

RESTRUCTURING AND REDUNDANCY

**Report of the Public Advisory Group on
RESTRUCTURING AND REDUNDANCY**

June 2008

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EXECUTIVE SUMMARY

Restructuring is a natural part of the life cycle of most businesses as they grow or shrink, respond to changes in market conditions or other demands on the business, or change the business model under which they operate. Change may also be forced on the business through receivership or insolvency, and that change may be as radical as whole or partial business closure. Restructuring of a business therefore often entails redundancy of employees.

The world in which this life cycle occurs however has changed significantly over the years.

In particular, the phenomenon of globalisation has exposed businesses to greater and more frequent competitive pressures than ever before.

Restructuring and, often, redundancy can now be frequent rather than occasional features of employment relationships.

Notwithstanding changes in the underlying pressures, there have been few changes to the essential nature of employment and insolvency law over the same period. Such changes as there have been created some prescription and protection in relation to only some aspects of restructuring and redundancy compensation. There has not been a comprehensive review of the restructuring and redundancy framework.

It is therefore timely to look at legal policy arrangements that underpin the processes of restructuring and redundancy, with a view to aligning them with modern realities.

These realities include the need to balance commercial imperatives with social policy safety nets that ensure the support and retention of workers so that despite the incidence of redundancy they can have secure employment in the context of economic transformation.

Public Advisory Group on Restructuring and Redundancy

The Labour Party's 2005 policy manifesto stated an intention to establish "a Ministerial Advisory Group to examine the adequacy of redundancy law and provision".

The Public Advisory Group to the Minister of Labour on Restructuring and Redundancy (the Group) was established in 2007 to examine the adequacy of redundancy laws and provisions in New Zealand workplaces. The Group's terms of reference call for this report to be provided to the Ministers of Labour, Social Development and Employment, and Economic Development by 30 June 2008. This document is that report.

The Group is an independent body established to provide independent advice to the Ministers of Labour, Social Development and Employment, and Economic Development. The Group's members were nominated by the Minister of Labour and considered by the Cabinet Appointments and Honours Committee for appointment.

The Group includes representatives from the following three organisations:

- New Zealand Council of Trade Unions (two seats)
- Business New Zealand (one seat), and
- State Services Commission (one seat).

Purpose of Report

As required, this report assesses the adequacy of redundancy laws and provisions and recommends options for addressing perceived gaps and issues with existing laws and policy provisions. The details of the Group's Terms of Reference are set out in Appendix A (To obtain this appendix, please send email to info@dol.govt.nz).

This report reviews New Zealand's legislative framework for redundancy and provides a broad based comparative analysis with international frameworks. It also includes an analysis of key issues affecting the provision and legal framework of redundancy.

The Group has considered the adequacy of the legal framework in supporting successful transitions for workers and longer term mitigation of adverse labour market impacts. The adequacy of these laws and provisions has been examined at the level of individual employees and employers, and in respect of issues impacting on the wider economy.

The report is structured in four parts:

- Part one describes New Zealand's legal framework, an analysis of redundancy related research, describes and provides a summary of key themes from public and expert consultation
- Part two reviews how other systems (European Union (EU), North America, Scandinavia, Australia and international Conventions such as the International Labour Organisation (ILO)) regulate redundancy and provides a legal comparative analysis with New Zealand
- Part three examines the key issues resulting from the comparative analysis
- Part four provides recommendations based on the research and analysis conducted in this report.

The Group has considered the following areas of interest in its report:

- evidence from research on the extent of redundancy provisions in employment agreements, employer and employee experiences and extent of any problems with current arrangements
- whether any additional legal requirements should apply to all redundancy situations or should be more targeted
- the experience of other countries that have implemented similar requirements
- employees' and unions' experiences
- the costs of entitlements and compliance for employers
- relevant International Labour Organisation standards
- interface matters with the existing insolvency regime
- interface matters with Part 6A of the Employment Relations Act 2000, and
- portability of entitlements.

The Group also had regard for whether redundancy and restructuring situations disproportionately affect any particular groups, including any gender, ethnic and disability implications.

The Group's Terms of Reference require that the report provides recommendations on the following matters:

- statutorily prescribed consultation requirements
- the amount of notice employers must provide employees in the event of a redundancy
- consultation requirements to avoid mass redundancies, and
- a statutory requirement for redundancy compensation or other entitlements.

Recommendations

The Restructuring and Redundancy Public Advisory Group's recommendations are as follows:

RECOMMENDATION 1

That the government should consider the introduction of a statutory requirement for redundancy compensation and other entitlements incorporating the following features:

- a) notice of redundancy termination to the affected worker
- b) compensation based on length of service
- c) a maximum level of statutory compensation, and
- d) provision of redundancy support and other active labour market mechanisms to affected workers and organisations.

RECOMMENDATION 2

That the government considers the following options to implement Recommendation 1.

- a) A Code which acts as a guide to employers on notice, compensation, and other matters in respect of redundancy. Compliance with this Code will be voluntary but may form the basis of Government considerations of what constitutes a 'good employer' in the context of contracting and migration policy.
- b) A legal right to redundancy compensation with no specified formula. This could take one of two forms:
 - (i) First of all it could be a mechanism similar to that provided for 'vulnerable' employees in Part 6A of the Employment Relations Act 2000. This would mean that all workers would have the right to redundancy compensation. The quantum would be as agreed or could be referred to the Employment Relations Authority for settlement. The quantum set by the Authority or Employment Court could be subject to criteria which include firm size as well as length of service, industry practice and other matters.
 - (ii) The second option could be that all workers in a collective agreement have the legal right to redundancy compensation and the formula could be as agreed or as determined in the Employment Relations Authority or Employment Court.

- c) A statutory formula for notice and compensation. There are numerous options which include:
- (i) 4 weeks notice plus redundancy compensation based on 4 weeks for the first year of service and 2 weeks for each subsequent year up to a maximum statutory requirement for 26 weeks pay. This option is supported by the NZCTU.
 - (ii) A formula as in (c) (i) above but excluding workers on wages or salary of \$150,000 or more per annum.
 - (iii) A formula as in (c) (i) above but excluding workers with less than one year's service from compensation but including all workers for the 4 week's notice requirement.
 - (iv) A formula as in (c) (i) above but excluding employers of a specified size - for instance 1-5 workers.
 - (v) A formula as in (c) (i) above but with a maximum statutory payment - for instance 16-20 weeks, with the ability to negotiate additional payments above that level.
 - (vi) A formula as in (c) (i) above but with a sliding scale of notice based on length of service.
 - (vii) A combination of the above variations.
 - (viii) A formula based on the Australian National Employment Standard (see Appendix I, (To obtain this appendix, please send email to info@dol.govt.nz)).
- d) An insurance scheme to provide for redundancy compensation. There are several options including:
- (i) A levy based scheme similar to ACC which provides for payment only to those affected.
 - (ii) A levy based scheme with additional assistance from the Government.
 - (iii) A fund that is built up by contributions from employers, workers and possibly the Government but with 'worker accounts' rather than an insurance scheme.
 - (iv) A variation to KiwiSaver where there is a portion of contributions that can be accessed in a redundancy situation.
- e) A Redundancy Support Scheme which would exist alongside a statutory formula as in (c) (i) above. This would channel support to workers and employers in the form of active labour market assistance. However, it would also provide to employers that registered with the scheme and who employ fewer than 20 workers a rebate on the cost of redundancy compensation. This could be based on a maximum rebate of (e.g.) \$2000 per worker.

RECOMMENDATION 3

That if the government does introduce a statutory provision for redundancy notice and compensation it then considers ratifying ILO Convention 158.

RECOMMENDATION 4

That if the government does introduce a statutory provision for redundancy notice and compensation, it phases in such a provision with a one year delay. That in the one year period there is a major education and awareness arising campaign.

RECOMMENDATION 5

That if the government does introduce a statutory provision for redundancy notice and compensation then it ensures the Department of Labour and other relevant departments are resourced adequately to provide advice, develop calculators and other resources.

RECOMMENDATION 6

That notice of redundancy is a priority debt under the Companies Act 1993.

RECOMMENDATION 7

That redundancy compensation is non-taxable and that tax records are also used so that statistics on the incidence of redundancy can be recorded.

RECOMMENDATION 8

That the government enhance the Security in Change work programme. This should include:

- a) A major awareness raising programme on redundancy support.
- b) Developing connections with the Unified Skills Strategy so that lifelong learning is maintained throughout redundancy experiences and that Industry Training Organisations are actively involved in retraining support.
- c) Expanding the scope and level of support for workers made redundant.
- d) Widespread consultation with stakeholders on how to move to an 'employment security' framework.
- e) Consideration of cost implications for Government of enhanced Security in Change.
- f) Consider the possible interface between redundancy support, income maintenance, employment security and the investment in jobs for sustainability (e.g. home insulation).

RECOMMENDATION 9

That the consultation provisions required in case law between employers and workers in restructuring and redundancy situations are codified.

RECOMMENDATION 10

That employers are encouraged to notify the Ministry of Social Development of redundancies as early as possible but taking into account relevant commercial and other legal obligations for instance Stock Exchange disclosure requirements.

As can be seen from recommendation 1, the Group recommends work towards a formal framework incorporating notice and compensation. However, the report does not recommend a specific form for this outcome. The impacts of any one of the identified options on its own will not be uniform nor necessarily equitable. For that reason it will be necessary to undertake further work to determine the best mix of options for the wider New Zealand context. It is to be expected that wide consultation with interested groups will form a central feature of any implementation of the Group's recommendations.

PART ONE - BACKGROUND TO REDUNDANCY - NEW ZEALAND OVERVIEW

What is redundancy?

Redundancy is not defined in the Employment Relations Act 2000 ("ERA") but the commonly accepted definition today is that from the Labour Relations Act 1987. Section 184(5) of the Act defined redundancy as:

... a situation where...[a] worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer...

The emphasis in the definition, and in the case law since redundancy has been a feature of New Zealand's employment law jurisprudence, is on the position rather than the worker who occupies the position.

The common law accepts the right of the employer to determine the structure of the business and, therefore, to make positions redundant subject to any redundancies being genuine and carried out in a fair and reasonable manner (*G N Hale and Son Ltd v Wellington Caretakers etc IUOW*)¹. The ERA has overlaid this management prerogative with a statutory obligation to act in good faith, including specifically in relation to consultation over changes to the business (section 4(4)(c)), any proposal to contract out or sell or transfer all or part of the business (section 4(4)(d)) and making employees redundant (section 4(4)(e)).

Acting in good faith means, amongst other things, where the employer is proposing to make a decision that could mean an employee's employment is terminated, giving relevant employees access to information about the decision and an opportunity to comment on that information before a decision is made (section 4(1A)(c)).

The following situations may justify termination on the grounds of redundancy (subject to any termination having been carried out in a procedurally fair manner):

- reducing employee numbers for efficiency or cost cutting reasons, including on or following the appointment of a receiver to a business, or because the work can be done by other means, e.g. contracting out
- materially changing the job description applying to a position (changing duties and responsibilities), and
- relocating a business or position in a business more than a reasonable distance from its original place.

RESTRUCTURING

Restructuring is a process that often results in redundancy. For that reason it is also covered by the good faith obligations of the ERA whether or not redundancy is the final outcome.

¹ [1990] 2 NZLR 1079

TECHNICAL REDUNDANCY

A technical redundancy situation arises where an employee's employment with a particular employer is terminated as a result of the sale or transfer of the business to another owner, but the employee is offered the same position with the new owner on the same terms and conditions of employment, including recognition of service with the previous employer. In this situation there is a new legal employer and the employee cannot be compelled to transfer it. However, in most employment agreements providing for redundancy compensation, a technical redundancy situation is typically grounds to avoid payment of redundancy compensation. In these circumstances, if the employee elects not to transfer their employment to the new owner there is no entitlement to redundancy compensation.

Where ownership of the legal entity is transferred, as with a sale of shares rather than the business asset, there is not any form of redundancy.

Substantially similar positions

Most redundancy agreements provide for transfer into a substantially similar position as an exclusion to entitlement to redundancy compensation in circumstances in which redundancy compensation might otherwise be payable.

Review of current laws and provisions

The current law in relation to redundancy in New Zealand are covered as follows:

Section 4 of the Employment Relations Act 2000 which, among other things, provides that the duty of "good faith":

- a) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative, and
- b) requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employees affected:
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision, and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

Section 4 is clear that good faith extends to:

- a) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business, and
- b) making employees redundant.

Part 6A Vulnerable Workers

The ERA defines some employees as "vulnerable employees". These employees attract special protections in the case of restructuring if their work is to be contracted out by their employer or their part of the business is to be sold. They may elect to transfer their employment to the organisation where the work has been transferred. A vulnerable employee includes the following categories of employees:

- a) cleaning services, food catering services, caretaking or laundry services for the education, aged-care and health sectors
- b) orderly services in the aged-care sector
- c) cleaning services or food catering services in the public service or local government sector
- d) cleaning services or food catering services in relation to any airport facility or for the aviation sector, and
- e) cleaning services or food catering services in relation to any other place of work. The new employer must decide how to best manage their resources. This may involve making transferred vulnerable employees redundant.

Justification

A redundancy can only be made for genuine commercial reasons and employers must be able to demonstrate that these reasons exist. The Employment Relations Authority or the Employment Court will consider the genuineness of the decision to make someone redundant, including whether the decision was made in "good faith".

Genuine reasons

Reasons for an employee's redundancy can include:

- the introduction of new technology
- rationalisations of staff to increase business efficiency
- restructuring business operations, including a change in the organisation's roles or location
- closure of business
- outsourcing, and
- sale of the employer's business.

In addition to having genuine reasons for any redundancy the employer must demonstrate they have carried out any termination on the grounds of redundancy to be procedurally fair.

In circumstances in which termination for redundancy is contemplated, it may be necessary for an employer to select between a number of potential candidates for redundancy. Selection criteria and the application of them must be consistent with the employer's obligation to act justified.

There may still be a genuine redundancy if the employee's tasks are delegated to other existing employees following the redundancy. However, if the employee is effectively replaced with someone else, then the redundancy is unlikely to be genuine. A genuine redundancy occurs when a position becomes superfluous to an employer's needs.

In the recent past, the test for whether a dismissal is justified has increasingly become contentious as the courts began to step back from considering the merits of an employer's decision to dismiss. Over time the test applied by the courts to determine whether a dismissal was justified gradually moved from objectively considering the conduct of an employer towards a subjective consideration of the actual employer's conduct. This shift was also seen increasingly in redundancy cases.

Amendments to the Employment Relations Act in 2004 introduced section 103A which established a new test for determining whether a dismissal is justified under the Act. Section 103A is intended to reinforce the concept of what a fair and reasonable employer would have done – determined on an objective basis. The policy intent is to ensure that there is balance between considering fairness to both the employer and the employee.

To date, only a small number of cases have considered the application of section 103A. In *Simpsons Farms Ltd v Aberhart*² the Employment Court specifically considered the application of 103A in a redundancy situation and confirmed that redundancy situations are within the ambit of the section. The Court also concluded that s.103 does not "revisit longstanding principles about substantive justification for redundancy" set out in earlier decisions such as *G N Hale and Son Ltd v Wellington Caretakers etc IUOW*.³ The Employment Court concluded that:

"Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s.103A, to return to the position espoused by ... Hale. So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s.103A."

A review of other relevant case law, which has been applied to other redundancy situations is attached as Appendix B (To obtain this appendix, please send email to info@dol.govt.nz).

Current New Zealand requirements

Notification

Knowledge of the possibility of redundancy is an obvious pre-requisite for consultation with unions and employees. This raises the issue of when such a possibility should be notified both to those affected, and wider. Notification to relevant government agencies is currently not required in employment statutes but is encouraged. There are some instances where notification is required; for instance, Stock Exchange disclosure requirements, requirements of employment agreements and any requirements relating to business failure i.e. receivership and liquidation.

² EC 2006 ARC 13/06

³ [1990] 2 NZLR 1079

Consultation

The requirement for consultation with affected parties before decisions are taken has been a central feature of procedural fairness for redundancy for many years.

More recently, the ERA expanded on historical provisions for consultation, aligning them to the concept of good faith and providing broad procedural guidelines.

The essential elements of “good” consultation are that the proposal must be precise enough to enable the employee to provide useful comment, employees are given a reasonable opportunity to consider the proposal, and feedback from the employee must be considered and taken into account before the final decision is made. Consultation therefore should begin as early as possible.

Underpinning these principles is the concept of “good faith”. This requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees, to provide employees with:

- access to information relevant to the continuation of the employees' employment, about the decision, and
- an opportunity to comment on the information to their employer before a decision is made.

Consultation does not require that the employer and employee agree on the employer's course of action. However, an employee who may be affected by a redundancy or restructuring must be given a real opportunity to provide feedback or input into the proposal, and the employer must consider such feedback with an open mind, and must make a genuine effort to accommodate those views.

The level and duration of consultation with an employee required in a redundancy situation will depend on the size of the business, and the urgency of the situation requiring the redundancy.

Notice of redundancies

Currently there is no statutory notice period that an employer governing when an employee must be advised that they will be made redundant. Notice periods where they exist typically are contained in employment agreements.

Redundancy compensation

In New Zealand, there is no statutory right to redundancy compensation, nor is there a common law right unless employers and employees or their union have agreed to one in the applicable employment agreement. The payment of redundancy compensation was most recently considered by the Advisory Group on Contracting Out and the Sale or Transfer of Businesses⁴ in 2003. Following this work, the Department of Labour considered a range of options relating to additional protections for vulnerable employees in contracting out or sale or transfer situations. This included considering whether there should be a statutorily prescribed minimum amount of redundancy compensation payable to vulnerable employees. This work subsequently resulted in Part 6A of the ERA and it

⁴ The Group comprised representatives of the New Zealand Council of Trade Unions, Employers' Federation and nominees from the State Services Commission, Minister of Labour, Ministry of Pacific Island Affairs and Maori Business Network. The Group was chaired independently by Nigel Haworth. A further Group was appointed to give further consideration to these proposals and advise the Government on options.

was therefore narrower in scope than this review. This review is the first comprehensive examination of redundancy matters for many years.

In 2003, Cabinet considered the question of whether redundancy compensation should be prescribed in the Act in relation to contracting out or the sale or transfer of a business. Cabinet agreed that if an employment agreement did not expressly provide for redundancy compensation to be payable, the parties would be entitled to negotiate over the matter [CAB Min (03) 18/11 refers]. This was reflected in Part 6A of the ERA which also provided for the Employment Relations Authority to determine the redundancy entitlements due to an employee in certain circumstances. Cabinet did not consider the broader question of whether redundancy compensation should be payable in wider circumstances in other redundancy situations.

Redundancy is a form of dismissal and is therefore subject to personal grievance provisions of the ERA. Compensation, damages and other remedies are available under these provisions.

Wage Adjustment Regulations 1974

The Wage Adjustment Regulations 1974 (reprinted in 1977) since revoked, dealt with redundancy in a negative way by restricting both the amount of redundancy compensation and the entitlement of claimants. Of particular interest is the reference to severance pay agreements between the Master Builders Federation and the Federation of Labour - see Appendix C (To obtain this appendix, please send email to info@dol.govt.nz).

They provided effectively for one week's pay (2 percent) for each year of service up to 20 years, and providing a minimum of one year that has been worked. The regulations also gave the then Industrial Commission power to approve redundancy agreements which provide better than the regulations - provided there were exceptional circumstances.

Other issues

Companies Act 1993

The Companies Act 1993 currently provides that a maximum of \$16,420* per employee is available for priority debts for unpaid wages, holiday pay and redundancy compensation when an employer is insolvent. Priority debts currently do not include notice of termination. (* See Note on page 127 of this pdf)

Holidays Act 2003

The Holidays Act provides minimum entitlements of annual holidays, public holidays, and special (including bereavement) leave. These entitlements also apply to employees made redundant and are not extinguished by redundancy.

Taxation of compensation

Currently, redundancy payments are treated as part of an employee's income; the tax rate used depends on the annual gross income of the employee. In previous years (up until 1992) only 5 percent of the redundancy payment was taxed this was at the earner's usual rate because payments were regarded as compensation.

The Income Tax Amendment Act (NO.4) 1992 provides that redundancy compensation is taxable assessable income in the hands of the recipients. Redundancy compensation

payments are treated as a lump sum payment in terms of PAYE but are not liable for the ACC earner levy or Fringe Benefit Tax (FBT). Redundancy compensation payments are, however, subject to student loan deductions.

The appropriate tax rate depends on the grossed up annual value of the employee's last 4 weeks' earnings and the payment. The tax rate applicable to the payment where the combined total of the payment and the gross value of the employee's income for the previous four weeks are:

- \$38,000 or less – is 21 percent or 21 cents in the dollar
- between \$38,000 and \$60,000 – is 33 percent or 33 cents in the dollar, and
- greater than \$60,000 – is 39 percent or 39 cents in the dollar.

Redundancy rebate

The redundancy tax rebate was introduced earlier this year to remedy the problem of overtaxing due to tax rates moving up a bracket when the redundancy payment was added to the employee's income. Legislation took effect as of 1 April 2008 to make the taxation of redundancy payments fairer to people who are pushed into a higher tax bracket when they receive the lump sum payment in the event of a redundancy. The rebate is based on a flat rate of six cents per dollar, for the first \$60,000 of the redundancy payment received per redundancy. The maximum amount claimable is \$3,600.

Redundancy compensation and effects on unemployment benefit

Prior to November 1992, redundancy payments were largely tax free. In addition, from March 1991, a separate stand down calculation for people who had received a redundancy payment and were applying for the unemployment benefit was introduced. This was calculated by dividing the amount of the redundancy payment by the weekly amount of benefit and family support the applicant would otherwise be entitled to receive. The maximum period of non-entitlement was 26 weeks. The separate redundancy stand down was removed in November 1992, when a withholding tax of 28 percent was introduced on redundancy payments. From this time, redundancy payments were included in the definition of income for the high income stand down.

Until recently, the stand-down for main benefits ranged from 1-10 weeks, depending on income prior to coming onto benefit. This has now been reduced to 1-2 weeks, which means that regardless of the amount of redundancy payment, people are able to qualify for a benefit relatively quickly.

The personal tax component of redundancy payments does not impact on clients benefit entitlement because the gross amount is used in the benefit assessment. Redundancy payments impact on commencement date of benefit since they form part of the average weekly income assessment to calculate the length of the stand-down (one or two weeks).

Reducing or removing the personal tax component of redundancy payments would deliver more disposable income, enabling employees to adjust their commitments to what is often a sudden and disruptive change in their circumstances. It may also increase the value of cash assets attributable to an employee. The value of cash assets is considered for a number of supplementary forms of assistance such as the Accommodation Supplement, Temporary Additional Support and Special Needs Grants.

Main benefits are not subject to a cash asset test, income earned (or forgone) from assets is charged against the benefit.

Portability of entitlements

There are limited examples of schemes internationally to assist the examination of portability of entitlements. This may stem from the difficulties inherent in establishing such approaches. One overseas example is, Manusafe, Australia.

