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REDUNDANCY IN AUSTRALIA A FAIR LEGAL FRAMEWORK?

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Primarily employment is the chief source of income for Australian families. Its interruption must be attended either by financial hardship or the fear of it. Employment is also part of a worker's daily routine and society; disruption of that routine and social contact necessitates a reorganization of an important aspect of a person's life. Long term employees may also find themselves with a competitive disability as a result of opportunities foregone in the continuous service of their employers.¹

In the light of the importance of work to employees and acknowledging the significant impact technological and other major change has on jobs, redundancy protection in Australia takes several forms – the obligation on employers to pay redundancy pay (sometimes called severance pay) to compensate employees declared redundant; the duty on employers to consult employees about proposed redundancies and to minimise employment effects; and the duty on employers to consult unions where larger redundancies of 15 or more employees are proposed. The sources of these obligations are varied – statute; collective agreements; industrial awards.

Redundancy pay in Australia today is a legislated minimum standard to which the vast majority of Australian employees are entitled. It is included in the National Employment Standards ('NES'), which form part of the *Fair Work Act 2009* (Cth) ('FWAct'). This was not always the case, however, as the current legislative obligations were preceded for several decades by less comprehensive

¹ Gaudron J in *Food Preservers' Union v Wattie Pict Limited* (1975) 172 CAR 22; (1975) 172 CAR 227.

arrangements - the source of redundancy pay and notifications was industrial awards which were handed down by an independent tribunal when settling industrial disputes about pay and conditions of employment. There was a piecemeal approach to redundancy pay with variations in the benefits to which employees were entitled, as there were different packages covering various industries or occupations.

In a landmark test case over thirty years ago, however, general minimum standards for notice to terminate employment relationships and redundancy pay and procedures were determined in Australia.² The independent industrial tribunal set a general redundancy pay standard that would operate throughout awards and throughout industry, thereby establishing a general minimum standard which was uniform.

The same test case also introduced, via industrial award clauses, uniform standards for consultation by employers with employees or unions when redundancies were being proposed, and requirements for notifying the likely effects on employment.

This case set the stage for standards today, although awards are no longer the main source of the entitlements to pay or consultation. This article will explore current redundancy pay entitlements, legal issues and the meaning of redundancy; the duty to consult; will further explore the influence of the test case; and critique various provisions.

I – REDUNDANCY PAY: MINIMUM STANDARDS IN THE FAIR WORK ACT 2009 (CTH)

The obligation to pay redundancy pay is currently set out in the statute governing Australian federal workplace relations, the *FWAct*, and is one of 10 minimum employment standards that can be enforced in the law courts.³ It is calculated by reference to continuous years of service in excess of one year, as an employee must serve a minimum of one year to receive redundancy pay. As Table One indicates, an employee, for example, with one to less than two years' service would be entitled to pay they would ordinarily earn in four weeks; an employee with five to less than six years' service would be paid their equivalent ordinary pay for 10 weeks. The maximum is 16 weeks' pay for 9 to less than 10 years' service. Curiously there is a decrease to 12 weeks' pay for longer service, 10 or more years, as payments for long service leave (paid leave that rewards long employment service with the employer after 10 years of service) are taken into account.

2 *Termination Change and Redundancy Case* (1984) 294 CAR 175; supplementary decision (1984) 295 CAR 673.

3 Chapter 4 *Fair Work Act 2009* (Cth) (referred to in footnotes as *Fair Work Act*).

REDUNDANCY IN AUSTRALIA

Table One: section 119 Fair Work Act redundancy pay

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

A – ORIGIN OF REDUNDANCY PAY STANDARDS: TERMINATION CHANGE AND REDUNDANCY CASE

The current standard owes its origins to the test case, the *Termination Change and Redundancy Case* ('TCR case'), where the peak trade union body, the Australian Council of Trade Unions ('ACTU'), sought improved standards for award covered Australian employees (which then were about 80% of employees) relating to job security and, for present purposes, redundancy compensation and consultation provisions. The case was brought before the independent industrial relations tribunal, the Commission,⁴ which at that time was charged with the responsibility of settling industrial disputes through making industrial awards setting out minimum conditions. A significant strand of ACTU's submission relied on international standards, through ILO Conventions or similar standards overseas:

