TERMINATION CHANGE AND REDUNDANCY CASE

COMMONWEALTH’S OUTLINE OF SUPPORTING CONTENTIONS

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COMMONWEALTH’S OUTLINE OF SUPPORTING CONTENTIONS

SECTION ONE: INTRODUCTION

Structure of outline

1. This document outlines the Commonwealth’s key contentions in supporting various elements of the claims filed in this matter by the Australian Chamber of Commerce and Industry (ACCI), the Australian Industry Group (AiG) and the Australian Council of Trade Unions (ACTU).

2. References throughout this document to an ‘agreed package’ of measures are references to those elements of the claims upon which the applicants have reached a consensus during the conciliation process before SDP Marsh.

3. This outline addresses in turn each element of the various claims that the Commonwealth supports – both those elements that form the agreed package as well as those elements that remain contested between the parties.

4. This first section outlines our general approach. The second section sets out the Commonwealth’s contentions supporting each element in the parties’ agreed package. The third section sets out the Commonwealth’s contentions supporting elements from the employer claims that are not agreed with the ACTU.

In-principle support

5. As a general rule, the Commonwealth supports the continuation of the key principles underlying the standard award provisions for notice of termination and redundancy pay. These principles and award provisions have served employees and employers well over the years. In general, they provide an effective award safety net of fair minimum terms and conditions of employment. However, in light of developments since 1984, the Commonwealth believes that now is an opportune time for the Commission to review these clauses, to ensure that they best still give effect to the Commission’s original intent and to take into account relevant changes since 1984.
6. In this matter the Commonwealth supports in-principle the package of measures agreed by the ACCI, the AiG and the ACTU.

7. The Commonwealth also supports in-principle other elements of the claims filed by the ACCI and the AiG.

History

8. In 1984 the Australian Conciliation and Arbitration Commission established test case provisions dealing with aspects of termination of employment, the introduction of major change at the workplace and redundancy pay.\(^1\) This package of measures is referred to as the original TCR standard.

9. In 1997, pursuant to legislative changes, the Australian Industrial Relations Commission reviewed the original TCR standard. Its Award Simplification Decision\(^2\) subsequently removed non-allowable elements from the termination and redundancy model clauses and determined that the model change clause did not deal with an allowable matter. The simplified termination and redundancy model clauses are referred to as the current TCR standard.

10. This present case involves three separate but related applications that seek to vary the current TCR standard and also seek to insert a standard redundancy disputes provision into dispute settling clauses in awards.

11. The Commonwealth views the existing termination and redundancy standards as generally appropriate. However it sees scope to refine and clarify the standards, especially in the wake of a number of decisions since 1984 that have cast doubt upon some aspects of the operation of the provisions (for example, the Amcor\(^3\) case).

Agreed package

12. The key changes in the parties’ agreed package go to the proposals dealing with:

- dispute settling procedures;

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\(^1\) 8 IR 34 and 9 IR 115
\(^2\) 75 IR 272
\(^3\) CFMEU v Amcor Ltd [2002] FCA 610 Finkelstein J
Commonwealth's outline of contentions _____________________________

- transmission of business; and
- superannuation benefits.

13. The redundancy disputes provision would be inserted into existing award dispute settling clauses. It outlines some processes to be followed during the handling of redundancy disputes.

14. There are two transmission of business proposals. The first, dealing with the notice of termination clause, would ensure that employees continuing in employment with a transmitee have their period of continuous service with the transmittor have their notice is given. It would also prevent double counting. The second, amending the redundancy clause, would make clear that employees are not entitled to receive severance payments if they continue in employment with a transmitee or, alternatively, reject an adequate offer of continuing employment with a transmitee. It would also give employers a ‘clean break’ option allowing them to pay out severance pay and accrued employee entitlements upon transmission.

15. It is also proposed to remove, on an award-by-award basis, the provision allowing employers to offset severance payments against any payout upon termination of employment from an employer funded superannuation benefit.

16. The agreed package also contains a number of other proposals.

**Contested matters**

17. In terms of the proposals that are not agreed, the key employer proposals supported by the Commonwealth are for provisions that:

- provide access to the incapacity to pay principle on a collective basis;
- separate redundancy entitlements for solvent and insolvent businesses; and
- clarify that the federal TCR standard is intended to cover the field.

18. While employers may be exempted from making severance payments if they demonstrate incapacity to pay, the existing provision has been used very infrequently and is not achieving its original objective. The proposal for group or sectoral exemptions offers
employers a more practical option for obtaining exemptions where they are justified.

19. The proposal to provide separate redundancy prescriptions and processes for solvent and insolvent large and small businesses reflects the fact that different considerations are relevant when establishing levels of severance pay and associated processes for these categories of businesses.

20. The proposal to clarify that the standard ‘covers the field’ would provide employers with certainty that State-based redundancy provisions will not apply.

SECTION TWO: AGREED PACKAGE

21. The Commonwealth supports in-principle the parties’ agreed package of measures. Considered together, these measures update and clarify various aspects of the current TCR standard.

Definition of redundancy

22. In general the parties have agreed that the definition of redundancy should be amended to explicitly include ‘termination of employment’ as a prerequisite for redundancy and therefore for severance pay. Many awards that generally include the TCR standard already include such a definition. For the remaining awards that generally include the TCR standard, the change would make explicit what is already implicit in the definition of redundancy.

23. In fact, the proposed change would reinstate what was explicit in the original TCR standard. In its 1984 decisions the Commission made the entitlement to severance pay contingent on termination of employment due to redundancy. The Commission stated:

In the circumstances, we are prepared to decide that an employee whose employment is terminated due to redundancy shall be entitled to the following severance payments in addition to the extended period of notice of termination prescribed for ordinary termination.4

4 8 IR 34 at page 76
24. The Commission reinforced the fact that any entitlement to severance pay was contingent on termination of employment on the basis of redundancy in the preamble to its severance pay clause:

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

6. In addition to the period of notice prescribed for ordinary termination in clause 4, and subject to further order of the commission, an employee whose employment is terminated for reasons set out in clause 1 hereof shall be entitled to the following amount of severance pay in respect of a continuous period of service.5

25. Clause 1 (a) provided:

1. (a) Where an employer has made a definite decision that he/she no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and the decision may lead to termination of employment, the employer shall hold discussions with the employees directly affected and with their union or unions.6

26. However, these provisions were modified during award simplification. The definition of redundancy adopted in the Award Simplification Decision does not explicitly include ‘termination of employment’ as a necessary characteristic of redundancy. However, the Award Simplification Decision did make ‘termination of employment’ a prerequisite for severance pay - the severance pay provision provides that the entitlement arises in respect of ‘an employee whose employment is terminated by reason of redundancy’.

