



NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT

SUBMISSION

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Executive Summary

1. This submission addresses two aspects of the proposed National Employment Standards ('NES'): the Fair Work Information Statement (Division 11 of the draft provisions) and notice of termination and redundancy pay (Division 10).

Fair Work Information Statement

2. The submission proposes that the NES include a requirement for employers to nominate in the Fair Work Information Statement the industrial instruments which apply to employees in the workplace. This requirement would encourage employers to turn their minds to this essential issue at the right time in the employment relationship, and would make employees aware of the source of their entitlements, reducing the need for employees to seek third party assistance in order to understand the key conditions of their employment.
3. The proposed requirement would not be unduly onerous for employers. The NES is already requiring the employer to make a statement. The specific information is to the employer's benefit too. It would only be an extension of existing notification requirements which apply in a transmission of business situation, and would be far less onerous than the information requirements which apply overseas.
4. We propose that no penalties should apply where an employer makes a mistake in the provision of this information, nor should the incorrect statement be legally binding on the employer.

Notice of Termination and Redundancy Pay

5. We propose that the Government consider amending Division 10 of the Draft Provisions, to enhance the levels of protection provided to employees in situations of termination and redundancy. This would bring Australian law more closely into line with the standards of protection afforded to employees in other major industrialised countries.
6. In relation to notice of termination:
 - The proposed minimum periods of notice are based on standards established in the *TCR Case* more than 20 years ago. Longer minimum statutory notice periods, such as those applicable under Irish or UK law, would better reflect contemporary Australian standards.
 - Australia should also adopt some form of the Irish, UK and NZ legislative provisions requiring an employer to provide not only written notice, but also a written statement of the *reasons* for dismissal upon request by an employee.
7. In relation to redundancy pay:
 - The establishment of redundancy pay as a minimum legislative entitlement for most employees covered by the Federal workplace relations system would be a major advance on the level of protection currently afforded to employees who are retrenched.
 - However, the exclusion of employees in small businesses from redundancy entitlements is questionable. This issue was comprehensively examined in the 2004 *Redundancy Test Case*, where a Full Bench of the AIRC decided to provide a lower scale of redundancy payments for employees in firms with under 15 employees. If the 2004 Test Case is an appropriate basis upon which to legislate minimum redundancy entitlements for employees in medium-larger businesses, then the decision's extension of those rights to small business employees should also be implemented – with the mechanisms referred to in the decision to address genuine situations of small business hardship.
 - The limited or 'patchwork' coverage of rights to severance pay in Australia is a significant problem. The notion of providing a minimum 'safety net' entitlement to redundancy pay, above which parties may agree to more generous entitlements, is an important first step in this area. However, options for extending and improving upon these minimum standards should also be considered.
 - A key issue to be addressed in this context is that current Australian arrangements, and the proposed redundancy pay NES, impose the obligation to make redundancy payments on the *employer*. However, in many instances, employers are unable to meet their obligations to make severance payments (eg due to corporate insolvency); and in some cases, employers deliberately avoid these obligations. In the event of

insolvency, employees may be able to recover some or all of their unpaid redundancy payments under 'GEERS'.

- Irish law offers a potential solution here: while it also imposes the redundancy pay obligation on employers, they can claim a partial rebate of the costs of meeting these entitlements from a central fund. A redundancy payments scheme such as that applicable in Ireland would provide greater certainty, than current and proposed arrangements in Australia, that employees would actually *receive* severance entitlements to which they are legally entitled. The Irish model, along with other schemes for protecting employee entitlements in place internationally, warrant further consideration from an Australian perspective.
- Finally, the Government should consider implementing (as part of the proposed NES, or through other provisions of the substantive workplace reform legislation) rights for employees to receive information and to be consulted in advance of large-scale redundancies. Again, various overseas models for providing statutory rights to information and consultation over redundancies may be examined, including those operating in Germany, Ireland, NZ and the UK. We do not recommend any particular overseas model over another; rather, we would encourage the Government to consider adapting elements of these (or indeed, other) countries' laws on redundancy information and consultation to best suit the Australian context.

Introduction

This submission recommends the strengthening of two aspects of the proposed National Employment Standards ('NES') contained in the *Discussion Paper – National Employment Standards Exposure Draft 2008* ('Discussion Paper'): the Fair Work Information Statement (Division 11 of the draft provisions) and notice of termination and redundancy pay (Division 10).

Fair Work Information Statement

This section of the submission responds to question 47 of the Discussion Paper which asks whether there are any other matters that need to be taken into consideration when finalising the information in the workplace NES.

