuring that employers are not forced to disclose confidential information if a redundancy dispute arises. This would include confidential information about redundancies that may be under consideration but where a decision has not yet been made and other forms of confidential information.

51. Ai Group submits that the Commission’s “current practice” is consistent with the following wording contained within the 1984 TCR Supplementary case (1984) 9 IR 115 at 126: “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”. In its 1984 TCR decisions, the AIRC decided to insert the above wording into both the redundancy and introduction of change clauses to ensure that all parties were aware of the Commission’s view on this matter.

52. Ai Group submits that the agreed redundancy dispute subclauses are allowable award matters. The content of the subclauses falls within the terms of s.89A(2)(p) – dispute settling procedures.

53. The ACTU has agreed that if subclauses 3.2.4, 3.2.5 and 3.2.6 are held to be allowable by the AIRC then it will withdraw its application under s.170FB of the Act for an Employment Termination Order: see clause 5 of Vol 2, Tab 2). Ai Group strongly opposes the ACTU’s s.170FB application. It would be cumbersome and unworkable to maintain an industry-wide Employment Termination Order identifying a large number of individual companies many of which would be subject to name changes and transmissions of business over time. Unlike award respondency lists, s.149(1)(d) of the Act does not apply to
Employment Termination Orders. Therefore, any industry-wide Termination of Employment Order would need constant updating to maintain its relevance.

54. In contrast to the complexities and deficiencies of an industry-wide Employment Termination Order, the agreed subclauses 3.2.4, 3.2.5 and 3.2.6 are relatively straightforward and would not impose a significant burden on larger employers who have made a decision to make employees redundant.

55. Ai Group opposes the application of subclauses 3.2.4, 3.2.5 and 3.2.6 to employers with less than 15 employees. It would be unreasonable for small businesses to be forced to comply with these additional dispute settling obligations for the following reasons:

- Small businesses do not typically employ specialised human resource personnel to ensure compliance with detailed procedural requirements in circumstances of redundancy;
- Similar to larger businesses, small businesses are subject to onerous unfair dismissal laws if they do not adopt fair and reasonable procedures when making staff redundant;
- The Act recognises in s.170CG(3)(da) and (db) that small businesses generally are not able to implement termination of employment procedures which are as sophisticated as larger businesses;
- The consultation requirements which were contained within the redundancy test case clause, prior to simplification, are largely similar to the requirements set out in subclauses 3.2.4, 3.2.5 and 3.2.6. An AIRC Full Bench decided in the TCR Supplementary decision that these consultation requirements were not appropriate for small businesses;
- The consultation requirements set out in s.170GA of the Act do not apply to situations where less than 15 employees are to be made redundant; and
Exempting small businesses from specific consultation requirements when redundancies are to occur is consistent with Clause 5 of Article 2 of the Convention Concerning Termination of Employment at the Initiative of the Employer (Schedule 10 of the Act).

3.4 Amended Wording for the Termination of Employment Test Case Clause

56. With the exception of the ACTU’s claim to extend notice of termination rights to longer term casual employees, the major parties have agreed on the wording for the termination of employment test case clause. The significant differences between the existing wording and the agreed new wording and the rationale for the amended wording is set out below.

4.3.1(d) – Calculation of the notice to be given by employers

57. A problem exists with the current award test case wording dealing with the calculation of notice of termination to be given by employers because the wording in awards is inconsistent with the requirements of s.170CM of the Act.

58. The agreed new wording ensures consistency between the Act and awards. The wording in s.170CM of the Act is incorporated within the award wording.

4.3.1(e) – Categories of employees exempt for the purposes of notice of termination

59. Agreement has been reached to add a new category of employees to the exemptions. That is: “trainees whose employment under a traineeship agreement or an approved traineeship is for a specified period or is, for any other reason, limited to the duration of the agreement”.

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60. The wording of the new exempt category is consistent with the wording in Workplace Relations Regulation 30B. This regulation exempts certain categories of employees from various provisions of the Act relating to termination of employment including s.170CM – Employer to Give Notice of Termination.

61. In 1984, when the TCR Decisions were handed down the modern concept of a traineeship was not common although apprenticeships were. The Full Bench in the TCR Case decided that apprentices should be excluded from the notice requirements. Today, the concepts of traineeships and modern apprenticeships are interwoven and it is has been agreed between the major parties that it is appropriate for the exemption to apply to both trainees and apprentices.

4.3.2 – Notice of termination by employee

62. Under the existing award provisions, there is consistency between the method of calculation of the notice required to be given by an employer and the method of calculation of the monies which are able to be withheld by an employer if an employee fails to give the required amount of notice.

63. It has been agreed between the major parties that such consistency should be preserved. Accordingly, the wording in 4.3.2 has been amended to ensure consistency with the new method of calculation set out in 4.3.1(d).

4.3.4 – Job search entitlement

64. The major parties have agreed that the existing subclause title of “Time off during notice period” should be replaced with the title of “Job search
entitlement”. The new title identifies that the purpose of the time off is to search for another job.

### 4.3.5 – Transmission of business

65. The ACTU’s applications sought the inclusion of a transmission of business subclause within each termination of employment award clause. A form of such subclause has been agreed upon between the major parties.

66. The agreed subclause is consistent with the current provisions of the Metals Award. Under the existing *Metals Award* termination of employment clause, paragraph 4.3.1(f) states that: “For the purposes of this clause, service shall be calculated in the manner prescribed by subclause 7.1.5 – How to Calculate Leave.”

67. The existing paragraph 4.3.1(f) includes a transmission of business provision in similar terms to the agreed new subclause 4.3.5. References to annual leave have been replaced with references to notice of termination.

### 3.5 A Series of Definitions relating to Redundancy

68. The major parties have agreed on the wording and the inclusion of the following definitions within the redundancy test case standard clause: “Redundancy”, “Business”, “Transmission”, “An insolvent employer”, “An insolvency practitioner”, “Employee Entitlements Safety Net Arrangement” and “Relevant authority”.

69. Various qualifications upon the agreement which has been reached on the wording of the above definitions are set out in sections 4.1, 4.2 and 4.6 of the Agreement in Vol 2, Tab 2.
Consistent with commonly accepted drafting principles, the major parties have agreed that all of the definitions within the redundancy clause should be set out in the first subclause. These definitions include:

- A definition of “Redundancy” which has been slightly reformatted but which remains consistent with the existing Metals Award redundancy definition and the definition handed down in the 1984 TCR Case. It contains the following key elements:
  
  o A definite decision being made that the employer no longer wishes the job the employee has been doing done by anyone;
  o The decision leading to termination of employment; and
  o The exception that redundancy does not occur where termination of employment results from the ordinary and customary turnover of labour;

- Definitions of “Business” and “Transmission”, which are identical to the definitions in the existing transmission of business subclause in the Metals Award redundancy clause;

- Definitions of “An insolvent employer” and “An insolvency practitioner” which are largely drawn from the operating guidelines for the Federal Government’s General Employee Entitlements and Redundancy Scheme (GEERS); (These definitions are important because they **tangibly and precisely define when an employer is insolvent** for the purposes of relevant provisions within the redundancy clause. They are relevant for the purposes of subclause 4.3 in the Ai Group, ACCI and ACTU proposals); and
3.6 A Series of Obligations Applicable to Employers in Circumstances of Insolvency

71. The major parties have agreed that the redundancy test case clause should contain a series of obligations upon employers in circumstances of insolvency. Such obligations include:

- Advising employees at the time when the employer becomes insolvent (defined as the time when a Liquidator, etc has been appointed, as set out in the definition of “an insolvent employer”);
- Advising the Relevant Authority (e.g., Department of Employment and Workplace Relations) which administers the Employee Entitlements Safety Net Arrangements (e.g., GEERS) of the employer’s insolvency in circumstances where there are insufficient assets or funds available to meet all employee entitlement liabilities; and
- Paying eligible employees, who are entitled to payments under the Employee Entitlements Safety Net Arrangements, upon receipt of advances made from the Government scheme.

72. The above obligations are practical and sensible award provisions which would facilitate the receipt by employees at the earliest possible time of compensation for lost severance and other entitlements in circumstances where a company has become insolvent and the employees are eligible under the relevant Government scheme (e.g., GEERS).
73. The provisions are allowable award matters. They deal with employee entitlements to redundancy pay (s.89A(2)(m)), wages (s.89A(2)(c)), notice of termination (s.89A(2)(n)), annual leave (s.89A(2)(e)) and long service leave (s.89A(2)(f)).

74. Further, paragraph 4.4.3(b) in Ai Group’s proposal is incidental and necessary for the effective operation of Ai Group’s proposed redundancy clause (s.89A(6)).

3.7 Amended Wording for the Redundancy Test Case clause dealing with the Categories of Employees Exempted

75. Agreement has been reached to add trainees to subclause 4.4.4, as a new category of employees to be exempted from the redundancy provisions.

76. As set out in the section above dealing with notice of termination, in 1984 when the TCR Decisions were handed down the modern concept of a traineeship was not common although apprenticeships were. The Full Bench in the TCR case decided that apprentices should be excluded from the notice requirements. Today, the concepts of traineeships and modern apprenticeships are interwoven and it is has been agreed between the major parties that it is appropriate for the exemption to apply to both trainees and apprentices.

77. Paragraph 4.4.4(vii) is a provision unique to the Metals Award and not appropriately included in other awards.
3.8 An Amended Transmission of Business Test Case Subclause

78. Transmission of business applies where all or part of a business moves from one entity (the transmittor) to another (the transmittee). It can have significant legal, industrial and commercial implications.

79. Transmission of business is a longstanding feature of all market economies. However, it has assumed a special significance in Australia over recent years as a consequence of a massive restructuring of the private sector and the corporatisation and privatisation of the activities of many governmental bodies.

80. It is no accident that Australian businesses have undergone this massive restructuring as the economy generally has become increasingly exposed to international competitive pressures. Globalisation has reshaped and will continue to reshape Australian industry. Globalisation of markets and production have forced major changes on Australian businesses. To survive and compete, Australian firms have had to rationalise, merge, downsize and cut costs. This restructuring has, in turn, had a major influence in lifting productivity levels.

81. Australian businesses are almost invariably restructured or rearranged in entirely good faith to remain competitive, with the intention of providing ongoing employment for employees and with no intention to reducing employee entitlements or rights.

82. Globalisation has also meant that businesses do not need to limit their restructuring within national borders. Firms based in Australia can outsource or transmit part of their business overseas. A good example is the rapidly expanding call centre sector where Australian firms have the option of outsourcing their call centre operations to foreign locations such as India,
Korea, South East Asia, North America and parts of Europe, thereby using local workers with English language skills to service Australian customers. Capital and jobs are fluid, and do not need to be invested, created or maintained in Australia.

83. This begs the immediate question of the wisdom of any award or legislative regime which places unfair and unwieldy restrictions upon the ability of firms in Australia to outsource or transmit their businesses (or parts of them) in order to remain globally competitive. Ultimately, there is a risk that investment and jobs will move off-shore if the award or legislative framework impose illogical and inequitable outcomes upon the ability of employers in Australia to manage their businesses in the context of transmission of business.

84. There is a pressing need for the current award transmission of business provisions to be amended.

85. In the 1984 TCR case (1984) 8 IR 34 at 75, the Commission said:

“...we would make it clear that we do not envisage severance payments being made in cases of succession, assignment or transmission of a business”

86. Despite this clear statement, some decisions of the Federal Court have awarded redundancy pay to employees in circumstances of transmission of business. These decisions include Construction, Forestry, Mining and Energy Union v Amcor Limited [2002] FCA 610, which is subject to appeal, and FSU v Commonwealth Bank of Australia (2001) FCA 1613 which was subsequently overturned on appeal. Both of these decisions had unique aspects. The Amcor decision was based upon the wording of a certified agreement and the CBA decision related to a redundancy clause in an enterprise award with significantly different terms to the standard test case redundancy clause.
Despite this, decisions such as these are causing great concern amongst employers and this is deterring some employers from implementing necessary restructuring plans due to the perceived risks involved.