'The ACTU further relied on International developments including the adoption by the International Labour Organisation (ILO) on 22 June 1982 of a new convention [Convention 158] and a new recommendation [Recommendation 1661 dealing with termination of employment at the initiative of the employer and what it termed "significant developments in respect of job security in a number of comparable countries particularly the United Kingdom and other Western European countries."'⁵

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- 4 The Commission has had various titles over the years. It will be referred to as 'the Commission' in this article or its current title, the Fair Work Commission. See M Pittard and R Naughton, *Australian Labour and Employment Law*, LexisNexis, 2015, chapter 3.
- 5 *Termination Change and Redundancy Case* (1984) 294 CAR 175.

COMPARATIVE LABOUR CASE LAW

Despite opposing arguments,⁶ the Commission was persuaded by the ACTU's submission and set redundancy pay, which was to be paid in addition to notice terminating employment, according to length of service:-

Service	Severance pay
Less than one year	nil
More than one but less than two years	4 weeks' pay
More than two but less than three years	6 weeks' pay
More than three but less than four years	7 weeks' pay
More than four years	8 weeks' pay

This standard set in 1984 has remained the standard for redundancy pay to the present day, although there was further improvement for longer service in the *2004 Redundancy Case*⁷ which was adopted in the *FWAct*:-

We think it is appropriate to extend the severance pay scale from four years of service to ten years. While the current scale reaches the maximum payment after four years of service, under the formula we have decided upon there will be increases in the amount of severance pay with each year of service between five and nine years. The scale will not go beyond 10 years of service. The new severance pay scale will be as follows:

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay ⁸

⁶ Some employer groups opposed it, as did two state governments.

⁷ (2004) 134 IR 57 at [153]

⁸ The Commission explained the upper limit as follows: [154] Our decision to increase severance payments for employees whose employment is terminated by reason of redundancy after five or more years of service is based, to a significant extent, on the loss of non-transferable credits. The largest non-transferable credit is long service leave which accrues at the rate of 13 weeks' leave for 15 years of service. The amount of 12 weeks' severance pay for 10 or more years of service, while still greater than the current maximum, has been fixed having regard to the fact that under the standard long service leave provision in federal awards employees with 10 or more years of service whose employment is terminated on account of redundancy are entitled to pro rata payment of long service leave. It would be double counting not to make an allowance for that fact in fixing the amount of severance pay to apply after 10 years of service.'

There has been no change since 2004 in the minimum redundancy pay, apart from the significant change to the source of that obligation – it is no longer contained in awards, but rather in the legislated National Employment Standards. Parliament, then, has become the body to decide when and how to modify standards, and the influence of the independent industrial tribunal has waned in that area, perhaps regrettably as it may be hard to trigger parliamentary review of standards.⁹

B - WHAT IS 'REDUNDANCY' TO TRIGGER COMPENSATION? THE CRITICAL QUESTION

Redundancy pay will be paid when one of two events occurs:

- (1) Where the employer no longer 'no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour', and the employer initiates the redundancy;¹⁰ or
- (2) Where the employer is insolvent or bankrupt.

The first event can cause problems of interpretation. When does the employer not require the job done by anyone? What if the employer folds, say, three jobs into two?

In *Borg and others v Patrick Stevedores Holdings Pty Ltd*¹¹ the Fair Work Commission's full bench ('FWC') confirmed that where 25 clerical jobs were reduced to 10 jobs because of automation the employer did not want the jobs done by anyone – even though some of the work remained to be performed by others, having been 'redistributed, reconfigured and reassigned'.¹² The FWC distinguished between work the employer required to be done on the one hand, and the job on the other hand. Hence the main point is that the employer does not wish *the job* to be done by anyone else.

It is possible though that reconfiguring of the work could be done by employers with a view to retrenching particular staff, retaining only desirable staff and thereby avoiding the application of unfair dismissal laws;¹³ it may be very hard to discover the true purpose behind that façade. However, that forensic task to determine the redundancy genuineness is one that may be undertaken – as in the case where the employer's requirement that a job needed higher level qualifications, resulting in the redundancy of the employee in that job, was held to be a genuine redundancy.¹⁴ Advertising for a replacement employee in the same 'redundant' job would expose the ulterior purpose of the redundancy!