We propose that Division 11 of the Draft Provisions should be amended to include a requirement for employers to provide specific information about employee entitlements as part of the Fair Work Information Statement. This proposal addresses the problems which employees currently experience in determining their rights and entitlements within a highly complex system of workplace relations laws.¹ Employers will also benefit from giving attention to this issue at the commencement of the employment relationship, but the proposal also takes into account the needs of employers by proposing a soft compliance regime in relation to the accuracy of the statement. Accordingly, the proposal suits the Government's objectives of ensuring that the NES are 'fair to working people, flexible for business and promote productivity and economic growth for the future prosperity of our nation.'²

Complexity and compliance under the current workplace relations system

The complexity of the current system makes it very difficult for employees to understand their entitlements without third party assistance. For example, to establish whether they are being paid their correct entitlements, an employee needs to know whether their employer is covered by the Federal workplace relations system and, if so, whether the employee is covered by an award (eg, pre-reform award, Victorian common rule award, or Notional Agreement Preserving State Award (NAPSA)), or a workplace agreement (eg, Preserved State Agreement, AWA, ITEA or collective workplace agreement), and/or a common law contract.

Various reports and surveys have confirmed that many employees within the Work Choices workplace relations system have been confused about their rights and entitlements.³ Despite greater access to information about workplace relations laws through awareness campaigns and the assistance provided by various agencies, employees have found it difficult to identify information which is sufficiently specific to enable them to understand and pursue their entitlements.⁴

¹ See A Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

² Discussion paper, p 2.

³ See, eg, Queensland Industrial Relations Commission, *Final Report: Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers: Volume 2* (29 January 2007) at 118;

⁴ See, eg, S Bertone, S Zuhair, H Babacan, S Marshall and C Fenwick, *Work Choices 'The Victorian Experience': A statewide study conducted by Job Watch in conjunction with Victoria University and*

In addition, data collected by the former Office of the Employment Advocate, and by independent researchers, has confirmed that there are many examples in workplace agreements lodged with the OEA of terms which fall below minimum legal entitlements.⁵ The requirement to prepare a more informative statement would alert the employer to the possibility they were making, or had made, such an agreement. It is incidentally our strong view that the substantive legislation to be introduced later in 2008 should require the Workplace Authority to assess all statutory workplace agreements for compliance with the new NES prior to their approval. This is necessary to ensure that workplace agreements do not contribute to employee confusion about their minimum entitlements.⁶

The inclusion of entitlements which fall below the minimum standards suggests that some employers are either unaware of the correct entitlements which are payable to employees, or in certain cases that they are taking advantage of employee ignorance to provide conditions which are lower than the minimum legal requirements. Both inadvertence and obfuscation by employers would be addressed by a requirement for employers to provide a more detailed information statement. Such a requirement would support the objective of 'ensuring compliance with minimum standards' which is currently a feature of the Workplace Relations Act 1996 ('WR Act').⁷ It would not impose a major burden on employers. The NES is already requiring employers to furnish a statement. Our recommendation only goes to the usefulness of the content of the statement. After all, such knowledge (of the applicable industrial instrument) is something the employer should have in any case when entering into an employment relationship. That knowledge (and the form of the Statement that is developed) will be applicable to whole categories of employee. The correct identification of the instrument will help employers to avoid costly disputes with employees at a later stage. It would also reduce the workload of Fair Work Australia, which will take over the functions of the Workplace Authority and Workplace Ombudsman in providing assistance and advice to employees and employers where there is non-compliance.

Proposal for specific information to be provided

Under the existing transmission of business rules, employers must provide transferring employees with a notice which identifies the industrial instrument(s) which will apply to employees after the transmission of business.⁸ This is vital information for the employees if they are to understand their position. There is no corresponding entitlement for employees who are not involved in a transmission of business. While it is the practice of some employers to provide new employees with a letter of offer which includes information about applicable industrial instrument(s), this is not a mandatory requirement.

the University of Melbourne, at 28; *Child Employment Principles Case 2007* [2007] NSWIRComm 110 at 73.

⁵ Carolyn Sutherland, 'Fair Agreements under Work Choices? A Closer Look at Bargaining Outcomes', paper presented to the 22nd Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) conference, 6-8 February 2008, St Kilda, Melbourne, at 8.

⁶ See further submission by Carolyn Sutherland to the Senate Inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*; Carolyn Sutherland, 'Fair Agreements under Work Choices? A Closer Look at Bargaining Outcomes', paper presented to the 22nd Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) conference, 6-8 February 2008, St Kilda, Melbourne, pp 8-10.