87. The transmission of business provisions which have been agreed upon between the major parties, as set out in subclause 4.4.6 of Vol 2, Tab 2, have the following effects:

- Where a **transmission of business occurs** (as defined in the subclause) and the **employee accepts employment** with the transmittee then:
  - If the transmittee **recognises the period of continuous service** which the employee had with the transmittor and any prior transmittor to be continuous service of the employee with the transmittee, then

  the **provisions of the award redundancy clause do not apply.**

- Where a **transmission of business occurs** (as defined in the subclause) and the employee **rejects an offer of employment** with the transmittee then:
  - If the terms and conditions offered are **substantially similar and no less favourable, considered on an overall basis**, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmittor, and

  - If the offer **recognises the period of continuous service** which the employee had with the transmittor and any prior transmittor
to be continuous service of the employee with the transmitee, then

the provisions of the award redundancy clause do not apply.

88. As set out in paragraph 4.4.6(b) of the agreed subclause, the Commission may vary the provisions of 4.4.6(a)(ii) if it is satisfied that this provision would operate unfairly for an employee or employer in a particular case.

89. The agreed subclause provides clarity for employers and employees in circumstances where a business is transmitted from one employer to another:

- It sets out the criteria which would need to apply for employers to avoid paying redundancy pay in circumstances where an employee accepts a job with the transmitee;

- It sets out the criteria which would need to apply for employers to avoid paying redundancy pay in circumstances where an employee refuses a job offer with the transmitee;

- It enables the AIRC to address any unfair circumstances which might arise in a particular case where an employee of a transmitee refuses a job offer with a transmittor;

- The transmission of business sub-clause is not linked to the adequate alternative employment sub-clause. Therefore, there is no requirement for a transmitee to obtain an order from the AIRC to avoid paying severance pay in circumstances where the criteria in 4.4.6(a)(i) or (ii) are met.
3.9 An Amended Acceptable Alternative Employment Test Case Provision

90. The major parties have agreed to retain the existing test case acceptable alternative employment provision with one important amendment. It has been agreed that an additional sentence should be added as follows:

“This provision does not apply to circumstances involving transmission of business as set out in 4.4.5.”

91. Breaking any link between the transmission of business sub-clause and the acceptable alternative employment sub-clause will overcome the significant uncertainty which currently exists regarding whether or not transmittees in any circumstances are required to obtain an acceptable alternative employment order from the AIRC to avoid paying redundancy pay. The extent of the existing uncertainty regarding this issue can be gleaned from the recent decision of Senior Deputy President Duncan in Commonwealth Bank of Australia v FSU, PR925304, 4 December 2002, paragraphs 71 to 84.

3.10 Minor Wording Changes to other existing provisions in the Redundancy Test Case Clause

92. The parties have agreed that minor wording changes should be made to two other existing provisions in the redundancy test case clause. These changes are reflected in the following provisions of the table in Vol 2, Tab 1.
Job search entitlement (subclauses 4.4.2(b)(iv) and 4.4.3(c)(iv) in Ai Group and ACCI’s proposals and 4.4.10 in the ACTU’s proposal)

93. The parties have agreed that the existing title of “Time off during notice period” should be replaced with the title of “Job search entitlement”. The new title identifies that the purpose of the time off is to search for another job.

94. Wording has also been inserted to clarify that the employee is not entitled to the job search entitlement under the notice of termination clause when they are entitled to the more generous job search entitlement under the redundancy clause.

Employee leaving during notice period

95. Subclause 4.4.9 has been reworded to clarify that the entitlement relates to circumstances where the employee leaves during the period of notice set out in paragraph 4.3.1 in the notice of termination clause and not situations where an employee leaves during a longer period of notice. In some circumstances much longer periods of notice are able to be given (eg. where a plant closure is to occur). It is not in the public interest for award provisions to discourage employers from provide lengthy periods of notice where this is possible.
4.0 Redundancy and Corporate Insolvency

4.1 Why Focus upon Insolvency?

96. The issue of corporate insolvency has received significant public attention in Australia over recent years. High-profile corporate collapses such as Ansett, One.Tel and HIH Insurance have highlighted the difficult position faced by the various stakeholders – business owners, employees and creditors - when a company becomes insolvent.

97. Insolvency presents a unique set of circumstances, as the following evidence by the National President of the IPAA illustrates (Vol 1, Tab 1 at para 151):

“A business collapses due to severe financial distress. A range of different stakeholders are left standing. The Administrator is then usually charged with the difficult task of keeping the business alive as an alternative to liquidation. In the event that the business is resuscitated, jobs are saved and creditors can generally expect a better return. The interests of the community are also served. Where the business is wound-up, everyone loses to some extent and various classes of creditor (not just employees) suffer hardship.”

98. In Ai Group’s view, it is appropriate for the Commission to recognise the unique circumstances surrounding employer insolvency in setting any national standards for redundancy. Different considerations apply where terminations are due to insolvency as distinct from “voluntary, self-improvement directed retrenchment”: see Re Redundancy Awards (1994) 53 IR 419 at 450-451 per Peterson J.

99. In the TCR case, the Commission rejected the argument that there should be any fundamental distinction based on the causes of redundancy: (1984) 8 IR 34 at 61-62. The Commission decided that it would adopt a general definition of
redundancy and provide a mechanism for employers to argue in particular cases that the standard prescription should be varied on the basis of incapacity to pay.

100. Almost two decades later, the incapacity to pay mechanism has proven to be very ineffective in providing protection for employers in cases of corporate collapse or decline. Businesses facing economic difficulties have been unable to obtain the relief necessary to restructure their operations and thereby maintain jobs.

101. At the same time, the evidence demonstrates that business failures are hard on all parties – owners, shareholders, employees, suppliers, customers and other trade creditors. No one is a winner in an insolvency situation. A balance needs to be struck between the interests of the employees and those of the other creditors of the company.

102. Any contemporary review of national standards for redundancy should also take into account developments under insolvency law. Since the original TCR case was heard in 1983-84, a number of significant changes have occurred in the area of insolvency regulation. Chief among those developments was the introduction in 1993 of the Voluntary Administration provisions under Part 5.3A of the Corporations Law.

103. Voluntary Administration is designed to maximise the chances of an insolvent company (or parts of it) continuing in existence. This has obvious benefits for all stakeholders, as well as the Australian community.

104. Voluntary Administration has become a popular form of insolvency administration in Australia. Many financially distressed companies have been able to restructure their operations during the administration period, and
thereby continue employment within the firm: see Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1.

105. However, the evidence also demonstrates that redundancy arrangements have the strong potential to impede, or even destroy, the process of Voluntary Administration: see Vol 1, Tab 1. In some cases, the high level of redundancy pay liabilities has effectively thwarted attempts by Administrators and business owners to re-organise the affairs of the business and maintain jobs: see Witness Statement of Mr Nicholas McGloin, Vol 1, Tab 2.

106. In reviewing the national standard for redundancy, it is appropriate for the Commission to encourage the policy of “corporate rescues” now embodied within our insolvency law.

107. It is also significant that the State now guarantees the payment of up to 8 weeks’ redundancy pay upon insolvency (through the operation of GEERS). Any increase in the level of redundancy pay beyond this standard will inevitably lead to industrial unrest in circumstances where there is a shortfall in paid entitlements upon insolvency.

108. For these reasons, Ai Group seeks to vary the existing test case redundancy standard in order to:

• distinguish between redundancy due to insolvency and redundancy due to other circumstances;
• limit the maximum amount of award-based redundancy payments to 8 weeks’ pay in the event of an insolvency (for larger businesses).
109. The above aspects of Ai Group’s applications build upon the insolvency-related provisions agreed between the parties during the conciliation process. The various aspects of the application are explored in more detail below.

4.2 Recognition of Unique Requirements in an Insolvency Scenario

110. Arising out of the conciliation process, the parties have agreed upon a unique set of requirements in the event of insolvency:

“4.4.3 Insolvent Employers’ Obligations

(i) Employers must advise employees of their insolvency at the time when they become an insolvent employer (as defined).

(ii) Insolvent employers, or the insolvency practitioner managing their affairs, must advise the Relevant Authority (as defined) of the employer’s insolvency at the time when the employer becomes an insolvent employer (as defined) where there are sufficient funds available to meet all the employee entitlement liabilities.

(iii) Without detracting from an employer’s obligations under the Corporations Act 2001, insolvent employers, or the insolvency practitioner managing their affairs, must pay employees who are eligible under the Employee Entitlements Safety Net Arrangements (as defined) on receipt of any advances made from the Employee Entitlements Safety Net Arrangements.
(iv) *Nothing in (i), (ii) or (iii) derogates from any other obligation which an insolvent employer or insolvency practitioner would have under any law*.

111. These obligations are triggered in the event that an employer becomes “an insolvent employer”. The agreed definition of an “insolvent employer” consists of two streams – an incorporated employer and an unincorporated employer. For the purposes of the clause, an incorporated employer becomes insolvent upon the appointment of Liquidator or Administrator under the Corporations Act 2001. An unincorporated employer is defined as insolvent upon entering bankruptcy under the Bankruptcy Act 1996.

112. Accordingly, the obligations imposed upon an insolvent employer (or the insolvency practitioner managing their affairs) are triggered by a precise and tangible event. In the case of an incorporated employer, the obligations arise when the company enters formal external administration. In the case of an unincorporated enterprise, the obligations only arise once the business files for bankruptcy. The agreed clauses therefore avoid the problem of introducing any definitional uncertainty.

113. The definition of “insolvent employer” is largely borrowed from the GEERS Operational Arrangements: see Vol 2, Tab 5. However, a comprehensive description of the different kinds of insolvency appointments for both incorporated and unincorporated enterprises (which trigger the definition of an “insolvent employer” under the agreed clauses) is also set out in the Witness Statement of Mr Michael Dwyer: Vol 1, Tab at para 36-125.

114. The obligations imposed upon insolvent employers under the agreed clause involve:
• notifying employees of the employers’ insolvency;
• advising the Relevant Authority (as defined) of the employers’ insolvency in the event there is any inability to meet unpaid employee entitlements (including severance pay);
• forwarding to employees any payments made from the Employee Entitlements Safety Net Arrangements.

115. The obligations may apply to the insolvency practitioner managing the affairs of the employer during the administration period. Effectively, the insolvency practitioner fills the shoes of the employer during the period of administration, and thereby becomes bound by the same set of obligations applicable to the employer under the relevant award.

4.3 Establishing the Link between the Award System and GEERS

116. The agreed clause establishes a formal link between the award safety net and the Federal Government’s GEER Scheme.

117. GEERS operates to provide compensation to employees who lose entitlements upon insolvency. GEERS came into operation in September 2001 and the replaced the former Employee Entitlements Support Scheme (EESS) which provided significantly less compensation to employees. GEERS is fully funded by the Federal Government. Insurance schemes were considered but rejected by the Government: Vol 2, Tab 9).

118. The history and nature of GEERS is explained in:

• the Witness Statement of Mr Michael Dwyer: Vol 1, Tab 1 at para 140-142;
119. According to the Audit Office review report, the Federal Government paid out 8,538 EESS and 4,582 GEERS payments in period to June 30 2002. Some $62.36M was paid out in 2001-2002, while the budget for the current financial year is $85.183M: see Vol 2, Tab 8. The vast majority of claims were from employees engaged in small insolvent businesses.

120. GEERS provides compensation for a maximum of up to 8 weeks’ redundancy pay in line with the community standard. There are sound reasons as to why GEERS should be capped to a maximum of 8 weeks’ redundancy pay, as set out in Ai Group’s publication, *Protection of Employees’ Entitlements: Understanding the Facts*: Vol 2, Tab 11 at pp.6-8.

121. In addition, capping is a common feature of employee entitlement protection schemes throughout the world: see Ministerial Discussion Paper, *The Protection of Employee Entitlements in the Event of Employer Insolvency*, Vol 2, Tab 10 at pp. 15-26; see also Annexure B to the Witness Statement of Mr Michael Dwyer, Vol 2, Tab 1.

122. Recent decisions of the Commission have had regard to the operation of GEERS as part of the overall safety net for Australian employees.