"Manusafe has been described as a trust fund established by the manufacturing unions with the object of collecting, maintaining and distributing employee entitlements to long service leave, severance pay and accrued sick leave".⁵

Notwithstanding its good intentions, employers were reluctant to sign up to Manusafe for three main reasons:

- long service leave benefits purportedly secured through Manusafe are more generous than the current entitlement
- perceived cash flow difficulties from Manusafe in the manufacturing industry, and
- deficiencies in the Manusafe trust deed.⁶

Another issue with Manusafe, as with the perceived risk with other funding models, has been the potential for perverse business behaviour e.g. soft landings, and the fact that funding models more often than not rely on voluntary uptake. Many employers are reluctant to contribute "to funding other people's failure." For these and other reasons it seems portability oriented funding models have not been successful. The Group agreed, due mainly to the apparent costs associated with a model and the limited number of successful examples internationally, not to pursue this further in the context of this report. It may however be useful to explore for the longer term.

New Zealand redundancy research

Redundancy provisions in collective agreements

Victoria University analyses and the Department of Labour captures information on provisions contained in collective employment agreements. A complete set of the University's 2007 redundancy tables and several key Departmental graphs are available at appendix D (To obtain this appendix, please send email to info@dol.govt.nz). Below are key excerpts from these data sources:

- *78 percent of all agreements have pay and notice. Across all industries and sectors, 78 percent of collective agreements (covering 309,900 employees) contain provisions for pay and notice in the event of a redundancy situation.⁷*
- *Some sectors are far less likely to have redundancy provisions. Agriculture and other community services are far less likely to have collective agreements with redundancy provisions than other industries.⁸*

⁵ *Manusafe entitlements and the Manusafe controversy*, issue 4, November 2001, Workplace Relations

⁶ Ibid.

⁷ Leda Blackwood et al, *Employment Agreements: Bargaining Trends & Employment Law Update 2006/2007*, Victoria University

⁸ Ibid

- *Four weeks notice is most common.* Four weeks notice continues to be the most common length of notice given to employees who are made redundant (57 percent).⁹
- *Union recognition and consultation is generally high.* Most collective agreements contain union recognition and consultation clauses in the event of redundancy (77 percent), however, they are far more common in the public sector (87.5percent) than the private sector (68 percent).¹⁰
- *The 6 + 2 compensation formula is most common in the public sector but a range of options prevail in the private sector.* Information collected by the Department of Labour suggests that:
 - approximately a third of all collective agreements contain provisions for redundancy counselling
 - almost half of all collective agreements provide leave for job interviews, and
 - an opportunity to comment on the information to their employer before the decision is made.

Redundancy provisions in individual agreements

There is little information available on redundancy provisions in individual employment agreements. While bargaining trends in the collective sphere will have some influence and cross over into individual bargaining outcomes, the extent of this crossover is insufficient to make any assumptions about individual bargaining trends.

New Zealand business environment

New Zealand is predominantly a nation of small businesses, with most enterprises in New Zealand operating as small and medium-sized enterprises (SMEs). SMEs can be defined as enterprises with 19 or fewer employees and that the average enterprise has 14 workers. At February 2006¹¹:

- *96.4 percent of enterprises employed 19 or fewer people*
- *86.8 percent of enterprises employed 5 or fewer people*
- *63.6 percent of enterprises had no employees, and*
- *70.4 percent of employees were employed by 3.6 percent of enterprises.*

SMEs provide a strong base for New Zealand's economy with value-added output created by SMEs accounting for approximately 40 percent in the economy. SMEs a significant contribution to employment figures by accounting for 29.6 percent of total employment at February 2006 employing 522,180 people, up 1.8 percent from the previous year (around 70 percent of workers in New Zealand are employed by 4 percent of enterprises). A large chunk of part-time employees are utilised in SMEs. The number of SMEs increased by 3.6 percent in the year ended February 2006, although the proportion of SMEs remained relatively constant. Internationally, SMEs account for the majority of firms in OECD economies.

⁹ Ibid

¹⁰ Ibid

¹¹ *SMEs in New Zealand: Structure and Dynamics*, July 2007, Ministry of Economic Development.

Between February 2001 and 2006, firms in New Zealand with 500+ employees were the greatest contributor to employment reduction (a reduction of 93,500 (net) jobs) followed by firms with 1-5 employees (a reduction of 81, 690 (net) jobs). However, over this period SMEs accounted for 59 percent of all net new jobs in the economy¹².

Firm size does have an impact the way a business operates. Larger businesses tend to engage more on research and development activity and are also more likely to engage in innovation than smaller businesses. Training (including management training) provided for employees is more likely as firm size increases.

Individual employment agreements perspectives from New Zealand small enterprises

On the request of the Restructuring and Redundancy Public Advisory Group, the Department of Labour contracted Massey University to survey 5,500 small to medium enterprises (SMEs) to fill information gaps on restructuring and redundancy practices to understand redundancy provisions in individual agreements; and specifically, frequency rates for notice periods, compensation, outplacement support, interview leave and relocation assistance provisions. The survey also examined consultation behaviours of SMEs in redundancy or restructuring events. The size of organisations in the survey was 1-49 people per business.

The information indicated that while there were differences in responses from firms of different sizes (such as responses from businesses with 1-19 people compared with 20-49), the overall sample was in favour of the 1-19 group, so the results give a good indication of employment relation practices amongst SME's in general.

Key findings from the summary were:

- all but a small number of the SME owners had written employment agreements with their employees
- in the micro-firm sector 67 percent of employees are on individual agreements and 77 percent in the small firm sector
- from those having individual employment agreement with staff, in the event of redundancy:
 - 69 percent of employees have a notice period
 - 20 percent of employees are entitled to compensation
 - 13 percent of employees are allowed to take leave for a job interview
 - 9 percent of employees receive outplacement support, and
 - 4 percent of employees get relocation assistance.
- in the event of restructuring or redundancy, SME owners are most likely to notify or consult their shareholders, lawyer and their accountant before notifying the employee, and
- of government agencies, the Department of Labour and Ministry of Social Development are most likely to be notified or consulted.

¹² Ibid

Business dynamics

The New Zealand business landscape has strengthened in the last few years, but there are indications that the economy is slowing and accordingly we may expect an adverse effect on some businesses and communities over the next few years.

Statistics New Zealand business entry and exit statistics relate to the movement of firms into and out of businesses. Entry and exit statistics are not start-up and failure statistics. Businesses may exit due to administrative changes in restructuring or ownership such as amalgamations, mergers or acquisitions by other firms. However, administrative changes cannot always be identified as such through the entry/exit datasets.

As of February 2007 there were over 460,000 enterprises in New Zealand. While there has been a net increase in the number of firms entering into business, the number of firms exiting has steadily grown over the past 6 years. Of these at least 315,000 enterprises were sole traders and almost 135,000 were enterprises consisting of 1-19 employees. The enterprises employed just over 1.9 million people.

The number of businesses has grown steadily in the past six years from over 370,000 in 2002, jumping to almost 420,000 businesses in 2004, which corresponds to the strong economic boom during that period. However, the economy has stabilised and is now growing at a slower pace. This gives rise to issues that affect business dynamics such as productivity and firm turnover.

Firm turnover in New Zealand is not unusual when compared with other economies. Most firms' initial level of labour productivity upon entry is below the industry average but grows rapidly thereafter. Continuing firms generally add to industry labour productivity growth. On average exiting firms experience stagnant or declining labour productivity in the years leading up to their exit, and when they eventually end most have below industry average labour productivity. This pattern persists even at a highly disaggregated industry level and indicates that firm turnover has positively contributed to labour productivity growth in NZ¹³.

SMEs account for the majority of all entries and exits and, in particular, are dominated by firms employing 5 or fewer employees. Larger firms remain longer in business than SMEs. The majority of firms with 1-5 employees remained the same size over the period 2001 to 2006 and did not evolve into a larger sized firm. Throughout the same period, firms with 6-9 employees were least likely to remain the same size, but were split as to whether they evolve into either a larger or smaller size. Just over half the firms with 10-19 employees remained the same size from 2001-2006, with those that moved most likely to have down-sized rather than expanded¹⁴.

Innovation in the business is often synonymous with creative destruction. The benefits of creative destruction, as the new replaces the old, often comes with workplace failure and worker displacement and subsequent reallocation to new jobs. A critical unknown factor in the framework is how best to encourage innovation and manage the resultant creative destruction to maximise the net benefits from innovation. Seeking to lift innovation and productivity across a broad base of workplaces is likely to reduce the costs associated with destruction. In this sense, creative destruction can be both positive in terms of encouraging innovation and destructive in terms of redundancy and potentially displacing

¹³ Law, David and McLellan, Nathan *The Contributions from firm entry, exit and continuation to labour productivity growth in New Zealand*, March 2005, Treasury

¹⁴ *SME's in New Zealand: Structure and Dynamics*, July 2007, Ministry of Economic Development

workers. This process can be managed efficiently and effectively if both employees and employers are involved adequately in the process.

Insolvency and business start-ups

Currently New Zealand's insolvency protection for employees is set out in the Companies Act 1993. The maximum priority amount is set out in the Companies (Maximum Priority Amount) Order 2006 and provides that the amount for the purposes of clause 6 of Schedule 7 (including for unpaid wages, holiday pay and redundancy compensation) of the Companies Act is \$16,420 per employee.

Clause 6 of the 7th Schedule provides that if "a liquidation of a company commenced before the Companies Amendment Act 2006 came into force, that company's property must be applied in accordance with the priorities stated in this schedule on the date the liquidation commenced as if the Companies Amendment Act 2006 had not come into force."

Therefore if a liquidation commenced before 1 November 2007 the priorities and clause 6 set out in the 7th Schedule (i.e. that Schedule in force prior to 1 November 2007 amendment) apply. Clause 6 (prior to Nov 2007 amendment) provides that the maximum amount for certain priorities must not in the case of any employee exceed the prescribed amount.

The Insolvency and Trustee Service (ITS) does not administer all of the company liquidations in New Zealand. The majority of liquidations are administered by private liquidators such as accountants and lawyers. Ministry of Economic Development statistics indicate that average annual figures for insolvencies for the year ended June 2007 are company liquidations commenced: 3,991 company receiverships commenced: 291. These figures can be skewed by the fact that liquidation can go on for many years and in some instances, companies do not provide adequate information. Some companies may also place themselves into liquidation unnecessarily.

Comparatively, company liquidations have increased gradually over the past six years since 2002 from 0.33 percent to 0.86 percent of businesses. The number of businesses that have gone into receivership in the previous six years has remained steady at around 0.04 to 0.05 percent, however in the year June 2006 - June 2007, receiverships increased to 0.06 percent of businesses. The increased number of insolvencies in 2007 may have significant effects on the occurrence of redundancy and may also be correlated to the slowing rate of growth in the economy. However, it is important to consider that, as the number of insolvencies has increased, the number of total companies on the companies register has also increased literally in this time.

It is difficult to measure exactly how many or what amount employees receive for redundancy compensation payments in the event of insolvency. The ITS unfortunately does not hold this information and neither do IRD or any other State agency. When a company becomes insolvent it can be placed in liquidation by its shareholders, its board or by the High Court. When a company goes into liquidation its available assets are realised by the liquidator for the benefit of its creditors. A liquidator must first pay secured creditors out of the proceeds realised. Next, the liquidator must pay those entitled to a preferential claim and then distribute the proceeds rateably among all unsecured creditors. If there is a surplus, it is to be distributed either in accordance with the terms of the company's constitution or in accordance with the default provisions of the Companies Act 1993.

The preferential claims which apply in the case of a company insolvency are set out in the Seventh Schedule to the Companies Act 1993. Wages, salary and compensation for redundancy owed to the employees are preferential claims, which are paid before the unsecured creditors of the insolvent entity. Any money representing the unclaimed assets of the company is paid into the Liquidation Surplus Account, which is administered by the Public Trust.

There is no accurate 'start up' figure as business 'start up' figures do not currently include sole traders or limited partnerships and many of the companies that are set up do not actually start doing business (e.g. they are set up for Loss Attributing Qualifying Company (LAQC) as trusts and for tax purposes etc).

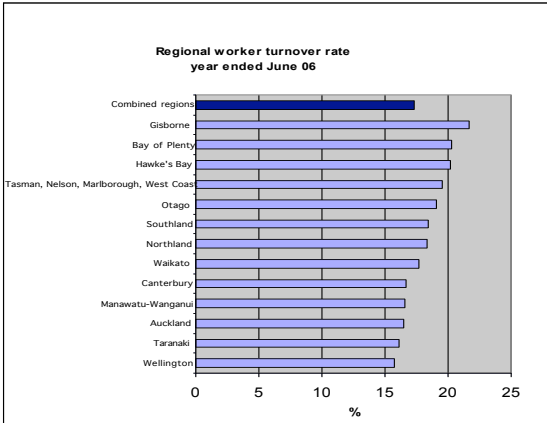
Incidence of redundancy and data on turnover rates

There are no official figures on the number of redundancies per year as redundancy notification to a state agency is not a statutory requirement.

Linked Employer-Employee Data (LEED) currently provides the best snapshot of overall churn in the labour market. LEED data measures the number of employees that leave businesses (separations) and job destructions. An unknown subset of these will be redundancies.

In the year to June 2006, over three hundred thousand employees per quarter began work in a business location (accessions) and almost three hundred thousand employees per quarter separated from a business, resulting in an average quarterly worker turnover rate of 17.3 percent. During the five-year period to June 2006, the worker turnover rate has remained at between 17.1 and 17.6 percent.¹⁵ Further trend series graphs showing job destructions and overall employee numbers are available in appendix E (To obtain this appendix, please send email to info@dol.govt.nz).

From an industry perspective, the agriculture, forestry and fishing industry had the highest average quarterly worker turnover rate, followed by the accommodation, cafes and restaurants industry. Both these industry groupings provide short-term seasonal work. The lowest average quarterly worker turnover rate was recorded in the manufacturing industry.¹⁶



¹⁵ Worker turnover rate is a measure of employment stability. A region or an industry with a low worker turnover rate is more likely to have stable employment. The worker turnover rate is the worker flow (or the sum of accessions and separations) as a percentage of the average of total jobs in consecutive periods. The average quarterly worker turnover rate for the year is the average of the turnover rates for four consecutive quarters.

¹⁶ Statistics New Zealand, Linked Employer-Employee Data: June 2006 quarter, released August 2007.

In addition to LEED data, a study by Statistics New Zealand is currently underway investigating the employment outcomes for displaced workers. It looks at the impact of closures on the future employment, earnings, and benefit receipt of the affected and unaffected employees. The project will provide information on labour market adjustment costs and the ease and speed with which displaced workers are re-employed. It is intended to support the Department of Labour's priority of increasing labour market participation.

Data from the Inland Revenue Department

Although, there is little information on redundancy compensation received, Inland Revenue (IRD) has attempted to estimate volumes of redundancy payments. The work was done as a one-off and there are no plans to update or replicate this analysis in the near future. However, there are some tangible results to come out of the work on redundancy payments. There is no variable for redundancy monies in IRD data, and so the data gathered resulted from a detailed process of elimination.

The analysis was performed for two years of employer data; the years ended 31 March 2004 and 31 March 2005. The numbers of workers found to be receiving redundancy compensation were almost 29,000 in 2004 with a total value of \$235.5 million and almost 30,000 in 2005 with a total \$238.9 million. IRD excluded employees over 60 years to avoid confusion with retirees.

The average value of a redundancy payment was approximately \$8,000 per each redundancy payment across both years. The analysis suggests that approximately 1.5 percent of employees were paid redundancy pay in 2005.

Redundancy information in the media

A review of media articles, spanning the last 12 months, has shown that the causes of redundancies are various, however, within certain industries there are common themes. For example:

- exporting and manufacturing business often cite the high New Zealand dollar as the primary reason for redundancies or closures
- larger businesses have relocated customer service and IT operations overseas in an effort to cut costs
- relocation to other parts of New Zealand
- business collapse, business going into receivership/liquidation, merging/consolidation of business operations, and
- cost cutting/efficiency factors enabling employer to meet budgets.

A table summarising key indices from all of these media articles is available in Appendix F (To obtain this appendix, please send email to info@dol.govt.nz).

Gender, ethnic and disability implications

Data from the 2006 census indicate that there are certain industries and geographical areas with a relatively high proportion of Maori or Pacific Island workers or female workers. According to the Household Labour Force Survey (HLFS) as of March 2008, there were just over 990,000 women in employment. They appear to be over represented in some industries such as Accommodation and Hospitality, Health and Social Services, Personal Services and Education. A number of jobs in these industries include vulnerable and low pay work, such as Homecare and Residential Care.

As of March 2008, there were approximately 205,000 Maori in employment (according to the HLFS). They appear to be highly represented in industries related to Manufacturing including Meat Processing, Sawmilling and Timber Dressing, Printing and Services to Printing, Construction, Transport, Wholesale, Personal Services, Health and Social Services. A number of these industries have large firms in smaller communities which are dependent on the firm for a large proportion of their economic activity. Pacific Island workers are also highly represented in Manufacturing, Transport, Health and Social Services, and Accommodation and Hospitality industries, particularly in the Auckland area.

Many of these industries identified above are also associated with low paid and low skilled jobs and the relatively high proportion of females and Maori and Pacific Island employees can increase the vulnerability of these groups, particularly in the event of a redundancy where it may be harder for them to gain a new job and also to have financial resources to support themselves through the transition period. More often than not a number of these industries can also be located in smaller communities, which can have an adverse effect not only on the worker but also on the community. The incidence of mass redundancies occurring is more frequent due to a slowing economy and the impact of globalisation, therefore attention must be given in the policy setting for possible implications of vulnerable workers and their displacement in the event of redundancy.

There is little information on the effects of redundancy on people with disabilities or any barriers they may face in re-employment.

Length of service

Women are more likely to have shorter service due, for example, to parental leave and related considerations. The proportion of women who hold the same job for over a year is approximately 30 percent for women compared to just over 34 percent for men. They are also disproportionately represented in part-time work with approximately 36 percent of employed women working part-time as compared to approximately 12 percent of working men employed part-time. Both these factors impact on the quantum of compensation due to redundancy that men receive as compared to women taken as a group¹⁷.

Older Workers

New Zealand is rapidly becoming more dependent on older workers to maintain the size of the labour force as the population ages, therefore it is prudent to encourage older workers to stay in the workforce for a longer period of time. International evidence suggests that once older workers have time out from employment, they are more likely to need assistance to re-enter the job market. It would seem wise when there is a rapid transition to give older workers a longer consultation period, particularly if trying to retain older workers from leaving the labour market altogether.

Labour market dynamics

The Department of Labour's regular forecasting activity and environmental scanning of the economy point to employment growth slowing over the next five years. In particular the manufacturing primary processing sector¹⁸ is forecast to barely grow over the next five years. These projections have been used to identify industries that are more likely

¹⁷ Based on Statistics New Zealand, LEED Job Tenure data, 2006

¹⁸ Primary processing includes Food, Beverage and Tobacco Manufacturing (such as freezing works and dairy plants), and Wood and Paper Products Manufacturing

to experience adverse labour market events. The industries within the manufacturing sector are very diverse but the specific industries that may be at a larger risk of job losses in the medium term are the Food, Beverage & Tobacco, Textiles & Apparel, Wood & Paper Products, Metal Product, Machinery & Equipment and Furniture Manufacturing Industries (which together employ around 160,000 people). These industries are exposed to outsourcing risks, have low projected employment growth and generally have large sites that would have a significant impact were they to close down.

At risk communities have been identified by examining current regional and employment data on the types of industries in these communities which are potentially exposed to a company or industry restructuring and large site closures. Areas considered are outside of the main urban centres which have a much greater ability to absorb employment shocks. The analysis showed that there are 61 non-metropolitan areas¹⁹ across New Zealand where more than 20 percent of employment, or 100 employees, are concentrated in a single industry (which may or may not be concentrated in a single firm). The attached maps in appendix G show the geographical locations of these at risk areas (To obtain this appendix, please send email to info@dol.govt.nz).

While many industries have some concentration in small areas, there are two or three main industries that dominate the data. Meat and Meat Processing, and Dairy Product Manufacturing are the two most frequently identified industries. Timber and its related industries are the next largest group of industries. There is a reasonable geographical spread of these concentrated areas of employment. There is a high share of concentrated employment in Waikato, but most regions in the North Island have some areas where employment is concentrated in a single industry. There is less concentrated employment in the South Island, with a high proportion of it located in Southland.

Public and expert consultation

Written submissions

The Group invited written submissions from members of the public seeking their views on the adequacy of current redundancy laws and provisions. Twenty-two written submissions were received, of which fourteen submissions (from businesses and professional groups) generally supported the current legal framework as adequate, while eight (from individuals, union representatives, community law advisers and academics) claimed that the current framework was not adequate and advocated changes.

A full list of the submitters, with an analysis of the common themes to emerge from the submissions, is attached as Appendix H (To obtain this appendix, please send email to info@dol.govt.nz).

Summary of the views from those advocating change indicated:

- Many workers are unable to bargain for redundancy entitlements and can only gain these by statutory means
- The “good faith” requirements of the ERA are overly broad and often avoided
- Compensation should be statutorily prescribed (and tax-free)
- Consultation and notice provisions should be strengthened
- Clarification of law and statutory definition is needed, and

¹⁹ We have excluded area units that are within ‘City’ territorial authorities

- Education about rights and responsibilities is also needed.

Views of those advocating status quo:

- Current law provides a workable platform
- “One size fits all” legislation would be inappropriate to the widely varying circumstances of restructuring/ redundancy situations
- Flexibility, not regulation, is needed for competitiveness in global market and to promote innovation
- Compliance costs are already heavy, particularly for SMEs
- Statutorily mandated provisions, especially regarding compensation, would do more harm than good, and
- Management prerogative is a fundamental tenet of employment law in New Zealand.

Specific issues raised in submissions:

In addition to comments for and against further legislation regarding consultation, notice and redundancy compensation, specific issues raised in submissions included:

- Whether special considerations apply in the case of:
 - SMEs (less able to cope with additional compliance costs and liabilities), and
 - Temporary, fixed-term and/or individual agreement workers (these groups particularly in need of statutory protection)
- Whether a Code of Good Practice to cover restructuring and redundancy situations should be developed, in lieu of regulation
- Whether the protection currently provided to “Vulnerable Workers” under Part 6A of the ERA should be extended to other employees
- Whether the Grievance Procedure provisions of the ERA (s103A) need clarification to provide an objective test for redundancy dismissals
- Whether the “Good Faith” requirement of the ERA should be clarified, e.g. regarding:
 - any situation in which consultation is not required, and
 - any situation that does not constitute a redundancy
- Tax treatment of redundancy payments.

Oral submissions

The Group consulted expert advice from key stakeholders, business groups, government agencies and academics to provide written and/or oral submissions. Oral submissions were received from eight submitters, other experts were invited but were unable to meet with the Group due to other commitments.

Key themes to emerge from oral consultation included:

- a greater focus was required for vulnerable employees and vulnerable sectors in the labour market
- the scale and impact of mass redundancies – especially in smaller centre and towns
- the balance between disclosure and notification – both for the employee and also for the market to manage

- current good faith principles are adequate for consultation requirements, and
- compensation – a fund model may create perverse business behaviour amongst employers e.g. soft-landings.