27. This amended definition of redundancy has been adopted in many simplified awards, but not all. The definition included in the simplified Metal Industry Award does explicitly include ‘termination of employment’ as a necessary characteristic of redundancy. The ‘Metals’ definition of redundancy has also been included in a number of other simplified awards. Neither the Award Simplification Decision nor the Metals award simplification decision7 addressed specifically any rationale for their respective definitions of redundancy.

28. The Commonwealth supports the agreement by the parties to make it clear that the entitlements that are associated with redundancy arise only where there is a termination of employment. This is consistent with the intent of the 1984 TCR decisions. If TCR provisions do not make this clear, they could possibly be interpreted as triggering

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5 9 IR 115 at page 131
6 Ibid at page 128
7 Print P9311, 10 March 1998
severance payments in the absence of termination of employment. They could therefore possibly be interpreted as requiring severance payments to be made where an employee is redeployed to lower paid duties, although it is clear from the 1984 decisions that the Commission did not intend that severance pay apply in such a situation.

29. The parties’ agreement records that the LHMU does not want to include this new definition of redundancy in specified awards to which it is party. In the Commonwealth’s view, all award TCR provisions should explicitly provide that redundancy entitlements such as severance pay arise only in relation to termination of employment at the employer’s initiative. The Commonwealth urges the Commission to apply this principle consistently to all its awards, including LHMU awards. In our view it would be anomalous to treat LHMU awards differently to other awards in relation to this issue.

Redundancy disputes

30. The Commonwealth supports in principle the parties’ proposal to establish a new provision for handling redundancy disputes.

31. The parties’ agreed provision outlines consultation and information sharing processes to help resolve disputes about contemplated redundancies that may lead to terminations of employment.

32. However, the parties do not agree upon one aspect of this proposal – as to whether or not small businesses should be subject to its prescription.

33. The parties agreed that this issue would be resolved in association with the arbitration of the ACTU’s application to remove the current exemption from severance pay of employers who employ less than 15 employees.

34. The Commonwealth supports the position of the ACCI and AiG that small businesses should be exempted from the redundancy dispute resolution procedures.

35. Such an exemption would be consistent with the second 1984 TCR decision which established the current small business exemption. This decision exempted small businesses from all the requirements of the redundancy clause, including the requirements to provide information and consult about alternatives once a definite decision had been made.
to implement redundancies. Thus the original small business exemption applied to similar requirements to those that are now included in the proposed redundancy dispute resolution clause.

36. The exemption of small businesses from the types of requirements included in the proposed clause is therefore the arbitral status quo. Since establishing the broad exemption in 1984, the Commission has never decided on merit to remove from the TCR standard the exemption, in whole or in part. The onus to demonstrate that the exemption should not apply clearly rests with the ACTU.

37. The exemption of small businesses from the redundancy dispute resolution procedure is also consistent with the approach taken by the Parliament in giving effect to the relevant provisions of the Termination of Employment Convention (the Convention). Article 13 of the Convention provides that its consultation and information-sharing requirements may be limited to cases in which the number of workers whose termination of employment is being contemplated is at least a specified number or a minimum percentage of the workforce. Sections 170FA and 170GA of the Workplace Relations Act 1996 (the WR Act) which relate *inter alia* to consultation and information-sharing about redundancies, both apply only to cases in which the employment of 15 or more employees is to be terminated. As a consequence, neither of these provisions would apply to employers who are covered by the small business exemption. The Parliament has recognised the strong case for excluding small business from redundancy requirements. This is consistent with the approach of the Commission.

38. The Commonwealth strongly supports the retention of the existing small business exemption, and will be making submissions opposing this part of the ACTU’s application and supporting the retention of the exemption in relation to all redundancy entitlements, including in relation to the dispute resolution procedures.

39. The Commonwealth also shares the employers’ understanding that the proposed reference to an employer contemplating termination of employment due to redundancy should be specifically taken to refer to situations where an employer intends or has the purpose of implementing retrenchments. The term ‘contemplates’ in this provision should not be read more broadly.

40. This is an important issue. If employers are required to discuss possible retrenchments before any firm decision has been taken, the provision could unnecessarily create disputes. It is worth noting in this
regard that although the ILO Convention uses ‘contemplates’ as a trigger for its requirements, both the Commission and the Parliament instead used ‘definite decision’ or ‘decision’ when dealing with similar issues. In particular, sections 170FA and 170GA of the WR Act which in part give effect to Article 13 of the Convention use the terms ‘decides’ and ‘deciding’ in lieu of ‘contemplates’. Australia reports regularly to the ILO on how it gives effect to the Convention, and the ILO has not called into question the use of the word ‘decides’ instead of ‘contemplates’.

41. If the Commission considers that the use of the term ‘contemplates’ could be ambiguous or not give the result the employers expected, there would be advantage in substituting ‘decides’ for ‘contemplates’ in the TCR provisions.

42. The Commonwealth also supports the employers’ proposition that commercial-in-confidence material needs to be appropriately protected in the implementation of the provisions.

Transmission of business

43. The Commonwealth supports the parties’ agreed transmission of business provisions – a new provision for the notice of termination clause and an amended provision for the redundancy clause.

44. In the 1984 test case decisions the Commission determined that employees should not receive severance payments merely because the ownership of their firm (or that part of their firm where they worked) changed hands:

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

45. The existing transmission provision appears to be designed to achieve this objective by deeming employment not to have been broken by reason of transmission. If employment is deemed not to have been broken, the employment of employees is deemed not to have been terminated, and no entitlement to severance pay arises (assuming the payment of severance pay is contingent on termination of employment due to redundancy).

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8 In the original TCR standard award provisions.
9 8 IR 34 at page 75
46. The existing provision also deems service with the transmittor to be service with the transmittee, ensuring that the transmittee is liable for all employee entitlements accrued with both the transmittor and the transmittee.

47. In these circumstances, it is inappropriate to require employers to pay severance pay to employees who continue in employment with the transmittee without any loss of non-transferable credits.

48. Importantly, the existing transmission provision does not explicitly disentitle employees to severance pay in transmission situations. In the Commonwealth’s submission, if there is any uncertainty about whether the provision achieves this objective, it should be amended to remove any doubt. The undesirable consequences of severance pay provisions that are interpreted as failing to disentitle employees to severance pay in these circumstances have been demonstrated by the Amcor decision, and other recent decisions. For this reason, the Commonwealth supports the parties' proposal to explicitly provide that severance pay is not payable to employees accepting employment with a transmittee who recognises previous service with the transmittor, or to employees who reject such an offer of ongoing employment on terms and conditions that are substantially similar and no less favourable when considered on an overall basis.

49. The Commonwealth also supports the fact that the parties' proposal provides the option of a ‘clean break’ approach to paying out employees' accrued entitlements (including severance pay) upon transmission.

**Adequate alternative employment**

50. The parties seek to alter this provision to make clear that it does not apply to circumstances involving transmission of business. It is also proposed to refer to ‘adequate’ alternative employment instead of ‘acceptable’ alternative employment.