123. In *Re Cosco Holdings Paper Manufacturing and Converting Award 1999* (PR919999, 15 July 2002), Justice Munro urged unions to “examine what need exists to have an award varied if the GEER Scheme does operate” (at para 10).
124. In *Shadfar v Domino River Pty Ltd* (PR922147, 4 September 2002), Senior Deputy President Williams ordered the reinstatement of an employee engaged by a company about to go into voluntary liquidation in order to afford the employee access to GEERS.

4.4 **Need to Distinguish between Redundancy due to Insolvency and Redundancy due to Other Causes**

125. There are a range of compelling reasons as to why loss of employment due to company collapse should be distinguished from other types of redundancy.

*Insolvency is a Totally Different Context*

126. There is an obvious distinction between redundancies which occur in the context of insolvency and those which arise due to other reasons such as corporate restructuring, technological change or decline in demand.

127. In the latter case, the employer makes a deliberate decision to shed labour in an effort to improve company performance and achieve higher profitability. Indeed, the employer may be seeking to enhance its existing level of profitability.

128. By contrast, the insolvent employer is financially stricken and has no option but to retrench all employees. The idea that every employee would some day become entitled to a redundancy package would not be contemplated. It does not follow that redundancy packages applicable to financially viable employers should apply if a business becomes insolvent.

> “Where activity . . . involves losses of employment on the one hand and corporate consolidation and improvement on the other, there is good reason for distinguishing the consequential redundancy benefits from those payable on corporate collapse or decline.

. . . . the question arises whether in the event that a case has been made out to justify an increase in redundancy pay in the particular circumstances in evidence in the present case, it should also extend to those redundancies which occur as a result not of improved company performance but rather financial constraints. *In my opinion it would not be appropriate to attempt to categorise these differing circumstances together. It would not be just that an employer who, as a result of economic downturn beyond its control is required to retrench employees, should be called upon to make the same payment with respect to redundancy pay as an employer who pursues higher profitability, better performance, perhaps from the starting point of profitability. Of course, viewed from the standpoint of an employee, whether the employer elects to sever the relationship for reasons of economic downturn or company reconstruction may be a matter of little significance. However, any import of redundancy pay must fairly reflect not only the circumstances of the employee but those of the employer.”

130. Furthermore, in a passage which is clearly relevant to the ACTU’s claim to increase the federal TCR severance pay scale in line with the NSW standard, his Honour commented (at 451) (emphasis supplied):

> “If one is to apply the principle that severance pay is awarded on the basis in part that the employer has a responsibility to support the retrenched employee
pending the conversion of that person into a social responsibility, then it appears to me that the circumstances which cause the loss of employment must be taken into account. In effect, the economic constraints limiting the grant of redundancy pay in 1983 must be taken to apply just as much to economic difficulty which may cause redundancy in 1994. The impost of an increase in redundancy pay in a given case does not fall on society generally or employers generally, so that any overall improvement in the economy will be cold comfort to both employer and employee detrimentally affected by poor financial performance. In my view the voluntary, self-improvement directed retrenchment is to be distinguished from economic difficulty”.

131. Although his Honour’s remarks about distinguishing cases of economic difficulty were not confined to cases of employer insolvency, we say that this reasoning applies a fortiori in the circumstances where the business has collapsed due to severe financial distress.

Need for Compromise between Employees and Other Creditors

132. In an insolvency scenario, there are a number of competing interests or worthwhile causes – business owners, shareholders, customers and suppliers. There are also no winners. As the Productivity Commission has observed (see page 99 of Annexure B to the Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1):

“An insolvency regime cannot fully protect the interests of all parties. Insolvency only occurs when some groups must be losers, and its prime intent is to create incentives for prudence among business owners and for a willingness to provide funds”.
133. The evidence demonstrates that there a range of classes of creditor which suffer hardship and inconvenience as a result of corporate collapses. These classes of creditor are not limited to employees. They include (see Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1):

- supplier firms (whose own employees may also suffer hardship due to the “knock-on” effects of insolvency);
- customers;
- sub-contractors (whose work arrangements are often similar to those of employees);
- and other claimants (eg, persons seeking damages for product liability).

134. The evidence also illustrates that business owners usually lose substantial personal assets upon insolvency: see Witness Statement of Mr Nicholas McGloin, Vol 1, Tab 2 at para 28.

**Dependent Contractors are a Particularly Vulnerable Class of Creditor**

135. Dependent contractors are in an equally disadvantageous position to employees upon company closure because their conditions tend to mimic those of employees: see Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1. They too may suffer significant economic loss and disruption.

136. In the recent paper by the Productivity Commission entitled “Self-Employed Contractors in Australia: Incidence and Characteristics”, the following facts were identified (see Vol 2, Tab 14):

- between 1978-2001, there has been a marked increase in the number and proportion of contractors in the Australian workforce;
• the share of contractors increased by at least 15% over the two decades to 1998;
• in August 1998, self-employed contractors accounted for 10.1 per cent of all employed persons, or about 844 000 persons;
• of these, around 25% were dependent contractors. This translates into a 2.6% share of total employment for dependent contractors;
• relative to independent contractors, dependent contractors are more likely to be: relatively younger, employed in low-skill occupations and receiving an unvarying wage or salary.
• dependent contracting is relatively common in construction, transport and storage.

137. The Productivity Commission made the following observations (quoting from the Ralph Report) (Vol 2, Tab 14 at p.6):

“There is evidence of a significant and accelerating trend for employees to move out of a simple employment relationship to become unincorporated contractors or owner-managers of interposed entities while not really changing the nature of the employer-employee relationship.”

138. Increasing redundancy pay entitlements for employees will reduce the amount of surplus assets available for distribution to other creditors, including contractors.

Imposing Additional Cost When Companies Can Least Afford It

139. As Peterson J pointed out in Re Redundancy Awards (1994) 53 IR 419 at 451, “any import of redundancy pay must fairly reflect not only the circumstances of the employee but those of the employer”. 
140. In cases of corporate collapse, the employer is clearly least able to afford
redundancy pay liabilities. It is appropriate for these unique circumstances to
be recognised in any general award of redundancy pay.

*Increased Redundancy Pay Creates a Bigger Incentive to Lose a Job than
Keep It*

141. The evidence demonstrates that increases in the redundancy packages of
employees provides a significant incentive for employees to lose their jobs
rather than keep them: see Witness Statement of Mr Nick McGloin, Vol 1, Tab
2.

142. In the context of insolvency, it provides a significant incentive for employees
to exercise their power as a creditor class to vote against restructuring
proposals and in favour of company liquidation: see Witness Statement of Mr
Nick McGloin, Vol 1, Tab 2.

143. This is contrary to the public interest: see section 90 of the Act.

*Developments in Insolvency Law post 1984*

144. One of the most significant reforms in Australia’s insolvency regime since the
TCR case was originally decided in 1984 was the introduction of Part 5.3A of
the Corporations Law in 1993. Its object was to maximise the chances of an
insolvent company continuing in business: see generally *Brian Rochford Ltd
(Administrator Appointed) v TCFU* (1998) 85 IR 332 at 336-338 per Austin J.
See also Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1.

145. To that end, Part 5.3A allows an Administrator to be appointed by the business
owners. The Administrator then takes control of the affairs of the company and
must investigate the possibility of a Deed of Company Arrangement being executed, in effect, a mechanism for the company to be restructured.

146. During the administration period, a moratorium is imposed upon any recovery action by creditors in order to permit the administrator to act efficiently and without interference – “not extinguishing rights but generally suspending their exercise”: Brian Rochford Ltd (Administrator Appointed) v TCFU (1998) 85 IR 332 at 338 per Austin J.

147. Accordingly, the Corporations Law treats the administration period as a “special time in the life of the company”: Brian Rochford Ltd (Administrator Appointed) v TCFU (1998) 85 IR 332 at 337 per Austin J.

148. Over the past decade, the Voluntary Administration procedure has proven a popular mechanism to reorganise the affairs of insolvent companies as an alternative to liquidation: see Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1.

149. However, the evidence also illustrates that the existence of redundancy pay liabilities within an insolvent business represent a significant threat to the aims of the Voluntary Administration process – namely, to improve the chances of the company (and its jobs) continuing to survive: see Witness Statement of Mr Nicholas McGloin, Vol 1, Tab 2.

Need to Facilitate Corporate Rescues

150. Corporate rescues serve the interests of all parties caught in an insolvency situation and the interests of the wider community.
Shareholders gain a greater return than through the immediate liquidation of all assets, employees keep their jobs, suppliers maintain a customer and the burden on the taxpayer (eg, through social security payments and GEERS payments) is reduced.

It is submitted that the Commission should adopt positive measures to assist the process of business re-organisation upon insolvency. To this end, a strong distinction should be drawn between redundancies due to insolvency and other redundancies. As the National President of the IPAA points out in his evidence (Vol 1, Tab 1 at para 153):

“We have observed over the years that redundancy pay liabilities are a major contributing factor toward the incidence of business failures and the corresponding problem of unpaid employee entitlements. In the lead-up to insolvency, directors have been hindered from implementing necessary restructuring due to the cost impact of retrenchment packages. In our view, it is appropriate for businesses under formal external administration to be afforded “breathing space” in order to facilitate possible corporate rescues.”

1984 TCR Decision

During the TCR case, “substantial debate took place as to what should be regarded as redundancy for the purposes of any decision the Commission might make to award general redundancy provisions”: (1984) 8 IR 34 at 55.

The employers argued that national standards for redundancy should not be set and that case by case approach should be adopted because it is necessary for the definition of redundancy to be flexible to enable the arbitrator to take into account particular situations. For example: “different situations should probably apply where terminations are due to insolvency and there is only a
limited amount of money for distribution amongst a number of worthwhile causes”**: (1984) 8 IR 34 at 58.

155. The Full Bench rejected this argument for the following reasons (at 61-62):

“ . . . to introduce definitional uncertainty into the resolution of redundancy disputes would have unfortunate consequences for industrial relations and the individual employees concerned . . . Employees, no matter what the reason for the redundancy, equally experience the inconvenience and hardship associated with searching for another job and/or loss of compensation for non-transferable credits that have been built up such as sick leave and long service leave. In particular, to make a distinction granting severance pay only in cases of technological change, notwithstanding the equality of hardship on employees in all redundancy situations, would be to penalise an employer for introducing technological change . . . In these circumstances, we do not believe that there should be any fundamental distinction, in principle, based on the causes of redundancy”.

Reasons for Distinguishing Original TCR Reasoning

156. In our respectful submission, the Full Bench’s reasoning does not apply in the context of the current review of safety net redundancy standards for the following reasons:

- The Full Bench was considering an entirely different proposal to that advanced by Ai Group in the current proceedings.
- In the TCR case, the Full Bench rejected the employers’ proposal to make a broad, overarching distinction between redundancy due to technological change and redundancy due to other causes (eg, economic downturn).
By contrast, Ai Group’s proposal is far more limited in nature. It seeks to draw a distinction much further along the spectrum and in narrower circumstances - between redundancy due to insolvency and redundancy due to other causes (eg, economic downturn as well as technological change).

In addition, the Full Bench in the TCR case was clearly not prepared to countenance a situation whereby employees made redundant in cases other than technological change were granted no severance pay entitlements.

Under Ai Group’s proposal, employees would continue to be entitled to severance payments in cases of employer insolvency. No one would lose an existing entitlement to severance payments.

There is no risk of penalising employers for introducing technological change (or otherwise improving company performance) under Ai Group’s proposal. The severance pay scale would continue to apply equally to cases involving technological change or economic downturn.

Experience also tells us that the proposed insolvency provisions would only operate in limited number of cases.

There is also no risk of any definitional uncertainty being introduced under Ai Group’s proposal. An “insolvent employer” is defined in precise and tangible terms (as set out above). Ai Group’s proposal is deliberately linked to this definition. Accordingly, the proposed obligations arising in circumstances of insolvency would only be triggered in a precise and readily identifiable manner.

