NEW JOB PROTECTION STANDARDS

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New job protection standards have been established for Australian workers as a result of the decisions of the Australian Conciliation and Arbitration Commission in the ACTU Job Protection Test Case.

The decisions have rewritten the contract of employment clause covering federal award workers by providing: protection against unfair dissmissal: extended periods of notice on termination of employment; and rights to severance pay in redundancy dismissals. They have also made a fundamental change to the relationship between employers and unions by requiring employers to consult unions about the introduction of technological change and redundancy problems.

The new standards were established with the support of the Federal and State Labor Governments and as a direct result of the ALP/ACTU Prices and Incomes Accord. During 1985, federal awards and many State awards will be varied to incorporate the new job protection standards. Before long, most award workers in Australia should enjoy the benefits of the most significant changes made with respect to job security in this country for over sixty years.

The Need For New Standards

The persistent high level of unemployment, the experience of the recent economic recession with workers being retrenched without any reasonable notice or compensation and the significant number of industrial disputes about job security issues (such as dismissals, retrenchments and management policy on, e.g., technological change) brought home to many the need for a concerted effort by the Union Movement to improve job protection standards through a major test case.The publicity for the test case argued the need for new standards in this way

> In an advanced society of the 1980's, you'd think workers could take job protection for granted.
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> In Australia, you can't.
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> Most awards allow employers, for any reason at all, to dismiss a worker with only one weeks notice.
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> There is little protection against redundancy.
>
> Unfair dismissals can occur.
>
> And on top of that, unions are rarely consulted on changes which affect the jobs of members.
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> The ACTU test case on job protection aims to change all of this.
>
> In our advanced 1980's society, there is a case for more protection.

Apart from the basic defects in employment standards embodied in awards, international comparisons demonstrated that Australia had fallen a long way behind job security standards in many advanced industralised nations. In particular, Australian workers had been denied improvements made over the last twenty years in Western European countries. For example, in Britain, France and West Germany workers have statutory rights to sevice-related notice on termination of employment, to an independant review of an alleged unfair dismissal, to be consulted about redundancy problems and to certain minimum severance payments on dismissal due to redundancy.

And not merely had Australia fallen behind Western European standards, it was clear when the International Labor Conference adopted a new Convention and Recommendation on Termination of Employment at the Initiative of the Employer in 1982 that Australian standards were far below those standards which the ILO considered should apply in all countries.

The Mounting of the Test Case

In response to these developments, the ACTU decided to pursue improvements in job protection standards. The most appropriate way of seeking these improvements was through a test case, in view of the constitutional and political problems in Australia in the way of legislative reform relating to employment standards. [1]

The ACTU lodged its job protection claim to commence the test case in 1981 using the Metal Industry Award and the Transport Workers (Airlines) Award as the vehicles for the case. The test case came before a Full Bench of the Australian Conciliation and Arbitration Commission comprising the President, Sir John Moore, Mr. Justice Maddern and Mr. Commissioner Brown.

When the test case commenced, the employers, through the Confederation of Australian Industry, challanged the jurisdiction of the commission to deal with some of the matters in the ACTU claim. On the 14 October 1982, the Commission handed down its decision on the jurisdictional issues [2] and cleared the way for the test case to proceed.

The hearing of the argument on the merits began on 8 March 1983, just three days after the election of the Hawke Government.

After 33 hearing days, the presentation of detailed submissions and information covering most aspects of Australian employment law and standards in other countries, an unprecedented employer campaign in opposition to new job protection standards, a national campaign by unions in support of the job protection award, and many delays, the shape of the new job protection standards was determined.

In it's decision of 2 August 1984 [3] and a supplementary decision of 14 December 1984 [4] the Commission accepted that the time had come for fundamental improvements to be made in job protection standards in Australia.

Labor Government Support

A significant factor in the Test Case was the support given by the Federal Labor Government and the State Labor Governments of N.S.W., Victoria, Western Australia and South Australia.

In a large measure, the improvements in the job protection standards flowing from the Test Case must be seen as a direct result of the Prices and Incomes Accord. The supporting polices in the Accord refer to Federal Government support for the establishment of "rights for employees, through their unions, to be notified and consulted by employers" about proposed changes and of "fair redundancey protection for workers including a requirement on employers to consult with unions in redundancy situations".