51. The existing alternative employment provision allows employers to be exempted from the severance pay prescription if they obtain acceptable alternative employment for a displaced employee with another employer.

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52. The Commonwealth believes the change in wording from ‘acceptable’ to ‘adequate’ would help clarify the intent of the clause, by making clear that this exemption provision operates on an objective basis rather than turning on an employee’s subjective view of whether an offer of alternative employment is ‘acceptable’.

53. This is consistent with the way the Commission has implemented this provision since 1984. In its decisions it has confirmed that this test is an objective one, and can be assessed upon consideration of various factors such as pay levels, hours of work, seniority, fringe benefits, workload and speed, job security and travelling time.\textsuperscript{11}

54. The Commonwealth also supports the amendment to make it clear that the provision does not apply to transmission of business. This amendment complements and reinforces the key amendments to the ‘transmission of business’ provision. These are designed to ensure that the transmission of business provision itself deals explicitly with all relevant redundancy issues for circumstances when businesses are transmitted.

Superannuation benefits

55. The parties were not aware of any instances in which employers are making superannuation contributions of the type that could be offset against severance pay under this provision. As a consequence, the parties have agreed to seek the deletion of the provision from the model clause provided there is scope to properly address any ongoing concerns in the variation of particular awards.

56. In the 1984 case the Commission heard evidence about superannuation scheme arrangements that provided for employee payouts upon termination of employment, including in cases of redundancy. The Commission considered the interplay between severance payments and superannuation payouts and provided for the severance pay prescription to be discounted where employees also received an employer-funded superannuation payout upon retrenchment.

57. The Commission considered that severance payments to retrenched employees should be discounted “especially in cases

\textsuperscript{11} The Commission has emphasised that this test of adequacy is objective in nature - for example, see Full Bench decisions re Hot Tuna (27 IR 226) and Derole Nominees (Print J4414) and decision re Elders by VP Ross (Print PR900768).
where a superannuation scheme has a specific provision whereby full payment is made on redundancy occurring.\textsuperscript{12}

58. In its second 1984 decision the Commission further commented:

\textit{There is substantial merit in the employers' submission that where an employer has voluntarily introduced a superannuation scheme, and his/her contributions are paid to an employee on termination, it would be inequitable to make him/her pay severance pay in addition.}\textsuperscript{13}

59. The current standard model clause provides for severance payments to be discounted (to the extent of the level of employer contributions only) in cases where superannuation benefits are payable to employees upon termination.

60. Subsequent decisions of the Commission have held that it is only voluntary employer-financed benefits that are to be discounted from severance pay. Thus, employer-financed benefits that are required under award-based superannuation and the Superannuation Guarantee are not discounted.\textsuperscript{14}

61. It is not possible to rule out the existence of employers who have made voluntary superannuation contributions of the type that can be properly discounted from severance pay under this provision. It would be unjust to prevent such employers from offsetting severance pay where they have structured their superannuation arrangements on the basis that certain superannuation benefits are a legitimate alternative to severance pay.

62. For this reason, the Commonwealth supports the proposal that, when the flow-on of the new standard is being considered award-by-award, employers be given the opportunity to indicate if such superannuation arrangements continue to exist. If such arrangements are shown to exist under a particular award, the superannuation offsetting provision would be retained in that award. The Commonwealth asks that this be made explicit by the Commission in any decision it hands down.

\textsuperscript{12} 8 IR 34 at page 76
\textsuperscript{13} 9 IR 115 at page 133
\textsuperscript{14} For example, see the Full Bench decision dated 23 March 1993 under the Clothing Trades Award (Print K7074).
Exemption of trainees from notice periods and severance pay

63. The parties have agreed to update the existing TCR standard by excluding trainees from extended notice periods and severance pay.

64. The Commonwealth supports the amendments proposed by the parties.

65. The proposal to exclude trainees from extended notice periods and severance pay is consistent with the original intention of the Commission in 1984 that these elements of the standard be applied only to those employees who could be described as ‘permanent weekly employees’ and who had an expectation of on-going employment.

66. The 1984 TCR decisions excluded a range of employee categories from both the notice provisions and redundancy provisions of the standard TCR clause. Apprentices and trainee apprentices were among those categories excluded.

67. In 1984, when the Commission determined the categories of employees who would be exempted from extended notice and severance pay entitlements, trainees of the type envisaged by the parties’ proposed amendments were not in existence. It follows that their exclusion or otherwise was thus not considered in the context of those decisions.

68. The WR Act sets out the minimum standard in relation to notice periods for eligible employees. Regulation 30B(1) of the Workplace Relations Regulations, specifically excludes certain kinds of employees from the notice periods provided by the WR Act. Trainees are excluded at paragraph (e) in the following manner:

\[(e) \text{ a trainee whose employment under a traineeship agreement or an approved traineeship:} \]

\[(i) \text{ is for a specified period;} \]
\[(ii) \text{ is, for any other reason, limited to the duration of the agreement.} \]

69. The parties’ proposed amendment excluding certain trainees from the period of notice provision mirrors the exclusion provided by the Regulations.

70. However, the WR Act and Regulations do not deal with the categories of employees to be excluded from severance pay
provisions. In this regard, the parties have followed the reasoning developed by the Commission in its 1984 test case decisions which lead to the exclusion of apprentices. Trainees are akin to apprentices in terms of their employment arrangements.\(^\text{15}\)

**Payment in lieu of notice and notice of termination by employee**

71. The parties seek to amend the current provisions dealing with payment in lieu of notice and notice of termination by employees.

72. The amendment to the payment in lieu of notice provision is directed at ensuring that award provisions reflect the minimum standard provided by the WR Act. The amendments would ensure that the payment in lieu of notice provisions continue to be consistent irrespective of whether the employer or employee initiates the termination of employment.

73. The Commonwealth supports the variation of the provisions along the lines agreed by the parties.

74. Payment in lieu of notice provisions operate to ensure that, in cases where either the employer or the employee fails to provide the other with the required period of notice of termination, appropriate compensation is made for the period of notice foregone.

75. The current TCR standard provides that payment in lieu of notice is to be based on the employee’s ordinary time rate of pay. The amended clause agreed by the parties adopts the wording of subsection 170CM(5) of the WR Act which provides the basis upon which the total compensation instead of notice must be calculated.

76. Providing additional guidance on this matter and ensuring consistency between the WR Act and awards will facilitate a better understanding of the precise calculation of payment in lieu of notice by employers and employees.

77. The proposed variation concerning payment in lieu of notice where the termination is at the instigation of the employee, rather than the

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\(^{15}\) Both apprenticeships and traineeships are now subsumed into the New Apprenticeships scheme. Both apprentices and trainees are bound by formal contracts of training or training agreements that are generally regulated by State and Territory vocational education and training legislation.
employer, seeks to ensure consistency between the two circumstances of termination. The variation aims to maintain the existing intention of the provision.