In particular, the New Zealand Stock Exchange highlighted the implications of redundancy notification and the effects on companies on the Stock Exchange. They indicated that although notice of an impending redundancy situation to a worker and State agency should be considerate of the worker's employment situation and provision of adequate redundancy support, any move to make redundancy notification a statutory requirement would have implications for the Stock Exchange. Confidentiality and a lack of assurance around disclosure of company information due to notification can have an adverse effect on corporate competitiveness.

The New Zealand Stock Exchange indicated that vulnerable workers are most at risk in the event of a redundancy. High income earners generally have the ability to look after themselves in the event of redundancy and do not need compensation protection as much as low income earners. In light of possible statutory requirements for compensation, income splitting was identified as a possible option to address equity issues through performance appraisals. This may mean that those who are made redundant and earn a high salary e.g. \$150,000+ may be exempt from performance appraisals in return for no compensation in the event of a redundancy.

The Small Business Advisory Group (SBAG) also provided a submission on the impact of regulatory requirements for small businesses. They highlighted the differences in business structure and resources available to small and larger firms, and that smaller sized businesses would struggle with additional compliance costs if statutory requirements were introduced. An impending redundancy or restructuring situation have far reaching effects in a smaller firm than a larger firm as many SME owners often have their own life-savings and homes on-the-line with their business and if the business goes under the owner risks losing everything they own as well as legal credibility in the case of bankruptcy. There is no one-size-fits-all approach to designing regulations and if a framework were to be explored for redundancy the implications for small businesses should be considered (which make up to 97 percent of businesses in NZ) and adapted separately for larger firms who have more resources and have a far greater impact on employment and communities through mass redundancies. They also pointed out that the small employer is often disadvantaged where an employee decides to leave, yet the employer simply has to cope with that situation.

It is also important to note the New Zealand Institute of Chartered Accountants (NZICA) view on accounting for redundancy provisions in business accounts. A redundancy situation cannot be accounted for in the accounts until the situation actually arises and only then can redundancy be crystallised in the financial reports.

NZICA also made reference to accounting processes in the European Union:

Regulation (EC) No 1606/2002

The International Accounting Standards (IAS) Regulation places an obligation on European companies whose securities are admitted to trading on a regulated market in the EU to prepare their consolidated accounts, as of 1 January 2005, in conformity with IAS/IFRS (International Financial Reporting Standards) and Standing Interpretations Committee/International Financial Reporting Interpretations Reporting Committee (SIC/IFRIC) issued by the International Accounting Standards Board (IASB) and endorsed by the EU.

Member states may permit or require this accounting framework to be applied to the consolidated accounts of companies whose securities are not admitted to trading on a regulated market in the EU and/or to annual (individual) accounts regardless of whether the company is admitted to trading on a regulated market in the EU. For a summary of the oral submissions please refer to Appendix H (To obtain this appendix, please send email to info@dol.govt.nz).

PART TWO - INTERNATIONAL REVIEW

Overview of legal protections in international jurisdictions

The relevant international instruments are the International Labour Organisation (ILO) Termination of Employment Convention, 1982 (No. 158) ("Convention 158") and the Termination of Employment Recommendation (No. 166) (Recommendation 166). These instruments set out the key principles relating to the dismissal of workers, including redundancy situations. In addition to placing emphasis on severance pay (funded directly by the employer or a fund constituted by employer contributions, or social security benefits or a combination of both), notice periods and appeal periods, it also focuses on member States encouraging employers to consult with worker representatives to consider alternatives to mass layoffs.

New Zealand has not ratified Convention 158 and is therefore not bound by its provisions. Recommendations by the ILO are not able to be ratified by member States and therefore New Zealand is not bound by the provisions of Recommendation 166.

Convention 158 includes:

- a) Article 12 which provides for employees to be entitled to a severance allowance upon termination of employment
- b) Article 13 which requires employers to consult workers representatives when they are "contemplating termination of employment for reasons of an economic, technological, structural or similar nature", and
- c) Article 14 which requires employers to provide notification to the competent authorities where the employer is contemplating redundancies.

The New Zealand Government's long-standing policy and practice – applying to all international treaties – is that it will only ratify such conventions, and thereby incur legal obligations thereunder, when it can fully comply with them. Many of the principles under Articles 1-11 in the Convention 158 have been implemented into New Zealand redundancy law. Several countries with similar legal systems to New Zealand including Canada, Ireland, the United Kingdom and Australia have not ratified Convention 158.

The review on legal protections in international jurisdictions provides an interesting basis to consider New Zealand's position comparatively to international trends. While statutory provisions for redundancy are intrinsically linked to some labour market policies and international obligations, this does not prevent New Zealand taking guidance for what does work well in other jurisdictions.

The majority of jurisdictions limit their requirements to collective redundancies, however unfair dismissal claims are still available for individual redundancies. These are not explicitly considered in this review.

European Union and international labour standards play a key role in setting the framework for legal protections for redundancy and restructuring situations. Legal protections in Europe tend to be more prescriptive and are largely driven by European Union directives. While there are differences between European economies and the New Zealand context, European developments are still informative.

In considering notice and redundancy compensation requirements, the Australian National Employment Standards (NES) was recently released by the Federal Labour Government. The Standards will apply to all Australian employees regardless of their

industry or occupation from 1 January 2010 - see Appendix I (To obtain this appendix, please send email to info@dol.govt.nz).

In summary, there are a number of international initiatives, statutory provisions and social plans which New Zealand could seek value in from either considering or adopting. While New Zealand provides consultation requirements which are on par with other jurisdictions, this is the extent of statutory protection that employees are entitled to. The provision of notice periods and social plans in other jurisdictions are worthy of consideration. The breakdown of requirements reviewed for the respective jurisdictions and a comparative analysis are attached in Appendix J (To obtain this appendix, please send email to info@dol.govt.nz).

PART THREE - ANALYSIS OF ISSUES

Notification

Notification of the possibility of the redundancy is an obvious pre-requisite for consultation with unions and employees. Notification to relevant government agencies is currently not required in employment statutes but is encouraged. There are some instances where notification is required for instance Stock Exchange disclosure requirements, requirements of employment agreements and any requirements relating to business failure i.e. receivership and liquidation.

It is difficult to measure the number of redundancies that occur every year, in various sectors, regions and for what reasons. A review of media coverage on recent redundancy situations and information from Ministry of Social Development (MSD) indicates that there are a large number of redundancies occurring in particularly small communities which has not only an adverse effect on employees but also the community both economically and socially.

Relevant aspects of notification include:

- informing a state agency of a redundancy situation
- informing and working with unions and employees, and
- disclosure of information to the Stock Exchange.

Commercial sensitivity is important to consider when notifying agencies and unions of the potential event of redundancy. A balance has to be struck between when MSD and employees are notified and also when the Stock Exchange should be notified. The employer may have good intentions by notifying MSD as early as possible, allowing appropriate assistance measures to be deployed for when the announcement occurs, however, there is always the risk that the news maybe leaked to employees particularly if it is in a smaller town. On the other hand, it can be difficult for State assistance to be deployed effectively if they are only told a few days or in some circumstances the day before a redundancy situation is announced.

Confidentiality and assurance of information provided in the notification can also have an impact on the share market. Information in the public domain on an impending redundancy can have an adverse effect on the share market as investors may 'catch wind' of the commercial status of a business, resulting in the share value of the business falling. Regardless, a balance must be struck between the fairness to shareholders and equitable notion of informing the employee in the event of a redundancy: it should not come as a shock to the employee if there is an impending redundancy situation.

The comparative analysis of New Zealand and international jurisdictions indicates that there are a number of countries who require compulsory notification of redundancies to a State agency, for example, the United Kingdom requires notification of redundancies over 20 employees and in the United States notification is required of a redundancy situation of more than 100 employees in a firm.

The Group's view

The Group recognises the obvious advantages of having compulsory notification of redundancies to a State agency, particularly in the event of mass redundancies in New Zealand and the potential impact on smaller communities. Compulsory notification to an

appropriate State agency is beneficial in dealing with displaced employees in advance of mass redundancies being announced and businesses closing.

The Group is however mindful of the balance required in notifying appropriate parties in a redundancy situation. Parties to a redundancy event include employees, unions, State agencies, and also the share market. Too much information in the public domain through notification have an adverse effect on the share market as investors may 'catch wind' of the commercial status of a business on the Share Market, affecting corporate competitiveness.

An non-compulsory option which would to ensure State assistance is provided in a timely manner and in consideration of providing fairness to the employee, is that the employer could inform the State agency of the 'potential' of a redundancy during the consultation process with employees during which assistance is not 'officially' deployed but resources are organised and information from the employer regarding skill-sets of the employee/s is matched to appropriate jobs as quickly as possible. If the 'potential' redundancy does arise, then it will:

- not be of surprise to the employee, and
- the State agency can be event ready and release resources immediately once the decision is final.

It is important to note that regardless of how much time a State agency has, the assistance provided should always be as best, event ready.

Other options could include a Code of Practice or minimum requirement in legislation for notification to a State agency. Compulsory notification to a State agency may require a threshold, such as 20 or more redundancies will need to be notified by the employer. The balance between incentivising compliance and penalising employers who do not comply may also need to be considered. Resourcing and administrative costs will also have to be considered if a compulsory notification of redundancies to a State agency is to be considered.

The Group has explored current policy work being done by MSD and the Department of Labour (DoL) in tracking redundancies and Security in Change work to providing earlier support for people at risk of redundancy. The outcomes of a pilot approach to tracking redundancies, and the assessment of the impact of redundancy events on the local communities, should provide a better overview of the requirements and costs associated with pursuing statutory notification to a State agency of a redundancy event.

The Group considers that it is preferable at this stage to encourage employers to provide early notification to relevant government agencies rather than introducing a statutory notification requirement.

Consultation

It is generally accepted that "good faith" requirements in s.4 of the ERA relating to redundancy require consultations with the employees or the union prior to declaring redundancies. In the past, good faith principles has been applied accordingly to employment relations matters including redundancy. In general, "good faith" principles have a strong basis in New Zealand's employment relations in comparison to international jurisdictions.

Employers have to follow a fair process when dismissing an employee for any reason. The required procedural steps in a redundancy situation depend on the individual

circumstances of each case. It is not just the act of consultation that is important, but the quality of the consultation should be meaningful in determining the right decision making processes.

Case law has stopped short of making consultation an absolute requirement. In *Aoraki Corp Ltd v McGavin*²⁰ it was noted that to impose an absolute requirement to consult would lead to impracticalities in some situations e.g. mass redundancies.

Relevant factors when considering the need for consultation include:

- the position held by the employee, e.g. whether they are in a management role²¹
- the size of the company, in a small workplace consultation will usually be expected²², and
- the employee's length of service²³

Victoria University's 2007 analysis of employment agreements suggests that for the most part, collective agreements recognise a role for the relevant union(s) in the event of a redundancy. However, union recognition clauses in the private sector are much more likely to be limited to advising the union of a redundancy prior to, or at the same time as, giving redundancy notice to employees.

CONSULTATION PROCESS

In any consultation process the employee should be given the opportunity to consider any proposal to disestablish his or her position and to comment on it. The employee should be given a reasonable opportunity to consider the proposal and feedback from the employee must be considered before the final decision is made. If a fair and meaningful procedure has been followed, then the employee should already be aware that his or her job is at risk and that their comments and suggestions regarding the situation would have been considered by the employer.

Alternatives to redundancy should be considered by the employer in the consultation process, ideally considered with the employee. The prevalence of redundancy counselling, job interview leave and relocation assistance is common in collective agreements, unfortunately there is little known about individual agreements. However, other alternatives a business should consider when consulting is retraining, positions in other companies within the same group and voluntary redundancy.

The Group's view

Consultation is a statutory requirement in any process of restructuring and redundancy. In addition, there is extensive common law on this matter. The Group's view is that this appears to be adequate but that consideration be given to codifying the relevant common law.

²⁰ *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601

²¹ *Dymocks Franchised Systems (NZ) Ltd v Robson* unreported, Shaw J, 4 December 2001, AC 80/01

²² *Holmes v Ken Rintoul Cartage & General Contractors Ltd* [2002] 2 ERNZ 130

²³ *McGuire v Rubber Flooring (NZ) Ltd* unreported, Travis J, 2 March 2006, AC 9/06

Notice

Currently there is no statutory notice period that an employer must comply with when an employee is advised that they will be made redundant.

Employers are entitled to make employees redundant, but any redundancy needs to be conducted in "good faith". Redundancies need to be genuine and employers must carry out a fair process. The focus should always be on whether the position is redundant, and not on the person. Redundancy cannot be used to dismiss an employee for misconduct or poor performance.

Providing adequate notice is imperative in allowing the employee to prepare for a redundancy event and for government assistance to be deployed appropriately.

The issue of adequate notice period has been brought before the courts and explored in case law. The courts have made a number of comments on the purpose of notice periods in redundancy situations.

Notice periods:

- give employees certainty over when their employment will end and allow them to plan accordingly²⁴
- allow for negotiation of redundancy agreements²⁵
- give employees the opportunity to adjust to the changed circumstances²⁶, and
- enable employees to try and find employment whilst employed, which is of itself a position of advantage.²⁷

It is important that employers comply with the notice provisions set out in their employment agreements and failure to give the required notice will make the employer liable for arrears of wages.²⁸ The denial of adequate notice is also a breach of an employer's obligations of fair dealing and good faith.

Although "reasonable" notice may be implied into employment agreements²⁹, redundancy is a special case where common law principles relating to reasonable notice offer little guidance.³⁰ "Reasonable" notice depends on the circumstances of each situation and has recently ranged from one week³¹ to two months.³²

Data gathered on collective agreements for 2007, indicate that four weeks notice period seems to be the most common allowance, but there are still some sectors who either provide little or no notice to their employees other than that specified for ordinary termination. Differential periods of notice may exist in some agreements but the practical effect maybe that some employees may get compensation instead of adequate notice period.

²⁴ *A-G in respect of DGSW v Richardson* [1999] 2 ERNZ 866

²⁵ *Hands v WEL Energy Group Ltd* [1992] 1 ERNZ 815

²⁶ *Kitchen Pak Distribution Ltd v Stoks* [1993] 2 ERNZ 401

²⁷ *Farmers Transport Ltd v Kitchen* unreported, Shaw J, 14 December 2006, WC 26/06

²⁸ *NZ (with exceptions) Electrical etc IUOW v Remtron Lighting Ltd (in rec)* [1990] 1 NZILR 583

²⁹ *Ogilvy & Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398

³⁰ *Charta Packaging Ltd v Howard* [2002] 1 ERNZ 10

³¹ *Muller v Taam Gardens Ltd and Ors* unreported, YS Oldfield, 21 June 2005, AA 226/05

³² *Ayers v Advertising Works Ogilvy Ltd* unreported, L Robinson, 20 October 2006, AA 324/06

Four weeks notice seems to be the most common notice period amongst collective agreements, however there are some sectors where it is less than one week and can have a far greater impact on the employee. For example, in service sector industries such as restaurants, hospitality and retail – one week notice is the most common amount of notice period. Workers in these jobs are often on minimum wage and with one week's notice it is difficult to consider options or find other work given the short time to adjust.

4 WEEKS NOTICE OPTION

Providing adequate notice is primarily an adjustment issue. The consequence of a minimum four weeks notice period is that employees will at best be prepared for the redundancy event, look for other work and seek assistance where possible such as counselling, training, government assistance etc. Notice is particularly important in the event of mass redundancies and for smaller communities where the impact of redundancy can be felt far greater both through economic and social circumstances.

A four week minimum notice period may also be important in the event of insolvency as it allows employees, employer and State agencies to prepare adequately before the firm is closed down. In the event of some insolvencies, a four week notice period maybe of no value, however a business should have some knowledge of its commercial status to be able to provide notice at an earlier stage. Voluntary redundancy and notice may also be different depending on requirements. Currently, Schedule 7 of the Companies Act does not have any requirements around notice period for redundancy in the event of insolvency.

Another issue related to time apart from providing adequate notice to the employee is untaken leave. This should not be offset by the notice period e.g. four weeks notice and if there is leave owing for the employee they should be able to take that leave. Another option is of course unless otherwise agreed, requirements stated in an individual agreement.

Some countries operate their mandatory notice requirements on a slide scale based upon services and age of employee in recognition of a greater time period required for some employees to prepare for their dismissal e.g. in Australia where the notice requirement is adjusted where an employee is over 45 years of age and with at least 2 years continuous service with the employer. This takes into account the difference that increased age can make for older workers as they are re-entering the workforce and to provide greater opportunity to find a new job. This may have some advantages for New Zealand, particularly in the area of skills shortages and the potential that older workers can have on workforce numbers and the economy.

Fairness is important in the event of redundancy, as the redundancy announcement should never be a shock or a surprise to the employee. If adequate notice period is provided, then this allows time for the employee to adjust to the news and make appropriate plans for their future particularly for those who are in vulnerable labour markets.

In providing adequate notice period, the length of service may be of value from an employee's perspective and for the employer to note. Business continuity when notice is provided is crucial in regards to the timing and who the notice goes to. In smaller business', employees maybe in touch with their employers on a more day-to-day basis and are more often than not aware of the businesses commercial position. In larger

organisations, employees may not be in touch with their employers on a frequent level as might be in smaller businesses or aware of the company's commercial position.

The Group's view

The Group agrees that the Government should consider the introduction of a statutory notice requirement of redundancy termination. This requirement could possibly be a code of practice or introduced through legislation as an appropriate vehicle to administer the minimum notice requirement e.g. four weeks.

The Group views a statutory requirement of four weeks notice, which is currently implied in most collective agreements as adequate in ensuring that employees are treated fairly in redundancy situations.

Another option is a notice period based on service.

Where the Group has recommended consideration of options for redundancy compensation that could exclude either the employees of small firms or employees with less than one year's service, separate consideration should be given to providing statutory notice of redundancy applying to all employees.

The Group has separately recommended that notice should be a priority debt under the Companies Act 1993.

Compensation

In New Zealand, there is no statutory right to redundancy compensation, nor is there a common law right unless employers and employees or their union have agreed to it in the employment agreement.

Currently, compensation is accounted for in at least 78 percent of collective agreements. A common formulation in the public sector is the 6+2 formula, which is 6 weeks wages for the first year of service and 2 weeks wages for each year of service thereafter. Outside the public sector there is wide variation but a breakdown is provided in Appendix D (To obtain this appendix, please send email to info@dol.govt.nz). There is little information available for those on individual agreements, however it can be said with some confidence that 'management' and higher income earners are commonly provided redundancy compensation.

There appear to be trends in given sectors ranging from the finance and business services sector which is at the high end to mining and metals manufacturing at the low end.

WHAT IS THE PURPOSE OF COMPENSATION?

Redundancy compensation generally recognises:

- that the termination is involuntary and not due to individual performance
- the loss of service related benefits
- the opportunity cost for the employee of the period invested with that particular employer, and
- the risk of not finding a comparable job and the impact generally on the earning power of the employee.

The Group note also that the Courts have formed views that compensation for redundancy also provides some income assistance for the period following termination.

An entitlement to redundancy compensation can also act as a deterrent where an employer might otherwise make an employee redundant without due consideration of alternatives.

In addition for employees, redundancy compensation contributes to employment security and can encourage prospective employees to consider employment in situations where there is a perceived risk of redundancy.

OPTIONS TO PROVIDE FOR COMPENSATION

There are several options for delivering statutory options for redundancy compensation. These include:

- a code
- a legal right to redundancy compensation with the amount to be determined by a third party (e.g. ERA Part 6A)
- a statutory formula, and
- a redundancy fund or levy based arrangement.

Aligned with any of the chosen options there could be a variety of support systems and approaches to assist workers affected by redundancy.

Code

Options include:

- an enforceable code of employment practice to apply to redundancy situations and including a guide on redundancy compensation or statutory compensation requirements, and
- a set of guidelines illustrating best practice.

Either option will require information and education prior to implementation.

A legal right to redundancy compensation with the amount to be determined by a third party

This option would be similar to the provisions of Part 6A of the ERA. It would provide for redundancy compensation. However, the amount would be agreed between the parties or, in the event that agreement was not possible, be determined judicially.

This approach would allow for the amount of compensation to be appropriate to the particular circumstances.

However, this approach does have some disadvantages. For employees, lack of information and bargaining power may result in little or no compensation. For employers, there is the risk of time-consuming and costly legal processes.

It may be that a pattern of compensation would emerge from a series of court decisions that would act as an effective guide to employers and employees.

Another option is to require that all workers in a collective agreement have a right to redundancy compensation based on the above approach.

Statutory formula

There are a considerable number of options in how to provide for a statutory formula. These include a simple formula based on length of service such as 4 weeks first year of

service and two weeks pay for each subsequent year. A number of adaptations could apply.

There could be an exclusion above a specified level of remuneration e.g. \$150,000. This would recognise that senior employees at or above this level of pay commonly have compensatory provisions in their employment agreements.

There could be an exclusion below a specified number of employees. This would recognise that there are a large number of very small businesses for whom standard statutory approaches may create disproportionate effects. However, such an exclusion from a statutory requirement in employment law would represent a departure from the usual New Zealand approach of universal application of statute regardless of firm size.

Employees with less than one year's service could be excluded. This would be consistent with other statutory entitlements based on length of service. This would also mean that statutory compensation would be targeted at those with a reasonable period of employment. It is estimated that up to a third of all employees would have less than one year's service based on current turnover statistics. This would mean that the first year of service would count towards compensation but eligibility would be for employees of one year's service or more.

There could be a maximum statutory level of compensation with the provision for negotiated payment above that level.

There could be a combination of the above adaptations.

The mix of options needs to take account of such things as basic business demographics.

Funding models

In considering options for compensatory funding models the Group agreed that the primary aim for any model is that there should always be money available to distribute for compensation to employees in the event of a redundancy.

- a) Self Insurance – Employers remain responsible for funding statutory redundancy entitlements, and can fund that either through their own balance sheet or by taking insurance with a third party provider.
- b) Compulsory Compensation Insurance - Employers remain responsible for funding statutory redundancy entitlements, and must take insurance with a third party provider to ensure payments are available even in an insolvency situation.
- c) Levy – Employers (and possibly employees) pay a payroll-based levy to a centrally managed fund which then meets statutory redundancy payment costs (similar to the levy collection under ACC scheme, but with only lump sum compensation payable as per the statutory formula).
- d) Contributions – Employers and employees (and possibly government) make contributions representing a small proportion of wages into one or more managed funds (similar to Kiwisaver) which then provides any lump sum compensation payable as per the statutory formula.
- e) General Taxation – Government funds statutory entitlements from general taxation (effectively an enhanced social security or unemployment benefit in redundancy situations).

Options (b) through (e) offer higher funding certainty, but with varying degrees of compliance and administration costs. Options (b) through (d) potentially open another source of short and medium term investment funding in New Zealand, potentially

assisting capital deepening and through that productivity. Options (b) through (e) could have reduced administration costs, greater efficiency and lower risks if they were firmly aligned with a similar funding scheme already in operation for another purpose (e.g. (b)) private income protection insurance, (c) ACC, (d) Kiwisaver, (e) Unemployment Benefit payments made by MSD) rather than set-up on a stand-alone basis.

Self insurance

This option has minimal compliance costs, and is effectively the funding status quo for current redundancy entitlements contained in employment agreements. It provides no greater certainty of payment of any statutory entitlement than does the current system of meeting redundancy entitlements in employment agreements.