Although it is true to say that, no matter what the cause, employees equally experience the hardship and inconvenience associated with redundancy, there are a range of other innocent parties in an insolvency scenario – including supplier firms (and their own workforces), dependent contractors, customers, other trade creditors and, in many
cases, the business owners themselves who lose substantial personal assets.

- It is fundamentally unfair that an employer who, as a result of severe financial distress is required to retrench employees, should be called upon to make necessarily the same payment with respect to redundancy pay as an employer who pursues higher profitability, better company performance and/or corporate consolidation.

- The Commission needs to take into account developments in insolvency law since the original TCR case in 1984 which encourage the policy of corporate re-organisation and restructuring upon insolvency.

4.5 **Current Maximum of 8 Weeks’ Severance Pay is Appropriate in Circumstances of Insolvency**

**Eight Weeks’ Pay Cushions the Blow**

157. The current provision of up to 8 weeks’ redundancy pay cushions the blow for employees who are retrenched upon insolvency and enables employees to search for another job over a reasonable period without experiencing hardship. Further, as the National President of the IPAA states in his evidence (Vol 1, Tab 1, para 154):

“Where the business cannot be revived, the current provision of up to 8 weeks’ redundancy pay for larger businesses represents an adequate compromise between the interests of employees and other unsecured creditors who face significant economic loss, hardship and disruption.”
Increasing the Scale upon Insolvency will lead to Industrial Disputation

158. Prior to the introduction of GEERS in September 2001, numerous industrial disputes arose concerning the protection of employee entitlements upon insolvency. Redundancy pay was at the heart of these disputes.

159. In some instances, these disputes led to widespread disruption to industry. For example, the Tristar and Walker disputes in 2001 brought the entire Australian vehicle industry to a standstill and are estimated to have cost the industry hundreds of millions in lost production and caused damage to its reputation.

160. The guaranteed provision of up to 8 weeks’ redundancy pay under GEERS has been instrumental in reducing the number of costly and damaging disputes. However, any increase in the severance pay obligations of insolvent employers will create the strong potential for a new wave of industrial unrest – a point highlighted in the evidence of Mr Michael Dwyer (Vol 1, Tab 1):

“The IPAA is concerned that any new provision in the federal standard redundancy scale beyond the current 8 weeks’ pay in cases of business failure, and any resultant discrepancy with GEERS, would create fertile ground for further disputation and possible disruption to external administrations.”

4.6 Why the Small Business Exemption is Appropriate in Circumstances of Insolvency

Majority of Insolvencies Occur within Small Businesses
161. The evidence demonstrates that the majority of cases of employer insolvency (and the associated problem of unpaid employee entitlements) involve small businesses: see Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1.

162. This is principally explained by the relative lack of financial resilience amongst small businesses: see page 19 of Annexure B to the Witness Statement of Mr Michael Dwyer, Vol 1, Tab 1.

163. In the National Audit Office’s review of the Employee Entitlements Support Schemes, it is shown that:

- The Federal Government paid out 8,538 EESS and 4,582 GEERS payments in the period to 30 June 2002, totalling $62.36M during 2001-2002;
- The number of claims has now stabilised at around 90 new claims (individual insolvencies) per month;
- The average number of employees per insolvent business was 10, but this figure was skewed by a small number of large cases. The median was just three;
- Approximately 80% of cases involved 10 employees or fewer.

Removing the Exemption will Exacerbate Small Business Insolvency

164. Any extension of severance pay liabilities to the small business sector will only push more small firms towards insolvency. It will also have the following undesirable consequences within insolvent small firms, as stated by Mr Dwyer (Vol 1, Tab 1):

“The majority of insolvencies and lost employee entitlements occur within small businesses. Extending redundancy pay obligations to small businesses
will inevitably exacerbate this situation, and reduce the amount of surplus assets available to other classes of creditors. In addition, it will make the task of re-organising the insolvent small business (as an alternative to liquidation) more difficult and complex.”

Ability of the Commission to Vary the Severance Pay Provision for Small Businesses

165. In the Supplementary TCR case, the Commission granted an exemption from severance pay for employers employing less than 15 employees: (1984) 9 IR 115 at 137. However, the exemption was subject to further order of the Commission in a particular redundancy case.

166. The ability of the Commission to vary the exemption in a particular case concerning an insolvent small business presents certain difficulties as a consequence of the decision of Justice Merkel of the Federal Court in Australian, Liquor, Hospitality & Miscellaneous Workers Union v Home Care Transport Pty Ltd [2002] FCA 497.

167. Section 471B of the Corporations Law 2001 provides that, during the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with except with the leave of the Court, unless it is with the Administrator’s written consent.

168. Merkel J held that in relation to a section 170FB application against a company in liquidation, the Australian Industrial Relations Commission is a “court” within the meaning of section 471B of the Corporations Act 2001 (although several Commission decisions have doubted this proposition: see Re Cosco Holdings, PR9191999, 15 July 2002 per Munro J). See also the NSW Court of Appeal decision in Fisher v Madden (2002) 114 IR 119.
Accordingly, Ai Group proposes the following provision dealing with insolvent small businesses (which removes the ability of the Commission to vary the exemption in a particular insolvency case consistent with Home Care Transport):

“4.4.3(d) Small Employers

... .

(ii) Severance Pay

Employees of small employers (as defined) are not entitled to severance pay.”

4.7 Incapacity to Pay Provisions do not Protect Insolvent Employers

Research was undertaken with respect to the operation of the incapacity to pay principle currently existing under the various State and Federal awards. The purpose of the search was to identify instances where application had been made to a relevant industrial tribunal for exemption from severance pay provisions of an industrial award on the grounds of economic hardship, including insolvency. In particular, the purpose was to discover whether the incapacity to pay provisions found within industrial awards serve as an appropriate and effective means of relief for employers facing severe economic difficulties.

The search material included the Australasian Legal Information Institute (AustLII) database, CCH Industrial Law Manuals, the federal OSIRIS
database, the Australian Industrial Relations Commission (AIRC) decision database and the Industrial Relations Commission decision databases for each State. The search from all of the above databases returned a result of seven applications: five to the Australian Industrial Relations Commission, one to the Tasmanian Industrial Commission and one to the New South Wales Industrial Relations Commission.

172. Of these applications, only one was settled advantageously to the employer as a result of a negotiated settlement between the parties (without formal intervention by the NSW Industrial Relations Commission). An examination of the cases shows a clear reluctance on the part of the Commission to remove a pre-existing minimum condition of employment, even in the case of clear financial difficulty.

173. In Re Cream Silver Holdings Pty Ltd, the Commission rejected an application for an exemption from the requirement to pay severance on the basis that a debt to employees was indistinguishable from any other commercial debt: Print J0115, 1 November 1989.

174. The Commission ordered that the affairs of the company be adjusted to meet the debts to employees and was not swayed by the proprietors having to meet the commercial debts of the company out of their personal finances.

175. The Commission noted the strict onus on the employer to prove hardship in such situations. In this instance, it was not satisfied that the payment of such entitlements was so great in comparison to the company’s overall debts:

“Whilst there is provision by which the parties can jointly or individually apply for a variation of the award terms I am of the view that the Commission should
proceed on the presumption that the award entitlement is the appropriate one, only to varied, in the absence of agreement, on grounds well made out.”

The completion of a period of service which qualifies an employee for a condition of employment which forms part of a contract of employment should have certainty attached to it by the Commission, particularly where such a condition is provided in an award of the Commission. In my view to do otherwise would reopen the question of the terms of the award and could cause disputes or at least create potential disputes. Accordingly it would be contrary to the provisions of the Act.”

176. These views were reinforced in a subsequent case, Re Klamar Pty Ltd, which concerned an application to vary the prescribed amount of severance pay under the Clothing Trades Award on the grounds of incapacity to pay. The Commission made it apparent in this instance that the inability to satisfy other creditors due to the concurrent obligation to pay employee award entitlements was not an appropriate nor sufficient reason for exemption to be granted (Print J6078, 21 December 1990):

“If some relief from the award obligations were to be granted this would result in certain of the other unsatisfied creditors having an enhanced opportunity of receiving greater satisfaction than would otherwise be available. This, however, is not a good and sufficient reason to deny the payment of benefits intended to be paid to the employees.”

177. In a more recent decision, the Commission rejected an incapacity to pay application on the ground that the Commission had not been reasonably satisfied that such obligations could not be met: Coate & Tails Australia Pty Ltd, Print T2228, 18 October 2000. Despite the company having gone into voluntary liquidation, ceasing to trade and having a limited pool of funds from
which to draw, the Commission was not satisfied that there were no funds from which the entitlements of employees could be met.

178. The Commission concurred with the contention of the union that the lack of “full, detailed and certified information on the employer’s financial position leaves room to doubt the necessity or appropriateness of the order” and the application was rejected on the basis of a failure on the part of the applicant to satisfactorily make out its case for exemption – the Commission reinforcing the view that a heavy onus exists on the part of employer to prove their incapacity to pay.

179. The Commission also reinforced the view that the award should form the basis of the “prima facie minimum” with respect to employment conditions and that a step taken by a Commission to remove this minimum entitlement was an extreme step. In this instance, the entry of the company into voluntary liquidation was not viewed as adequate evidence of the company’s economic incapacity to meet the minimum award entitlements of its employees.

180. Similarly, an application by Century Motors (Sydney) Pty Ltd for exemption from severance requirements payable under the Vehicle Industry – Repair, Services and Retail – Award 1983 was rejected on the grounds that the AIRC viewed it “a very serious step to take away entitlements which accumulate as a result of years of service”, particularly where such a benefit had been established by a test case Full Bench: Print K5635, 24 November 1992.

181. Applications by Ford Provincial Motors for exemption from the severance requirements under the Vehicle Industry – Repair, Services & Retail – Award 1983 (Print K2453, 3 April 1992) and Jireh House to the Tasmanian Industrial Relations Commission were respectively rejected after failing to satisfy the Commission of sufficient hardship: Case No. T5500, 6 July 1995. In each
instance, the Commission rejected the case of the applicant on the basis that it was not satisfied that the payment of severance would cause significant economic hardship to the company to warrant an exclusion and that the unique nature of the industry (of a charitable nature in the case of Jireh House) did not preclude the company from meeting its obligations as an employer in the first instance.

182. A reported settlement before the NSW Industrial Relations Commission resulted in an exemption from the full award severance entitlement: *Hume Country Golf Club Limited v Australian, Liquor, Hospitality & Miscellaneous Workers Union*, IRC 1322 of 1996, 27 November 1996. A partial payment of the monies owed to former employees of the Country Club was agreed upon by the company, union parties and the relevant employees concerned due to the acknowledged economic hardship of the employer. No formal intervention or decision by the NSW Commission was necessary in this matter.

183. An examination of applications made under the incapacity to pay provisions exhibits: first, a notable lack of such applications made to the industrial tribunals and secondly, a clear reluctance on the part of the Commission to grant such applications.

184. In dismissing applications for incapacity to pay, the Commission has consistently reinforced the heavy onus on employers to exhibit economic hardship and shown an understandable reluctance to vary or remove pre-existing and known severance pay entitlements for employees.

185. It can be readily seen from both the small number of applications made over the past two decades and the inability of applicant employers to gain relief that the incapacity to pay mechanism is ineffective in providing relief to employers facing severe economic difficulties.
5.0 Definition of weeks’ pay

186. The existing redundancy test case clause entitles redundant employees with one or more years service to between four and eight “weeks’ pay” for severance purposes.

187. “Weeks’ pay” is defined to mean “the ordinary time rate of pay for the employee concerned”.

188. The term “ordinary time rate of pay” was interpreted by the High Court of Australia in *Catlow v Accident Compensation Commission* (1989) 167 CLR 543. In the majority decision, McHugh J, with whom Deane and Dawson JJ agreed, said:

“In construing the terms of s.95(1), it is helpful to bear in mind that the terms of employment of most workers are governed by industrial awards or agreements which provide for an ordinary time rate of pay for a standard or ordinary number of hours per week. Industrial awards and agreements usually state the number of ordinary working hours in each day and week and provide for the payment of overtime and penalty rates of pay for hours worked outside those ordinary hours…. Thus, in the present case the industrial agreement under which the applicant was employed provided that the ordinary hours of work should be an average of 36 per week which were to be worked in the manner specified ‘without payment of overtime’.