**Time off during notice period**

78. The parties have agreed to retitle the existing provision as ‘Job search entitlement’. The amendment is directed at ensuring that the title of the provision more appropriately reflects the entitlement provided.

79. The Commonwealth supports the agreed variation.

**Employee leaving during notice period**

80. The parties have agreed to amend this provision by clarifying that the provision relating to payment of severance pay to employees who leave during the notice period applies only to the minimum notice period required by the TCR standard. The amendment is principally directed at ensuring the provision operates as intended by removing confusion that exists in relation to the voluntary granting by employers of notice periods in excess of the TCR standard.

81. The Commonwealth supports the agreed variation.

82. The Commission determined in its 1984 TCR decisions that an employee under notice of termination who wishes to leave, perhaps to take up alternative employment, should be granted the benefits of any redundancy provision, although such an employee would not be entitled to payment in lieu of notice in such circumstances.

83. Employers will generally provide employees with as much notice as possible of impending redundancies. To this end, employers often provide in excess of the minimum periods of notice required under the standard TCR provisions, sometimes in the order of 12 months’ notice.

84. This has resulted in some practical difficulties in implementing the provision in a fair manner in individual workplaces. Where an employee is provided with, for example, 12 months’ notice of an impending redundancy and leaves employment after, say, six months, the current wording of the clause is sufficiently ambiguous that its construction could lead to the conclusion that the employee is entitled
to severance pay. This is clearly not the original objective of the provision. In order to meet the original purpose of the provision, employees in this scenario would become entitled to severance pay only if they left after the first 48 weeks of notice had elapsed. That is, employees would become entitled to severance pay only if they left employment during the mandatory four weeks’ notice period (or five weeks if aged over 45 years) required by the TCR standard.

85. The proposed variation of the provision agreed to by the parties seeks to ensure that the provision implements the original purpose for which it was intended. It seeks to ensure that employers who provide extended notice periods above the minimum award standard are not penalised, and that employers are not provided with a disincentive to give as much notice as possible.

Introduction of obligations for insolvent employers

86. The parties propose to amend the TCR standard by including provisions which cover the situation of an employer becoming insolvent.

87. The proposed provisions create new obligations for redundancies arising from insolvency. These new obligations involve (a) advising employees of the insolvency; (b) advising the relevant government agency responsible for administering any employee entitlements safety net arrangements; and (c) paying any eligible employees any advances made from the scheme.

88. The main current safety net arrangement which is covered by the proposed provision is the General Employee Entitlements and Redundancy Scheme (GEERS), administered and funded by the Commonwealth. Through this scheme and its predecessor, the Employee Entitlements Support Scheme (EESS), the Commonwealth plays a key role in the protection of employee entitlements arising from employer insolvency.

89. The Commonwealth first addressed this issue through the implementation of EESS in 2000. The scheme was introduced as a safety net scheme to compensate for employee’s legal entitlements left unpaid due to an employer’s insolvency.

90. In September 2001 the Federal Government announced a new safety net scheme, GEERS, to replace EESS. GEERS is fully funded
by the Federal Government. EESS continues to apply to claims lodged in respect to terminations due to insolvency from 1 January 2000 up to and including 11 September 2001. GEERS applies to terminations due to insolvency occurring on or after 12 September 2001.

Obligations in relation to GEERS and insolvency

91. The terms of the GEERS scheme are set out in its Operational Arrangements. The safety net nature of GEERS is set out in the Operational Arrangements at paragraphs 6.5 to 6.7 which state:

6.5 **Amounts payable under GEERS will be reduced where payments in respect of employee entitlements are made to employees during the insolvency process and after the employee’s employment has been terminated.** For example, if an employee is owed seven weeks’ redundancy pay at the time of termination, and if two weeks’ redundancy pay is provided for the former employee during the insolvency process but before GEERS makes a payment, the maximum GEERS payment would be five weeks’ redundancy pay. The Scheme does not relieve employers or insolvency practitioners of their responsibility to meet employee entitlements to the extent that there are sufficient assets to do so.

6.6 **Circumstances which would lead to reduced GEERS payments in the way described in paragraph 6.5 may include proceeds of asset sales or funds that become available to creditors under Deeds of Company Arrangement.**

6.7 **Any payments made under GEERS are made without any legal obligation on the part of the Commonwealth to do so and the Commonwealth reserves to itself the right to determine in its absolute discretion matters of eligibility and amount of any payments that it makes under GEERS. Without limiting the application of this discretion, it will be applied in cases where outstanding entitlements are unable to be adequately verified and in cases where Uncommercial Transactions benefiting the employees (as defined in section 588FB of the Corporations Act 2001) may be occurred.**

92. The Government may make payments to eligible employees who lose their jobs due to the insolvency of their employer, where all other sources of available funds have not been sufficient to meet the employer’s obligation in respect of outstanding employee entitlements and up to the limits prescribed under the scheme.

93. Under GEERS, employers remain liable for the payment of their employees’ full entitlements. Where there are insufficient funds available from an insolvent employer, however, payments can be made under the scheme as an advance. The Commonwealth seeks to recover from the insolvent companies the monetary advances made to employees. As a consequence, the existence of GEERS does not
change the amounts of funds available to creditors of insolvent businesses who are ranked below employees. Furthermore, if severance pay were increased and if all other things were equal, this would reduce the amount of funds available to lower-ranked creditors, even if GEERS were amended to cover the increased entitlement.

What GEERS provides

94. Specifically, where employees have a legal entitlement derived from legislation, an award, a statutory agreement or a written contract of employment, as it was at the date of their former employer’s insolvency, they may be eligible to receive GEERS payments equivalent to the following:

- all unpaid wages including unpaid amounts in respect of paid leave already taken and allowances such as shift allowance and overtime;
- all unpaid annual leave including annual leave loading;
- all unpaid pay in lieu of notice;
- up to eight weeks’ redundancy pay; and
- all long service leave.

95. The maximum annual income at which GEERS assistance is calculated is $75,200 for employees terminated in 2001-2002 and $81,500 for employees terminated during 2002-2003. This income cap is indexed annually. Recipients earning more than this amount are still eligible for GEERS, but GEERS will be paid as if they earned the relevant income cap.

96. The Government’s intention is that eligible employees whose employers become insolvent and cannot pay employee entitlements may access GEERS assistance. If employees have already received more than the GEERS entitlements from other sources, the Government scheme is not available. Similarly, where an employer has put in place employee entitlement protection arrangements, the Government will not make any payments under GEERS until such time as the funds available from such arrangements have been fully exhausted.

97. The primary source of funding for employee entitlements is, and must remain, the responsibility of the employer. The means by which employers provide any such protection for employee entitlements is a
matter for each employer to consider. GEERS is not a business subsidy nor does it provide business restructuring support.