Compulsory compensation insurance

This option would be similar to a normal business insurance type model, whereby the employer seeks income protection for their employees who may in the future be made redundant. This is a competitive business insurance type model, and insurance companies could specifically cater for these business costs that would be incurred by the employer in ensuring their employees are secured for redundancy compensation. Some form of insurer of last resort may be required to cover firms who do not actively seek or gain insurance cover.

In the event that the business goes into receivership, the money would then be transferred from the insurance fund to the receiver and the insurance company effectively becomes a creditor to the receiver. However, redundancy payments will be paid to employees and any monies that is left over from the receivership will be credited back to the insurance company.

The benefit of this is that similar to a levy option the cost of the insurance can be borne by the employer but matched in employee contributions. An insurance model would ensure payments are made to employees in the event of redundancies.

The risk is that larger organisations may be able to afford insurance costs related to business income protection whereas smaller sized firms may struggle to bear the cost of an insurance levy. Similar to a levy option, premiums may have to be set according to the history of the business and as such an appropriate criteria will have to be set.

There may also be scope for perverse business behaviour, where businesses may deliberately go under, either to start afresh or to get rid of employees in order to recoup some money for personal benefit or to start another business. To counter-act perverse business behaviour, strict conditions and criteria would need to be set, to ensure this does not happen. However, for this reason and also for genuine redundancy cases, some employers may be put in the position where they have to subsidise either perverse business practices or a genuine case of a business going under when they may be in a financially secure position that they may never need to access the funds.

Similar to a levy option, the added business cost for the employer may mean that the employer does not increase the employee's wage or salary due to another business compliance cost.

Another risk is that the insurance company will go under, but in most insurance companies it would be considered that they would have an underwriter – essentially a global insurer underwriting the insurance company which is insuring the business for redundancy compensation.

Levy

A compensation levy option could be developed, which could be based on a scheme similar to the current ACC funding model, whereby firms are rated according to their industry, number of injuries or deaths per industry etc and a levy cost is then identified according to criteria for the type of the business.

In the context of employment relations and redundancies, this would require a business to be rated in regards to a set criteria and a levy rate would then be set for the employer. A rating criteria could involve:

- length of existence for business
- profits, and
- industry average.

So, for example, a business that has been in existence for a period of time, has consistently demonstrated good returns on profit and in an industry with low average for redundancies would have a lower risk rating and as such a lower rate set for a levy. The levy could be contributed via a payment solely from the employer or the levy cost could be divided between employer and employee.

The benefit of this approach is that the cost of the levy could be shared by both employer and employee, and the levy fund ensures that there will be money available to pay redundancy compensation if required.

The risks associated with this option is that it could be extremely expensive to establish and allocate resources to as it would need to be setup in a similar format to the current ACC corporation. Given the cost associated with resourcing, administrating e.g. who will develop criteria and rate businesses annually for their redundancy compensation levy may not be very cost effective.

A funding model can also create disincentives for employers by creating opportunities to engage in perverse business behaviour e.g. to access the compensation fund for either their personal benefit or to start another business.

For this reason and also for genuine redundancy cases, some employers may be put in the position where they have to subsidise either perverse business practices or a genuine case of a business going under when they may be in a financially secure position that they may never need to access the funds.

Due to the added business cost for the employer there maybe the risk that the employer does not increase the employee's wage or salary.

Contributions

This model would operate on a similar level to kiwi-saver in that there would be employee, employer and government contribution to a fund. But the government contribution does not necessarily need to be a fiscal contribution towards a monetary compensation it could also be in the form of providing training. The State already provides similar initiatives, whereby training initiatives are subsidised by the government for employees.

Data obtained from IRD from 2005 indicate that nearly thirty thousand compensation payments were taxed and the value of these compensation payments was \$238.9 million which roughly equates to \$8000 per payment for each redundant worker. This data

indicates that if a contribution either from the State or the employer were to be introduced it could be at a cost of \$2.50 per week per employee.

The benefit of this option is that the cost is borne by all three parties – employer, employee and the State ensuring credibility to the fund and that money will be available for employees in the event of redundancy. Redundancy compensation need not be associated with a wholly monetary compensation option for the employee. The form of compensation should also allow for training initiatives for the employee to engage in, which would make for better skilled employees re-entering the workforce.

As with the levy type option, there are resource and administrative costs associated with this option which could be very costly. The scope for perverse business behaviour also exists, so strict requirements would need to be developed for the fund so as to avoid perverse practices. It can be roughly calculated that from the IRD data, 1.5 percent workers were made redundant in 2005. This indicates the economic life cycle issues as 2004-2005 respectively were strong years economically, but when the economy is slower it would be expected that redundancy payouts would be more commonplace as economic activity and GDP is lower leading to more incidences of redundancy. The economic life-cycle would potentially affect the above options too via higher premiums.

Similar to the other options, the added business cost for the employer may mean that the employer does not increase the employee's wage or salary due to another business compliance cost. Again as mentioned in other options, some employers may be put in the position where they have to subsidise either perverse business practices or a genuine case of a business going under when they may be in a financially secure position that they may never need to access the funds.

Income protection for the above options would be tax deductible.

General taxation

This option could be delivered through a number of ways:

- it may require extending some parameters around the unemployment benefit so as to include a compensation equivalent of four weeks work (which the employee would have been doing had they not lost their job) on top of the unemployment benefit, and
- through active labour market policies (ALMP) such as providing for a counselling service, CV writing course, training.

The Government could establish a fund dedicated to redundancy provisions by providing an amount e.g. \$50 million to a labour market dynamics fund and which can be applied to employees made redundant.

A criteria may need to be established so as to ensure uptake of the ALMP, and that the benefit can only be accessed if the ALMP services have been approached.

The benefit of this approach is that this would enable better State assistance to be deployed to those who need it, particularly those who have been in the same job for a long time and may need assistance with searching for new jobs.

It also ensures that people do not take up the unemployment benefit immediately after redundancy and not utilise any other services available to them, to find a new job.

However, the cost of this option would be borne by the tax payer and as discussed earlier the cost may be high or low for the respective year depending on the economy and the number of redundancies.

KiwiSaver

Further options the Group discussed included using the KiwiSaver scheme as a fund. This option may be in the form of an additional employer contribution in KiwiSaver to provide redundancy insurance. It could alternatively be a provision that allows a proportion of employer and worker contributions to be withdrawn in the case of redundancy. However, the Group agreed these options would work best if the KiwiSaver option was compulsory. The Group's view is that the KiwiSaver options are too complex and risks undermining the objectives of the KiwiSaver scheme.

Funding models – overseas

The international review indicated that there are some funding models in international jurisdictions which support the payment of redundancy compensation. For example, in Ireland there is a scheme, where employers who comply with all redundancy requirements are entitled to a 60 percent rebate from the Social Insurance Fund. Employers are required to make regular payments into this fund through Pay Related Social Insurance contributions. Where an employer is unable to pay the employee their entitlement, the Department of Enterprise, Trade and Employment pays the full amount directly to the employees from the Social Insurance Fund. This system guarantees payment to employees, and provides incentives for employers to comply with redundancy requirements such as notice.

Summary of funding models

The funding models identified above all provide some level of benefit but more so risks for those involved. The benefit in the models is that they all ensure compulsory compensation to the employee, which is vital allowing the employee to find other work whilst still managing to pay for expenses.

The risks identified indicate that any one of these models would be costly, resource and administratively intensive to operate. The models may also be unfair for employers who may end up subsidising the cost for businesses with bad practices and it may also encourage perverse business behaviour amongst some employers.

Affordability of the funding models is a crucial issue that could affect businesses. The cost of providing for compulsory compensation via these models may see employers cutting back on other parts of their business such as investing in training or increasing wages or salary of staff.

The cost of the funding model may be dictated also by the state of the economy as with any economic cycle, if the economy is slow and GDP is low then it could be predicted that redundancies may occur more frequently given the business climate and as such may push the cost of the funding model and premiums high.

It is important to note that as there is little data available on the number of people who actually receive a redundancy payment, it may be worth reviewing data or developing a mechanism by which this information can be obtained. This information will help inform a better understanding of the requirement of a funding model and the structure of a mechanism.

Redundancy support scheme

The Group has included the option of a redundancy support scheme. This builds on the initiatives already developed on "Security in Change". A Redundancy Support Scheme provides a way to consolidate and expand the scope of current MSD assistance as well as provide access to a rebate for small employers on the cost of redundancy compensation.

This would also have the effect of increasing the number of employers that engage on active labour market mechanisms.

It is recognised that active labour market mechanisms work best when many employers are engaged. However in practice it is likely that only larger firms will participate. What is proposed in the Redundancy Support Scheme is that all employers that register with the scheme are eligible for a range of services and that workers and unions can also notify the MSD to ensure that redundancy support mechanisms are made available in a redundancy situation. In some cases it may be possible to avoid redundancies due to high levels of information about possible firm closures and new employment opportunities.

However, it is also possible for such a scheme to include provision for a rebate for small employers for the cost of redundancy compensation. This would be on way to ensure that all workers have the same entitlements regardless of firm size, assist small employers with the costs of compliance with the statutory requirements, and promote active labour market mechanisms. If the statutory formula excluded workers with less than one year's service, the Group does not believe that the cost to Government of a rebate needs to be of a very large sum. In any case such a provision can be calibrated based on the definition of small firm that applies and the extent of the rebate.

It is suggested that only employers that register with the scheme are eligible but that the effect of registration for a small employer should not be onerous. The Group notes that there is already in operation a payroll subsidy for small employers that recognises the disproportionate cost to small employers in the provision of PAYE details to Inland Revenue.

The Group's view

The Group was able to reach agreement that the Government should consider the introduction of a statutory requirement for redundancy compensation based on length of service. However, we did not reach a firm conclusion on the quantum delivery mechanism for such an entitlement. Accordingly the Group has also discussed a range of options as set out above. These options will need further analysis and policy development. They include a statutory formula for all workers and variations, which exclude some workers, some employers, and cap the statutory minimum compensation.

The Group has also considered a fund or levy-based scheme.

The Group has proposed further consideration of a Redundancy Support Scheme, which would channel support for workers and employers affected by redundancy and in the case of small employers provide a rebate on redundancy pay.

ILO CONVENTION

International Labour Organisation Convention 158 and Recommendation 166 relating to the termination of employment set out the key principles relating to the dismissal of

workers in redundancy situations. This includes placing emphasis on severance pay, notice periods and appeal periods.

The Group's view

The Group discussed the implications of New Zealand ratifying ILO Convention 158. The Group's view is that there is no point in attempting to ratify the Convention unless a statutory provision for redundancy compensation is provided and only then should the Government initiate the ratification process.

TAX TREATMENT OF COMPENSATION

Redundancy compensation is currently fully taxed. The current tax treatment appears to be unfair given that redundancy compensation is not an earning in the normal sense of the word. The tax treatment could be more generous to redundant employees. In previous years (up until 1992) redundancy compensation were taxed at a rate of 5 percent of the redundancy payment and at the earner's usual rate because payments were regarded as compensation. The Group proposes a tax free option or a lower tax rate, e.g. five percent.

The Group notes that some relief was provided earlier in 2008 through the Income Tax Act 2004, Income Tax Act 2007, and the Tax Administration Act 1994 being amended to provide a new rebate (renamed "tax credit" in the Income Tax Act 2007) for redundancy payments. The rebate is a flat rate of six cents in the dollar, capped at the first \$60,000 of redundancy payments in relation to each redundancy event.

Before this amendment, depending on the level of a person's earnings, receipt of a redundancy payment arguably could result in over-taxation when the redundancy payment pushed the person's total earnings over an income threshold and therefore onto a higher marginal tax rate. There was no tax relief available for redundancy payments. The rebate will mean low and middle income workers will not be adversely affected by having an artificial tax rate applied to their redundancy payments.

For example, an employee receives a redundancy payment of \$80,000. His redundancy payment rebate is capped at the maximum of \$60,000 redundancy payment, giving a rebate of \$3,600 ($\$0.06 \times \$60,000$).

A new definition of "redundancy payment" has been included in legislation. A definition is required so that redundancy payments qualifying for the rebate relate to payments which arise from a genuine redundancy and have been subject to the PAYE rules.

In Australia, redundancy payments up to a certain amount are tax free. The tax-free limit for the 2006–07 year is a flat dollar amount of \$6,783 plus \$3,392 for each completed year of service. ($\$7,020^* + \$3,511^*$ for each completed year of service * for the 2007/08 financial year and will be indexed each financial year).

Anything paid over that is an ETP (Eligible Tax Payment). This amount will be taxed but at a special low tax rate. The employer is responsible for paying the compensation, there is no Government funded redundancy scheme.

The Group's view

The Group agrees that the tax rate of redundancy compensation should either sit as tax free – similar to Australia and other jurisdictions or that 5 percent of the payment should be taxed as was previously done before 1992.

PRIORITY DEBT

Pay in lieu of notice is not currently regarded as priority debt under the Companies Act 1993.

The Group's view

The group considers that at least 4 week's pay in lieu of notice should be included as a priority debt within the overall limit of \$16,420 per employee.

TIMING OF IMPLEMENTATION

It is recognised that implementation of a statutory provision for compensation and other matters is a significant change to the minimum code. It would therefore be advisable to allow a reasonable time before such requirements come into force to allow employers to adapt. During this period there should be an extensive education and information campaign.

Redundancy compensation does not crystallise as a contingent liability until a redundancy situation arises. However, a statutory obligation for employers to compensate redundancy workers is a realisable and potentially significant cost and that is further reason to allow time to adapt.

A disadvantage of a delayed introduction is that it could build momentum around a date of application and result in some works being made redundant just before the statutory requirement comes into force. However, this is unlikely as it would be a one-off situation with few or no long term benefits to the employers.

The Group's view

The Group considered that depending on the nature of any statutory requirements an implementation period of one year was appropriate.

RESOURCES

It is important to recognise that any addition to the minimum code needs to be enforced. Ideally there should be a major education campaign advising employers and workers of their rights and obligations. But in addition there would be requirements for ongoing resources, calculators, staff who are trained and available to provide advice and labour inspectors. Further, if there is an extension in active labour market policies (ALMP) such as Security in Change, there needs to be adequate resources provided.

The Group's view

The Group recognises that implementation of a statutory provision implies a need for additional resources in relevant government departments and agencies.

THE IMPACT OF POSSIBLE STATUTORY REQUIREMENTS ON THE UNEMPLOYMENT BENEFIT

It could be argued that having statutory provision of redundancy pay may ensure that people to some extent have sufficient means to look after themselves for a longer period before the need to grant a benefit. For example, if the minimum statutory redundancy

pay was the equivalent of 2 weeks pay, it could be argued that it would be appropriate for people to wait that long before MSD are prepared to look at granting a benefit, similar to what MSD do with holiday pay.

It is worth noting that a person is not entitled to benefit for any period of paid notice whether notice period is worked or not worked. It is regarded as a continuing payment from employer when it is determined the 'cessation date of employment'. Another point to consider is that setting a statutory notice period gives a guaranteed period during which MSD can work intensively with people to find them other suitable employment.

An important issue to note is how the redundancy payments are treated for Working for Families (WFF) Tax Credit purposes. If the payments are not taxed, they may not want to include them as income for WFF tax credit purposes, if they are taxed they would almost certainly be included as income. Therefore, people getting WFF tax credits might experience an unexpected reduction in their entitlement and possibly a debt as a result of a new statutory redundancy payment.

Government services

The Government is currently engaged in a number active labour market policy work in relation to redundancy. The implementation of the Employee Security in Times of Change project is being led by MSD and is developing ways to engage with industry, unions and government to provide support earlier on in redundancy processes to affected employees.

EMPLOYEE SECURITY IN TIMES OF CHANGE

MSD is leading the implementation of the Employee Security in Times of Change work programme. In April 2007, Cabinet agreed to introduce a range of processes to help ensure that workers at risk of redundancy are better identified and provided with the services and support they need to obtain alternative employment at an earlier stage than at present.

The initiatives involve developing ways of proactively engaging with unions, associations and firms, and providing support to workers being made redundant. These initiatives are relationship-based, and in November 2007, Cabinet agreed that it was desirable to widen both industry and governmental agency involvement in the partnership scheme.

An employee redundancy support fact sheet developed by the Security in Change Steering Group is attached as appendix K (To obtain this appendix, please send email to info@dol.govt.nz). This describes support that MSD provides to workers in the event of a redundancy.

MINISTRY OF SOCIAL DEVELOPMENT SERVICES

MSD is most actively involved with providing assistance to employees in the event of a redundancy by ensuring services such as counselling, CV writing, employment search etc are all provided where possible. In some situations, employment may be found for employees made redundant but the new job may be some distance away from their hometown. MSD is able to provide support to workers who are displaced as a result of redundancy, such as providing assistance in relocation costs or travel costs for those who may have to travel some distance from their home and community to another part of the country to work.

There is also a 'jobs for you' (Jobs4U) scheme, which is a mechanism that MSD applies to reduce matching time for the employee to the new job. MSD does this by matching the appropriate skill-set of the employee to jobs available whether in the same community or at a location which is in travelling distance of their home.

In providing assistance, early notification would enable MSD to activate rapid response units to affected areas, particularly if they are smaller communities and have the risk of negative flow on effects affecting more than just the employees. However, as discussed earlier notification must be balanced with commercial sensitivity both for the employee and the employer in order to communications about redundancy are handled in a timely tactful, appropriate and direct way.

A challenge facing Government agencies is in ensuring that appropriate support services are delivered in a timely manner at the point of need. This implies the need for contingency planning to ensure that the appropriate infrastructure and support mechanisms, involving a range of government departments, other agencies such as territorial authorities, tertiary providers, relevant ITOs and others, can be quickly and smoothly brought in to play as and when necessary.

The MSD also provides Redundancy Support pages on the Work and Income website at <http://www.workandincome.govt.nz/employers-industry/redundancy-support.html>, which describes the employment training, financial support, job search, mentoring and other services that MSD can offer in the event of a redundancy.

Work and Income officers are often deployed to areas where redundancies have occurred and provide first hand support to employees who have lost their jobs as a result of a redundancy.

DEPARTMENT OF LABOUR SERVICES

Department of Labour provides information on the Employment Relations Act 2000 on its website www.dol.govt.nz to guide employers when they are faced with making a redundancy decision. The Department's Workplace Contact Centre also provides information to both employers and employees on the Employment Relations Act 2000 and dispute resolutions.

Department of Labour supports competency, and champions workplace practices that lift productivity and drives innovation. It also works to assist workers who are displaced by the process of creative destruction that is often associated with innovation, by providing information on skills that are in shortage, and better matching training available to workplace demands. Employment regulations can also modify the creative destruction process (such as restrictions on the use of contracting out). Government has a strategy to increase the adoption of global knowledge (Treasury is preparing policy on this), which needs to more explicitly incorporate increasing the absorptive capacity of workplaces.

ACTIVE LABOUR MARKET POLICIES (ALMP)

There is also scope to address redundancy and restructuring in smaller and rural areas through ALMP. Cabinet has recently agreed that the DoL pilot an approach with up to ten firms in small towns and rural areas to investigate ways to improve access to, and take-up of, business assistance services so that labour market and community outcomes are

improved. This approach will support both economic and social objectives. Improving government support for firms in rural areas or small towns could result in:

- firms remaining viable over the long term, which will help secure the labour market outcomes of rural communities and small towns
- individual workers accessing government services, for example work-based training programmes, so that they develop transferable skills that help secure their longer-term employment outcomes, and
- communities strengthening and, where possible, diversifying their employment base through engagement with economic development agencies, territorial authorities and government agencies.

It is envisaged that the Department of Labour's Labour Market Knowledge Managers (LMKMs) would facilitate this approach in close collaboration with the regional networks of other agencies including New Zealand Trade and Enterprise, the Tertiary Education Commission, the Ministry of Social Development and the Ministry of Economic Development.

Tracking redundancies

A number of activities are in train to provide earlier support for people at risk of redundancy. As part of the Security in Change approach, Ministry of Social Development and Department of Labour are piloting an approach to tracking redundancies. This work will monitor the labour market outcomes of people who have been made redundant and speed up the provision of customised support. An innovative feature of this pilot is the involvement of the National Distribution Union, acting as the main provider to deliver services to all affected staff, such as assessment interviewing, the preparation of personal employment plans, providing a resource centre and mentoring services. The wider impact of the redundancy events on the local communities is also being assessed.

Unified Skills Strategy

The Unified Skills Strategy is aimed at improving the skills of the existing workforce and ensuring firms have access to skilled workers whilst mindful of the need to increase productivity.

Action six of the strategy proposes 'Improved access to careers and labour market information and advice for adults in the workforce, including enabling pathways within and between industries'. This strategy is anticipated to help employees in times of job transition when affected by redundancy, by increasing awareness of current government provision of career and labour market information and enhancing the range of information and tools on the Career Services website and their other suite of services. Other training initiatives that could be leveraged off include iwi training initiatives that engage with employees in affected communities.

Worker displacement issues

In the consultative process, Te Puni Kokiri raised the issue of worker displacement especially amongst Maori, who in the event of a redundancy (particularly if they receive a redundancy payment) may tend to head back to their Whanau, iwi and land to gain security during an unsecure time in their life. The redundancy approach taken here is more of a collective approach where the effects of the redundancy are shared by the Whanau and not just by the employee. Redundancy compensation provides opportunities

that can be utilised in many ways to assist not only the affected employee but also their Whanau and iwi.

Worker displacement can often have an impact not only on the community they leave but also on the new communities they enter (especially in the event of mass redundancies in a small area such as Oringi, April 2008). For example, demographic movements of redundant employees from an urban centre to rural areas where employees may want to connect with their iwi, land or Whanau again - in a time of insecurity can have a big impact economically on the smaller centres. Similarly, the same effect can apply to redundancies that occur in small centres and employees move to larger, urban areas putting at risk the economic viability of many businesses in the smaller centres.

This indicates the issue of job transition and managing the shift in skills and workforce from one geographical area to another when redundancy occurs. This places pressure on both old and new communities to provide employment to affected employees and to those who have returned to be with their Whanau or iwi (this issue is also dependent on the length of time the employee will stay in the region). This shift, during a time of skills-shortages in New Zealand poses a broader policy interest in terms of productivity, skills retention and recruitment and job prospects/ employment security.

The Group's view

Redundancy has many implications for (ALMP), which are targeted at assistance for employees, skills retention, productivity, and employment security (job transitions). The Group agrees that further work needs to be done in addressing these issues, especially in retaining redundant employees in New Zealand and in the workforce and to address productivity and skills-shortages issues.

The scope of assistance needs to be wide and the appropriate government agency should be event ready – in New Zealand's case it is MSD – with other agencies ready and able to provide assistance as may be needed in the circumstances of specific redundancies. The role for government can also be extended to research and development, which can be encouraged further with qualification or tax incentives.

In addition there may be opportunities to link workers affected by redundancy into new opportunities that are emerging – for instance around home insulation, solar heating, major construction projects and so forth. The Group recognises that this will not be easy as there are many factors that impact on a successful matching of worker and employer needs.

PART FOUR – RECOMMENDATIONS

Recommendation 1

That the government should consider the introduction of a statutory requirement for redundancy compensation and other entitlements incorporating the following features:

- a) notice of redundancy termination to the affected worker
- b) compensation based on length of service
- c) a maximum level of statutory compensation, and
- d) provision of redundancy support and other active labour market mechanisms to affected workers and organisations.