Against this industrial background of awards and agreements fixing a number of ordinary hours per week, it seems natural to read the expression ‘calculated at the worker’s ordinary time rate of pay for the worker’s normal number of hours per week’ as a reference to the ordinary time rate of pay for the worker’s
standard or ordinary hours per week as fixed by award, agreement or contract”. Emphasis added.

189. In the AIRC’s Reasonable Hours Test Case Decision, the Full Bench said:

“The expression ‘ordinary time hours of work’ in s.89A(2)(b) is a conflation of two well-established expressions in the industrial relations vocabulary – ‘ordinary hours of work’ and ‘ordinary time’”. (PR072002, 23 July 2002, para.49)

190. In Ai Group’s experience, the term “ordinary time rate of pay” in the Metals Award and other awards has been interpreted over the years in a manner which is consistent with the following definition from Clause 8 –Weekly Wage Rates of the former Metal Industry Award 1984 – Part I. The definition was removed from the Metals Award in 1998 during the simplification process along with a large number of other detailed definitions:

“’Actual rate of pay’ is defined as the total amount an employee would normally receive for performing 38 ordinary hours of work. Provided that such rate shall expressly exclude overtime, penalty rates, disability allowances, shift allowances, special rates, fares and travelling time allowances, and any other ancillary payments of a like nature. Provided further that this definition shall not include production bonuses and other methods of payment by results which by virtue of their basis of calculation already produce the results intended by this clause”.

191. The above definition is very similar to Ai Group’s proposed definition of “weeks’ pay”, as set out in subclause 4.4.1 in Vol 2, Tab 1.
In Ai Group’s experience, the terms “weeks’ pay” and “ordinary time rate of pay” are currently being widely understood and interpreted in a consistent manner with Ai Group’s proposed definition. However, Ai Group submits that there would be benefit in awards defining “weeks’ pay” in more specific terms. Such an approach is consistent with s.143 of the Act which requires that awards be expressed in plain English and be easy to understand.

Clarity is important for companies which adhere to the award redundancy provisions. Clarity is also important for those companies which have adopted the award definitions in their generous over-award redundancy agreements. There would be very significant cost implications for both groups of companies if any alternative more generous definition of “weeks’ pay” was to apply.

The ACTU proposes that severance pay be calculated in the same manner as notice of termination. The claim appears to be nothing more than a claim for increased severance pay, dressed up as a claim for consistency. There is no rationale for the two entitlements to be calculated in a consistent manner. Notice of termination and redundancy pay are two totally different concepts.

The differences between the two concepts are clearly identified in the following extract from a 2001 judgment of a Full Bench of the Industrial Relations Commission of New South Wales in Court Session, comprising President Wright and Justices Walton and Boland: (Westfield Holdings v Adams, 114 IR 241, 21 December 2001):

“[139] Some decisions have expressed the view that a payment in the form of a redundancy or severance pay is also directed at ameliorating any adverse consequences which flow directly from the termination of an employee's employment in the period immediately following termination. In Shop,
Distributive & Allied Employees' Assn (NSW) v Countdown Stores ("Crocker's Case") (1983) 7 IR 273 at 292, Fisher P stated:

[T]he major application of severance pay where the dismissal relates to redundancy caused by the economic recession is likely to be directed towards the amelioration of social hardship by supplementing income from unemployment benefits and so prolonging the maintenance of living standards and extending the period during which the search for work can be conducted without the serious erosion of family assets and family stability. It would also help meet the absence of income which seems customary during the first three to four weeks of unemployment until receipt of unemployment benefits.

[140] However, although the function of a notice period, or a payment made in lieu of notice, and redundancy or severance pay overlap to some extent, the purposes of those payments are, in our view, conceptually and functionally distinct. In the Termination, Change and Redundancy Case (1984) 8 IR 34, for example, the Full Bench of the then federal Commission drew a distinction between payments by way of notice and redundancy payments. The Full Bench stated (at 73):

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

... We prefer the view the view that the payment of severance pay is justifiable as compensation for non-transferrable credits and the inconvenience and hardship imposed on employees.
A useful discussion of the differing functions of a payment in lieu of notice and a redundancy or severance payment may be found in the judgment of von Doussa J in Fryar v System Services Pty Ltd. His Honour stated (at 331):

There is a distinction between the nature and purpose of a period of notice or payment in lieu, and a severance payment. The distinction is reflected in Arts 11 and 12 of the Termination of Employment Convention. While the two are often treated together to arrive at a global redundancy package, the separate nature and purpose of the two entitlements remains, and assume importance in this case.

A period of notice is to give an employee the opportunity to adjust to the change in circumstances which is to occur and to seek other employment: Matthews v Coles Myer Ltd (1993) 47 IR 229. The period may be worked out, as s 170DB allows, and it often is, as it is recognised that the employee's prospects of obtaining other employment may be better if the search is undertaken while the employee remains in employment: see for example Sinclair v Anthony Smith & Associates Pty Ltd (IRC of A, von Doussa J, 1 December 1995, unreported) at 8.

A severance payment, however, is intended to provide a payment as compensation for the loss of non-transferable credits and entitlements that have been built up through length of service such as sick leave and long service leave, and for inconvenience and hardship imposed by the termination of employment through no fault of the employee: Termination, Change and Redundancy case (1984) 8 IR 34 at 62, 73. The inconvenience and hardship includes the disruption to an employee's routine and social contacts and the competitive disability to
long term employees arising from opportunities forgone in the continuous service of the employer: Food Preservers Union of Australia v Wattie Pict Ltd (1975) 172 CAR 227. Such a payment is taxed on the favourable terms which apply to an eligible termination payment. It is quite inconsistent with the nature and purpose of the payment, and the taxation regime, that the severance entitlement should be worked out as if the number of weeks used to calculate the entitlement were weeks of notice.

[142] We also observe that reference was made in Fryar to ILO Convention 158 concerning Termination of Employment at the Initiative of the Employer made in Geneva on 22 June 1982, to which Australia is a signatory. Relevantly, the Convention provides that a worker whose employment is to be terminated shall be entitled to both a reasonable period of notice or compensation in lieu thereof (Article 11) and a severance allowance or other separation benefits (Article 12).

[143] The differing rationales of notice and redundancy have been observed in the context of proceedings under s106 of the Act, and its predecessors: see ICI Operations Pty Ltd v Hutton (1993) 47 IR 288 at 297; Newton v Goodman Fielder Mill Ltd (1997) 81 IR 227 at 238; Starky v Healthcare Corporation Pty Ltd (unreported, Maidment J, Matter No IRC 6613 of 1997, 24 August 1999) and Ross v GN Comtext at [40]-[43]. In Newton v Goodman Fielder, for example, Hill J stated (at 238):

The agreements made with the union in 1988 and 1991 express themselves to cover not only redundancy or severance payments but also notice of termination of employment or payment in lieu provisions. There are, in my opinion, significant differences in the nature and purpose of provisions governing notice of termination of employment
and provisions dealing with the appropriate severance payments to be made on retrenchment for redundancy reasons more particularly in the case of the restructuring of a business - despite that there may be some overlapping of the factors relevant to take into account in each case. See generally Sinclair v Anthony Smith & Associates Pty Ltd (unreported, Industrial Relations Court of Australia, von Doussa J, 1 December 1995, Matter No SI 126 of 1995). See also Lavings v Barclay Mowlem Construction (NSW) Ltd (unreported, Industrial Court of NSW, Hill J, 5 September 1994, Matter No 1233 of 1993); Fryar v System Services Pty Ltd (1996) 137 ALR 321 at 331; Matthews v Coles Myer Limited (1993) 47 IR 229; Termination, Change and Redundancy Case (1983) 8 IR 34 at 62, 73; Food Preservers Union of Australia v Wattie Pict Limited (1975) 172 CAR 227; cf Marks J in Caulfield v Broken Hill City Council (1995) 60 IR 221.

Furthermore, in addition to the considerations referred to in these cases and others the general rule, except in cases of summary dismissal for cause and/or any contractual provision to the contrary, is that an employee is entitled as of right to fair and reasonable notice of termination irrespective of the reasons therefore. Termination of employment on the ground of redundancy consequent upon restructuring for reasons of economy and efficiency, has long attracted special consideration, and generally speaking, separate and additional benefits.

[144] In our opinion, these authorities persuasively demonstrate the distinct functions to be served by awarding a payment in lieu of notice and a payment in the nature of redundancy or severance. Whilst a period of notice, or payment in lieu, is directed at supplementing the income of an employee immediately following termination, the focus of a redundancy or severance payment is to
compensate an employee for the loss of non-transferable benefits and for the inconvenience and hardship imposed by the termination. This is, in our view, not merely an additional purpose, but rather the dominant function of a redundancy or severance payment. The fact that an employee may apply redundancy or severance payments to supplement the employee's income during a period of unemployment, or to support the employee and their family, does not alter the purpose of those payments being made. In many instances, an employee will, of necessity, be forced to draw on any available resources during a period of unemployment. The purpose of making a redundancy or severance payment is, nonetheless, qualitatively different to providing for the employee during this time.” (Emphasis added)

196. If the ACTU’s proposed definition of “weeks’ pay” was adopted by the AIRC, there would be enormous cost implications for companies. For example in the manufacturing industry a significant amount of shift work is carried out and shift loadings of 15, 20 and 30 per cent are common for work carried out on weekdays and 50 and 100 per cent are common for weekend shift work. If these loadings applied to severance pay there would be a very substantial added cost burden imposed on employers – both employers who apply the award provisions and employers bound by generous over-award redundancy provisions. Union claims for the flow on of any new more generous definition of “weeks’ pay” to over-award redundancy agreements would almost certainly lead to increased disputation in the manufacturing industry.
6.0 Age 65 severance pay cap

6.1 Background to the Existing Award and Legislative Provisions

197. In the 1984 TCR Case Supplementary Decision, the AIRC decided that “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”. [9 IR 131]

198. When the TCR decisions were handed down, the Conciliation and Arbitration Act 1904 did not contain an express provision preventing a person from being terminated due to their age. Accordingly, policies were in place in many workplaces which required employees to retire at a certain age (eg. at age 65 in some workplaces and at age 60 in others).

199. The Industrial Relations Act 1988 was amended in 1994 to proscribe termination of employment based upon a person’s age (unless this was based upon the inherent requirements of the particular position).

200. A similar provision is now contained within the Workplace Relations Act 1996 in s.170CK(2)(f).

201. The effect of s.170CK(2)(f) is that, in general, it is unlawful for an employer to terminate the employment of a person because he or she has reached a certain age. However, there are exceptions as the following Court decisions highlight:

- In 1998, the High Court of Australia held that a Qantas policy which required international pilots to retire at the age of 60 was not discriminatory. The Qantas policy was necessary because many countries prohibit pilots aged 60 and over from flying in their airspace and...
landing at their airports. (Qantas Airlines v Christie [1998] HCA 18, 19 March 1998);

- In August 2002, the Federal Court held that the “maximum retiring age” of 65 for certain federal public servants covered by the Public Service Act 1922 was valid. (Peacock v Human Rights and Equal Opportunity Commission [2002] FCA 984, 8 August 2002).

### 6.2 The Existing Limit on Severance Pay is not Discriminatory

202. There are very sound policy reasons underpinning the existing limit on severance pay for those who are approaching or have exceeded the normal retirement age.

203. Some of these policy reasons were referred to by Commissioner Wilks in a decision made, on reference from a Full Bench of the Commission, in a case relating to the simplification of the Coal Mining Industry (Production and Engineering) Consolidated Award 1997. The relevant award provision states that:

> “16.4.2 The amount of severance pay due under this provision is not more than what an employee would have received had the employee remained in employment with the employer until the age of 60 years”.