All the Labor Governments intervened in the Test Case in general support of the arguments put by the ACTU. The conservative Governments of Queensland and Tasmania intervened in opposition to the ACTU claims.

The New Standards

The new standards established by the decision in the test case bring about major improvements in 3 areas:

- ordinary termination of employment
- introduction of change
- redundancy.

The new standards have rewritten the laws relating to termination of employment for federal award employees. Such employees will now have protection against unfair dismissal and will be entitled to extended periods of notice on termination. In brief terms, the new standerds mean that

- Employers are prohibited from dismissing an employee harshly, unjustly or unreasonably;
- Employers must provide employees, on request, with a written statement of the employment record;
- Employers are required to give a period of notice of termination, or payment in lieu, based on the length of service and age of the employee concerned;
- Employees are required to give the same amount of notice on resignation (but not the age-related notice);
- A dismissed employee is entitled to one day's time off on full pay to look for alternative work;
- A disputes settlement procedure is established so that disputes concerning unfair dismissals may be settled between the employer and the union or referred for conciliation by the Commission.

The need for most of these improvements is obvious. It is a disgrace that up until now in the federal industrial system there has been no right for an employee with a complaint of unfair dismissal to have the complaint determined by an impartial tribunal with effective powers to order relief. That deficiency has now been remedied, although legislative action is necessary to provide for orders of restraint and/or compensation to be made in unfair dismissal cases.[5] The standard of "one weeks notice" which has applied for over sixty years in Australia is no longer appropriate given present community expectations, developments in comparable countries, the usual commitment of workers to employment for an indefinite duration rather than to employment renewable on a weekly basis (and the benefits to employers of such commitment in promoting a stable and experienced workforce), and the need for a longer period of notice to give employees time to adjust to and deal with all the difficult and disruptive consequences of job loss. Workers will now be entitled to a period of notice of termination based on their length of service and age. A worker with five years or more service must be given four weeks' notice and an additional one week's notice if he/she is over 45 years of age. For similar reasons as applied to the notice period, it is important that the dismissed workers receive reasonable assistance from their employers in the task of finding other employment through the provision of paid leave and the right to obtain a statement of the employment record. The giving of some such assistance to dismissed workers is now an award obligation.

Important new rights have been established for unions to be consulted about the introduction of major changes planned by an employer. Under the new standards, employers are required to notify, provide information to and consult with employees and their unions on major changes in production, program, organisation, structure or technology which will have significant effects on employees. In terms of the potential effect of changing the relations between employers and employees/unions in Australia, the requirement to consult on the introduction of change is probably the most important aspect of the new standards. Indeed, although not widely recognised as such, this aspect of the test case decisions together with the new rights of involvement of employees/unions through the Prices and Incomes Accord, are the most significant and far-reaching developments with respect to industrial democracy to have occurred in Australia.

There is widespread support for consultation between employers and unions about the introduction of change (see, for example, the report of the Committee of Inquiry of Technological Change in Australia; the Economic Summit Communique; the National Labour Advisory Council Guide-lines; decisons of the industrial tribunals; and ILO standards). That widespread support has now been translated into an award obligation. In view of the benefits of consultation (including minimising the potential for conflict during times of change), the Commission decided to require that there be consultation between employers and unions about the introduction of major changes in enterprises.

The new standards also contain significant protections for workers in redundancy situations. Employers will be required to consult unions in redundancy situations and, in the event of dismissals due to redundancy, to make severance payments to the workers affected. The new obligations imposed on employers in redundancy situations may be summarised as follows:

- Employers (with 15 or more employees) are required to provide information to and consult with employees and unions in redundancy situations;
- Employers must notify the Commonwealth Employment Service about proposed dismissals due to redundancy;
- Employers (with 15 or more employees) will be required to make severance payments to workers dismissed due to redundancy. Other employers (those with less than 15 employees) may be required to make such payments upon order of the Commission in a particular redundancy case;
- Employees to be redeployed due to redundancy are entitled to a period of notice of transfer to a lower paid position.