Recommendation 2

That the government considers the following options to implement Recommendation 1.

- a) A Code which acts as a guide to employers on notice, compensation, and other matters in respect of redundancy. Compliance with this Code will be voluntary but may form the basis of Government considerations of what constitutes a 'good employer' in the context of contracting and migration policy.
- b) A legal right to redundancy compensation with no specified formula. This could take one of two forms:
 - (i) First of all it could be a mechanism similar to that provided for 'vulnerable' employees in Part 6A of the Employment Relations Act 2000. This would mean that all workers would have the right to redundancy compensation. The quantum would be as agreed or could be referred to the Employment Relations Authority for settlement. The quantum set by the Authority or Employment Court could be subject to criteria which include firm size as well as length of service, industry practice and other matters.
 - (ii) The second option could be that all workers in a collective agreement have the legal right to redundancy compensation and the formula could be as agreed or as determined in the Employment Relations Authority or Employment Court.
- c) A statutory formula for notice and compensation. There are numerous options which include:
 - (i) 4 weeks notice plus redundancy compensation based on 4 weeks for the first year of service and 2 weeks for each subsequent year up to a maximum statutory requirement for 26 weeks pay. This option is supported by the NZCTU.
 - (ii) A formula as in (c) (i) above but excluding workers on wages or salary of \$150,000 or more per annum.
 - (iii) A formula as in (c) (i) above but excluding workers with less than one year's service from compensation but including all workers for the 4 week's notice requirement.
 - (iv) A formula as in (c) (i) above but excluding employers of a specified size - for instance 1-5 workers.

- (v) A formula as in (c) (i) above but with a maximum statutory payment - for instance 16-20 weeks, with the ability to negotiate additional payments above that level.
 - (vi) A formula as in (c) (i) above but with a sliding scale of notice based on length of service.
 - (vii) A combination of the above variations.
 - (viii) A formula based on the Australian National Employment Standard (see Appendix I (To obtain this appendix, please send email to info@dol.govt.nz)).
- d) An insurance scheme to provide for redundancy compensation. There are several options including:
- (i) A levy based scheme similar to ACC which provides for payment only to those affected.
 - (ii) A levy based scheme with additional assistance from the Government.
 - (iii) A fund that is built up by contributions from employers, workers and possibly the Government but with 'worker accounts' rather than an insurance scheme.
 - (iv) A variation to KiwiSaver where there is a portion of contributions that can be accessed in a redundancy situation.
- e) A Redundancy Support Scheme which would exist alongside a statutory formula as in (c) (i) above. This would channel support to workers and employers in the form of active labour market assistance. However, it would also provide to employers that registered with the scheme and who employ fewer than 20 workers a rebate on the cost of redundancy compensation. This could be based on a maximum rebate of (e.g.) \$2000 per worker.

Recommendation 3

That if the government does introduce a statutory provision for redundancy notice and compensation it then considers ratifying ILO Convention 158.

Recommendation 4

That if the government does introduce a statutory provision for redundancy notice and compensation, it phases in such a provision with a one year delay. That in the one year period there is a major education and awareness arising campaign.

Recommendation 5

That if the government does introduce a statutory provision for redundancy notice and compensation then it ensures the Department of Labour and other relevant departments are resourced adequately to provide advice, develop calculators and other resources.

Recommendation 6

That notice of redundancy is a priority debt under the Companies Act 1993.

Recommendation 7

That redundancy compensation is non-taxable and that tax records are also used so that statistics on the incidence of redundancy can be recorded.

Recommendation 8

That the government enhance the Security in Change work programme. This should include:

- a) A major awareness raising programme on redundancy support.
- b) Developing connections with the Unified Skills Strategy so that lifelong learning is maintained throughout redundancy experiences and that Industry Training Organisations are actively involved in retraining support.
- c) Expanding the scope and level of support for workers made redundant.
- d) Widespread consultation with stakeholders on how to move to an 'employment security' framework.
- e) Consideration of cost implications for Government of enhanced Security in Change.
- f) Consider the possible interface between redundancy support, income maintenance, employment security and the investment in jobs for sustainability (e.g. home insulation).

Recommendation 9

That the consultation provisions required in case law between employers and workers in restructuring and redundancy situations are codified.

Recommendation 10

That employers are encouraged to notify the Ministry of Social Development of redundancies as early as possible but taking into account relevant commercial and other legal obligations for instance Stock Exchange disclosure requirements.

As can be seen from recommendation 1, the Group recommends work towards a formal framework incorporating notice and compensation. However, the report does not recommend a specific form for this outcome. The impacts of any one of the identified options on its own will not be uniform nor necessarily equitable. For that reason it will be necessary to undertake further work to determine the best mix of options for the wider New Zealand context. It is to be expected that wide consultation with interested groups will form a central feature of any implementation of the Group's recommendations.

APPENDIX A

TERMS OF REFERENCE PUBLIC ADVISORY GROUP TO THE MINISTER OF LABOUR ON RESTRUCTURING AND REDUNDANCY ISSUES

Purpose

The Public Advisory Group to the Minister of Labour on Restructuring and Redundancy Issues Group's (the Group) broad purpose is to examine the adequacy of redundancy laws and provisions.

Specifically, without limiting the Group's work, the Group will focus on the adequacy of the legal framework in supporting successful transitions for workers and longer term mitigation of adverse labour market impacts. The Group's analysis will consider the adequacy of these laws and provisions at the level of individual employees and employers, and for wider economic transformation. The Group will provide recommendations on the following matters:

- statutorily prescribed consultation requirements
- the amount of notice employers must provide employees in the event of a redundancy
- consultation requirements to avoid mass redundancies, and
- a statutory requirement for redundancy compensation or other entitlements.

The Group will also consider:

- evidence from further research on the extent of redundancy provisions in employment agreements, employer and employee experiences and extent of any problems with current arrangements
- whether any additional legal requirements should apply to all redundancy situations or should be more targeted
- the experience of other countries that have implemented similar requirements
- employees and unions experiences
- the costs of entitlements and compliance for employers
- relevant International Labour Organisation standards
- interface matters with the existing insolvency regime
- interface matters with Part 6A of the Employment Relations Act 2000, and
- portability of entitlements.

The Group will also have due regard for the whether redundancy and restructuring situations disproportionately affect any particular groups, including any gender, ethnic and disability implications.

The Group's recommendations are to be formed in consideration of the work being led by the Ministry of Social Development titled Security in Change.

Status and accountabilities

The Group is an independent body established for a specified period to provide independent advice to the Ministers of Labour, Social Development and Employment, and Economic Development. The Ministers will consider all findings and recommendations of the Group and act on these as the Ministers consider appropriate.

Duration

The Group will operate between 1 November 2007 and 30 June 2008. All appointment durations will mirror this period.

Appointments

As with other appointments of this nature, each of the Group's members will be nominated by the Minister of Labour and considered by the Cabinet Appointments and Honours Committee for appointment.

The Group's size and composition

The Group will include representatives from the following three organisations or agencies:

- New Zealand Council of Trade Unions (two seats)
- Business New Zealand (one seat), and
- State Services Commission (one seat).

In order to meet the Group's objectives all members are required to have a comprehensive understanding of redundancy and restructuring matters and their impact upon the workforce.

Each member must attend to the greatest extent practicable all meetings of the Group and must work effectively with other members.

The Chair

The Group will be chaired on a rotating basis by the Business New Zealand member and one of the New Zealand Council of Trade Union members.

Conflicts of interest

Any information that affects any member's ability to perform in this role, including conflicts of interest, must be identified and an appropriate regime for managing this put in place.

Report

The Group will produce a report containing its recommendations to the Ministers of Labour, Social Development and Employment, and Economic Development before 30 June 2008.

Reimbursements

The Department of Labour will meet the fair and reasonable costs associated with member participation at each meeting of the Group.

Member fees

The State Services Commission (SSC) has issued guidelines on remuneration levels for members of bodies to which Ministers make appointments [CO (06) 8]. The Group's members will receive a nominal daily fee in accordance with SSC Guidelines,¹ at the rate of:

- Member \$300 excluding GST
- Chair \$400 excluding GST.

Government officials will not be entitled to receive any fees.

The Group's administrative processes

Overall direction of Group's activities will be co-ordinated by the Chair. Meetings will be called by the Chair as required. Meetings will follow an agenda, which will be circulated in draft to members for their consideration and comment in advance of the relevant meeting.

Secretariat

Secretariat functions will be provided by the Department of Labour. The Chair should provide the Department with as much notice of proposed meetings as possible to ensure that the necessary resources are provided.

The Department of Labour will meet the costs of arranging and holding meetings (including any venue costs), refreshments as may be appropriate to the timing of the meeting, and photocopying/distribution of documents to members.

¹ Fees Framework for Members of Statutory and Other Bodies Appointed by the Crown

APPENDIX B

CASE LAW REVIEW – REDUNDANCY

When an employee is dismissed for redundancy the Authority or Court will look at both the substantive reasons for the dismissal, i.e. whether the redundancy is genuine, and the procedure followed by the employer, to determine if the employee has a personal grievance. This two-stage approach was confirmed in 2006 by the Employment Court in *Simpsons Farms Ltd v Aberhart*.¹

Substantive justification

It has been a long standing rule in New Zealand that the courts will not question an employer's genuine commercial decision to reorganise their business, *G N Hale and Son Ltd v Wellington Caretakers etc IUOW*.² *Simpsons Farms* stated that this rule remains unaffected by the introduction of s103A Employment Relations Act 2000 ("ERA").

*"Although Parliament was prescriptive in 2004 as far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s103A, to return to the position espoused by the courts in cases such as, and following, Hale. So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for Authority or the Court, even under s103A."*³

In a genuine redundancy situation the dismissal will be substantively justified as an employee has no right to continued employment.⁴ The Court in *Simpsons Farms* commented that when a dismissal was substantively justified, the reality of the case meant it was one of alleged unjustified disadvantage, rather than a case of unjustified dismissal.⁵

Whether a redundancy is genuine

A genuine redundancy is generally one made for valid commercial reasons and "determined in relation to the position, not the incumbent".⁶ Cases where redundancies are not genuine are uncommon. Employees often concede there were genuine reasons for their employer to restructure and base their grievance on the manner in which their dismissal was carried out.

In *Allen v Johnson's House Removal Co Ltd*⁷ the Court found that the dismissal had "all the hallmarks of an employer who has, for whatever reason, tired of an employee and sought to justify her dismissal by relying on management prerogative." The company had negative views about Ms Allen, did not ask her if she would consider working fulltime to keep her job, and re-hired a former employee shortly after the dismissal. The Court held there was not a genuine

¹ *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825

² *G N Hale and Son Ltd v Wellington Caretakers etc IUOW* [1991] 1 NZLR 151

³ *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825, para 67

⁴ *G N Hale and Son Ltd v Wellington Caretakers etc IUOW* [1991] 1 NZLR 151

⁵ *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825, para 72

⁶ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739

⁷ *Allen v Johnson's House Removal Co Ltd* unreported, Shaw J, 19 November 2003, AC 59/03

reorganisation or a redundancy on genuine grounds. The employee was awarded, inter alia, \$5,000 compensation for hurt and humiliation and 24 weeks lost wages.

In *Farmers Transport Ltd v Kitchen*⁸ the Court found there was a “blatant attempt to disguise a dismissal for performance as redundancy”. The employer had been concerned about the employee’s performance for at least six months before the alleged redundancy, and had effectively demoted him by removing him from his management position. While the Court accepted there was a genuine need to improve the performance of the business, Mr Kitchen’s performance should have been dealt with in an open way. It was also not a genuine redundancy as the position held by Mr Kitchen at the time of his dismissal was not disestablished or surplus to his employer’s needs. Mr Kitchen was awarded \$12,000 compensation by the Court.

Doubt was cast on the genuineness of the redundancy in *Staykov v Cap Gemini Ernst & Young New Zealand Ltd.*⁹ The employee had a positive work record and the employer had previously given assurances that there would be no redundancies that year. The employer provided no evidence to justify the redundancy and the Court considered it more probable than not the dismissal came about to mask the adverse view management had formed of Mr Staykov. The Court took these factors into account and award him \$30,000 compensation and 14 weeks lost wages.

On the surface, the employer’s reasons for redundancy appeared to be sound in *Lewis v Greene*.¹⁰ The employee had gone on parental leave and instead of replacing her with a temp the work was reallocated among existing employees. The employer claimed that there was no longer enough work for a legal executive (Ms Greene’s role) and that the other employees were able to cope with additional work, which Ms Greene could not have done without training. However, the employer failed to properly compare conveyancing fees generated by Ms Greene with fees generated during the comparable period after she left. That was an important omission in deciding whether a legal executive position could have been maintained. The Court found the main reasons for making Ms Greene’s position redundant were the extreme bad feeling between the parties when she went on parental leave; the employer’s desire not to disturb the smooth running of his firm; and a redundancy situation that probably occurred before the employer approved the employee’s parental leave. Ms Greene received reimbursement of 85 weeks lost wages, and \$15,000 compensation for hurt and humiliation.

If an employer appears to have mixed motives and dismisses an employee for a combination of genuine commercial reasons, but with underlying personality or performance concerns,

“... the employer bears the burden in justifying a redundancy dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. If the predominant motive was for another reason, the dismissal will be unjustified. An important indicator of whether a redundancy was for genuine commercial reasons is whether the employer

⁸ *Farmers Transport Ltd v Kitchen* unreported, Shaw J, 14 December 2006, WC 26/06

⁹ *Staykov v Cap Gemini Ernst & Young New Zealand Ltd* unreported, Travis J, 20 April 2005, AC 18/05

¹⁰ *Lewis v Greene* [2004] 2 ERNZ 55

can show 'a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation.'"¹¹

Other grounds for finding a redundancy is substantively unjustified

A redundancy can also be unjustified if it does not conform to the requirements in the parties' employment agreement. In *Nee Nee v TLNZ Auckland Ltd*¹² seven employees were found to be unjustifiably dismissed because "the dismissals did not meet the definition of redundancy in their collective employment agreement and were in breach of the employer's contractual obligations to prefer permanent employees over casuals."

Procedural fairness

Employers have to follow a fair process when dismissing an employee for any reason. The required procedural steps in a redundancy situation depend on the individual circumstances of each case. Two key features of most redundancy processes are consultation and notice.

Consultation

Consultation is more than notification¹³ and is usually required¹⁴, although the courts have stopped short of making it an absolute requirement. In *Aoraki Corp Ltd v McGavin*¹⁵ it was noted that to impose an absolute requirement to consult would lead to impracticalities in some situations e.g. mass redundancies.

Relevant factors when considering the need for consultation include:

- the position held by the employee, e.g. whether they are in a management role¹⁶
- the size of the company, in a small workplace consultation will usually be expected¹⁷, and
- the employee's length of service.¹⁸

In *Communication & Energy Workers Union Inc v Telecom NZ Ltd*¹⁹ the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ Ltd*²⁰. In particular, the Court noted:

- a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality

¹¹ *Rillstone v Product Sourcing International 2000 Ltd* unreported, R Arthur, 7 June 2007, AA 167/07

¹² *Nee Nee v TLNZ Auckland Ltd* [2006] 1 ERNZ 95

¹³ *Assn of Salaried Medical Specialists v Otago DHB* [2006] 1 ERNZ 492

¹⁴ *Coutts Cars Ltd v Baguley* [2001] ERNZ 660

¹⁵ *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601

¹⁶ *Dymocks Franchised Systems (NZ) Ltd v Robson* unreported, Shaw J, 4 December 2001, AC 80/01

¹⁷ *Holmes v Ken Rintoul Cartage & General Contractors Ltd* [2002] 2 ERNZ 130

¹⁸ *McGuire v Rubber Flooring (NZ) Ltd* unreported, Travis J, 2 March 2006, AC 9/06

¹⁹ *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429

²⁰ *Wellington International Airport Ltd v Air NZ Ltd* [1993] 1 NZLR 671

- b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view
- c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally
- d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done, and
- e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.²¹

Consultation will ordinarily (subject to the terms of the particular agreement) include a duty on the employer to consult over the employee's suitability to fill any vacancies, disclose all available options, and advise the amount of compensation to which he or she might be entitled, *Cammish v Parliamentary Service*.²²

A failure to consult can result in parties being ordered to comply with the consultation obligation in s4(4)(c) ERA, see *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd*.²³

It is not just the act of consultation that is important; the quality of the consultation will also be taken into account. The employer must not withhold the true reason for the restructuring, mislead the employee as to the criteria for selection, or predetermine the outcome.²⁴

Notice

Notice is given to employees when it has been decided that their employment will end. The Courts have made a number of comments on the purpose of notice periods in redundancy situations.

Notice periods:

- give employees certainty over when their employment will end and allow them to plan accordingly²⁵
- allow for negotiation of redundancy agreements²⁶

²¹ Brookers Databases>Employment>Employment Law>Employment Relations Act> Employment Relations Act 2000> Part 9 Personal grievances, disputes, and enforcement> Personal grievances>103 Personal grievance>ER103.21 Accessed 10/12/2007

²² *Cammish v Parliamentary Service* [1996] 1 ERNZ 404

²³ *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597

²⁴ *Harris v Charter Trucks Ltd* unreported, Couch J, 11 September 2007, CC 16/07

²⁵ *A-G in respect of DGSW v Richardson* [1999] 2 ERNZ 866

- give employees the opportunity to adjust to the changed circumstances²⁷, and
- enable employees to try and find employment whilst employed, which is of itself a position of advantage.²⁸

It is important that employers comply with the notice provisions set out in their employment agreements and failure to give the required notice will make the employer liable for arrears of wages.²⁹ The denial of adequate notice is also a breach of an employer's obligations of fair dealing and good faith.

Although "reasonable" notice may be implied into employment agreements³⁰, redundancy is a special case where common law principles relating to reasonable notice offer no guidance.³¹ "Reasonable" notice depends on the circumstances of each situation and has recently ranged from one week³² to two months.³³

Proper notice is particularly important in cases concerning older and long-serving employees. It gives them the opportunity to negotiate a more dignified exit such as retirement and to hold appropriate farewell ceremonies.³⁴ In *Harris* the parties' employment agreement provided for "at least two weeks notice of termination". Mr Harris, who had been employed in the business for more than 25 years with only a few breaks, received two weeks pay in lieu of notice. The Court found that a fair and reasonable employer would have recognised that the dismissal was going to be difficult and traumatic for him and given consideration to providing a period of notice longer than the bare minimum stipulated in the employment agreement. Also, keeping Mr Harris out of the workplace by paying him in lieu of notice deprived him of the dignity of working and the ability to say goodbye to his colleagues as equals.³⁵

Once notice of redundancy has been given, the employer cannot unilaterally withdraw it.³⁶ In *Malaysia Airline System BHD (NZ) Ltd v Malone*³⁷ the employee was entitled to rely on the redundancy notice issued by his employer and to receive redundancy compensation as specified in his collective employment agreement even though the employer's circumstances had changed and it no longer wished to make him redundant.

Other procedural factors

Other procedural factors that the Courts and Authority have taken into account include:

²⁶ *Hands v WEL Energy Group Ltd* [1992] 1 ERNZ 815

²⁷ *Kitchen Pak Distribution Ltd v Stoks* [1993] 2 ERNZ 401

²⁸ *Farmers Transport Ltd v Kitchen* unreported, Shaw J, 14 December 2006, WC 26/06

²⁹ *NZ (with exceptions) Electrical etc IUOW v Remtron Lighting Ltd (in rec)* [1990] 1 NZILR 583

³⁰ *Ogilvy & Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398

³¹ *Charta Packaging Ltd v Howard* [2002] 1 ERNZ 10

³² *Muller v Taam Gardens Ltd and Ors* unreported, YS Oldfield, 21 June 2005, AA 226/05

³³ *Ayers v Advertising Works Ogilvy Ltd* unreported, L Robinson, 20 October 2006, AA 324/06

³⁴ *Farmers Transport Ltd v Kitchen* unreported, Shaw J, 14 December 2006, WC 26/06

³⁵ *Harris v Charter Trucks Ltd* unreported, Couch J, 11 September 2007, CC 16/07

³⁶ This is similar to the rule that applies to notice of resignation by employees.

³⁷ *Malaysia Airline System BHD (NZ) Ltd v Malone* [2003] 1 ERNZ 494

- The general procedural fairness obligations relevant to all dismissals. These include the need to advise the employee of the purpose of any meeting they are called to, provide the employee with an opportunity to have a representative or support person present, and approach decisions with an open mind³⁸
- Failure to consult with all the employees potentially affected by a reorganisation. In *Harris v Charter Trucks Ltd*³⁹ the employer proposed reducing the number of swing lift operators from four to three, but only interviewed one of the current operators, Mr Harris. At the very least, all four operators should have been involved in the process and, to be truly fair, the inquiry should have extended further
- Proper disclosure of information. Sections 4(1B) and 4(1C) ERA allow an employer to withhold confidential information if there is a good reason to maintain the confidentiality of the information. The test under these sections is whether the commercial position of the employer would have been unreasonably prejudiced by the disclosure.⁴⁰ See also *Nee Nee v TLNZ Auckland*⁴¹, where the employer withheld the identity of the four people responsible for assessing the skills and aptitude of the employees. The Court found the employer could not justify this decision and none of the 'good reasons' for maintaining confidentiality applied. The employees were also not given sufficient material to allow them to make informed responses to the redundancy proposal
- The selection criteria used by the employer. Selection of staff to be made redundant must be carried out in good faith, without reference to irrelevant criteria, and with reference to relevant criteria.⁴² The dismissal in *Harris* was unjustified on the criterion actually used. Harris happened to be the employee off work at the time the employer carried out his analysis of the work performed by the team in question. Such an arbitrary criterion was entirely unreasonable. In *Nee Nee* the employees were measured against a number of skill areas e.g. crane, hatch, tally. The Court commented that this was unfair on those persons the employer had required to specialise in one area, e.g. tally, to the exclusion of other areas
- The way in which the dismissal is communicated to the employee, e.g. dismissing the employee by way of a letter faxed to his advocate was held to be grossly insensitive⁴³
- The way in which the dismissal is communicated to others. The employer in *Harris* did not tell the other staff what had happened to Mr Harris; he simply disappeared from the work place, never to be mentioned again. The Court found that handling the dismissal in this manner invited others to speculate and draw the wrong conclusions about his departure. It also prevented other staff from having a farewell function for him and from offering Mr Harris support at a difficult time

³⁸ *Farmers Transport Ltd v Kitchen* unreported, Shaw J, 14 December 2006, WC 26/06

³⁹ *Harris v Charter Trucks Ltd* unreported, Couch J, 11 September 2007, CC 16/07

⁴⁰ *Harris v Charter Trucks Ltd* unreported, Couch J, 11 September 2007, CC 16/07

⁴¹ *Nee Nee v TLNZ Auckland* [2006] 1 ERNZ 95

⁴² *NZ Building Trades Union v Hawkes Bay AHB* [1992] 2 ERNZ 897

⁴³ *Harris v Charter Trucks Ltd* unreported, Couch J, 11 September 2007, CC 16/07

- The size and resources of the employer. In *Farmers Transport* the employer was one of a large group of companies with many staff and its executive officer had access to HR advisers. In the circumstances, it was not unreasonable to expect that either the employee's alleged performance problems would have been addressed appropriately or, if there was a genuine redundancy, that proper notice would have been given to him
- The length of service of the employee. The procedure adopted by *Farmers Transport* was held to be "grossly unfair", particularly in light of the employee's 42 years of service, and
- Whether the employer misled the employee. In *Funnell v Bruce A. Short Ltd*⁴⁴ the employer had already decided to reorganise its business and remove Mr Funnell. Although the employer did engage in some discussion with Mr Funnell about contracting to the company in its proposed new form, these were found to be desultory and the employer was never really serious about an ongoing commercial relationship with the employee. Its conduct was found to be misleading and the dismissal was procedurally unfair.