**GEERS redundancy payments**

98. Where eligible employees have a legal entitlement to redundancy pay at the date of termination, GEERS may provide assistance up to a maximum of eight weeks pay. This eight week limit, which reflects the maximum national TCR standard for severance pay, ensures that all eligible employees who are owed redundancy entitlements receive a ‘safety net’ payment of up to eight weeks’ redundancy pay.

99. In conclusion, the obligations sought to be created by the agreed provision will ensure that employees will know if their employer becomes insolvent, that GEERS or any other relevant scheme receives the earliest notice of an employer’s insolvency, and that employees receive any advance from the scheme as soon as possible. These obligations are clearly in the interest of employees and will assist GEERS to achieve its objective of providing safety net arrangements for employee entitlements where there are no other sources of funds to meet their outstanding entitlements.

**SECTION THREE: CONTESTED CLAIMS**

100. We now turn to the other elements of the remaining employer claims that are supported by the Commonwealth.

**Employees exempted - casuals**

101. The ACCI seeks to clarify the existing exemption of casual employees from severance pay by specifying that any casual employee in receipt of a casual loading is exempt, irrespective of the length of casual service or access to leave entitlements.

102. The Commonwealth supports the clarification of the provision along the lines proposed by the ACCI.

**What is the original purpose of the exemption provision?**

103. The purpose of the exemption provision is to ensure that the improved notice periods and severance pay entitlements granted by the Commission applied only to those employees who could be
described as ‘permanent weekly employees’ who had an expectation of on-going employment. Other employees, or employees dismissed for misconduct, were not intended to be eligible for entitlements deriving from the TCR standard.

104. The original 1984 decision shows that in determining who would be entitled to severance pay the Commission had regard to the most recent decisions of the federal Commission and other industrial tribunals. The Commission noted that all the decisions it examined restricted the applicability of severance entitlements in some manner.

105. For instance, the Milk Processing and Cheese Manufacturing Etc (Appeal) case\(^\text{16}\) excluded seasonal and casual employees from severance pay; while the 1983 NSW case (the Croker Case)\(^\text{17}\) excluded casuals, employees with less than 12 months’ service, employees engaged for a specified period or task, and employees engaged on a trial period. Further, the NSW decision did not automatically apply to industries which contemplate intermittency in employment by including in the wage rate a specific factor to compensate for patterns of itinerant employment.

106. The Commission concluded that:

\begin{quote}
Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also inconsistent with the general severance pay prescription being granted where termination is a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work.\(^\text{18}\)
\end{quote}

107. The Commission further decided that employees with less than one year’s continuous service would not be entitled to severance pay and that this restriction would, in most cases, ensure that employees engaged on a trial basis would not become entitled to severance pay.\(^\text{19}\)

108. In its second 1984 decision the Commission considered additional submissions from the parties. The Commission clarified its original decision in the following manner:

\begin{quote}
(T)he fact that seasonal employees, temporary employees and employees on daily or hourly hire or trainee apprentices do not appear in the clause we have
\end{quote}

\(^{16}\) (1978) 45 SAIR 902
\(^{17}\) 7 IR 273
\(^{18}\) 8 IR 34 at page 75
\(^{19}\) Ibid
drafted only means that those categories of employees are not provided for in the Metal Industry Award. The same can be said for the position of employees whose wage rates make provision for the itinerant nature of the work, in so far as Part I of the Metal Industry Award is concerned. The necessity for their exclusion, or otherwise, from any provisions in other awards will be a matter for consideration having regard to the terms of those other awards but clearly, having regard to our decision, their inclusion for the purposes of redundancy provisions would be unlikely.  

109. Examination of the 1984 decisions clearly identifies that the purpose of the provisions exempting certain categories of employees from severance pay entitlements was to ensure that only permanent weekly employees who had a continuous period of service with their employer and an expectation of on-going employment would benefit from severance pay.

**Does the exemption provision still meet this objective effectively?**

110. The above analysis of the exemption provisions granted by the Commission in 1984 shows that the original intention of the Commission’s 1984 decisions was to apply severance pay entitlements to permanent weekly employees only and that seasonal and/or casual employees were specifically exempted in both decisions. Similarly, the Commission excluded those employees where provision is made in the calculation of their wage rate for the itinerant nature of their work.

111. Casual employment may take several different forms. It may be part-time or full-time, regular or irregular, and may be of a seasonal/temporary nature or last for longer periods of time. The conditions of employment applying to casual employees have also developed over time and some casual employees today have access to certain types of leave traditionally available only to permanent employees. The distinction between some casual employees and other employees is thus less clear today than in 1984. One clear distinguishing feature, however, is that casual employees receive a loading in addition to the basic wage rate and other employees do not. The standard casual loading compensates employees for the factors that are also compensated by severance pay. It therefore follows that casual employees in receipt of such a loading should not also receive severance pay.

112. The existing TCR standard refers generically to ‘casual employees’ and does not define the category further. Specifically referring to employees who receive a loading, irrespective of other characteristics

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20 9 IR 115 at page 136
of their employment, will clarify the existing provision and ensure that only permanent ongoing employees receive severance pay entitlements.

113. The ACTU’s claim seeks to extend the TCR test case standard to long term casual employees. The Commonwealth will be opposing this element of its claim.

Definition of ‘week’s pay’ for severance pay

114. Both the ACCI and the AiG seek to vary the existing provision. These amendments are principally directed at clarifying the provision so that it better reflects the original intention that underlies it.

115. The proposed amendments seek to clarify which entitlements are not included in an employee’s ordinary time rate of pay.

116. The Commonwealth supports variation of the provision for the purpose of ensuring that it achieves its original objective more effectively.

What is the original intent of the definition of weeks pay for severance pay?

117. The definition of a week’s pay ensures that employees receive the appropriate amount of severance pay and that employers are aware of the basis upon which the amount should be calculated.

118. In its original 1984 decision the Commission defined week’s pay as meaning “the ordinary time rate of pay for the employee concerned”.21

119. Following this decision, employers submitted that specific reference should be made to the rates prescribed by the award for the employment in question. In its second 1984 decision the Commission decided that, for the Metal Industry Award, the amount of severance pay would be calculated on the same basis as for payment in lieu of notice on termination of employment. However, the Commission emphasised that this was relevant only to the Metal Industry Award and that a different decision may well be appropriate in the context of other awards22.

21 8 IR 34 at page 76
22 9 IR 115 at page 130
120. In practice, the TCR standard clause has retained the original definition for week’s pay, being the ordinary time rate of pay for the employee concerned.

Does the definition of weeks pay for severance pay achieve its original objective?

121. Confusion regarding what specific elements are included, or not, in the ordinary time rate for the calculation of severance pay is a concern for employers and employees alike.