⁷ WR Act, s 3(f).

⁸ WR Act, s 602.

Under the new NES, the Fair Work Information Statement will be a one-size-fits-all document which will provide very general information about the workplace relations system to new employees. Given that employers must go to the effort of providing this statement anyway, it would not be unduly onerous to require employers to insert into the statement the name(s) of the industrial instrument(s) which apply to the employee, and to provide information to assist employees to access the instruments. This obligation would be far less extensive than the information requirements which apply in Europe, where employers must provide very detailed information about the place of work, title and description of the work, notice, leave, pay, frequency of payment, hours of work, and details of any applicable collective agreement.⁹

The provision of specific information would substantially improve an employee's understanding of their entitlements and would be of much greater practical use to employees than general information about the workplace relations system.

Our proposal is that the Fair Work Information Statement should include a 'Specific Information Section' in which the employer must:

1. identify any industrial instrument(s) which apply to the employee (ie, agreements and/or awards); and
2. identify the location of those instruments (by attaching a copy or providing a website or onsite location).

The standard form part of the statement should also state that the employee has the benefit of any entitlements in the NES which are more favourable than the industrial instruments listed in the specific information statement.

Provision of the information statement to those not covered by an award or agreement

The requirement to provide the Specific Information Section would be straightforward in its application to employees who are not covered by an award or a statutory agreement. A standard form could be provided for these employees which states that no award or agreement applies and therefore only the NES have application.¹⁰

Provision of statement to those who have not yet been employed

The Discussion Paper asks whether employers should be allowed to provide the information statement to workers before they commence employment.¹¹ It is our view that this option should be available to allow employers to provide the information statement with the letter of offer or contract of employment.¹²

Another option, which should also be permitted by the proposed provisions, would be for employers if they so choose to provide the specific information (about the application of agreements and awards to the employee) within the terms of the letter

⁹ Directive 91/533/EEC of October 14th 1991, article 2. See also Employment Rights Act 1996 (UK), s 1 and Employment Act 2002 (UK), ss 37-38.

¹⁰ It would not be necessary for the employer to identify other sources of law such as applicable State legislation or common law principles.

¹¹ Discussion paper, p 58, question 46.

¹² Similar provisions in the United Kingdom permit this: see Employment Act 2002, s 37.

of offer or contract of employment, while still providing a separate standard form information statement about general rights.¹³

Provision of statement to those who change their employment status

Over the course of employment, through transfer, promotion, and other events, some employees obtain a new classification. In some but not all of these situations, a new contract of employment is formed. The Discussion Paper does not indicate whether the Fair Work Information Statement would be required in these situations. We propose that the Statement be required if the applicable industrial instrument is changing. Again it is in the interests of both the employer and employee to know that this is happening.

Compliance with the Fair Work Information Statement standard

Mechanisms for ensuring compliance with the NES will be dealt with in the substantive legislation. In keeping with the aim of the Government to ensure the NES are 'flexible for business', we are not proposing that employers bear a heavy compliance burden in relation to the provision of accurate information in the Specific Information Section. The purpose of the requirement to provide specific information is to increase employer and employee awareness of applicable entitlements - by prompting employers to investigate and document the instruments which apply to their employees - not to trap the employer into providing enhanced benefits. A penalty for non-compliance with the Fair Work Information Statement standard should only be imposed where an employer fails to provide the statement at all or fails to complete the Specific Information Section, or where the employer knowingly or recklessly provides inaccurate information in the statement.

More importantly, the statement should indicate to employees that the employer will not be bound by any mistaken statement in the Specific Information Section, and that the contents of the Fair Work Information Statement do not form part of the contract of employment. The legislation would need to give the employer immunity from action, under contract and related laws such as the Trade Practices Act and Fair Trading Acts, arising from the provision of the Statement. This would ensure that the Fair Work Information Statement does not provide an additional layer of entitlements. For example, if the employer identified that a particular award applied to the employee, but upon later investigation it was discovered that the award did not bind the employer with respect to that employee, the employer would not be held to its incorrect statement. However, if the employer *chose* to include the specific information as a term of the contract of employment itself, then the contractual term would be binding. But this would be matter of general contract law not compliance with the NES.

Unlike the current transmission of business requirements, the employer should not be required to lodge a copy of the notice with an administrative agency (currently the Workplace Authority, to be replaced by Fair Work Australia).¹⁴

¹³ Again, this is permitted under the Employment Act 2002, s 37.

¹⁴ See the requirement in s 603 of the WR Act.