Personal grievance remedies

If the Court or Authority finds that an employee has a personal grievance relating to their redundancy they can order that they be reimbursed for wages lost as a result of the grievance and receive compensation for hurt and humiliation. In a genuine redundancy situation compensation is limited to hurt and humiliation resulting from procedural failures only, and is not compensation for the loss of employment.⁴⁵

Compensation awards for hurt and humiliation in redundancy cases between January 2005 and June 2006 ranged from \$500 to \$30,000. The average award was between \$7,000 to \$7,999.

The award of \$30,000 in *Staykov v Cap Gemini Ernst & Young New Zealand Ltd* is unusually high in the context of personal grievance awards. The Court found that the redundancy was not genuine and the employee's situation was exacerbated because the employer did not, contrary to assurances, provide a reference or assist Mr Staykov with obtaining alternative work. The dismissal was carried out in a way which conveyed the impression that there was substantial cause and fault on the part of Mr Staykov. The Court found that he was considerably distressed by the employer's conduct towards him and that this affected his self confidence, his health and caused him stress and anguish. He also suffered distress as a result of the job loss and career dislocation. The Court also awarded reimbursement of lost wages of 14 weeks.

With a genuine redundancy the employee is unlikely to receive lost wages as their employment would inevitably have ended, even if an appropriate process had been followed.⁴⁶ However an employee may be awarded lost wages in recognition of the extra

⁴⁴ *Funnell v Bruce A. Short Ltd* unreported, Colgan CJ, 14 March 2006, AC 12/06

⁴⁵ *Coutts Cars Ltd v Baguley* [2001] ERNZ 660

⁴⁶ *Hutchinson v Signature Security Systems Ltd & Anor* unreported, P Montgomery, 30 January 2007, CA 12/07

time they would have been employed if there had been consultation, e.g. in *Ayers v Advertising Works Ogilvy Ltd*⁴⁷ Mr Ayers was awarded four months lost wages as the Authority considered two months would have been a reasonable consultation period, and that after consultation, he would then have been given two months notice of his dismissal. Lost wages are also awarded if the process is so flawed it cannot be said with any certainty which of the potentially affected employees would have been selected for redundancy if a proper process had been followed.⁴⁸

The Court of Appeal in *Coutts Cars Ltd v Baguley*⁴⁹ also commented that it was "arguable, in principle, that the loss of opportunity arising from failure to consult should be brought into account as part of the remedy of reimbursement in settling the grievance."

After an employee is selected for redundancy - *an employer may still have obligations to an employee selected for redundancy.*

Redundancy compensation

Where the parties' employment agreement is silent on the issue of redundancy compensation the Court will not order its payment.⁵⁰ If the parties cannot agree on the interpretation of a redundancy clause the Court of Appeal has held that whether the Authority has jurisdiction to determine the amount of redundancy compensation payable depends upon the interpretation of the redundancy clause.⁵¹

Redundancy compensation was considered in *Vaughan v Canterbury Spinners Ltd*.⁵² The parties' redundancy clause obliged the employer to pay redundancy compensation, and to pay such amount of redundancy compensation as was proper at the time and in the circumstances of the particular redundancy. What was left for negotiation was simply the ascertainment of the amount that was proper given those circumstances. The Court stated that the level of compensation must be proper with regard to all the circumstances and can vary between employees e.g. due to differing lengths of service. It can also differ according to the company's financial position as far as it affects its ability to pay. Current industry practice can also be relevant.

"[Compensation] must be an amount that represents redundancy compensation of an amount that ordinary people involved in industry generally and in the particular branch of industry in question would recognise as amounting to a proper payment of redundancy compensation."

Questions over an employee's entitlement to redundancy compensation can also arise when the parties disagree over whether there is a redundancy situation. In *McCain Foods (NZ) Ltd v Service & Food Workers Union Inc*⁵³ the Court concluded that a

⁴⁷ *Ayers v Advertising Works Ogilvy Ltd* unreported, L Robinson, 20 October 2006, AA 324/06

⁴⁸ *Harris v Charter Trucks Ltd* unreported, Couch J, 11 September 2007, CC 16/07

⁴⁹ *Coutts Cars Ltd v Baguley* [2001] ERNZ 660

⁵⁰ *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601

⁵¹ *Canterbury Spinners Ltd v Vaughan* [2002] 1 ERNZ 255

⁵² *Vaughan v Canterbury Spinners Ltd* [2003] 2 ERNZ 495

⁵³ *McCain Foods (NZ) Ltd v Service & Food Workers Union Inc* [2004] 2 ERNZ 252

redundancy situation did arise when the employer closed one of its supermarkets and transferred the employees' roles from that supermarket to others operated by it. The employer was ordered to pay the employees redundancy compensation in accordance with the terms of their employment agreement.

Other assistance

In *Aoraki*, the Court of Appeal commented that "fair treatment may call for counselling, career and financial advice and retraining and related financial support." In *Harris*, the employee was offered no support or assistance to cope with the effects of the dismissal in circumstances where he had done no wrong and had no alternative employment prospects. It was held to be a case where a fair and reasonable employer would have provided the type of assistance referred to in *Aoraki*.

Redeployment

The Court of Appeal held that in "a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position."⁵⁴

In *Westpac Banking Corporation v Money* [2004] 1 ERNZ 576 a number of employees were made redundant but there was only one alternative vacant position. The vacancy was filled by another employee, unaffected by redundancy. The Court of Appeal held that the employer failed to comply with its contractual obligations to make "every reasonable endeavour" to find the redundant employees alternative positions by offering the vacancy to employees unaffected by redundancy.

Preferential rehiring

In *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*⁵⁵ the parties' collective employment agreement provided that workers whose employment ended due to redundancy would, where practicable and all other things being equal, be given preference for re-employment. The Authority held the employer could not refuse to rehire former employees based on matters that should have been resolved during the time the employees worked for the company.

Parental leave and redundancy

One area of redundancy law where employers seem to have difficulty meeting their responsibilities is when they are dealing with an employee on parental leave. Parental leave legislation and New Zealand's international obligations have been held to impose a higher standard on employers in parental leave redundancy cases.⁵⁶ The Court in *Lewis v Greene* held:

"An employer who is contemplating the redundancy of an employee on parental leave is bound to take extra precautions to ensure that she has an opportunity to be actively involved in the consultation process in a meaningful way that is at least equal to that of the employees who remain at work."

⁵⁴ *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739

⁵⁵ *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* unreported, D Asher, 12 February 2006, WA 27/06

⁵⁶ *Lewis v Greene* [2004] 2 ERNZ 55

In *Apaapa v Whitehouse Entertainment Ltd*⁵⁷ the employer reorganised its business while the employee was on parental leave. Ms Apaapa was not included in the process or given appropriate information. The Authority found that the employer had designed a false redundancy process to legitimise its actions. The redundancy was not genuine and the whole process had been conducted in bad faith. The employer had completely failed to understand its obligations under the Parental Leave and Employment Protection Act 1987. The employee was reimbursed for lost wages and awarded \$15,000 compensation.

In *Viegas v The Flower House (2005) Ltd*⁵⁸ the employee was made redundant when the employer stopped trading. There was no notice the shop was to be closed or discussion regarding redeployment options. The Authority could not safely conclude the redundancy was genuine. At time of the redundancy Ms Viegas was 4½ months pregnant and had told her employer she wished to take parental leave. Her difficulty in finding work after her dismissal was compounded by the understanding she was no longer eligible for statutory parental leave payments. Ms Viegas sought compensation from the Authority for loss of this benefit. While there is an express statutory provision to ensure employees whose employment ends during parental leave retain their entitlement to payment, the Authority commented that similar provision did not appear to have been made for those whose employment was terminated before the commencement of leave. The question of eligibility for payment in such cases has not been tested. As parental leave payments are a statutory entitlement not an obligation of employer they could not be described as a benefit of the employment relationship and the Authority could make no further order for compensation for their loss. The employee received \$5,000 compensation and lost wages from her dismissal until the date she would have started parental leave.

Conclusion

Personal grievance cases concerning redundancy are relatively common in New Zealand. The majority of these cases involve procedural failures by the employer. Common problems include employers failing to adequately consult with their employees, provide sufficient information or appropriately take into account the specific circumstances of each employee, especially in parental leave situations. When these procedural failures unjustifiably disadvantage an employee they will usually be compensated for the hurt and humiliation caused by the unfair process. Other entitlements, e.g. to redundancy compensation or preferential re-employment generally depend on the terms in the parties' employment agreement.

⁵⁷ *Apaapa v Whitehouse Entertainment Ltd* unreported, D King, 26 June 2006, AA 219/06

⁵⁸ *Viegas v The Flower House (2005) Ltd* unreported, Y Oldfield, 27 June 2007, AA 193/07

APPENDIX C

WAGE ADJUSTMENT REGULATIONS 1974

45. Implementation of equal pay—Nothing in regulation 44(1) of these regulations shall apply with respect to any increase in remuneration or work classification made for the purpose of implementing the Equal Pay Act 1972.

The expression "41" was substituted for the expression "37" or regulation 37A by regulation 6 of S.R. 1976/120 and "37" was substituted for "37A" by regulation 7 (3) of S.R. 1976/120.

PART III REDAUNDANCY

45a. Interpretation.—In this Part of these regulations, unless the context otherwise requires, "Employer" includes an employing authority within the meaning of Part III of these regulations;

"Ordinary pay" has the meaning assigned to it by the Annual Holidays Act 1944 II; and shall be deemed to include the cost of living allowance provided for in regulation 5 of these regulations;

"Redundant employee" means a worker or State employee whose employment is terminated by his employer if that action of the employer is attributable wholly or mainly to the fact that the position filled by that worker or employee has, or will become superfluous to the needs of the employer, and "redundant" and "State employee" have corresponding meanings; and "redundancy" has the meaning ascribed to that term in Part III of these regulations.

"Ordinary pay" The words in double square brackets were added by regulation 16 of S.R. 1976/137.

45b. Redundancy pay—(1) No employer shall pay any sum to any redundant employee by way of compensation for redundancy unless—

- (a) The payment of that sum is in accordance with the express provisions of an instrument, being a contract or a trust deed or a deed of settlement, being operative with the express provisions of this Part of these regulations and are still in force in the same terms at the time when the payment becomes due; or
- (b) Were in force immediately before its commencement of this Part of these regulations and are still in force in the same terms at the time when the payment becomes due; or
- (c) Apply to an employer as a party to the Severance Payments Agreement made between the New Zealand Master Builders' Federation Incorporated and the New Zealand Federation of Labour and dated the 24th day of March 1976, irrespective of whether the notice or agreement which makes the said Severance Payments Agreement applicable to the employer was signed or entered into before or after the commencement of this Part of these regulations; or
- (d) Provide for payment of a sum not greater than that permissible under paragraph (b) of this clause, and are not otherwise more favourable to the employee than those applying under that paragraph or under subclause (2) of this regulation; or
- (e) Have been specifically approved in accordance with regulation 45c of these regulations and are in force at the time when the payment becomes due; or

(b) The sum so paid to the redundant employee does not exceed 2 percent of the total of all ordinary pay derived by him under his contract of employment with the employer during the 12 months immediately preceding the date on which the employee is given notice of his redundancy, multiplied by 29 or by the number of years immediately preceding that date (including as proportionate parts of years, months or months) during which he has been in the continuous employment of the employer, whichever number is the less.

(2) No redundant employee shall qualify for a payment in terms of paragraph (b) of subclause (1) of this regulation, if he has had less than 12 months continuous employment with the employer immediately before the date on which he is given notice of his redundancy.

(3) For the purposes of this regulation, any sum which is paid by an employer to a redundant employee in lieu of notice terminating the employment of that employee and which exceeds the amount of the wages payable in respect of the ordinary period of notice specified in the instrument that governs the employee's conditions of employment shall, to the extent that it so exceeds that amount, be deemed to be a payment by way of compensation for redundancy.

45c. Approval of redundancy provisions—(1) Where any party to an instrument, or to an agreement reached under section 16 of the Agricultural Workers Act 1962, desires to have included in that instrument or in any Order in Council giving effect to any such agreement, by way of compensation for redundancy, being provisions which shall provide for the payment of a sum that exceeds or is likely to exceed that permissible under paragraph (b) of regulation 45b (1) of these regulations or which otherwise may be favourable to redundant employees than those applying under that paragraph or under subclause (2) of regulation 45b or in any such Order in Council, the Industrial Commission may, on the application of that party, approve the inclusion of those provisions in the instrument or in any such Order in Council if it is satisfied that there are exceptional circumstances that render the sum or conditions provided for under the said paragraph or subclause clearly inadequate or inappropriate in the particular case.

(2) The Industrial Commission may approve the inclusion of those provisions with or without amendment, and either conditionally or unconditionally, but nothing in subclauses (7) to (9) of regulation 7 of these regulations shall apply in respect of any approval given by the Commission pursuant to this regulation.

(3) In considering any application for approval under subclause (1) of this regulation, the Industrial Commission shall not be obliged to regard any existing decision or existing provision or existing agreement relating to redundancy as a precedent.

(4) The Aircrew Services Tribunal, the Waterfront Industry Tribunal, and the Aircrew Services Tribunal may in respect of groups of employees whose conditions of employment are governed by instruments of consent within their respective jurisdictions exercise, subject to subclauses (2) and (3) of this regulation, the powers conferred on the Industrial Commission by subclause (1) of this regulation.

APPENDIX D

REDUNDANCY TABLES AND GRAPHS

The following tables have been reproduced with the kind permission of Victoria University of Wellington's Industrial Relations Centre.

Redundancy notice by sector and industry (2007)

	<4 weeks (%)	4 weeks (%)	5 to 8 weeks (%)	>8 weeks (%)	Other (%)	Silent (%)	Coverage (000s)
All settlements	7	57	19	4	0	13	287.4
Private sector	9	65	22	2	0	3	121.6
Govt core	1	52	19	6	0	23	143.8
Govt - trading	78	16	0	4	0	2	8.2
Local govt - core	2	81	4	2	0	11	10.4
Local govt - trading	23	63	5	0	1	8	3.4
Agriculture etc	0	100	0	0	0	0	0.3
Mining	14	74	2	1	0	9	0.7
Food manufacturing	3	78	13	0	0	6	18
Textile mfg	21	69	1	0	3	6	3.5
Wood/paper mfg	3	82	10	0	0	4	5.7
Printing	10	68	21	0	0	1	3.5
Chemical mfg	8	89	2	0	0	0	5.4
Mineral mfg	5	76	10	0	0	2	1.5
Metals mfg	5	90	4	0	0	0	5.2
Machinery mfg	5	59	34	0	2	0	9.2
Other mfg	12	83	5	0	0	1	0.8
Utilities	1	82	7	0	0	10	2
Construction	50	45	0	0	0	4	4.9
Wholesaling	1	92	5	0	0	2	1
Food retailing	1	98	1	0	0	0	7.8
Other retailing	16	80	4	0	0	0	4.2
Accom., cafes, etc	15	82	1	0	0	2	1.4
Transport	26	37	33	0	0	3	13.6
Storage	15	61	13	0	0	11	0.3
Communication	97	3	0	0	0	0	6.5
Finance	0	3	97	0	0	0	11
Insurance	0	10	90	0	0	0	1.9
Business services	18	45	6	26	0	5	6.3
Govt admin. & defence	1	77	7	2	0	13	32.5
Education	0	23	32	9	0	36	74.9
Health	1	88	5	0	0	6	48.7
Community services	3	75	4	2	0	16	5.3
Other com. services	3	83	8	4	0	2	8.9

Compensation for the first year of service by sector and industry (2007)

	No payment (%)	1 to 3 weeks (%)	4 to 5 weeks (%)	6 weeks (%)	7 to 10 weeks (%)	>10 weeks (%)	Other (%)	Silent (%)	Coverage (000s)
All settlements	3	4	15	37	27	4	7	2	287.4
Private sector	7	6	24	27	29	2	1	6	121.6
Govt core	0	2	9	46	23	6	14	0	143.8
Govt - trading	3	1	15	76	5	5	0	0	8.2
Local govt - core	1	1	14	57	25	1	0	0	10.4
Local govt - trading	4	3	27	32	28	1	3	2	3.4
Agriculture etc	2	54	32	7	0	0	0	5	0.3
Mining	22	1	14	31	0	8	8	15	0.7
Food manufacturing	2	2	26	16	39	11	0	3	18
Textile mfg	2	24	44	21	0	0	3	7	3.5
Wood/paper mfg	4	5	9	50	33	0	0	0	5.7
Printing	3	4	41	20	29	0	0	2	3.5
Chemical mfg	2	2	18	24	18	3	0	33	5.4
Mineral mfg	7	6	21	41	5	0	0	21	1.5
Metals mfg	35	4	7	25	21	2	0	7	5.2
Machinery mfg	7	5	20	13	49	0	1	5	9.2
Other mfg	13	5	49	17	4	0	0	12	0.8
Utilities	12	2	10	24	43	1	2	5	2
Construction	7	42	29	16	1	0	2	3	4.9
Wholesaling	1	11	16	59	9	0	0	4	1
Food retailing	3	0	1	76	19	0	0	0	7.8
Other retailing	0	4	29	60	0	0	0	7	4.2
Accom., cafes, etc	4	8	67	15	0	0	0	6	1.4
Transport	3	5	18	36	26	3	5	4	13.6
Storage	11	0	44	11	1	0	3	30	0.3
Communication	0	0	3	0	97	0	0	0	6.5
Finance	0	0	2	1	97	0	0	0	11
Insurance	0	0	0	3	96	0	0	0	1.9
Business services	24	1	5	54	5	0	4	7	6.3
Govt admin. & defence	0	5	17	29	23	20	6	0	32.5
Education	0	1	4	34	34	3	24	0	74.9
Health	2	2	12	79	4	0	0	1	48.7
Community services	9	12	62	12	0	1	0	4	5.3
Other com. services	3	3	60	21	9	1	0	2	8.9

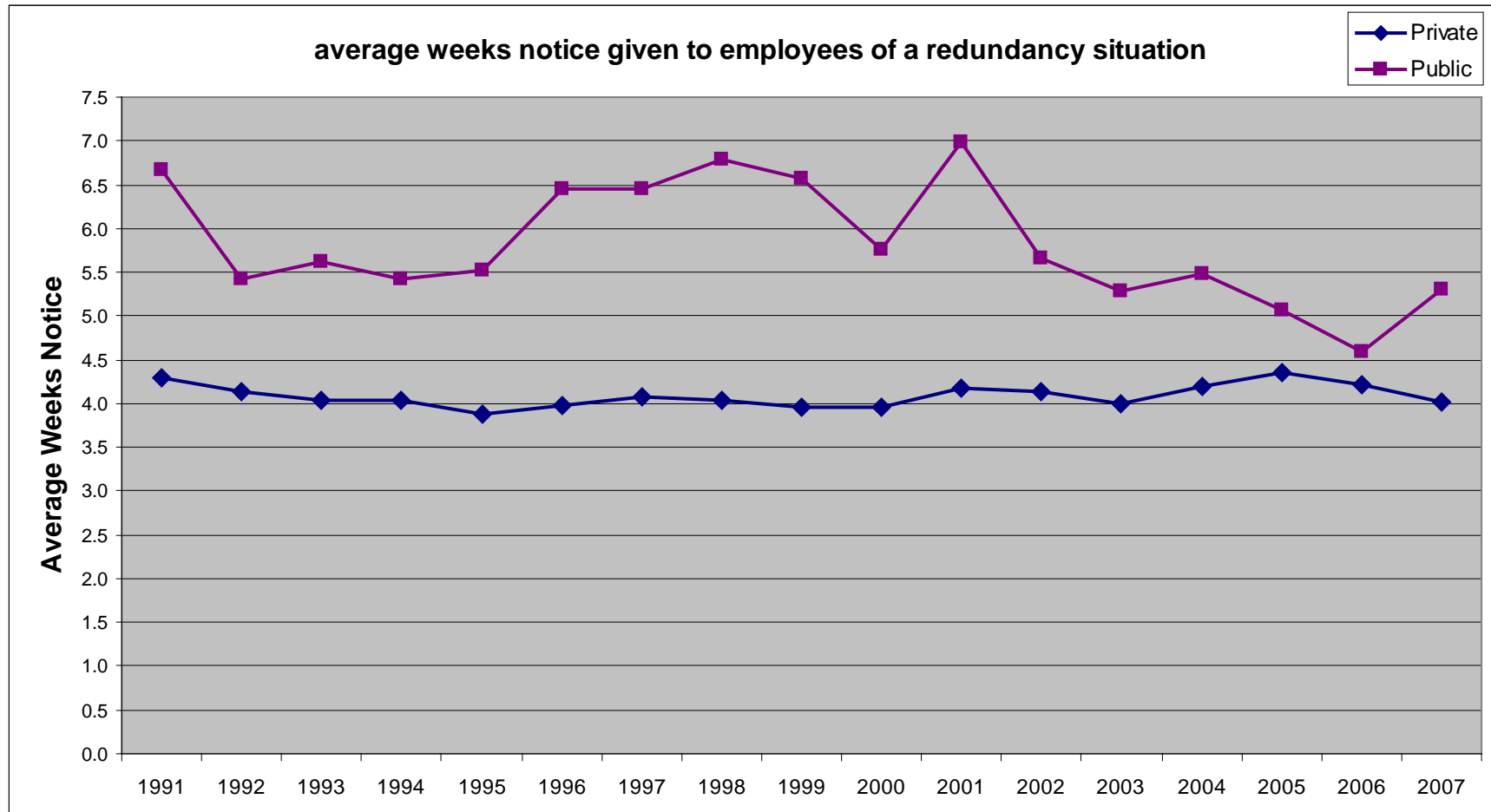
Compensation for subsequent years of service by sector and industry (2007)