9 M Pittard, 'Reflections on the Commission's legacy in legislated minimum standards' (2011) 53 *Journal of Industrial Relations* 698 - 717.

10 Section 119 *Fair Work Act*.

11 [2016] FWCFB 3662.

12 Ibid at [14].

13 Where the dismissal is a genuine redundancy, it is not subject to the unfair dismissal laws so that safeguards and process required under that law to protect against unfair dismissal is not relevant, hence there is a separation of unfair dismissal laws and redundancy protection (see later discussion).

14 *Mackay Taxi Holdings Ltd T/A Mackay Whitsunday Taxis v Wilson* [2014] FWCFB 1043 (12 February 2014).

C - NATURE OF REDUNDANCY PAY: DIVERTING FROM MINIMUM STANDARDS

Whilst redundancy pay is a standard set in the NES, it is a minimum, not actual, standard - the parties may agree on more generous provisions. This can be achieved through individual agreement in the contract of employment; or by collective bargaining in an enterprise agreement, the form of collective agreement adopted legislatively in Australia, which is subject to approval by the independent tribunal before it is operative and enforceable.¹⁵ Employers commonly provide better redundancy pay in enterprise agreements: the ABC Enterprise Agreement 2013-16 recognises up to 24 years of service with 77 weeks' pay for redundancy,¹⁶ and the QUT Enterprise Agreement 2014-2017 provides for a formula which is capped at 78 weeks' redundancy pay for academic staff.¹⁷ Thus whilst the legislated standard is uniform, considerable differences in entitlements can arise where there is bargaining power to successfully negotiate a better 'deal'.¹⁸

Redundancy pay can be reduced from the statutory minimum in two circumstances only: first, where the employer does not have the capacity to pay; and, secondly, where the employee "obtains other acceptable employment".¹⁹ This reduction, sensibly, cannot be imposed unilaterally by the employer as it is subject to oversight by the independent tribunal: the FWC must declare the sum, and it is possible that the sum paid may be reduced to zero. Given this ability to reduce redundancy pay where the employee obtains alternative employment, redundancy pay is seen as compensation for loss of employment (and hence income), not as compensation for the employee losing the particular job.

D - LEGAL ISSUES - ORDINARY EARNINGS AND CONTINUOUS SERVICE

Legal issues arise as to when the employee's service is continuous with the employer, as a break in service will affect the redundancy pay; and about what are 'ordinary earnings' for the employee.

An employee must have at least 12 months' continuous service with the employer prior to redundancy in order to receive redundancy pay.²⁰ 'Continuous service' has a particular meaning. The statute permits authorised breaks in service that do not break continuity

15 See Pittard and Naughton, fn 4, chapter 12. A collective agreement between union and employer for better redundancy pay which has not been approved by the Commission will generally not be enforceable: *Gregory v Philip Morris Ltd* (1987) 77 ALR 79; *Ryan v Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235.

Sometimes industry specific redundancy schemes are established under awards or in enterprise agreements, in which case the employees are ineligible for the statutory scheme payments: see section 123 (4) (b) or (c) *Fair Work Act 2009* (Cth).

16 http://www.abc.net.au/careers/documents/ABCEnterpriseAgreement_20132016.PDF

17 <http://www2.qut.edu.au/jobs/working-at-qut/docs/QUT%20Enterprise%20Agreement%20%28Academic%20Staff%29%202014-2017.pdf>

This redundancy pay which is considerably more generous than the legislated standard also applies to fixed term employees.

18 Sometimes workplace policy may provide better redundancy pay. Questions may arise whether that policy is enforceable.

19 Section 120(1) *Fair Work Act*.

20 Section 121 *Fair Work Act*.

of service for the purposes of redundancy, but these periods of absence do not count in the years of service.²¹ Unauthorised absences also do not break continuous service, but are excluded from years of service calculations.²² Employees, however, who engage in community service, eg voluntary firefighting, will be able to treat that service period as service in the computation of years.²³

Redundancy pay is based on “the employee’s base rate of pay for his or her ordinary hours of work”,²⁴ which generally excludes overtime or penalty rates of pay, any loadings or monetary allowances, or bonuses. Hence an employee who regularly works overtime over the employment period will not be able to include that in calculating redundancy pay.²⁵ The monetary compensation for loss of that job is therefore limited and does not reflect the reality of the pay the employee might have received over the years.