Notice of Termination and Redundancy Pay

We propose that the Government consider amending Division 10 of the Draft Provisions, to enhance the levels of protection provided to employees in situations of termination and redundancy. This would bring Australian law more closely into line with the standards of protection afforded to employees in other major industrialised countries.¹⁵ Most of our comments in this part of the Submission respond to question 45 on p 56 of the Discussion Paper: ‘Are there any other matters that should be taken into consideration when finalising the notice of termination and redundancy pay NES?’.

Notice of Termination

The proposed minimum periods of notice that an employer must provide to an employee prior to termination (or payment in lieu), set out in para 272 of the Discussion Paper, mirror those provided for currently in section 661 of the WR Act. That provision, in turn, reflects the standards established in the 1984 *Termination, Change and Redundancy Case*.¹⁶ This means that the proposed NES on notice of termination is based on standards established more than 20 years ago.

In our view, Australia should consider the minimum notice periods applicable in comparable overseas countries before settling upon the periods of notice proposed in the Discussion Paper. For example:

- In Germany, employees are entitled to minimum periods of notice prior to dismissal based on length of service: ranging from one month’s notice for employees with up to two years’ service, up to seven months’ notice for those with 20 years or more of service. These statutory notice periods are often extended under the terms of collective agreements.¹⁷
- In Ireland, the *Minimum Notice and Terms of Employment Acts, 1973-2001* specify minimum notice periods (or pay in lieu of notice) that employers must provide to all employees with at least 13 weeks’ continuous service. These periods range from one week’s notice for employees with 13 weeks-two years’ service, up to eight weeks’ notice for those with more than 15 years’ service.¹⁸ Under the Irish *Unfair Dismissals Acts 1977-2001*, an employer must also provide an employee with written reasons for dismissal within 14 days of a request by the employee.
- UK employees with at least one month’s continuous service are entitled to the following minimum statutory periods of notice: at least one week’s notice for one month-two years’ service; one week’s notice for each year of service between two and 12 years; and at least 12 weeks’ notice for service beyond 12

¹⁵ See Anthony Forsyth, *Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?* (Supplementary Report for the Victorian Office of the Workplace Rights Advocate, November 2007), available at:

http://www.business.vic.gov.au/busvicwr/_assets/main/lib60148/economic%20dismissals-artfinal.pdf.

¹⁶ ‘*TCR Case*’ (1984) 8 IR 34; see also 9 IR 115.

¹⁷ Achim Seifert and Elke Funken-Hotzel, ‘Wrongful Dismissals in the Federal Republic of Germany’ (2004) 25 *Comparative Labor Law and Policy Journal* 487, pages 493, 503-504.

¹⁸ See further Department of Enterprise, Trade and Employment Ireland, *Minimum Notice and Terms of Employment Acts, 1973 to 2001*, available at: <http://www.entemp.ie/> (accessed 9/10/2007).

years.¹⁹ A dismissed employee (with at least one year's service) is also entitled to receive a written statement of the reasons for dismissal within 14 days of requesting it from the employer.²⁰

- Notice periods, tied to information and consultation rights for employees, also apply in respect of large-scale redundancies/collective dismissals in Germany, Ireland, and the UK (see further below).
- In New Zealand, while there are no minimum statutory notice periods, employees have 60 days from the date of dismissal to request a written statement of the reasons for dismissal, and the employer must provide the statement within 14 days of the request.²¹
- United States law also does not specify any minimum notice periods, apart from requiring at least 60 days' notice of plant closings or mass layoffs of the magnitudes specified in the Federal *Worker Adjustment and Retraining Notification Act 1988*.²²

The minimum notice periods established under Irish and UK law are in our view more appropriate models for Australian regulation in this area than the much higher standards applicable under German law. However, if the relevant Irish or UK legislation were to be adapted to form part of the notice of termination provisions under Australian law, at least one important change would be necessary – that is, the entitlement to notice should commence from the commencement of employment,²³ rather than after one month's service (UK) or thirteen weeks' service (Ireland).

We note that the proposed notice of termination NES would require an employer to give notice of termination in writing (para 279 of the Discussion Paper). We consider that Australia should adopt some form of the Irish, UK and NZ provisions requiring an employer to provide not only written notice, but also a written statement of the *reasons* for dismissal upon request by an employee. Employees are entitled to be informed of the reasons for their dismissal, both as a matter of fairness and in order to decide (and obtain advice upon) whether there is any legal basis for challenging the dismissal. The current requirement that an employee be 'notified' of the reason for dismissal²⁴ is inadequate to achieve these objectives – for example, because it only applies to dismissals for reasons of incapacity or misconduct, and it does not require the reasons to be provided in writing.