	No payment (%)	1 week (%)	2 weeks (%)	3 to 4 weeks (%)	>4 weeks (%)	Other (%)	Silent (%)	Coverage (000s)
All settlements	4	4	59	6	0	25	2	287.4
Private sector	8	7	55	9	0	16	5	121.6
Govt core	1	2	57	4	0	37	0	143.8
Govt - trading	0	0	98	0	0	2	0	8.2
Local govt - core	9	1	86	1	0	2	0	10.4
Local govt - trading	9	1	86	1	0	3	0	3.4
Agriculture etc	25	54	16	0	0	0	5	0.3
Mining	36	0	32	4	0	13	15	0.7
Food manufacturing	3	2	54	0	0	38	3	18
Textile mfg	3	23	39	0	0	28	7	3.5
Wood/paper mfg	6	1	78	3	0	11	0	5.7
Printing	0	10	59	24	0	4	2	3.5
Chemical mfg	1	2	52	10	0	3	33	5.4
Mineral mfg	7	8	62	0	2	1	21	1.5
Metals mfg	35	4	53	0	0	1	7	5.2
Machinery mfg	9	4	44	1	0	37	5	9.2
Other mfg	13	26	49	0	0	0	12	0.8
Utilities	25	2	59	4	0	6	5	2
Construction	7	24	29	0	0	37	3	4.9
Wholesaling	2	4	61	0	0	29	4	1
Food retailing	3	0	96	0	0	0	0	7.8
Other retailing	1	9	82	0	0	2	7	4.2
Accom., cafes, etc	14	13	50	3	0	15	6	1.4
Transport	5	20	63	2	0	7	4	13.6
Storage	11	3	53	0	0	3	30	0.3
Communication	0	0	100	0	0	0	0	6.4
Finance	0	0	2	79	0	20	0	11
Insurance	0	0	100	0	0	0	0	1.9
Business services	26	3	55	6	0	4	7	6.3
Govt admin. & defence	1	5	61	12	1	21	0	32.5
Education	1	1	36	2	0	61	0	74.9
Health	3	1	93	0	0	1	1	48.7
Community services	26	9	57	0	0	5	4	5.3
Other com. services	5	2	83	1	0	7	2	8.9

Maximum compensation payable by sector and industry (2007)

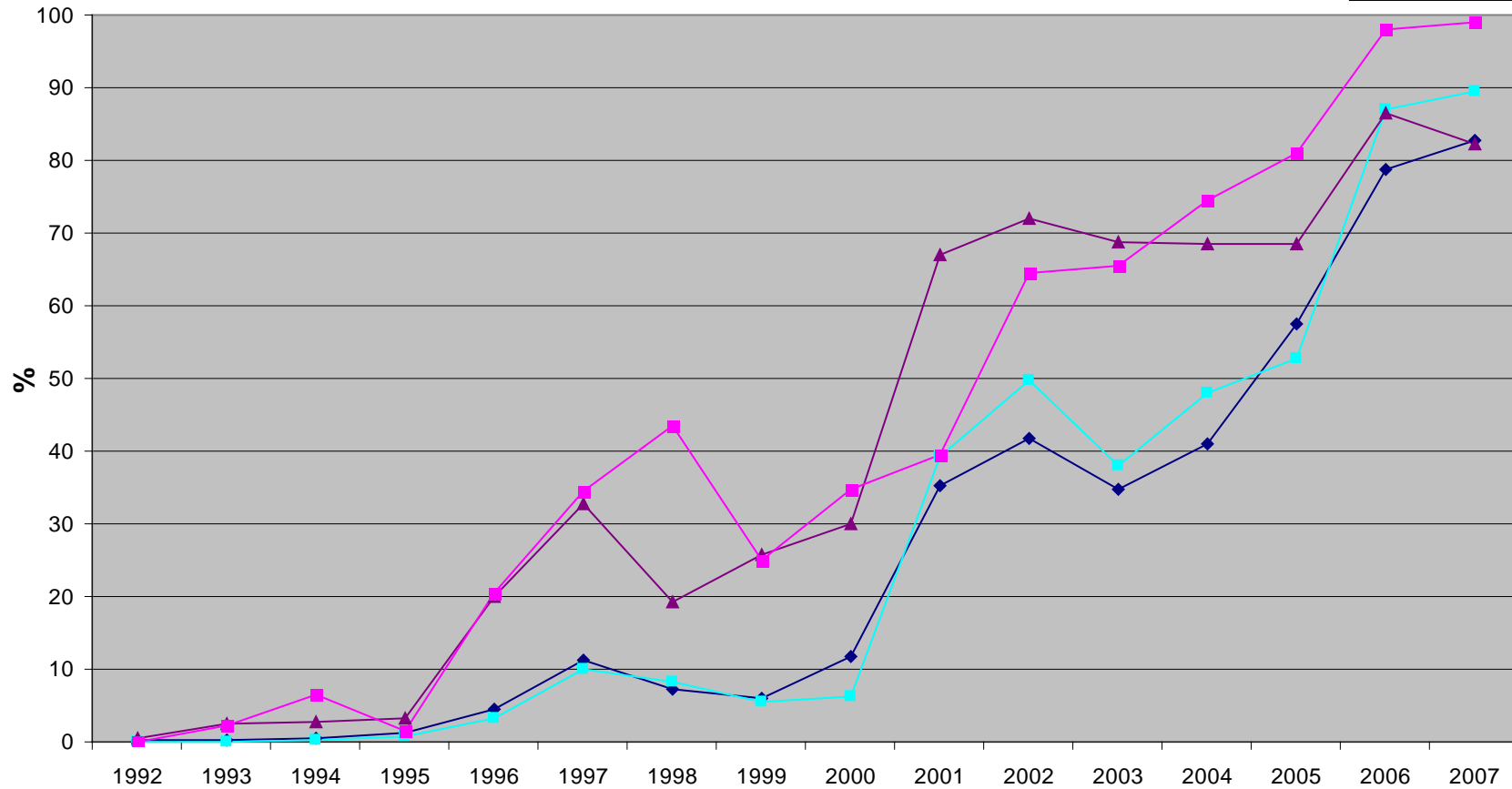
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Unlimited	Coverage (000s)
All settlements	3	5	38	30	9	4	10	0	287.4
Private Sector	7	9	27	17	21	1	19	0	121.6
Govt Core	0	2	46	42	1	7	1	0	143.8
Govt - trading	0	2	80	13	5	0	0	0	8.2
Local govt - core	1	9	23	34	1	6	27	0	10.4
Local govt - trading	4	5	20	37	5	3	26	0	3.4
Argriculture	2	28	0	8	0	0	61	0	2.5
Mining	17	15	8	29	3	0	28	0	0.3
Food manufacturing	4	1	7	17	44	3	24	0	0.7
Textile manufacturing	2	10	38	22	0	0	28	0	3.5
Wood/paper manufacturing	3	3	13	47	11	1	22	0	5.7
Printing	0	7	35	9	4	0	44	0	3.5
Chemical manufacturing	1	12	6	20	3	1	57	0	5.4
Mineral prod manufacturing	7	5	20	29	4	0	36	0	1.5
Metal prod manufacturing	35	5	7	19	7	0	28	0	5.2
Machinery manufacturing	7	7	9	13	41	0	24	0	9.2
Other manufacturing	13	4	22	8	0	0	52	0	0.8
Utilities	12	15	18	26	4	0	24	0	2.0
Construction	7	22	43	9	1	2	18	0	4.9
Wholesaling	1	31	25	16	4	0	24	0	1.0
Food retailing	3	0	76	20	0	0	1	0	7.8
Retailing	0	8	77	4	0	1	11	0	4.2
Accommodation/restaurants	4	18	56	13	0	0	10	0	1.4
Transport	3	6	23	29	28	3	8	0	13.6
Storage	11	22	22	0	0	0	44	0	0.3
Communication services	0	0	89	11	0	0	0	0	6.5
Finance	0	0	19	0	79	0	2	0	11.0
Insurance	0	0	57	10	0	0	33	0	1.9
Property and business services	24	7	21	34	0	0	14	0	6.3
Government admin and defence	0	5	14	46	2	26	8	0	32.5
Education	0	2	81	15	0	0	1	0	74.9
Health services	2	6	14	73	0	0	5	0	48.7
Community Services	9	31	49	1	0	2	10	0	5.3
Other services	3	12	9	34	5	22	15	1	8.9

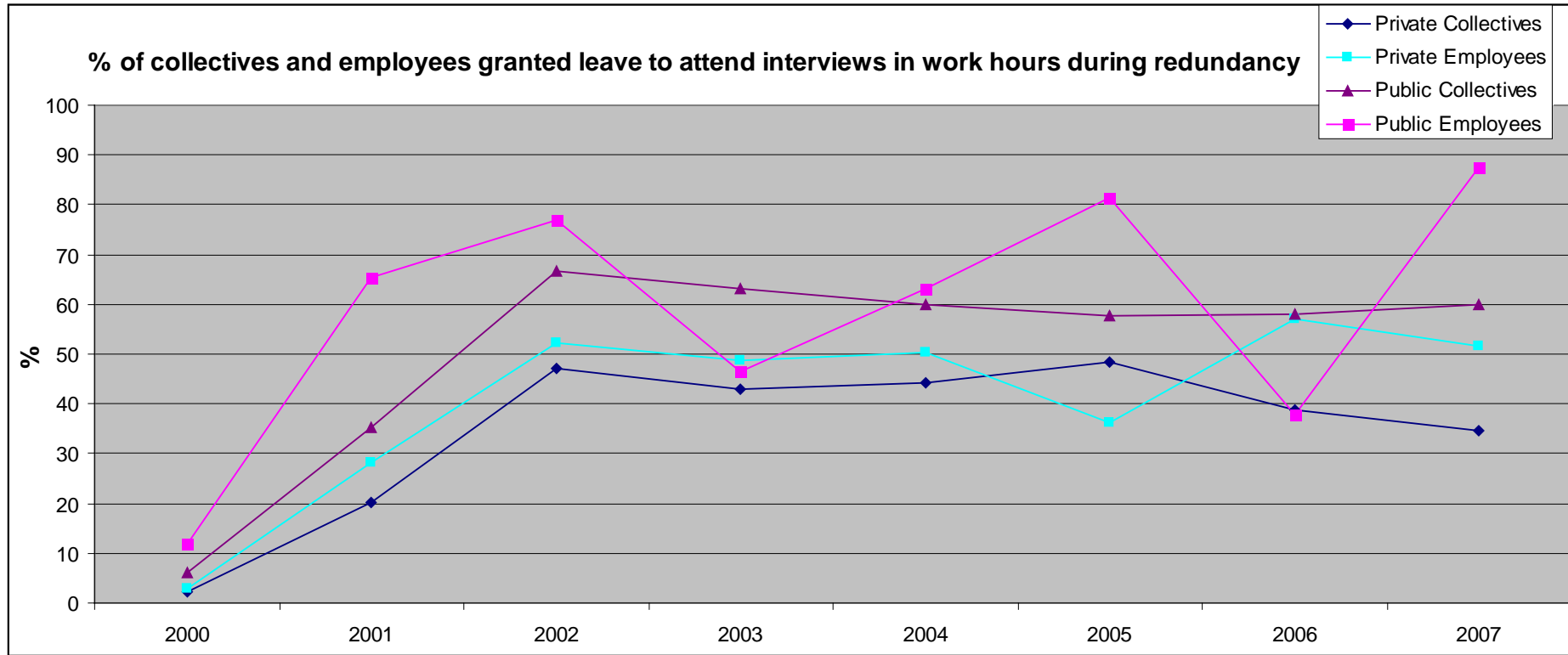
The following charts and graphs have been produced from the Department of Labour's collective database



% of collectives and employees where the employer consults with the union/employees over a redundancy situation

- ◆ Private Collectives
- Private Employees
- ▲ Public Collectives
- Public employees





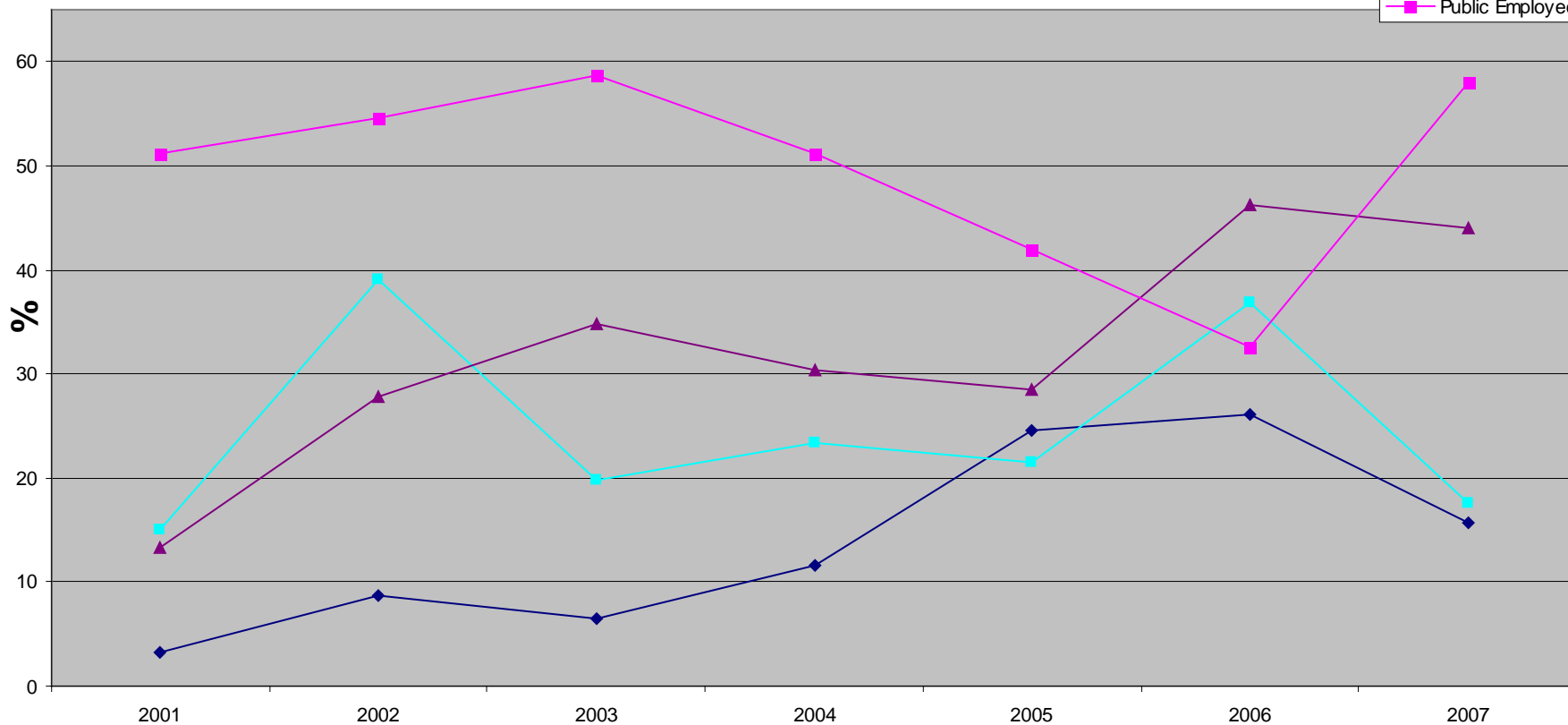
% of collectives and employees offered counselling services during redundancy

- ◆ Private Collective
- Private Employees
- ▲ Public Collectives
- Public Employees

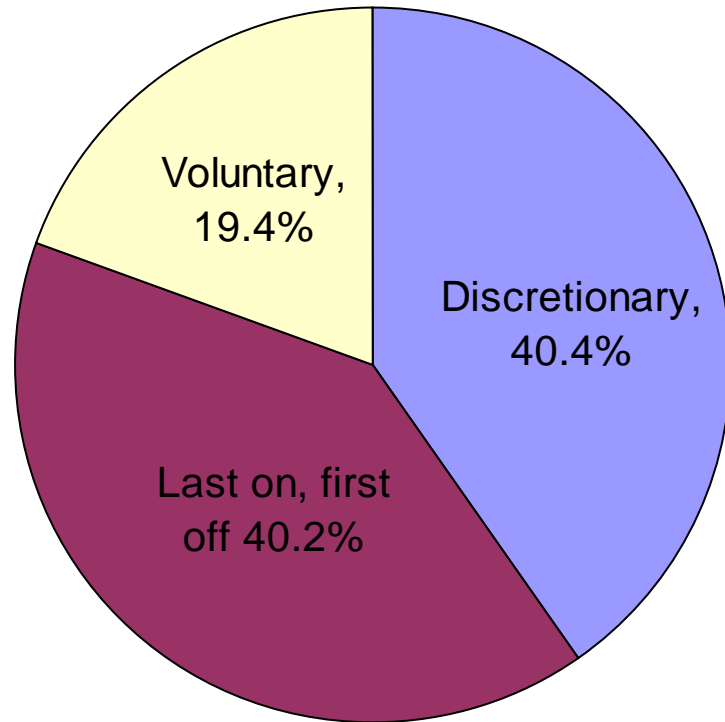


% of collectives and employees that are offered assistance to relocate during redundancy

- ◆ Private Collectives
- Private Employees
- ▲ Public Collectives
- Public Employees