122. It is generally accepted that payments such as overtime and penalty rates do not form part of an employee’s ordinary time rate of pay. However, uncertainty can arise when, for instance, overtime is worked on a regular basis. For example, the definition of ordinary time earnings in the Superannuation Guarantee (Administration) Act 1992 similarly does not include overtime, penalty rates, travelling time etc and other like payments.

123. The existing provision should be varied along the lines proposed by the ACCI and the AiG to remove any doubt or uncertainty about the basis on which severance pay should be calculated.

124. The ACTU’s claim seeks to amend the definition of a week’s pay for the calculation of severance pay to include allowances, loadings, penalties etc. The Commonwealth opposes this element of the ACTU’s claim.

**Variation of small business exemption**

125. The existing TCR standard exempts employees of businesses with less than 15 employees (small businesses) from severance pay. The standard further provides that the Commission may vary this exemption in a particular redundancy case. The ACCI and the AiG seek to vary the existing provision to provide that the Commission may vary the small business exemption in a particular redundancy case when there are exceptional circumstances.

126. The Commonwealth supports the variation sought by the employers.

127. The small business exemption was established by the Commission’s second 1984 decision. The original decision had
resulted in a multitude of complaints from employers, largely concerned with the cost implications of the decision and seeking a revision of several aspects of the decision including the position with respect to exemptions. Additional evidentiary material was put to the Commission on the cost impact of its decision and the ramifications for small business. In granting the exemption the Commission noted the desirability of uniformity with NSW and the financial implications for small businesses if they were not exempt.

128. The second decision did not explicitly state the types of circumstances envisaged by the Commission that may warrant variation of the exemption clause in a particular redundancy case. However, a number of subsequent decisions of the Commission have dealt with applications to vary the exemption and these provide sound guidance on the intent and proper application of the provision.

129. Some 18 months after this second decision, a Full Bench of the Commission considered an application to vary the small business exemption in a case involving local government in Western Australia. The Full Bench’s decision canvassed the basis on which the small business exemption was granted, making it clear that incapacity to make severance payments was not the foundation on which the exemption was granted. Importantly, for our discussion here, it follows that if a small business does have a ‘capacity to pay’, this is not a sufficient reason to overturn the exemption. The Full Bench stated:

The two subclauses are interrelated in the sense that financial incapacity and profitability underlie both. The Test Case Bench was concerned that very small businesses might have special difficulty in meeting the financial burden of redundancy pay and should therefore by exempt from such liability under the award; and further that it should be open for the larger employers to apply for partial or full exemption on the grounds of incapacity.

130. Later, in a 1993 decision concerning the clothing industry, Commissioner Oldmeadow similarly decided that the small business exemption was not founded on an assumed incapacity to pay, and that capacity to pay was thus not a basis for removing the exemption in a particular case, stating:

I do not accept that the comments of the majority decision lead to this conclusion. First there are two separate provisions in the standard TCR clause, an exemption subclause and an incapacity subclause. The incapacity subclause can be availed of by a company of any size. Had the TCR Full
Bench required a company with less than 15 employees to demonstrate incapacity the TCR provisions would have reflected this requirement. The standard provisions however distinguishes companies with less than 15 employees. There is no requirement for a company falling within the exemption subclause to prove incapacity. Further, as the majority in the Full Bench decision observed the inclusion of the exemption clause by the TCR Full Bench was in recognition of the “special difficulty” for small businesses in meeting the “financial burden” of redundancy pay. A “special difficulty does not necessarily mean incapacity to pay.”

131. Commissioner Oldmeadow, in 1995, in relation to a case concerning the metal industry, considered that variation of the small business exemption could only be done having regard to the particular circumstances of the case. In this matter, the Commissioner noted:

*It is clear, on consideration of the relevant decisions, that an application to remove the fifteen employee exemption in respect of severance payments is a matter for discretion and is to be determined by consideration of the facts and circumstances in each particular case, and with due regard to the decision of the Full Bench in the Termination, Change and Redundancy Case and the related Supplementary decision (Prints F6230 and F7262).*

132. In her consideration of this matter, Commissioner Oldmeadow specifically referred to a number of other Commission decisions concerning applications by the relevant union for removal of the exemption where the employer had less than 15 employees. These decisions covered a range of industries including clothing, footwear, timber, metal and shipbuilding. None of the decisions turned on the ‘capacity to pay’ of the business. In all cases, the key issue was whether or not the actual number of employees at the time of the redundancies, or the structure/restructuring of the businesses meant that the business should not qualify for the existing small business exemption.

133. In summary, whether the small business exemption should be removed in a particular case depends on whether special or exceptional circumstances exist. The Commission has never considered it sufficient that the small business be shown to have capacity to pay. This is because the original basis of the small business exemption was not that small businesses had an incapacity to pay.

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25 Print K9342, 12 October 1993
26 Print M7407, 1 December 1995
27 For example: G7894, 16 June 1987; H5975, 2 December 1988; J5068, 19 October 1990; K2225, 23 March 1992
134. It is desirable that the provision in question be clarified to better reflect its intention and purpose. The ACCI and AiG approach will achieve this aim.

Retirement age cap on severance pay

135. The AiG seeks to vary the existing provision by replacing the current reference to ‘normal retirement date’ with ‘age 65 years’. This amendment is principally directed at clarifying the provision and ensuring it effectively serves the purpose for which it was originally intended.

What is the original purpose of the variation?

136. The Commission originally included this provision in the TCR standard in the context of equity and industrial justice. In determining when severance pay should be granted the Commission had regard to the most recent decisions of both the federal Commission and other industrial tribunals.

137. In this regard the Commission examined a number of decisions of various industrial tribunals to consider in what circumstances the general severance pay standard should be departed from. One such decision was by Commissioner Cox in the Clothing Trades Award Case in which he awarded severance pay “but no more than would have been earned if employment had proceeded to normal retirement date.”

138. The TCR Bench agreed, stating:

In addition, we are of the opinion that where termination is within the context of an employee’s retirement, an employee should not be entitled to more than he/she would have earned if he/she had proceeded to normal retirement.

139. The Commission’s second 1984 decision did not amend this aspect of the TCR standard.

Does the provision still meet its objective effectively?

140. In support of its claim to remove the provision, the ACTU is arguing that the provision is discriminatory and should be deleted. This is not

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28 (1983) 4 IR 242 at page 252
29 8 IR 34 at page 75
the case. The provision has been the subject of review in a number of cases and all have reinforced its appropriateness.

141. The Full Bench in the Award Simplification Decision was charged with the task of examining allowable award matters and related issues. In relation to test case provisions, the Full Bench confined itself to two matters:

- the need to confine the provisions to allowable award matters and those coming within s.89A; and
- the requirements of Items 49(7) and (8).