Redundancy Pay

(a) Entitlement to Redundancy Pay and the 'Small Business' Exclusion

The establishment of redundancy pay as a minimum legislative entitlement for most employees covered by the Federal workplace relations system, as proposed in paras

¹⁹ See *Employment Rights Act 1996* (UK), section 86(1).

²⁰ Inns of Court School of Law (City University, London), *Employment Law in Practice*, 7th edition, Oxford University Press, 2006, page 119.

²¹ *Employment Rights Act 2000* (NZ), section 120.

²² See further Anthony Forsyth, *Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?*, at pages 29-30.

²³ As it does now under section 661 of the WR Act.

²⁴ See WR Act, section 652(3)(a)-(b).

281-283 of the Discussion Paper, would be a major advance on the level of protection currently afforded to employees who are retrenched.

At present, severance entitlements are available under Australian law only where an applicable award or workplace agreement makes provision for them, or they are specified in an employee's contract of employment.²⁵ Federal awards and agreements have commonly contained provisions requiring severance payments to be made to redundant employees, based on the standards established in the *TCR Case*. Those standards were increased (for award-covered employees) in the 2004 *Redundancy Test Case*,²⁶ which forms the basis for the level of severance payments proposed in the Discussion Paper. It should also be noted that under the Federal Government's General Employee Entitlements and Redundancy Scheme ('GEERS'), employees can recover up to 16 weeks' redundancy pay. However, claims under GEERS can only be made where an employee's legal entitlement to redundancy payments (eg under an award, workplace agreement, or contract) was not met by their employer.²⁷

While the proposed introduction of a statutory right to redundancy pay is welcomed, the exclusion of employees in small businesses from redundancy entitlements (Discussion Paper, para 282) is in our view questionable. Small business employees were originally excluded from the redundancy pay standards established in the *TCR Case* in 1984. However, this issue was revisited and comprehensively examined in the 2004 *Redundancy Test Case*, where a Full Bench of the AIRC decided to provide a lower scale of redundancy payments for employees in firms with under 15 employees.²⁸ The Full Bench stated as follows:

Having considered all of the material and submissions ... we have concluded that we should partially remove the small business exemption. As a general proposition the employees of small businesses are entitled to some level of severance pay. The evidence establishes that the nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as suffered by persons employed by medium and larger businesses. It is also clear that the level of the exemption is to some extent arbitrary and can give rise to inequities where a business reduces employment levels over time.

While some small businesses lack financial resilience and have less ability to bear the costs of severance pay than larger businesses, the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay. ... For those businesses which are unable to meet their redundancy pay obligations the incapacity to pay provision, as amended by this decision, provides an avenue for relief.²⁹

If the 2004 *Redundancy Test Case* is an appropriate basis upon which to legislate minimum redundancy entitlements for employees in medium-larger businesses, then

²⁵ The statutory rights of certain employees to seek orders from the AIRC for the making of severance payments following redundancy (introduced in 1993, and found in sections 170FA-170FE of the pre-Work Choices WR Act) were repealed by the Work Choices legislation.

²⁶ (2004) 129 IR 155; the new scale adopted provided for four weeks' severance pay for employees with 1-2 years' service, up to 16 weeks' pay for those with nine years' service, dropping to 12 weeks' pay for those with 10 or more years' service (due to the fact that many employees obtain pro rata rights to long service leave if made redundant after 10 years' service).

²⁷ See Department of Workplace Relations, *General Employee Entitlements and Redundancy Scheme: Operational Arrangements*, 1 November 2006, available at: <http://www.workplace.gov.au/NR/rdonlyres/D6EB90C2-B571-42F0-B812-09BCA7496020/0/GEERSOperationalArrangementsNov2006.pdf> (accessed 6/11/2007).

²⁸ That is, up to a maximum of eight weeks' pay for employees with at least four years' service; see (2004) 129 IR 155 at paras [10-15], [169-276].

²⁹ (2004) 129 IR 155 at paras [272-273].

the decision's extension of those rights to small business employees should also be implemented – with the mechanisms referred to in the decision to address genuine situations of small business hardship. The former Coalition Government overrode this aspect of the AIRC's 2004 decision, by providing (in the Work Choices legislation) that award provisions for severance pay cannot apply to employees in businesses with less than 15 employees.³⁰ In our view, the Labor Government should not (in effect) retain this component of Work Choices by excluding small business employees from the proposed redundancy pay NES.

b) *Coverage of Redundancy Entitlements and Ensuring that Employers' Redundancy Pay Obligations are Met*

The Discussion Paper (para 290, and questions 42-43) raises the issue of whether the redundancy pay NES should address the different types of redundancy schemes operating in Australia. It is noted there that '[t]he Government recognises that some awards ... and laws may provide redundancy entitlements that are structured differently from the proposed NES and / or are more beneficial than the NES.'