In establishing these standards, the Commission accepted the ACTU submission that a new approach to handling redundancy problems should be adopted in Australia. The cornerstones of the new approach proposed by the ACTU were: consultation between employers and unions with a view to avoiding or minimising dismissals due to redundancy; and award rights to reasonable compensation and assistance for employees affected by redundancy; The ACTU argued that this approach would bring about a more co-operative manner of handling redundancy problems; would minimise the potential for disputation by laying down appropriate procedures for dealing with redundancies; and would ensure fair treatment of employees by establishing basic rights with respect to such matters as severance pay and assistance in finding suitable alternative employment.

The Commission decided to depart from the previous practice of dealing with redundancy problems on an ad hoc basis (that is, only as and when a particular redundancy problem affecting a group of employees occurred) and to embody the fundamentals of the proposed ACTU approach in an award prescription.

Not the Final Word

Although the Commission's decisions are a major step towards providing greater job security for Australian workers, those decisions will not be the final word on the topic of job protection.

As mentioned above, there is a need for legislative action to provide effective remedies in cases of unfair dismissal. There will also be a need for a review of the new standards over time in order to remove deficiencies in them (such as the exclusion of the operation of State anti-discrimintion and equal opportunity legislation in the case of discriminatory dismissal of federal award employees; the lengthy notice requirements placed on employees for resigning; the limitations on the obligation to consult and the information to be provided by employers about proposedchanges or redundancy problems; and the various exclusions or exemptions from the redundancy pay provisions). Further, it should be recognised that some of the new standards established are quite low, especially when compared to standards in, e.g.,

many redundancy agreements and to standards in comparable countries. As the Commission indicated in its decision of the 2 August 1984, "There is a need to hasten slowly in the setting of new standards" and, in regard to the "limited relief" relating to redundancy pay and conditions, "We have acted with restraint having regard to the current economic circumstances and the terms of the National Wage Case Principles". [6]

There will therefore be scope in future years to build upon and to improve the new job protection standards.

A Challenge to Unions and Employers

The decisions in the test case have made significant but long overdue improvements in the basic contract of employment applying to most workers in Australia.

One of the bases on which these improvements have been made was that the changes would have wider benefits than just ensuring fairer treatment for workers. Indeed the ACTU in its submissions in the test case stressed the potential benefits of improve job protection standards for employers, industrial relations and the community. Fairer and more equitable procedures with respect to consultation would prevent hardship to workers and would minimise industrial disputation about dismissals. More consultation between employers and unions on the introduction of change and in redundancy situations would lead to better decision-making by enterprises and less industrial conflict. Greater job security will help build a better industrial relationship between management and workers which would enable Australia to take better advantage of the skills of both groups.

The realisation on the wider benefits of the new job protection standards will entail challenges for both employers and unions.

The challenge for employers is to reconsider their attitudes to management. They must be prepared to involve employees through their unions in important decisions relating the the introduction of change or redundancy problems. They must be prepared to adopt new management practices that will ensure that employees are treated fairly, especially when dismissals are considered. It will only be through such changes in attitudes that employers and workers alike will benefit from the new job protection standards.

The new standards also constitute a challenge for unions. The new procedures relating to consultation and unfair dismissals depend on the involvement of unions. Unions will therefore need to commit resources to the new consultative mechanisms and to ensure that their workplace organisation is effective. As the ACTU Executive noted, "union action will be required to ensure that the new job protection standards are applied in practice and that the benefits of the new standards are realised. In fact the new rights of consultation and notification on the introduction of change, the new procedures and rights relating to complaints of unfair dismissal, and the greater involvement with respect to handling redundancy problems, will make new demands on the resourses of unions and will provide an opportunity for unions to provide better services to their members".

The way in which employers and unions respond to these challenges will determine the extent to which the Australian community will benefit from the new job security scheme.

FOOTNOTES:

1. See further, A Boulton , "Job Protection and the Test Case Approach" *University of NSW Occasional Papers - 1981*, pp. 17-19.

2. Print F0870

3. Print F6230

4. Print F7262

5. See recommendations for legislation to confer the right to order reinstatement and/or compensation in dismissal cases in the *Report of the Committee of Review into Australian Industrial Relations Law and Systems*, A.G.P.S., 1985 Volume 1 (Recommendations 17 & 18).

6. Print F6230, pp. 21, 31.