142. Of particular relevance here is Item 49(8) of Schedule 5 of the Workplace Relations and Other Legislation Amendment Act 1996. This item requires the Commission to review an award to make sure that it does not contain provisions that discriminate against an employee because of *inter alia* age.

143. In its examination of the standard redundancy provisions as part of the award simplification case, the Commission retained the provision dealing with the age retirement cap in the form it appears in the TCR standard. The Full Bench did not consider that the provision was discriminatory.

144. This issue has been dealt with extensively in relation to the *Coal Mining Industry (Production and Engineering)* Consolidated Award 1997. In this case a Full Bench of the Commission, in a decision relating to an appeal from a decision by Commissioner Harrison regarding the second stage of the simplification of the award, referred the matter to Commissioner Wilks to determine whether the retrenchment pay cap in the award was discriminatory.

145. Commissioner Wilks found that:

...the clause is applicable to all employees. There is no different formulae 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…

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38 AW774609
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 the clause does not involve direct discrimination…

146. Commissioner Wilks further found that the provision did not involve indirect discrimination either, on the basis that the provision is, in all of the circumstances, reasonable. He concluded that the provision did not discriminate against an employee because of age, but:

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 otherwise be required to bear.

147. The AiG’s proposed variation seeks to further define ‘normal retirement date’ for the purpose of the Metal Industry Award by replacing the phrase with a reference to the employee attaining the age of 65 years. A referral only to the ‘normal retirement date’ is subjective and may be open to several interpretations by employers and employees. For instance, common retirement ages today may be 55 years, 60 years, 65 years or some other age or date agreed between an employer and his/her employees.

148. The precise provision which was considered by Commissioner Wilks in the case referred to above had also replaced the more general ‘normal retirement date’ with a reference to a specific age for retirement, in this case 60 years. In this respect Commissioner Wilks noted that, for practical purposes, there is no difference between the two provisions. In the case before him a reference to age 60 was reasonable as it is the normal retiring age for workers covered by the award. He also noted that “any ambiguity is avoided by retaining it”.

149. President Giudice considered Commissioner Wilk’s decision in a matter concerning simplification of the Metropolitan Daily Newspapers Redundancy Award 1996. That award included the following provision:

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.

31 Print S8070, 13 July 2000
32 Ibid
33 Print S8526, 25 July 2000
150. After considering Commissioner Wilk’s decision and the Award Simplification Decision, President Giudice concluded that he ‘doubted’ whether the above clause discriminates on the basis of age so as to offend item 51(7)(f) of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996*. He went on to further conclude that Commissioner Wilk’s reasoning seemed applicable to the provision currently under consideration.

151. The retirement age cap on severance pay is clearly still relevant to redundancy situations in the year 2002 and into the future. The principle underlying the provisions is sound and in no way discriminates against employees on the basis of age. The decisions clearly support the position that the provision would retain its integrity if it also referred to a specific retiring age or even an agreed date for retirement.

152. The ACTU proposes that the current provision be deleted from the TCR standard. The Commonwealth opposes this proposal.

**Intention to cover the field**

153. Both the ACCI and the AiG seek to insert new provisions dealing with the intention to cover the field. The new provisions are aimed at ensuring that federal award employees are covered only by federal TCR provisions.

154. in relation to both termination of employment and redundancy and not by State legislation or other termination and redundancy provisions.

155. The Commonwealth supports the proposed provisions.

**What is the purpose of the existing TCR clause?**

156. The TCR test case clause is intended to provide a comprehensive minimum code covering redundancy situations for employees covered by federal awards, subject to provisions which employers and employees may agree to include in federal certified agreements or Australian workplace agreements (AWAs).

157. The federal system of industrial regulation exists side by side with the various State systems. The laws of the Commonwealth, by virtue of s109 of the Constitution, prevail over State laws to the extent of any
inconsistency. It follows then that a federal award provision dealing with TCR should prevail over any State provision dealing with the same subject.

Is this purpose still being met?

158. While the Commonwealth is not aware of specific cases where this has been a serious issue, it agrees that it is preferable to make the situation clear in awards to avoid any confusion or disputation.

159. It is important that the intention of awards in relation to the TCR test case standard is clearly spelt out and understood by all parties. Areas of uncertainty can result in costly proceedings and create confusion for both employers and employees. Obligations and rights under award provisions need to be easily and clearly understood by employers and employees in order for them to be implemented in a proper and fair manner.

160. The provision sought by the employers aims to remove any doubt or ambiguity concerning the comprehensive nature of the existing TCR test case clause. It seeks to ensure that employees are covered only by the TCR standard provision and not by State legislation or other redundancy provisions made pursuant to a State law. This is consistent with the original purpose of the TCR test case clause.

Incapacity to pay

161. The ACCI seeks to vary the existing provision by extending the ability to claim incapacity to pay to a ‘group’ of employers, as well as individual employers. These amendments are principally directed at ensuring the provision better serves the purpose for which it was originally intended.

162. The Commonwealth supports the variation.

What is the original purpose of the provision?

163. In its original 1984 decision the Commission provided for employers to argue in particular redundancy cases that they did not have the capacity to pay severance pay entitlements. In explaining its position on the issue of incapacity to pay in August 1984, the Commission said:

In coming to our decision in this case we have been conscious of the cost of the unions’ claim….We have also paid regard to the fact that the impact of
redundancy provisions will not apply equally to all businesses....For many companies it will introduce a new charge directly impacting on industry resources which involves a considerable financial outlay which was not ascertainable beforehand and has not been funded...we have made provision, in our decision, for employers to argue in particular redundancy cases that they do not have the capacity to pay...  

164. In its second 1984 decision the Commission reaffirmed the need for an award provision that would ensure employers were aware of their right to argue incapacity to pay, but accepted that such incapacity may only require a variation of severance pay rather than a total exemption from the TCR provisions.

165. The inclusion of the incapacity to pay provision is a protective provision that recognises the significant cost impact that severance pay will impose on businesses and that the impact will be spread unevenly among enterprises.

Does the provision still meet its objective effectively?

166. There is evidence to support the contention that the existing incapacity to pay provision is not effective. Employers rarely use the provision.

167. A search of industrial tribunal decisions identified only six relevant decisions, five of the federal Commission and one of the Tasmanian Industrial Commission. In each decision the application was refused by the relevant industrial tribunal.

168. Applications under the incapacity to pay provisions are thus very uncommon and where they have been made have not been successful.

169. The provision has proved ineffective in protecting businesses for a number of reasons - businesses are reluctant to claim incapacity to pay because it might cause creditors to discontinue credit; the time and cost of making and prosecuting an application are considerable; and the likelihood of success is minimal.