A significant problem, as we see it, is the limited or 'patchwork' coverage of rights to severance pay in Australia at present. Employees covered by awards and collective agreements (especially union collective agreements) are likely to have quite generous entitlements to redundancy payments.³¹ Many high-income employees have a contractual entitlement to such payments. However, many employees (predominantly, those who are award-free/non-unionised) have no right to severance pay. The proposed redundancy pay NES will assist some of these workers, although many others will be excluded from the protection offered as they are employed in small businesses.

We are not suggesting that the level of redundancy pay entitlements provided in the NES should be raised to the considerably higher levels found in some union collective agreements. The notion of providing a minimum 'safety net' entitlement to redundancy pay, above which parties may agree to more generous entitlements, is an important first step in this area. However, options for extending and improving upon these minimum standards should also be considered.

A key issue to be addressed in this context is that current Australian arrangements, and the proposed redundancy pay NES, impose the obligation to make redundancy payments on the *employer*. However, in many instances, employers are unable to meet their obligations to make severance payments (eg due to corporate insolvency); and in some cases, employers deliberately avoid these obligations. In these situations, the employees' legal rights to severance pay are rendered meaningless, although (in the event of insolvency) they may be able to recover some or all of their unpaid redundancy payments under GEERS (see above).

Irish law offers a potential solution here: while it also imposes the redundancy pay obligation on employers, they can claim a partial rebate of the costs of meeting these entitlements from a central fund. Employees whose dismissals fall within the

³⁰ See WR Act, section 513(1)(k) and (4).

³¹ For example, as at early 2004, around 20% of private sector employees covered by Federal awards had more generous entitlements to severance pay under certified agreements than those provided for in the *TCR Case* standard; see Breen Creighton and Andrew Stewart, *Labour Law*, 4th edition, The Federation Press, 2005, page 432.

definition of ‘redundancy’ under the *Redundancy Payments Acts 1967-2007* (Ireland) are entitled, under that legislation, to monetary compensation from their employer. Redundant workers must have completed two years’ continuous service with their employer to qualify for payments under the Irish legislation.³² The amount of redundancy pay to which employees are entitled is based on their length of service – ie two weeks’ pay for each year of continuous employment (capped at €600 per week), plus a bonus week’s pay.³³ Employers required to make payments under Irish law can claim a 60% rebate from the Social Insurance Fund (into which employers are required to make regular contributions).³⁴

A redundancy payments scheme such as that applicable in Ireland would provide greater certainty, than current and proposed arrangements in Australia, that employees would actually *receive* severance entitlements to which they are legally entitled. In our view, a combination of the proposed NES and aspects of the Irish should be considered: that is, the quantum of severance pay entitlements linked to an employee’s length of service as proposed in the redundancy pay NES (extended to cover small business employees), combined with the Irish concept of establishing a central fund from which employers’ redundancy payment costs are partially met. However, in the Australian context, contributions to that fund should be required only from employers.³⁵ Part of the objective here is to shift the onus of meeting unpaid entitlements from the taxpayer (as is currently the case under GEERS) to the broader employer community. We note that the issues we have raised in this part of the submission are linked to the broader debate over how best to protect employee entitlements more generally; and that there are many other models in place internationally that should be examined to achieve that objective.³⁶

c) *Information and Consultation Rights in respect of Proposed Redundancies*

We submit that the Government should consider implementing (as part of the proposed NES, or through other provisions of the substantive workplace reform legislation) rights for employees to receive information and to be consulted in advance of large-scale redundancies. We acknowledge that the Government’s ‘Forward with Fairness’ policy documents designate ‘consultation, representation and dispute settling procedures’ as one of the 10 matters that may be included in ‘modern awards’. However, we consider that information and consultation over redundancies should not be left to regulation by awards (and agreements); rather, they should be legislated entitlements.

³² Law Society of Ireland, *Employment Law*, Oxford University Press, 2006, pages 312, 314; the employment must also be insurable under the Irish *Social Welfare Acts*).

³³ Law Society of Ireland, *Employment Law*, pages 318-319; Department of Enterprise, Trade and Employment Ireland, *A Layperson’s Brief Guide to the Redundancy Payments Scheme* (‘Irish Redundancy Payments Guide’), available at: <http://www.entemp.ie/> (accessed 2/11/2007).