204. After considering in some detail the issue of whether or not the clause directly or indirectly discriminated against employees, Commissioner Wilks concluded that it did not. (Print S8070, 13 July 2000). The rationale for the decision is found in the following extract:
“[20] Clearly, the clause is applicable to all employees. There is no different formula applied to any employee on any of the bases which would be prohibited by the definition of direct discrimination. For example, if an employee retires at the ‘normal retiring age’ of 60 years, he or she could not earn more than that. It follows therefore, that the clause is intended to avoid the potential for employees to obtain an unintended or ‘windfall’ gain from being made redundant at a point where he or she is coincidentally nearer to the normal retirement age than another employee who, for no different reason is also made redundant, but may be much further from the normal retiring age of 60 years.

[21] Any differential in monetary entitlement is a function of the point in time at which the retrenchment occurs and is not based on some formula which relies upon the age of the individual concerned to differentiate directly. Accordingly, I find that the clause does not involve direct discrimination as described by the definition of it which I have set out above.

[22] Having now found that the clause does not involve direct discrimination, I turn to consider the clause in the context of the definition of indirect discrimination, also set out above.

[23] The definition is comprised of two operative parts. The first is that ‘indirect discrimination occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute can apply’. The second is that ‘and the requirement or condition is unreasonable under the circumstances’.
[24] The use of the conjunctive ‘and’ means, in my view, that both of the operative parts of the definition must apply before a finding that this clause is indirectly discriminatory can be made.

[25] In relation to the second of those parts it is clear to me that, dependent upon the point in time at which an individual employee is retrenched, the quantum of retrenchment pay is affected. For example, an employee who is 58 years and 6 months of age and who has 30 years continuous service with a company would be entitled to 60 weeks retrenchment pay, while another employee who is 59 years of age and has the same amount of service with the company would only be entitled to 52 weeks retrenchment pay. This apparent discrimination is, as I have already said, not primarily caused by the clause but rather by the timing of the decision to retrench employees. Both of the employees in the example given above would not be entitled to any retrenchment pay at all if they had taken early retirement at age 55 or, alternatively, had worked on until the normal retirement age of 60 years. It is the fact of the redundancy which determines an employee’s entitlement, the clause merely ensures that no employee can receive more than he or she would have received if no redundancy had occurred at all. In my view, such a clause is, in all of the circumstances, reasonable.

[26] Having formed the view that the clause is, in all of the circumstances reasonable, it is not necessary for me to assess the clause against the first part of the definition of indirect discrimination which I have set out above.

[27] I am fortified in my view that the clause is, in all of the circumstances reasonable, by the decision and proposed order of the Full Bench in the Award Simplification Decision [Print P7500].
[28] In that decision, the Full Bench proposed the following order in relation to severance pay in redundancy at 16.3.3:

‘16.3.3  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.’

[29] For practical purposes there is no difference between the clause proposed by the Full Bench in that case, and the clause before me. In addition, many awards of the Commission are couched in similar terms in respect to the retrenchment pay cap.

[30] Reference to age 60, on the evidence before me, is reasonable, as that is the normal retiring age for workers covered by this award. Any potential ambiguity is avoided by retaining it.

[31] In conclusion, it is my view that the clause as it stands does not contain provisions that discriminate against an employee because of or for reasons including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

[32] Rather, it exists to ensure that no employee will derive an economic benefit arising from redundancy or retrenchment which would not otherwise have been available to him or her had retrenchment not occurred. Equally, the clause acts to protect employers against possible economic cost which it would not otherwise be required to bear.”
205. It is evident from the above extract that Commissioner Wilks decided that the clause did not amount to:

(i) direct discrimination because the clause applied equally to all employees. All employees were entitled to the same benefits provided by the severance pay scale despite the fact that the scale phased out as an employee approached age 60.

(ii) indirect discrimination because the clause was “reasonable in the circumstances”.

206. In the Award Simplification Decision the “normal retirement date” limit on severance pay was retained. (Print P7500, 23 December 1997).

207. Justice Giudice, the President of the Commission, expressed support for the abovementioned decision of Commissioner Wilks in a decision involving the simplification of the Metropolitan Daily Newspapers Redundancy Award 1996. (Print S8526, 25 July 2000). The relevant provision in the award stated that:

“7.6.1 No employee shall be entitled under these provisions to a payment greater than he/she would have received in wages had they remained in employment until the age of 65 years”.

208. The following extract from Justice Giudice’s decision is relevant:

“[11] Having considered Commission Wilks’ decision and the Award Simplification Decision I doubt whether sub-clause 7.6.1 discriminates on the basis of age so as to offend item 51(7)(f). Commissioner Wilks’ reasoning seems to be applicable to the provision under consideration in this award. Neither party suggested that the sub-clause is discriminatory. In fact the
employer submitted that the clause is ‘an essential part of the scheme provided for under the Act’ (correspondence dated 10 December 1999). In the circumstances the appropriate course is to include the sub-clause in the new award.”

6.3 Proposed Federal Age Discrimination Legislation

209. In 2001, the Federal Government announced its intention to develop federal age discrimination legislation. A Core Consultative Group (CCG) was established by the Attorney-General to assist in developing the legislation. The CCG comprised representatives of government, business (including Ai Group), unions and community groups. Following detailed discussions, the CCG recommended to the Federal Government that the legislation include an exemption for acts done in compliance with the provisions of industrial awards. The existing federal acts which deal with discrimination on the basis of sex, race and disability contain such an exemption. It appears that the proposed age discrimination legislation has not yet been drafted.

6.4 Need for Certainty regarding the Meaning of “Normal retirement date” and Ai Group’s Proposed Provision

210. The award clauses considered by Commissioner Wilks and Justice Giudice both limited severance pay on the basis of a precise age (60 in the coal industry award and 65 in the newspaper award). Such an approach has considerable merit as it avoids ambiguity and uncertainty.

211. In Ai Group’s experience, due to s.170CK(2)(f) of the Workplace Relations Act, unions consistently argue at the enterprise level that there is no longer any lawful concept of a “normal retirement date” and argue that employers are consequently not permitted to limit severance pay for employees of any age. In
the light of the abovementioned AIRC decisions, such arguments are clearly not correct. However, the vigorous pursuit of these arguments by unions is leading to unfairness for employers and the risk of unnecessary industrial action.

212. Ai Group proposes that the relevant sub-clause in the redundancy test case standard clause be reworded as follows:

“The severance payments must not exceed the amount which the employee would have earned during the period between the date of the redundancy and the employee attaining the age of 65 years if such redundancy had not occurred”.

213. Ai Group’s proposed wording would base the severance pay limit on the specific age of 65 rather than the less tangible concept of a “normal retirement date”. This approach is preferable for the following reasons:

• S.143 of the Act requires that awards be easy to understand in structure and content. The content of Ai Group’s proposed provision would be easier for employees and employers to understand than the existing provision.

• As pointed out by Commissioner Wilks in his decision, many federal awards already contain limits on severance pay based upon specific retirement ages (including the coal industry and newspaper industry awards which were the subject of Commissioner Wilks and Justice Giudice’s decisions).

• Under the Social Security Act 1991, Australian males are entitled to an Age Pension when they reach the age of 65 years. Women born on or
after 1 January 1949 are entitled to an Age Pension at age 65. The 65 year age requirement is being phased in for older women. (Previously the entitlement was based on an age of 60 years for females).

- An age limit of 65 for redundancy pay is consistent with legislation in place in various overseas countries. For example, the UK. Under the UK Employment Rights Act 1996, redundancy pay is not payable to employees aged 65 or over and those who are above the normal retirement age established by their particular organisation. From 64 to 65, the amount payable under the scheme is reduced 1/12th for every month up to age 65 when it becomes nil. (Vol 2, Tab 17).

214. The modification of the test case clause to enshrine an age limit of 65 for severance pay would not preclude a modified provision (eg. one based upon an age of 60) being inserted or retained in a specific award in appropriate circumstances. The validity of any arguments in favour of an alternative provision could be assessed by the Commission at the time when a relevant application is made to flow on any new test case provisions at the award level.

6.5 **The Limit on Severance Pay is Likely to be Increasingly Important in the Future**

215. In May 2002, the Treasurer, the Hon Peter Costello MP released Australia's first *Intergenerational Report*. As set out in the Foreword to the report:

- it “provides a basis for considering the Commonwealth's fiscal outlook over the long term, and identifying emerging issues associated with an ageing population”; and
its purpose “is to assess the long term sustainability of current Government policies over the 40 years following the release of the report, including by taking account of the financial implications of demographic change”.

216. Part II of the report deals with Australia’s long-term demographic and economic prospects. As set out in the extract from the report reproduced in Vol 2, Tab 15:

- “Australia will experience further ageing of its population over the next four decades” (p.1);
- “Overall, the proportion of the population that is very old (over 85 years of age) is expected to triple, while the proportion in the prime working age range of 15 to 64 is expected to fall” (p.1);
- “While the population of labour force age is projected to grow by just 14 per cent, the number of people aged 55 to 64 is projected to increase by more than 50 per cent over the next two decades. This is expected to be the fastest growing group of labour force age” (p.3);
- “In 2002, the aged to working-age ratio (the proportion of people aged over 65 to people of traditional labour force age, 15 to 64) is 19 per cent. This is projected to rise to almost 41 per cent by 2042.” (p.3).

217. The extract from the report set out in Vol 2, Tab 16 shows that:

- “Consistent with the projected lower labour force growth, economic growth in Australia, as measured by growth in real GDP, is expected to slow over the next four decades” (p.1);
• "With projected lower growth in the labour force and falling participation rates, annual employment growth could be significantly lower over coming decades." (p.4).

218. The Workplace Relations Act requires that the Commission perform its functions in a way that protects and promotes economic prosperity (eg. Refer to ss.3(a), 88B(1), 88B(2) and 90). This necessarily includes taking into account any demographic trends that threaten Australia’s economic prosperity.

219. Given the economic challenges facing Australia over the coming decades due to an ageing population it is imperative that employers are encouraged to employ mature aged workers – not discouraged.

220. The removal of the limit, as proposed by the ACTU, could discourage employers from employing persons of mature age because of concerns (valid or not) that such employees would not retire at a reasonable age, forcing the employer to:

• Make such employees redundant when their health prevents adequate performance, with the resultant significant costs; or

• Terminate such person’s employment for performance reasons, when their health prevents adequate performance – which is very difficult and unpleasant for employers to implement.
6.6 Over-award redundancy agreements

221. The award provisions limiting severance pay for those approaching, and those who have exceeded, the normal retirement age are commonly adopted in generous over-award redundancy agreements. In such circumstances the risks and negative effects associated with removing the severance pay limit, as proposed by the ACTU, are magnified.
7.0 Covering the Field

7.1 Overview – Nature of the Problem and Proposed Remedy

222. For many years, it was commonly assumed that federal awards insofar as they dealt with termination of employment were intended to cover the field and thereby ousted the operation of inconsistent State laws dealing with the same subject matter: *Metal Trades Industry Association v Amalgamated Metal Workers’ and Shipwrights’ Union* (1983) 152 CLR 632 (“Metal Trades case”).

223. This was consistent with the policy of avoiding unequal treatment between employees engaged in a particular industry whose terms and conditions of employment were governed by federal instruments, and ensuring that one federal tribunal was vested with powers to deal with the dismissal/retrenchment of employees under federal awards: see *TCR* case (1984) 8 IR 34 at 42.

224. However, recent decisions by various State industrial tribunals have cast considerable doubt upon the paramountcy of federal award provisions dealing with termination of employment (including redundancy pay): see, eg, *Thornthwaite v Australian National Credit Union Ltd* [2002] NSWIRComm 240; *Burgess v Mount Thorley Operations Pty Ltd (No 2)* (1999) 100 IR 260.

225. The view has even been expressed that, despite the existence of comprehensive federal awards containing provisions dealing with termination of employment and redundancy, this is not sufficient to evince an intention on the part of the Commonwealth arbitrator to cover the field in relation to the matters with which those awards deal: see, eg, *Thornthwaite v Australian National Credit Union Limited* [2002] NSWIRComm 240 at para 81-83 per Haylen J; *Scott v Picone* [2002] NSWIRComm 239 at para 52 per Haylen J.
226. In these cases, federal award employees have been afforded a “green light” to pursue remedies under State laws, notwithstanding the operation of comprehensive federal award/certified agreement provisions relating to termination of employment and the availability of other remedies under federal law (such as the unfair dismissal jurisdiction of the Commission).