E - SMALL BUSINESSES AND EXEMPT EMPLOYEES

Although the *2004 Redundancy Case* applied redundancy pay to small businesses, but capped it at 8 weeks’ pay,²⁶ this was not followed in subsequent legislation. The *FWAct* provides that, where an employee is engaged by a ‘small business employer’, being defined as one employing ‘fewer than 15 employees’ (including fulltime and part-time employees; and casual employees who have been regularly and systematically employed), that employee is not entitled to redundancy pay.²⁷

This is one of the concessions to true small businesses which it is thought might struggle to meet the Act’s requirements about redundancy. Yet it means that employees are treated unequally and less favourably compared to their counterparts in large businesses – because they happen to be employed by a small business employer. The measure of small business, too, leads to inequities: it is not by reference to size of business, say through annual turnover, but by employee numbers. A business with 14 fulltime employees might be significantly larger than one staffed by 15 part-time and casual employees – yet the former is exempt from statutory redundancy pay whilst the latter is not.

21 Section 22(1) *Fair Work Act*.

22 Section 22(3) *Fair Work Act*.

23 Section 22 *Fair Work Act*:

- (1) A period of *service* by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an *excluded period*) that does not count as service because of subsection (2).
- (2) The following periods do not count as service: (a) any period of unauthorised absence; (b) any period of unpaid leave or unpaid authorised absence, other than: (i) a period of absence under Division 8 of Part 22 (which deals with community service leave); or (ii) a period of stand down under Part 35, under an enterprise agreement that applies to the employee, or under the employee’s contract of employment; or (iii) a period of leave or absence of a kind prescribed by the regulations.
- (3) An excluded period does not break a national system employee’s *continuous service* with his or her national system employer, but does not count towards the length of the employee’s continuous service.

24 Section 119(2) *Fair Work Act*.

25 Section 16(1) *Fair Work Act*.

26 (2004) 134 IR 57.

27 Section 23 (2)(b) *Fair Work Act*.

Special provisions apply in the case of transfer of employees –where one company transfers its business to another and that second business offers similar employment to the employees of the first business but the employees reject the offer, there will be no obligation to pay redundancy pay.²⁸

Where the employees are engaged in the following categories they are not eligible for statutory redundancy pay: fixed term employees; employees engaged for a specified job; employees engaged for a season; casual employees; apprentices; and those on training programs for limited duration.²⁹ Both employees engaged for a fixed term and those doing specified jobs may be in work for long periods which should justify redundancy pay, not exclusion. Dismissal for serious misconduct renders the person ineligible for redundancy pay.³⁰

F - LINK WITH UNFAIR DISMISSAL LAWS

Where there is a 'genuine redundancy', the statutory protection under the *FWAct* for unfair dismissals does not apply. To avoid employers successfully arguing that the dismissal was a redundancy and hence valid reasons and process required under *FWAct* to effect fair dismissal do not apply, the legislation requires 'genuine redundancy'.

There is a three-fold element to genuine redundancy – the employer must not want anyone else to do the job because of operational requirements; the employer must comply with consultation requirements under a modern award and enterprise agreement;³¹ and there must be no reasonable opportunity for redeployment in the employer's enterprise or in an associated entity.³²

In unfair dismissal claims, the Commission is commonly called on to decide whether the redundancy is genuine and therefore whether the unfair dismissal laws apply. In *Paul Williams and Ors v Staples Australia Pty Ltd*,³³ for example, the FWC found that there was no meaningful consultation by the employer as required for the redundancies:

'Regrettably, in this instance the evidence has disclosed an approach to consultation in respect to the redundancies of warehouse jobs that was unduly hasty and largely tokenistic. Staples management did not engage in genuine or meaningful consultation with its employees and their representatives, but instead it made disingenuous gestures which it sought to portray as consultation.'³⁴

28 Section 122 *Fair Work Act*.

29 Section 123 *Fair Work Act*. Some enterprise agreements extend coverage to fixed term employees, eg QUT Enterprise Agreement at fn 17.