³⁴ See Irish Redundancy Payments Guide. The Social Insurance Fund is a government-administered fund into which employers *and* employees make compulsory contributions, and out of which payments are made to cover a broad range of social benefits including jobseekers’ allowances, illness and occupational injury benefits, and state pensions.

³⁵ That is, employees should not be required to partly fund their own future redundancy payments, as is effectively the case under Ireland’s Social Insurance Fund (see above).

³⁶ See further (for example) Robbie Campo, ‘The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models’ (2000) 13 *Australian Journal of Labour Law* 236.

Currently, Australian employees have no general statutory entitlements to be informed or consulted about impending redundancies. A mechanism is provided under sections 668-671 of the WR Act, enabling unions to seek orders from the AIRC in the event of an employer's failure to inform or consult over redundancies affecting 15 or more employees.³⁷ However, the AIRC's powers under these provisions were restricted by Work Choices.³⁸ In addition, awards may not currently contain provisions requiring information and consultation about retrenchments,³⁹ although workplace agreements made under the WR Act can.⁴⁰

Again, various overseas models for providing statutory rights to information and consultation over redundancies may be examined, for example:

- In Germany, employee information and consultation rights are effected through the legal rights of 'works councils' in relation to large-scale workforce reductions (ie collective dismissals).⁴¹ An employer must provide written notice in advance to the works council and the relevant public authority, where the employer is contemplating dismissals of the following numbers of employees, within a 30 day period: more than five, in businesses usually employing between 20-60 employees; more than 25, or more than 10% of the workforce, in businesses with between 60-500 employees; and more than 30 in those with over 500 employees. In respect of mass redundancies meeting these threshold requirements, the employer must inform the works council about the reasons for the dismissals, the period in which they will occur, the number and categories of employees usually employed and of those to be made redundant, and the basis for calculating severance payments. The works council can comment in writing on the proposed dismissals, and consultation must take place between employer and works council about ways to avoid dismissals, reduce their number or minimise their consequences.
- Ireland's *Protection of Employment Act 1977* requires firms with more than 20 employees to inform and consult workers' representatives over collective redundancies, at least 30 days before any dismissals take effect. Whether these information and consultation obligations are triggered depends on the scale of the proposed redundancies – in establishments with 21-49 employees, there

³⁷ See Anthony Forsyth, 'Giving Teeth to the Statutory Obligation to Consult Over Redundancies' (2002) 15 *Australian Journal of Labour Law* 184, examining relevant provisions in the pre-Work Choices WR Act (and their limitations). These provisions were a (partial) statutory formulation of the information and consultation standards established in the 1984 *TCR Case*. A 'redundancy disputes procedure', including information rights in respect of proposed redundancies, also formed part of the standard award clause established by the AIRC in the 2004 *Redundancy Test Case*.

³⁸ As a result, the AIRC can no longer make orders under these provisions for reinstatement of redundant employees, withdrawal of termination notices, disclosure of an employer's confidential information, or payment of compensation/severance pay.

³⁹ This limitation was first introduced by the exclusion of such provisions from the list of 20 'allowable award matters' in section 89A of the pre-Work Choices WR Act.

⁴⁰ However, the incidence of such provisions in agreements is fairly low; data from 2003 indicated that less than one third of Federal enterprise agreements made provision for discussions between management and employees/unions over redundancies or other forms of workplace change; see Anthony Forsyth, Samantha Korman and Shelley Marshall, *Joint Consultative Committees in Australia: An Empirical Update*, Corporate Governance and Workplace Partnerships Project Working Paper Series, CELRL/CCLSR, University of Melbourne, January 2007, page 12.

⁴¹ Under the *Protection against Dismissal Act 1969* and the *Works Constitution Act 1952*; see further Anthony Forsyth, 'The 'Transplantability' Debate Re-Visited: Can European Social Partnership Be Exported to Australia?' (2006) 27 *Comparative Labor Law and Policy Journal* 305, at pages 315-319.

must be at least five dismissals within 30 days; 50-99 employees, at least 10 dismissals; 100-299 employees, at least 10% of the workforce; and at least 30 dismissals in businesses with 300 or more employees. The required content of the information to be provided, and the scope of consultation, are similar to the requirements specified under German law (see above). Notification of collective redundancies must also be provided to the Minister for Enterprise Trade and Employment.⁴²