227. This raises the serious problem of inconsistent treatment between like employees and like employers engaged within a particular industry: see *Re Victorian Minimum Wage Orders*, PR921046, 7 August 2002 at para 92 per Ross VP, Watson SDP, Lewin C.

228. It also inexorably leads to “forum shopping” and the associated vices of employers being exposed to double jeopardy and one industrial tribunal possibly being played off against another.

229. In our respectful submission, it is appropriate for the Commission to redress this situation by clarifying that the federal test case provisions dealing with notice of termination and redundancy pay are intended to “occupy the field”. This would be entirely consistent with the provisions of the Act, in particular section 152, and relevant High Court jurisprudence concerning measures adopted by federal law-makers to evidence an intention that federal laws are to override State laws where they both deal with the same subject matter: *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453.

230. It would also be consistent with an examination of the log of claims underlying the federal award: see *Metal Trades* case (1983) 152 CLR 632 at 650 per Mason, Brennan and Deane JJ.
231. Moreover, such clarification would assist in ameliorating the (increasing) number of costly legal disputes before State tribunals about the intended scope and operation of federal awards. This would also be consistent with the strong emphasis upon dispute prevention under Part VI of the Act (s.89).

232. Ai Group proposes that the following clauses be inserted within the test case provisions governing notice of termination and redundancy:

“4.3.6  **Intention to cover the field**

The provisions of clause 4.3 apply to the exclusion of any provisions, providing for notice of termination and/or payment in lieu thereof in any matter relating to the employment or termination of employment of persons covered by this award, of any law of a State, or of any industrial award, order, determination or agreement made under any such law.”

“4.4.10  **Intention to cover the field**

The provisions of clause 4.4 apply to the exclusion of any provisions, providing for redundancy and/or severance pay in any matter relating to the employment or termination of employment of persons covered by this award, of any law of a State, or of any industrial award, order, determination or agreement made under any such law.”

233. These clauses are designed to provide a clear and readily discernible intention on the part of the Commonwealth arbitrator that federal award provisions governing notice of termination and redundancy pay are to override State laws and awards dealing with the same subject matter.
7.2 Inconsistency Rule and Paramountcy of Federal Awards

234. Section 109 of the Australian Constitution provides that where a federal law and a State law are in conflict, the federal law prevails to the extent of the inconsistency. Federal awards are a Commonwealth law for the purposes of section 109 of the Constitution: *Ex parte McLean* (1930) 43 CLR 472 per Dixon J.

235. There are three tests of inconsistency, two concerned with direct inconsistency and the third with indirect inconsistency: see George Williams, “The Return of State Awards” (1997) 10 *Australian Journal of Labour Law* 170. The third test is the “cover the field” test; where the Commonwealth evinces an intention that its law shall be all the law on the subject, any State law on the subject will be considered to be inconsistent and therefore inoperative for the duration of the conflict.

236. Federal awards are clearly capable of overriding inconsistent State laws and awards under s.109. This extends to circumstances where the federal award evinces an intention that its provisions shall exclude the operation of any State law: *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 337.

237. Following the High Court decision in the *Metal Trades* case (1983) 152 CLR 632, it was widely assumed that federal award provisions imposing obligations upon employers in consequence of termination of employment left no room for State laws. In that case, the High Court emphasised the importance of section 65 of the *Commonwealth Conciliation and Arbitration Act* 1904 (a forerunner to section 152(1) of the current Act). The section was seen by Mason, Brennan and Deane JJ as being of “paramount importance” as it “is to be regarded as evincing a statutory intention that an award made pursuant to the Act is to operation to the exclusion of any State law” (at 648, 649).
238. Section 152 of the Workplace Relations Act provides that:

“(1) Subject to this section, if a State law or a State award is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.

(1A) If a State law provides protection for an employee against harsh, unjust or unreasonable termination of employment (however described in the law), subsection (1) is not intended to affect the provisions of that law that provide that protection, so far as those provisions are able to operate concurrently with the award.”

239. Section 152 of the Workplace Relations Act “provides evidence of a federal intention that federal awards are to override state laws and awards where they both deal with the same subject-matter…This is modified by s 152 as regards termination of employment and state employment agreements”: George Williams, “The Return of State Awards” (1997) 10 Australian Journal of Labour Law 170 at 176.

240. Despite the provision found in section 152 of the Act (and its predecessor, section 65), some recent decisions at the State level have doubted whether the operation of State laws are necessarily precluded by the existence of a federal award or agreement. These decisions have typically centred around whether or not federal award employees whose employment has been terminated may access various remedies before State tribunals, including compensation for additional pay in lieu of notice and/or severance pay.
Various adjudicators at the State level have found it significant that the federal award (or agreement) in question does not appear to manifest an intention to exclude the operation of State laws.

7.3 “Jurisdiction Hopping” under Unfair Dismissal Laws

In some States, it is clear that employees covered by federal awards are not able to bring claims for unfair dismissal. For example, in Cohen v Government Insurance Office of Australia Ltd (1996) AILR 5-104, a single Commissioner of the NSW Industrial Relations Commission found that the unfair dismissal provisions under Part 6 of the Industrial Relations Act 1996 (NSW) were not intended to cover Federal award employees. Connor C held:

“As I perceive the situation, it was not the intention of the State legislature to extend the jurisdiction of Part 6 as far as employees covered by Federal awards but to confine to State award employees and award free employees receiving an annual remuneration of $62,000 or less. Furthermore in the Metal Trades Industry Association Case (1983) 152 CLR 632 the High Court...unanimously declared provisions of the 1983 Employment Protection Act of New South Wales invalid in it purported application to employees covered by the Federal metal industry awards. Those Federal awards laid down procedures which employers were required to observe in terminating the employment of staff and, to that extent, they operated to oust the State legislation. The Federal awards, in the High Court’s opinion, left no room for a State law to attach additional obligations on any employer in consequence of termination of employment under a Federal award.”

Further, in Moore v Newcastle City Council; Re the Civic Theatre Newcastle (1997) 77 IR 210, a Full Bench of the NSW Industrial Relations Commission
held that federal award employees have no access to remedies under the Industrial Relations Act 1996 in relation to termination of employment. However, the decision in this case turned on interpretation of the statute. The Commission considered that section 83 of the Industrial Relations Act 1996 did not extend to federal award employees, and therefore the issue of any potential inconsistency was not finally resolved.

244. In other States, however, it is equally clear that federal award employees are not excluded from the unfair dismissal jurisdiction established under State legislation.

245. In City of Mandurah v Hull (2000) 48 AILR 13-205, the Western Australian Industrial Appeal Court held that the definition of “employee” in the Industrial Relations Act 1979 could include federal award employees. The Court found no inconsistency, direct or indirect, between the federal award in question and the State legislation.

246. The Court could not discern any intention that the provisions of the federal award occupied the field. Thus the State legislation was not rendered invalid to the extent of any inconsistency by section 109 of the Constitution. Nor was there found to be any inconsistency between the Workplace Relations Act and the State legislation that would render the State provisions invalid.

247. It is apparent from the above cases that whether or not federal award employees are able to access remedies under State unfair dismissal laws will depend upon where the particular employee lives and works. Some States grant access, others deny it. There is no rational basis for the differential treatment. It is merely a product of one’s place of residence. In our submission, this is an entirely unsatisfactory basis upon which the rights and obligations of employees and employers should be determined.
7.4 “Jurisdiction Hopping” under Unfair Contract Laws

248. The law is even more unsatisfactory in relation to whether or not federal award employees can bring claims for additional pay in lieu of notice and/or severance pay via unfair contracts claims under State legislation, especially section 106 of the NSW Industrial Relations Act 1996.

249. Recent decisions by the NSW Industrial Relations Commission have suggested that there is no blanket prohibition against a federal award employee bringing a section 106 unfair contract claim for additional compensation upon termination, notwithstanding the operation of comprehensive award (or agreement) conditions governing termination/redundancy and the availability of federal remedies.

250. Again, this raises the serious problem of inconsistent treatment – advantaging some working citizens and disadvantaging others (depending upon which part of Australia they reside in).

251. Moreover, these decisions appear to indicate that whilst an employer is able to raise a jurisdictional argument that the terms of the federal award (or agreement) cover the field, this argument will either: not have much chance of success, or, will only be successful after protracted and costly legal argument before the relevant tribunal. For example:

- In *Burgess and Others v Mount Thorley Operations Pty Ltd (No 2)* (1999) 100 IR 260, the applicants were retrenched employees who had been covered by a federal enterprise agreement. They brought a section 106 claim that their contracts were unfair. In a preliminary challenge
before the NSW Industrial Relations Commission, the respondent employer argued that any order pursuant to section 106 made in favour of the applicant by the Commission would be inconsistent with the provisions of the agreement. The agreement contained detailed provisions relating to termination of employment and redundancy.

- In considering whether or not the industrial agreement was intended to cover the field, Marks J of the NSW Industrial Relations Commission considered the decision in the Metal Trades case referred to above:

  “Similarly Mason J (as his Honour then was), Brennan and Deane JJ in a joint judgment held that: "... the award has the appearance both in form and substance of being a complete statement of the rights of the parties with respect to termination of employment in the ordinary course of affairs. The State Act is not expressed to have the character of emergency legislation. It applies to employment generally; it is not aimed at employment in industries which have been drastically affected by the recent economic slump. The benefits and the exercise of the jurisdiction for which it makes provision and the duties which it imposes are in no way limited by reference to time or circumstance. In these circumstances the provisions of the award governing termination of employment amount to a relevantly complete statement of the parties' rights with respect to that matter and the terms of s7 of the State Act would derogate from the operation of the award. The section is therefore inconsistent with the award."

- However, Marks J considered that the agreement was not inconsistent with section 106:
“Whilst I accept that the industrial agreement which regulated the employment of the applicants by the respondent for the purpose of these proceedings dealt comprehensively with the circumstances and consequences of termination of employment in a wide variety of scenarios, can it be said that there was manifested an intention thereby that the certified agreement would deal exhaustively or exclusively with this area so as to exclude any operation of s106 of the Act for the purpose of these proceedings? I have previously discussed the nature of the claims made by the applicants in these proceedings. And I have previously described the breadth of the jurisdiction of this Court under s106 of the Act. I am unable to discern any intention that the certified agreement would deal exhaustively or exclusively with the termination of the employment of the applicants with the result that the jurisdiction of this Court under s106 would be ipso facto excluded.”

- Subsequently, the respondent sought a declaration in the Federal Court that the orders sought by the applicants in the proceedings under section 106 before the NSW Commission would, if granted, be inconsistent with the terms of the certified agreement and would therefore be invalid: Mount Thorley Operations Pty Ltd v Burgess [2001] FCA 117. Moore J refused to make such a declaration on the basis that no orders had yet been made in the NSW proceedings, saying (at paragraph 18):

  “In addition, it is desirable that the question of inconsistency, if it remains an issue in this Court, be determined at a time when the State award or State law which is said to give rise to the inconsistency has crystallised by orders having been made by the State Commission, assuming the absence of orders does not, as discussed earlier, deny jurisdiction to make the orders sought.”

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Moore J said, “It was also accepted that Mount Thorley could then test, in these proceedings, whether there was inconsistency between [the orders of the State Commission] and the Agreement. In my opinion this is the preferable course”. Accordingly, the Federal Court proceedings were stayed.

Finally, after years of hearings, the NSW Commission determined in May 2002 that it did not have jurisdiction to hear the claims brought by the applicants: Burgess v Mount Thorley Operations Pty Ltd [2002] NSWIRComm 106. Schmidt J found that there was inconsistency between the orders sought by the applicants and the terms of the federal agreement and the federal award. The relief sought by the applicants dealt with the same subjects with which the award and agreement dealt – namely, termination of employment and the money payable on termination. The Commission concluded that any claim for breach of the award or agreement should be dealt with in the Federal Court and could not be considered by the NSW Commission.