30 Section 123 (1)(b) *Fair Work Act 2009* (Cth).

31 Section 389 *Fair Work Act*. For consultation requirements see section on duty to consult.

32 Section 389(2) *Fair Work Act*.

33 [2017] FWC 607.

34 *Ibid* at [57].

II - THE DUTY TO CONSULT PRIOR TO REDUNDANCIES

The *TCR Case* was instrumental in introducing standard award clauses for notification and consultation by the employer with the employees or union prior to redundancy. In essence the notification clause provided:

‘...the employer shall as soon as practicable provide in writing to the employees concerned or their union or unions all relevant information about the proposed terminations including the reasons for the proposed terminations the number and categories of employees likely to be affected the number of workers normally employed and the period over which the terminations are likely to be carried out.’

Under the *FWAct*, section 139(1)(j) enables a term about ‘procedures for consultation, representation and dispute settlement’ to be included in modern awards. To this end modern awards may include consultation clauses, though it is not mandatory to do so. The obligation to consult in modern awards is the obligation to consult about major change, which embraces ‘major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees’.³⁵ This was later expanded to include major change in roster or hours of work, so the consultation provisions go beyond situations where redundancies may result. Notification and consultation will commonly be to employees *and* their representatives.³⁶

By way of contrast, enterprise agreements *must* contain terms providing for consultation in the event that there are ‘major workplace changes that are likely to have a significant effect on employees’.³⁷ It is only employees, not also their representatives, who must be notified of the proposed change and consulted with, although employees may be represented in the consultations.³⁸ A model consultation clause set out in the regulations will be regarded as being in the enterprise agreement if that agreement does not otherwise contain consultation provisions. Hence employees covered by enterprise agreements will always have the added protection of the duty to consult prior to the redundancy.

When will the duty to consult be fulfilled? The Federal Court, discussing generally the meaning of consultation, stated:³⁹

‘... A key element of that content [of the obligation to consult] is that the party to be consulted be given notice of the subject upon which that party’s views are being sought before any final decision is made or course of action embarked upon. Another is that ... the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according to the nature and circumstances of the case. In other words, what will amount to “consultation” has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto.’

35 See clause 8 Clerks Private Sector Award 2010 at http://awardviewer.fwo.gov.au/award/show/MA000002#P212_16247

36 See Clerks Private Sector Award 2010 *ibid*.

37 Section 205(1)(a) *Fair Work Act*.

38 Section 205(1)(b) *Fair Work Act*.

39 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44]; (2010) 198 IR 382, 395.

The court gave further insights when it said:⁴⁰

‘To elaborate further on the ordinary meaning and import of a requirement to “consult” may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, “this is what is going to be done” and saying to that person “I’m thinking of doing this; what have you got to say about that?”. Only in the latter case is there “consultation”. ...’

Thus consultation must be meaningful; it does not involve the right of veto; it may vary in different cases; and it involves inviting and listening to a response, not informing about the proposed redundancy.

A - LARGE REDUNDANCIES FOR ECONOMIC, STRUCTURAL AND TECHNOLOGICAL REASONS

Another statutory obligation arises where there are large redundancies. Where 15 or more employees are to be declared redundant, ‘for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons’,⁴¹ the *FWAct* prescribes that the employer must, prior to dismissal and as soon as possible after making the decision about redundancy, take the following steps:

- o notify the relevant union about the reasons, timing, and the number and categories of employees to be affected by the redundancy;⁴² and
- give the union an opportunity to consult with the employer about measures to ‘avert or minimise the proposed dismissals’ and measures which might include finding alternative employment ‘to mitigate the adverse effect of the proposed dismissals’⁴³

These consultation steps must be taken in a timely manner – prior to dismissal and as soon as possible after making the decision to dismiss.⁴⁴ Notably it is the union that receives the notification and is consulted, in comparison to the award and enterprise agreement provisions which either include employees or identify employees only to receive the notification.