- In NZ, section 4 of the *Employment Relations Act 2000* imposes ‘good faith’ obligations on employers when they propose to make any decisions that could adversely affect the continued employment of any employees; when they are contemplating business sales, transfers, outsourcing or other restructuring measures; or when they are making any number of employees redundant.⁴³ ‘Good faith’ in these contexts means that the employer must discuss the relevant proposals with the affected employees and their union representatives before a final decision is made. This consultation process must provide a real opportunity for the employees/union(s) to provide input into the employer’s decision, and must be preceded by the provision of all relevant information (except commercially sensitive information).⁴⁴ In *NZ Amalgamated Engineers Union v Carter Holt Harvey Ltd*,⁴⁵ the NZ Employment Court found that the employer had breached its good faith obligations by failing to consult over proposed redundancies at an early stage, and by dealing with employees directly rather than with their union.⁴⁶
- Under the *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), an employer must inform and consult with appropriate employees’ representatives over collective dismissals (ie proposals to make 20 or more employees redundant at one establishment over a period of 90 days or less); and notify the relevant Secretary of State of such redundancies. The required content of the information to be provided, and the scope of consultation, are similar to the requirements under German law (see above). Where 100 or more employees are to be made redundant, consultation must commence at least 90 days before the first dismissal is to take effect; otherwise, at least 30 days prior to that date. Failure to comply with these information and consultation obligations can lead to an employment tribunal making a ‘protective award’ (ie an order for up to 90 days’ remuneration to be paid by the employer to the employees affected).⁴⁷

We do not recommend any particular overseas model over another; rather, we would encourage the Government to consider adapting elements of these (or indeed, other)

⁴² See further Law Society of Ireland, *Employment Law*, pages 321-323.

⁴³ See in particular section 4(1A) and (4)(c)-(e); and Gordon Anderson, ‘Transplanting and Growing Good Faith in New Zealand Labour Law’ (2006) 19 *Australian Journal of Labour Law* 1, at page 19.

⁴⁴ Anderson, pages 19-20, noting that the obligations in the *Employment Relations Act*, section 4(1A) were introduced by legislative amendments in 2004 aimed at overriding the NZ Court of Appeal’s decision in *Auckland City Council v New Zealand Public Service Association* [2004] 2 NZLR 10; in that case, the Court had supported an approach based on ‘the desirability of consultation’ but not ‘mandatory consultation at particular times’ (Anderson, page 20).

⁴⁵ [2002] 1 ERNZ 597.

⁴⁶ These breaches led the Court to ‘freeze’ the employer’s restructuring plans for one month to allow proper consultation to occur; see Anderson, page 21.

⁴⁷ See further Simon Deakin and Gillian Morris, *Labour Law*, 4th edition, Hart Publishing, 2005, pages 866-884.

countries' laws on redundancy information and consultation to best suit the Australian context.⁴⁸ That said, we are of the view that the information and consultation standards established under German law are at the 'high end' of international benchmarks in this area, and to that extent may be an inappropriate model for Australian regulation.

Information and consultation rights over redundancies are an important element of 'workplace democracy', and the rights of employees to be treated fairly in the workplace. At the same time, there is significant international evidence supporting the notion that high levels of information exchange and consultation by management lead to positive outcomes in terms of business efficiency, productivity and competitiveness. The adoption of such an approach runs counter to Australia's entrenched 'adversarial' industrial relations culture, but demands further consideration.⁴⁹

⁴⁸ Some of the issues that may need to be explored in embarking on such a process are analysed in Forsyth, 'The 'Transplantability' Debate Re-Visited: Can European Social Partnership Be Exported to Australia?'

⁴⁹ See further Anthony Forsyth, 'Workplace Democracy Rights' in M Bromberg and M Irving (eds), *Australian Charter of Employment Rights*, Australian Institute of Employment Rights/Hardie Grant Publishing, 2007, 43.

Workplace Law – Corporate Law

About the Workplace and Corporate Law Research Group (WCLRG)

The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

WCLRG provides a focus for research and external engagement for academics working in the fields of workplace relations and employment law, corporate governance, corporate social responsibility, and the intersections between labour law and corporate law.

Several members of WCLRG have recently carried out contract research projects for the Victorian Office of the Workplace Rights Advocate/Department of Innovation, Industry and Regional Development, examining the impact of ‘Work Choices’ on matters including bargaining arrangements, and access to unfair dismissal claims (the ‘operational reasons’ exclusion).

Further information about WCLRG may be obtained by visiting our website at: <http://www.buseco.monash.edu.au/blt/clarg/>; or by contacting the Director of WCLRG, Dr Anthony Forsyth, at: Anthony.Forsyth@buseco.monash.edu.au.