Despite the extensive process of hearings before the NSW Commission, the dispute is still ongoing. Schmidt J’s decision is currently subject to an appeal before a Full Bench of the NSW Commission.

252. In Thornthwaite v Australian National Credit Union Limited [2002] NSWIRComm 240, Haylen J of the NSW Industrial Relations Commission rejected an argument that as a federal award and federal agreement applied to the applicant, the applicant could not bring an action under section 106 of the NSW Act.
In this case, the applicant sought orders for 12 months’ pay in lieu of notice and redundancy pay (at the rate of 6 weeks per year of service), plus outplacement assistance. Upon termination, the applicant had been provided with a redundancy package in accordance with the terms and conditions under the federal award and certified agreement.

In dismissing the employer’s objection, Haylen J expressed the view that (at paragraphs 81-82) (emphasis supplied):

“... orders made under s 106 of the Act would not usually be inconsistent with a law of the Commonwealth, namely the provisions of a certified agreement or award.

If a more particularised analysis is undertaken it appears that the award and the agreement are not comprehensive in nature and are not intended to cover the field...

A further matter to be considered in light of recent legislative developments is the nature of Federal award regulation. While it was appropriate for the court in the Metal Trades Industry Association case to describe, in 1982, the awards of the Federal Commission as being comprehensive in nature and regulating terms and conditions of employment in a detailed fashion, that description is no longer apt.

The Workplace Relations Act 1996 brought about a most significant change. Section 89A limited, in a decisive way, the matters which may be contained in an award of the Commission. One of the principal objects of the Act was to ensure that the primary responsibility for determining matters affecting the relationship with employers and employees rested with the employer and
employees at the workplace or enterprise levels. Awards were not only no longer to be comprehensive but were relegated to safety net arrangements to be supplemented by enterprise arrangements.

In that context and having regard to the minimum rates nature of both the agreement and the award relied on by the respondent in these proceedings, it is not possible to say that there is a legislative intent that those instruments are to cover the field in relation to every subject matter with which they deal.

Section 152 of the Workplace Relations Act will, therefore, not assist the respondent's argument. Amendments to s 152 made in 1996 and 1997 (and particularly the introduction of ss. 1A) suggest that the field of exclusive coverage of federal awards has been considerably narrowed in comparison with the operation of s 65 of the Conciliation and Arbitration Act. Further, s 152 will not apply when the State law deals with a different matter, namely, the contract of employment at common law.”

255. Again, in Scott v Picone [2002] NSWIRComm 239 Haylen J rejected an employer’s argument that the applicant’s termination entitlements were matters covered by the federal Pastoral Industry Award 1986 (at paragraph 52) (emphasis supplied):

“... for the reasons set out in Thornthwaite, I adhere to the following conclusions:
a. to establish the operation of s 152 of the Workplace Relations Act, the matter dealt with by the Federal award must be established with precision;

b. even where there is a comprehensive federal award, a consideration of its terms may indicate that there are areas left for the operation of a state law;

c. it is usual for federal awards to operate against the background of general statute law, both state and federal, which are not intended to be displaced by the award provisions;

d. section 106 of the NSW IR Act is a general statutory provision whose field of operation may be described as dealing with contractual unconscionability, a field not usually addressed by federal awards or agreements;

e. that the contention cannot be sustained that a minimum rates award, standing alone and made in compliance with the provisions of s 89A of the Workplace Relations Act 1996 evinces an intention to cover the field in relation to the matters with which it deals;

f. that such an award made under commonwealth law does not, simply by its own operation, become part of the contract of employment – the commonwealth law and awards made under it, without more, do not operate in the same field nor deal with the same matter as s 106 of the New South Wales IR Act”.

256. Haylen J also adopted the above conclusions in Hogan v Employment National (Administration) Pty Ltd [2002] NSWIRComm 313 at para 205 in which it was held that a probationary employee engaged under a federal AWA could seek relief under section 106.
257. In that case, the Commission reduced a three-month probationary period which was stipulated in the AWA to two months, and awarded the applicant $18 000 compensation, plus interest and costs.

258. With respect to his Honour, we say that this line of reasoning is flawed for the following reasons:

- It is contrary to the express terms of section 152 of the Workplace Relations Act, in particular sub-section 152(1);
- It overlooks the fact that federal awards have always operated as a minimum code of conditions regulating the employment relationship as was clearly recognised by the High Court in the Metal Trades case;
- This line of reasoning also overlooks the fact that notice of termination and redundancy pay are allowable matters under section 89A of the Workplace Relations Act and are clearly dealt with in a comprehensive manner under federal awards. The High Court’s observations in the Metal Trades case about the comprehensiveness of termination of employment provisions under federal awards are equally applicable today (the provisions have not altered substantially since the 1984 TCR case);
- It is not to the point to say that federal awards have been “relegated” to mere safety net arrangements to be supplemented by enterprise arrangements. The Workplace Relations Act establishes a comprehensive framework governing the employment relationship, including awards, certified agreements, AWAs and other remedial avenues (such as provisions dealing with unfair dismissal complaints). The effect of section 106 “would be to destroy or vary the adjustment of industrial relations established by the [federal] award with respect to the matters formerly in dispute” and thereby must be rendered
inoperative under section 109 of the Constitution: *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 499 per Isaacs J.

- It is clearly inaccurate to say that section 106 deals with a different matter from a federal award or certified agreement – both the State law and the relevant federal instrument regulate the employment relationship (or more precisely, the contract of employment).

- Compensation for additional notice and/or severance pay under section 106 clearly deal with the same subjects with which relevant federal awards or certified agreements deal – namely, termination of employment and the money payable on termination;

- In determining whether a federal award evinces an intention to cover the field, it is useful to “look beyond the actual terms of the award to the log of claims on which it is based”: *Metal Trades case* (1983) 152 CLR 632 at 650 per Mason, Brennan and Deane JJ. Unfortunately, this analysis is not undertaken in any of the cases cited above.

259. In light of the above cases, it is important for the Commonwealth arbitrator to clarify an intention for federal awards to occupy the field in respect of termination of employment and redundancy.

### 7.5 Need for Consistency of Treatment

260. The desirability of equal treatment between like groups of employees and employers has long been recognised within Australia’s industrial relations system.

261. This principle has been explicitly acknowledged in the past by both employer representatives and trade unions, not least in the areas of termination and
redundancy. In the TCR case (1984) 8 IR 34, the Full Bench of the Commission stated (at 42):

“We acknowledge the desirability of one federal tribunal being vested with all the powers to deal with complaints about unfair dismissal relating to employees under federal awards . . . [We] agree with the CAI and the ACTU, who both agreed that if anything is to be done in this area for federal award employees then it should be done by, and confined to, federal tribunals. It is our view that when the general terms and conditions of employment of a particular industry, including termination, are covered by a federal award it is preferable to deal with problems of unfair dismissal of those employees also by a federal award”.

262. In Ai Group’s view, these comments apply with even greater force nowadays given the existence of a comprehensive termination of employment jurisdiction within the Commission. Regrettably, the ACTU no longer appears to hold this view, being presumably content to allow federal award employees to “hop” from one jurisdiction to another.

263. Recently, a Full Bench of the Commission in Solahart Industries Pty Ltd v AMWU (PR924402, 7 November 2002 per Giudice J, Polites SDP, Whelan C) viewed allegations of "jurisdiction-hopping" as a “serious matter” and stated (at para 25):

“We are conscious of the problems which can arise if parties seek to move in and out of industrial jurisdictions for short-term gain.”
264. In recent times, the Commission has also highlighted the desirability of ensuring consistency of treatment in the context of general employment conditions.

265. In *Re Victorian Minimum Wage Orders* (PR921046, 7 August 2002 per Ross VP, Watson SDP, Lewin C at para 92) a Full Bench of the Commission made the following observations: (emphasis supplied)

“In this regard we endorse the remarks made by the President, Giudice J, in a recent speech to which the VTHC made reference in its submissions:

“Our regulatory framework should be designed in a way which accords a high priority to consistency of treatment . . .

There is an important related issue concerning minimum standards – referred to in Federal industrial legislation as the award safety net. A great deal has been done in the last 20 years or so to coordinate many basic entitlements through the state and federal industrial award systems. But there are still differences in the nature and level of entitlements. Where those differences have no rational basis but are accidents of industrial or political history they advantage some citizens and disadvantage others. This too is a lack of equality and it undermines our society in a significant way”.”

266. The employer variation seeks to accord a high priority to consistency of treatment, and to avoid the problems associated with federal award employees engaged in a particular industry moving in and out of different industrial jurisdictions for short-term gain (depending upon where they reside in Australia).
7.6 Proposed Clauses are Consistent with the Act and relevant High Court Jurisprudence

267. It is submitted that the proposed employer variation is consistent with the terms of section 152 which illuminate a federal intention that federal awards are to override state laws and awards where they both deal with the same subject-matter.

268. It is clearly open to the Commission to make the variation sought, as illustrated by the following decisions of the High Court of Australia:

- In *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, the High Court considered whether a Commonwealth scheme for preferential employment of ex-service personnel after the Second World War overrode a similar State scheme. Section 24(2) of the *Re-establishment and Employment Act 1945* (Cth) provided that the Commonwealth scheme applied “to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the Forces, of any law of a State, or of any industrial award, order, determination or agreement made or filed under or in pursuance of any such law”.

- The Court held that the State Act was overridden by the Commonwealth Act and that section 24(2) played an important part in this determination by assisting the Court to find that the Commonwealth Act covered the relevant field.
Latham CJ referred to the evident intention of the federal legislature to ensure uniformity of treatment amongst ex-service personnel (at 111-112):

"The Federal Parliament may think it wise to do this upon an Australian basis so that all returned men in all parts of Australia are treated in the same way. It is in my opinion within Federal legislative power to prevent the operation of separate and possibly varying State enactments dealing with the same subject. It appears to me obvious that great confusion, dissatisfaction and unrest might well result from the specification by the laws of the Commonwealth and six States of different qualifications of servicemen for benefits, of different conditions attached to those benefits, and of different benefits required by law to be given. The Commonwealth Parliament in the statute under consideration has exercised its complete control of this subject so at to establish uniformity throughout Australia, so that the same provisions will apply to the same classes of men, wherever they were domiciled, wherever they enlisted, and wherever, within the limits prescribed by the Commonwealth Parliament, they served in relation to the war. As Higgins J said in Attorney-General v Balding, federal law provides for administration ‘on one systematic basis by Commonwealth authority’”.

More recently, in Botany Municipal Council v Federal Airports Corporation (1992) 175 CLR 453, the High Court unanimously held that section 109 of the Constitution could be used by the Commonwealth to render inoperative several recited New South Wales laws in respect of their impact upon licensees carrying out work for the Commonwealth in building Sydney Airport’s third runway.
The Commonwealth made regulations under the *Federal Airports Corporation Act* 1986 (Cth) which demonstrated an intention to cover the field. Under Regulation 9(2) it was stated: “A licensee is authorised to carry out the part of the works . . . referred to in the licence in spite of a law, or a provision of a law, of the State of New South Wales . . .” There then followed a list of New South Wales laws specifically overridden.

In a joint unanimous judgment, the Court found that the regulations, including Regulation 9(2), were valid. The Court stated (at 465):

“There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity”.

269. The proposed employer variation is also clearly allowable under section 89A of the Act.

7.7 Logs of Claims Evince an Intention to Cover the Field

270. In determining whether a federal award evinces an intention to deal with a matter to the exclusion of any other State law, it is useful to “look beyond the actual terms of the award to the log of claims on which it is based”: *Metal Trades* case (1983) 152 CLR 632 at 650 per Mason, Brennan and Deane JJ.
271. It is apparent from the logs of claims underpinning the vehicles to the present test case proceedings that federal awards evince an intention to cover the field. The nature and level of entitlements sought in the log of claims dealing with termination and redundancy are comprehensive.

272. In these circumstances, it is appropriate for the Commonwealth arbitrator to clarify that the area relating to termination and redundancy under the federal award leaves no room for the operation of State laws dealing with the same subject matter.