The FWC is empowered to make orders – in the public interest – where these consultation and notification requirements have not been met, in order to put both the union and the employees ‘in the same position (as nearly as can be done) as if the employer had complied’ with its statutory obligations to consult.⁴⁵

40 [2010] FCA 591 at [45]; (2010) 198 IR 382, 395.

41 Section 531(1)(a) *Fair Work Act*.

42 Section 531(2) *Fair Work Act*.

43 Section 531(3)(a) *Fair Work Act*.

44 Section 531(3)(b) *Fair Work Act*.

45 Section 532 *Fair Work Act*.

REDUNDANCY IN AUSTRALIA

However limitations are placed on the orders FWC can make - for example it cannot order reinstatement of employees or payment of severance pay,⁴⁶ and the power cannot be exercised on FWC's own motion, but rather on application of employees or unions.⁴⁷

Arguably these limitations impede the FWC in restoring employees to their original position, and constrain it from being proactive.

Importantly, the employer must also notify the proposed large redundancy to Centrelink, the Australian government agency which makes social security payments and relevantly assists people in finding work. Termination of employment cannot occur without that notification taking place.⁴⁸

B - TIMING OF CONSULTATION

Consultation provisions however have varied over the years since the test case: they are now legislatively enshrined, or provide a legislative framework for awards and enterprise agreements. The stage of consultation, however, is a problem. It usually arises once a definite decision is made to introduce change - not at the stage of the employer contemplating change or exploring options for change, but at the decision stage. Is that in sufficient time? Once the decision is made the effects on employment are usually clear. Will consultation bring about a change in, or amelioration of, that decision? Certainly the consultation obligation requires listening to employees and meaningful consultation - but if these motions appear to be gone through it may be hard to prove that matters raised in the consultation have not been actually considered. And even were legitimate and persuasive arguments against the proposed redundancy made, it may be hard to turn the clock back to explore other options.

C - CRITERIA FOR REDUNDANCY

A classic High Court of Australia decision ruled that 'last on, first off' criteria for redundancy selection was discriminatory and unlawful in the particular circumstances of that case.⁴⁹ In the years prior to the redundancy, the company had adopted discriminatory employment practices by favouring engaging men over women employees and only at later dates recruiting women. On its face 'last on, first off' was neutral but 'the requirement imposed in this case was unreasonable because in the particular circumstances it repeated the discriminatory effect of the prior recruitment practice.'⁵⁰ Hence, when the 'last on, first off' criterion was applied, it fell disproportionality on the female workforce and was held to be unlawful in contravention of the New South Wales *Anti-Discrimination Act 1977*.

In other circumstances such a criterion may not be discriminatory and could be used. 'Spill and fill' of positions is not prohibited; and employers may apply metrics to identify efficient or productive employees for selection to the remaining positions. So long as the redundancy is genuine, unfair dismissal laws which might otherwise provide safeguards

46 Section 532(2) *Fair Work Act*.

47 Section 533 *Fair Work Act*.

48 Section 530 *Fair Work Act*.

49 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56. The 'last on first off' criterion required the more recently engaged employees to be retrenched first.

50 *Ibid*, per Dawson J at [27].

against unfair dismissal - as a valid reason for dismissal is required, as is a proper process of notification and opportunity to put one's case as to why dismissal should not occur - are effectively circumvented. Employers may also decide to seek voluntary rather than forced redundancies.

CONCLUSION

The *FWAct* provides a framework for minimum redundancy pay based on length of service, and notification and consultation requirements for redundancies of 15 or more employees. It also permits modern awards, and requires enterprise agreements, to include terms about notification and consultation. The case law has fleshed out the nature of meaningful consultation. Whilst these safeguards exist, we have seen that there are areas where the framework is weak and could be fairer - in terms of the definition of small business employer which is exempt from the obligation to pay redundancy pay; the exclusions of certain categories of employees, such as fixed term employees, from receiving compensation for redundancy pay; and the timing of notification and consultation. Enterprise agreements can rectify these deficiencies - yet only those employees in good bargaining positions vis-vis their employers can benefit.