34 8 IR 34 at page 61

1. 35 See, for example, Prints J0115, J6078 and T2228 relating to the clothing industry, Prints K2453 and K5635 concerning the vehicle industry, and Case No T5500 in the Tasmanian Industrial Commission.
170. Enabling a group of employers to make application under the provision would assist in improving the overall effectiveness of the provision by reducing the costs involved for individual employers and lessening their reluctance to make application. It will allow employers to make a joint overall submission, highlighting common elements confronting them such as drought conditions, a fall in demand for a particular commodity, or a poor economic environment confronting a particular geographical region.

171. The variation proposed by the ACCI and the AiG seeks to improve the ability of the current provision to meet its objective of protecting businesses from severance payments in those situations where they cannot afford the payments.

Restructuring the TCR standard to deal with insolvency situations

172. The ACCI and the AiG seek to restructure the TCR standard. This proposal seeks to draw an initial distinction between large and small businesses and then between redundancies that are the result of insolvency and redundancies that arise for other reasons.

173. The restructuring does not seek to change existing entitlements - however, it does create new obligations for redundancies arising from insolvency. The new obligations created by the provision involve advising employees of the company’s insolvency, advising the relevant government agency responsible for administering any employee entitlements scheme, and paying eligible employees any advances made from the employee entitlements scheme. The main current employee entitlements scheme is GEERS. These new obligations are agreed by the parties as part of the package, and have been discussed previously.

174. The Commonwealth supports the employers’ proposal to restructure the TCR standard in a way which differentiates between insolvency-related redundancies and other redundancies.

The desirability of differentiating between the causes of redundancies.

175. There have been numerous decisions of industrial tribunals in the federal and State jurisdictions which recognise the distinction between job losses resulting from technological change or structural rearrangement and when termination occurs as a result of economic
downturn.\textsuperscript{36} For example, see \textit{SDAEA (NSW) v Countdown Stores} (Fisher P.)\textsuperscript{37}; \textit{SDAEA (NSW) v MYER (NSW)} (Fisher P.)\textsuperscript{38}, and \textit{Re Clerks (State) Award} (The Commission)\textsuperscript{39}.

176. In the 1984 TCR case the Confederation of Australian Industry (CAI) argued in favour of different treatment of retrenchments caused by employers’ financial difficulties, submitting that severance pay should not be awarded in such circumstances. The Commission found some merit in the CAI’s arguments:

\begin{quote}
There is no doubt that to compensate employees declared redundant in circumstances of financial difficulty will add to the economic difficulties that precipitated the dismissal. That is a strong argument for accepting the CAI submission, in so far as it contends that there is no justification for imposing substantial additional cost burdens on employers when redundancy occurs as a result of economic downturn.\textsuperscript{40}
\end{quote}

177. However, the Commission ultimately rejected the CAI’s position, finding that:

\begin{quote}
In particular, to make a distinction granting severance pay only in cases of technological change notwithstanding the equality of hardship of employees in all redundancy situations, would be to penalise an employer for introducing technological change.\textsuperscript{41}
\end{quote}

178. We would emphasise that the proposition rejected by the Commission in 1984 was that no severance pay should apply in the case of employers’ financial difficulties. The Commission did not consider or reject a proposition that severance pay should apply to both categories of retrenchments and that a lesser level of payments should apply in the case of financial difficulties. It is also relevant to note that the level of severance pay ultimately granted by the Commission in 1984 left little practical scope for differential levels to apply for different causes of redundancy - nor did the severance pay standard that had been established in the NSW jurisdiction. The level of severance pay awarded by the federal Commission was similar to that granted by the NSW Commission in 1983. However, the NSW standard applied only to redundancies resulting from economic difficulties. The NSW decision allowed for higher levels of severance pay to be granted on a case-by-case basis for restructuring-related

\textsuperscript{36} Ibid, page 57
\textsuperscript{37} [1983] 7 IR 273
\textsuperscript{38} [1983] 7 IR 303
\textsuperscript{39} [1987] 21 IR 29
\textsuperscript{40} 8 IR 34 at page 61
\textsuperscript{41} Ibid, page 62.
Commonwealth’s outline of contentions _________________________33

retrenchments. The desirability of retaining as much consistency as possible with NSW left little scope for the federal Commission to award different levels of severance pay if it were to establish an affordable minimum standard for severance pay. In practice, different levels of severance pay for different causes of severance pay were not a realistic option in 1984.

179. Nor is there any realistic scope in 2003 for the award safety net to provide different levels of severance pay for different causes of redundancy. This is because there is no justification whatsoever to increase the current level of severance pay in the TCR standard. As we will argue in detail in our response to the ACTU’s claims, there is no relevant change since 1984 in the factors that are intended to be compensated by severance pay. The existing standard continues to provide an appropriate award safety net for employees.

180. In contrast, there is abundant scope in the agreements stream for different levels of severance pay to be established for different causes of redundancy. In fact, there is strong reason to expect that the parties to agreements will often agree to different levels of severance pay for insolvency-related retrenchments compared with restructuring-related retrenchments. As noted by the Commission in 1984, the cause of redundancy in a particular workplace has a significant determining influence on the ability of the employer to meet severance pay obligations. Employers facing insolvency are not in a position to meet the significant cost of severance pay, while those who are restructuring and wish to facilitate job-shedding are in a superior financial position to afford higher severance pay. In fact, it may be in the interests of employers who are restructuring to agree to higher levels of severance pay to encourage voluntary retrenchments and to attract employee support for the restructuring. This is particularly the case given that restructuring-related retrenchments generally only affect a small proportion of the workforce while insolvency-related retrenchments generally affect the entire workforce.

181. The contents of certified agreements show that a number of employers have taken advantage of the scope provided by enterprise bargaining to agree to higher levels of severance pay to encourage their workforce to accept restructuring proposals. In some cases agreements contain levels of severance pay that are many times higher than the level of the current TCR standard.

182. Of course, the rationale for these high severance payments bears almost no relationship to the rationale for the severance payments
contained in the TCR standard. The two types of payments are both referred to as severance payments, but they are chalk and cheese. The TCR severance payments were established to compensate for the hardship associated with job loss, and for the loss of non-transferable credits. They bear no relationship to payments that are designed to encourage voluntary retrenchment. They are also designed to attract employee support for restructuring and apply to only a small subset of an employer’s workforce.

183. These considerations provide compelling reason for the level of insolvency-related severance pay to be based on the TCR standard rather than the level of severance pay that applies to restructuring-related retrenchments. The rationale for higher restructuring-related severance pay has no relevance to insolvency-related retrenchments. The rationale for the level of severance pay provided by the safety net does.

184. However, few agreements distinguish between insolvency-related and restructuring-related retrenchments in relation to severance pay. Agreements that include high levels of severance pay (presumably to gain acceptance for restructuring) generally apply the payments to all retrenchments, including insolvency-related retrenchments.

185. Nevertheless, there appears to be growing recognition amongst employers that restructuring-related payments should be distinguished from insolvency-related payments, and that lower payments should apply to insolvency situations.