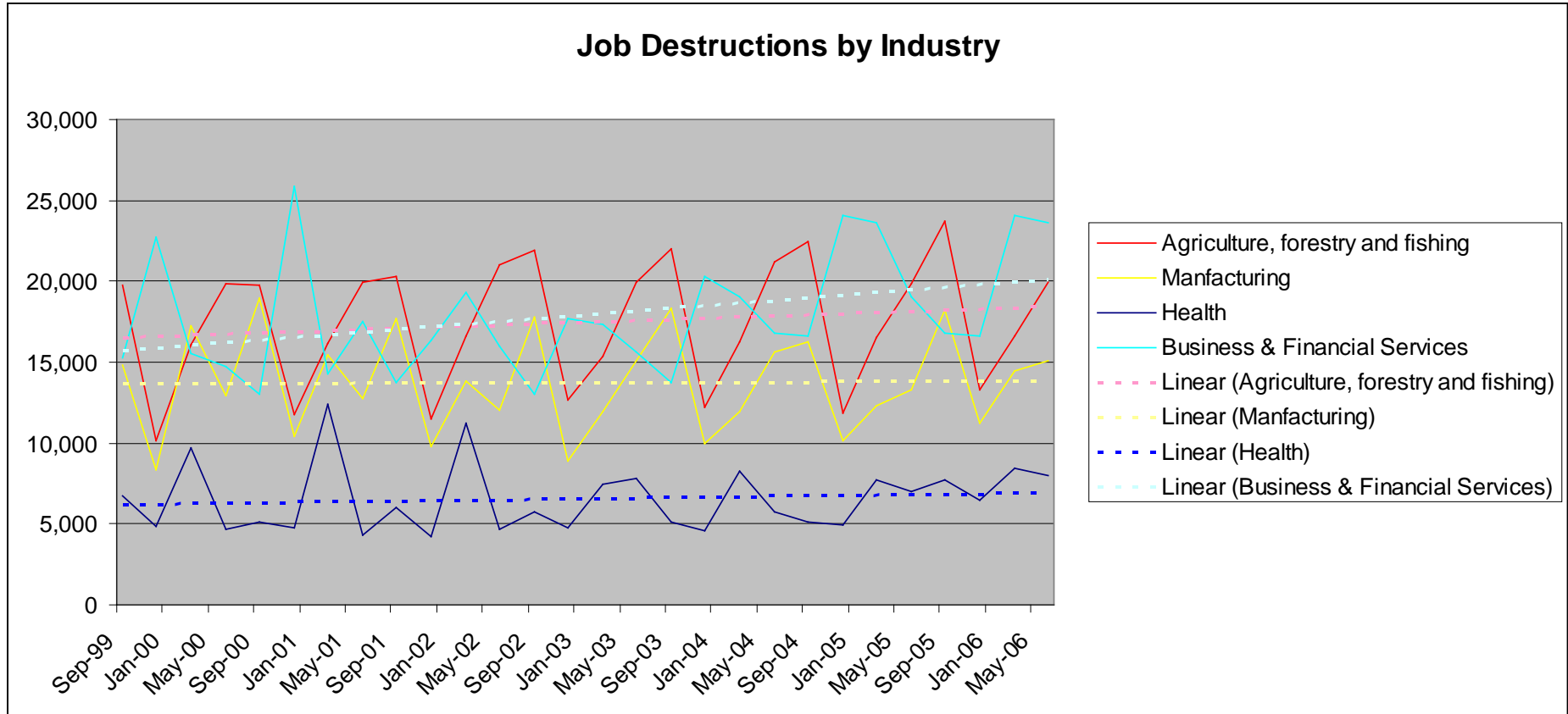


where selection method present: method of selecting redundant employees

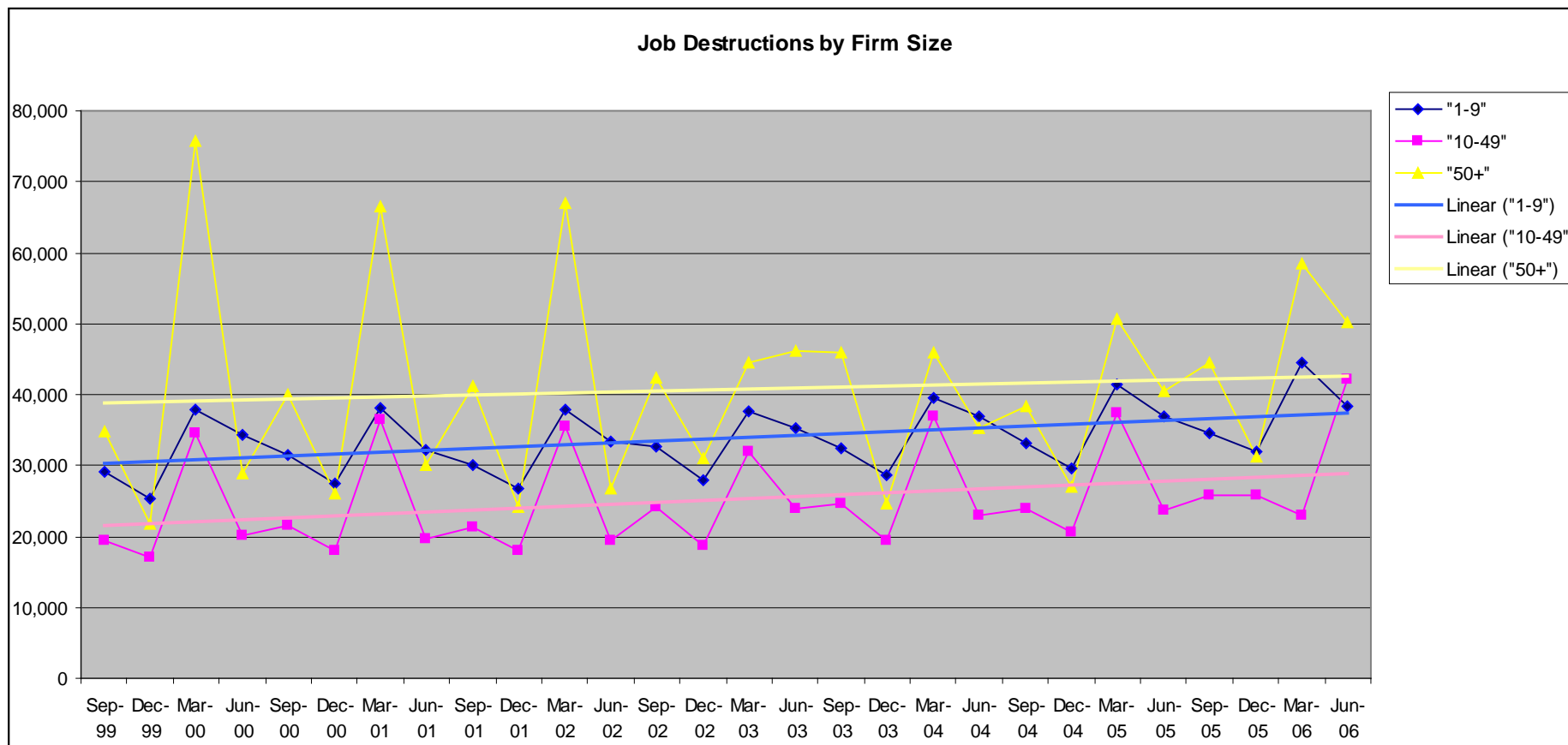


APPENDIX E

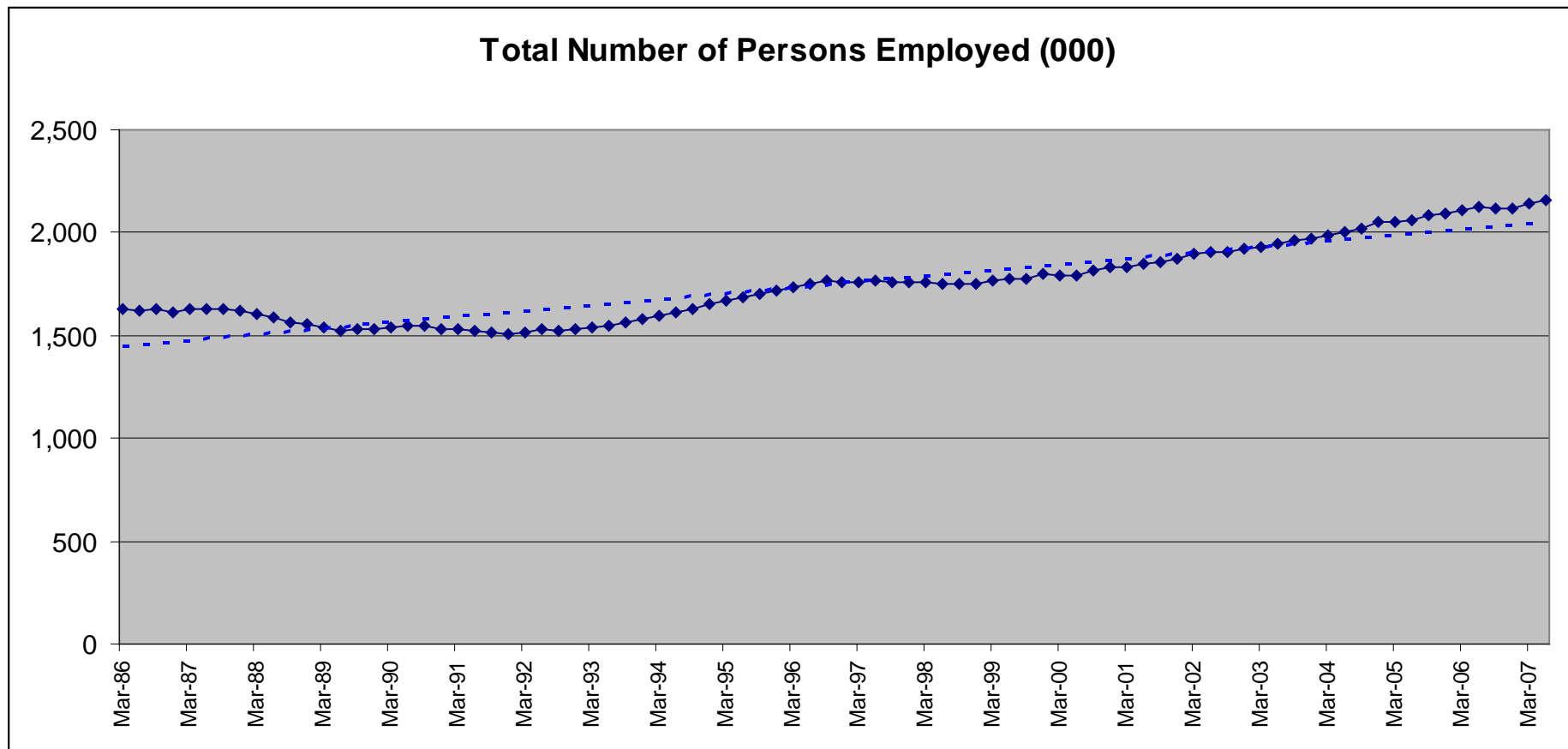
STATISTICS NEW ZEALAND - LEED DATA ANALYSIS



Source: Statistics New Zealand; Linked Employer-Employee Data Tables



Source: Statistics New Zealand; Linked Employer-Employee Data Tables



APPENDIX F

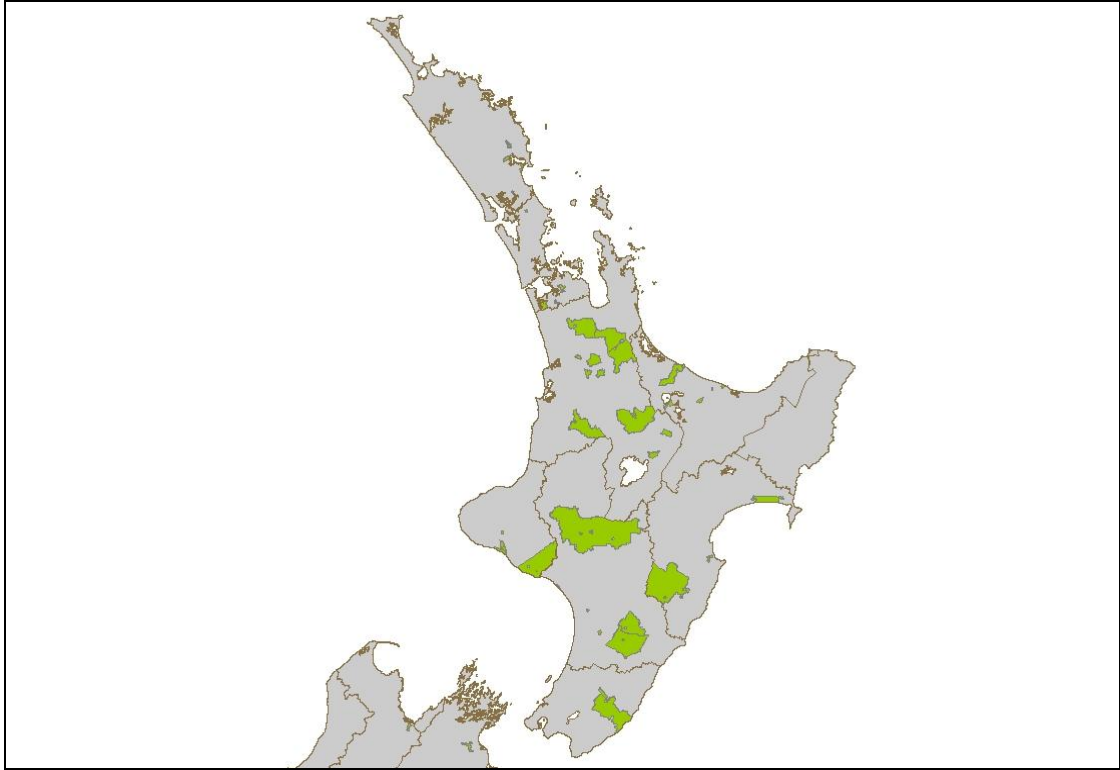
SUMMARY OF REDUNDANCY AND RESTRUCTURING EVENTS FROM MEDIA ARTICLES

Company	Redundancy Date	Number	Job Type	Reported Reason	Location
Feltex	-	180	Several	Business collapse	Mainly Christchurch
Fonterra	-	130	IT jobs	Outsourcing to an Indian company as part of a strategy to cut costs and lift efficiency.	-
Fonterra	-	120	Cheese processing	-	Panmure
Fonterra	-	100	Innovation centre	-	Palmerston North
Gale Pacific	-	100	Textile manufacturing	Relocating manufacturing operations to China.	Canterbury
Gisborne Milk	Dec-07	-	Milk station work	Various	Gisborne
GPC Electronics	10-Dec	-	Electronics manufacturing	The volatile New Zealand dollar	Christchurch
Hunter (1998) Ltd Engineered Timbers		25 aprx	Timber workers	The high NZ dollar, high production costs, and several cancelled projects in Fiji.	Richmond
Medlab Central	-	10	Medical technicians	A merger of services	Wanganui
Nelson Diagnostic Laboratories	Nov-06	42	Lab Technicians	Contract cancellation	Nelson
Norsewear	-	22	Textile manufacturing	Take over	Wanganui
Postie Plus Group	Oct-07	9	Import distribution	Relocating two of its three operations to Christchurch	Westport
Skellerup	Before December 2009	100	Rubber exporting	The high NZ dollar	Christchurch
SkyCity	Before December 2009	230	Mainly back-of-house operations and support functions	Cost cutting	Auckland
Target Pest Enterprises Ltd	Oct-07	approx 280	Pest management	Company in receivership	Christchurch
Vodafone	Nov-07	-	Call centre	Relocating operations to Egypt	Auckland
WECA International	Aug-07	11	Building	The high New Zealand dollar	Whitianga
Whisper Tech	Before July 2008	35	Manufacturing heating units	-	Christchurch
Wickliffe	Mar-08	48	Printers	Shift of operations to Auckland	Dunedin
PPCS	May-08	446	Meat workers in sheep processing plant	Resizing processing capacity to livestock availability	Oringi (Hawkes Bay)
Auckland War Memorial and Museum	[Reported May-08]	aprx 66-99	Technical, conservation and registration museum staff	Restructuring	Auckland

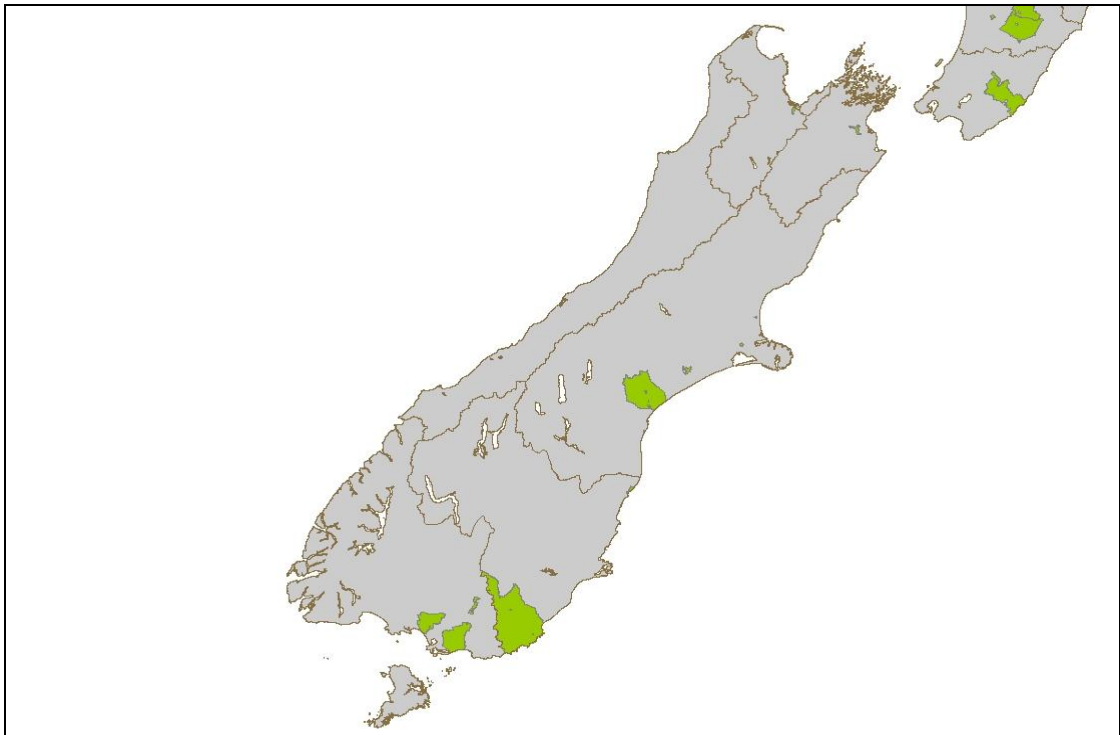
Company	Redundancy Date	Number	Job Type	Reported Reason	Location
Provenco Group and Cadmus Technologies	[Reported May-08]	aprx 100	EFTPOS staff	Merged firms	-
Victoria University College of Education	[Reported May-08]	29	Academic and administration staff	Shift in University's focus to research and research-led teaching	Wellington
PPCS	[Reported May-08]	138	Meat workers at deer processing plant	Resizing processing capacity to livestock availability	Dunedin
DOC	Jun-08	60	DOC workers	To enable employer to meet budget	Half regional, half Wellington
Kumfs	[Reported May-08]	23	Factory workers at shoe manufacturing plant	Changes in customer demand resulting in need for offshore manufacturing	South Auckland
NZPA	[Reported 04 June-08]	7	Journalists	Cost cutting	
Alpha Aviation	[Reported 24 January-08]	70	Not specified	Company in liquidation	Hamilton
Fisher and Paykel	[Reported 28 February-08]	430 (total)	Engineers + others unspecified	Housing market downturns in US, Australia and NZ / High dollar and increasing manufacturing costs	Mosgiel
Team New Zealand	[Reported 10 March-08]	20	Unspecified	Company struggling to stretch 2 year budget over 4 years	
TVNZ	[Reported 11 March-08]	125	Unspecified		
Laminex Group (Division of Fletcher Building)	[Reported 20 March-08]	60	Unspecified	Production moving to China (Shanghai)	Auckland
NZ Police (Tauranga police station)	[Reported 25 March-08]	5	Civilian jailers	Introduction of Bail Amendment Act – Station claimed introduction of Act meant less prisoners being kept at station therefore jailers no longer required	
Wrightson	[Reported 14 April-08]	6	Administrative	Consolidation of businesses	Hawkes Bay
Sentinel	[Reported 23 April-08]	10	Sales	Review of funding arrangements. Conditions in property and lending markets deteriorate.	Unknown
McCain	[Reported 2 May-08]	30	Unspecified	Flat domestic sales, ageing plant and declining exports to Japan, China and South East Asia	Timaru
Kopu sawmill (Carter Holy Harvey)	[Reported 7 May-08]	145	Unspecified	Industry excess capacity	Thames

APPENDIX G

Map One: North Island Area Units with more than 20 percent employment concentrated in a single industry



Map Two: South Island Area Units with more than 20 percent employment concentrated in a single industry



Area units with high proportion of employment in a single industry – Business Demography Survey 2007

Territorial authority	Area unit	ANZSIC96 L3 industry	Maximum share of AU employment	Total industry in AU	Maximum industry employment in AU
Timaru District	Pareora	C211 Meat and Meat Product Manufacturing	95.2%	620	590
South Taranaki District	Ohawe Beach	C212 Dairy Product Manufacturing	89.2%	930	830
Waitaki District	Pukeuri	C211 Meat and Meat Product Manufacturing	88.5%	1310	1160
Southland District	Waianiwa	C211 Meat and Meat Product Manufacturing	82.5%	2920	2410
Franklin District	Glenbrook	C271 Iron and Steel Manufacturing	80.0%	1750	1400
South Taranaki District	Tawhiti	C211 Meat and Meat Product Manufacturing	78.8%	800	630
Wairoa District	Whakaki	C211 Meat and Meat Product Manufacturing	72.3%	1010	730
Tararua District	Papatawa	C211 Meat and Meat Product Manufacturing	72.2%	900	650
Gore District	Mataura	C211 Meat and Meat Product Manufacturing	71.9%	1350	970
Ashburton District	Fairton	C211 Meat and Meat Product Manufacturing	71.2%	2080	1480
Waikato District	Horotiu	C211 Meat and Meat Product Manufacturing	64.6%	790	510
Southland District	Edendale Community	C212 Dairy Product Manufacturing	59.6%	520	310
Kaipara District	Maungaturoto	C212 Dairy Product Manufacturing	53.8%	520	280
Waitomo District	Waipa Valley	C211 Meat and Meat Product Manufacturing	52.3%	860	450
Whakatane District	Edgecumbe	C212 Dairy Product Manufacturing	51.4%	740	380
Matamata-Piako District	Waihou-Walton	C211 Meat and Meat Product Manufacturing	48.9%	2250	1100
South Taranaki District	Makakaho	C211 Meat and Meat Product Manufacturing	47.7%	650	310
South Taranaki District	Eltham	C211 Meat and Meat Product Manufacturing & C212 Dairy Product Manufacturing	47.4%	1940	920
Western Bay of Plenty District	Rangiuru	C211 Meat and Meat Product Manufacturing	46.3%	1470	680
Hastings District	Karamu	C213 Fruit and Vegetable Processing	46.0%	1370	630
Carterton District	Waingawa	C232 Other Wood Product Manufacturing	45.9%	610	280
South Waikato District	Kinleith	C233 Paper and Paper Product Manufacturing	45.5%	660	300
Rotorua District	Whaka	L781 Scientific Research	45.3%	860	390
Gore District	Charlton	C211 Meat and Meat Product Manufacturing	44.8%	670	300

Territorial authority	Area unit	ANZSIC96 L3 industry	Maximum share of AU employment	Total industry in AU	Maximum industry employment in AU
Franklin District	Paerata-Cape Hill	L786 Other Business Services	44.2%	520	230
Southland District	Waituna	C211 Meat and Meat Product Manufacturing	44.1%	930	410
South Waikato District	Wawa	C232 Other Wood Product Manufacturing	43.1%	510	220
Matamata-Piako District	Springdale	C212 Dairy Product Manufacturing	42.7%	820	350
Whakatane District	Orini	C233 Paper and Paper Product Manufacturing	42.6%	610	260
Clutha District	Clutha	C211 Meat and Meat Product Manufacturing	39.8%	2610	1040
Rangitikei District	Bulls	C211 Meat and Meat Product Manufacturing	39.4%	940	370
Taupo District	Wairakei-Aratiatia	C231 Log Sawmilling and Timber Dressing	35.8%	1590	570
Waipa District	Lake Cameron	C282 Other Transport Equipment Manufacturing	35.1%	940	330
Manawatu District	Longburn	C212 Dairy Product Manufacturing	34.8%	660	230
Waikato District	Eureka	L781 Scientific Research	33.5%	1970	660
Waitaki District	Orana Park	C221 Textile Fibre, Yarn and Woven Fabric Manufacturing	33.0%	940	310
Whangarei District	Springs Flat	C212 Dairy Product Manufacturing	32.4%	1110	360
Central Hawke's Bay District	Tikokino	C211 Meat and Meat Product Manufacturing	31.5%	1810	570
Kawerau District	Kawerau	C233 Paper and Paper Product Manufacturing	30.5%	3110	950
Rotorua District	Ngapuna	C231 Log Sawmilling and Timber Dressing	29.9%	2340	700
Wanganui District	Castlecliff South	C211 Meat and Meat Product Manufacturing & C212 Dairy Product Manufacturing	28.8%	800	230
Waipa District	Hautapu	C212 Dairy Product Manufacturing	29.4%	1260	370
Selwyn District	Lincoln	L781 Scientific Research	28.0%	2110	590
Rotorua District	Reporoa	C212 Dairy Product Manufacturing	27.8%	540	150
Hastings District	Whakatu	C211 Meat and Meat Product Manufacturing	27.5%	2690	740

Territorial authority	Area unit	ANZSIC96 L3 industry	Maximum share of AU employment	Total industry in AU	Maximum industry employment in AU
Papakura District	Ardmore	C282 Other Transport Equipment Manufacturing	26.8%	710	190
Waikato District	Waerenga	C231 Log Sawmilling and Timber Dressing	26.0%	500	130
Wanganui District	Balgownie	C211 Meat and Meat Product Manufacturing	25.6%	2030	520
Timaru District	Orari	C212 Dairy Product Manufacturing	25.4%	2050	520
Tasman District	Ranzau	C232 Other Wood Product Manufacturing	25.2%	1030	260
Tararua District	Mangatainoka	C212 Dairy Product Manufacturing	25.0%	560	140
Rotorua District	Owhata East	C254 Other Chemical Product Manufacturing	25.0%	520	130
Rodney District	Wellsford	C276 Fabricated Metal Product Manufacturing	24.5%	940	230
Central Hawke's Bay District	Waipukurau	C211 Meat and Meat Product Manufacturing	24.1%	2410	580
Whangarei District	Marsden Point-Ruakaka	C251 Petroleum Refining	24.1%	1330	320
Carterton District	Te Wharau	C211 Meat and Meat Product Manufacturing	23.2%	560	130
Waimakariri District	Kaiapoi North	C286 Industrial Machinery and Equipment Manufacturing	21.1%	710	150
Ruapehu District	Tangiwai	C233 Paper and Paper Product Manufacturing	21.1%	710	150
Whangarei District	Otaika-Portland	C263 Cement, Lime, Plaster and Concrete Product Manufacturing	21.1%	570	120
Papakura District	Papakura South	C216 Bakery Product Manufacturing	20.0%	2000	400
Marlborough District	Omaka	C282 Other Transport Equipment Manufacturing	20.0%	1500	300

Source: Business Demography Survey 2007, Statistics New Zealand

APPENDIX H

ANALYSIS OF CONSULTATION

Introduction

Twenty-two written submissions were received, covering a cross-section of views from individuals, businesses, union representatives and groups representing human resource professionals, community law advisers and academics. A full list of the submitters is attached as Annex A.

The submissions highlighted a clear division of views on the adequacy of the current legal framework relating to restructuring and redundancy. Fourteen submissions generally supported the current framework as adequate, while eight submitted that the current framework was not adequate and advocated changes.

Adequate	Not Adequate
Human Resources Institute of New Zealand (HRINZ)	Helen Brosnan
Tom Ryan (Manager Accounts, NZ Wool Testing Authority Limited)	Angelina Matekohi (<i>National Secretary of Tuia Union Incorporated</i>)
Recruitment and Consulting Services Association Ltd (RCSA)	Bob Hewitt ³
New Zealand Manufacturers and Exporters Association	Community Law Canterbury
Employers and Manufacturers Association (Northern) Inc	Himanshu Khamar
Progressive Enterprises Limited (but "supports a review") ¹	Finsec (<i>Union representing workers in the finance sector</i>)
Registered Master Builders Federation	Dunedin Community Law Centre
ECANZ	Centre for Work and Labour Market Studies, AUT University
Air New Zealand Limited	
Meat Industry Association	
Ports of Auckland Ltd ²	
Telecom Corporation of New Zealand Ltd	
New Zealand Institute of Chartered Accountants	
Small Business Advisory Group (SBAG)	

Common themes to emerge from the submissions are outlined below, followed by an analysis of the submissions in terms of the Advisory Group's main Terms of Reference (Consultation, Notice, Mass Redundancy, and Compensation). Specific issues raised in submissions are then examined.

¹ While generally supportive of the current framework, PEL suggests clarification of some issues.

² Two submissions were received, from the Manager and Group Manager of Human Resources, and are treated as one for the purposes of this analysis.

³ This submission related solely to the tax treatment of redundancy payments.

Common themes in submissions

Summary

Views of those advocating status quo	Views of those advocating change
<ul style="list-style-type: none">• Current law provides workable platform• "One size fits all" legislation inappropriate to widely varying circumstances of restructuring/ redundancy situations• Flexibility, not regulation, is needed for business in global market and to promote productivity and innovation• Compliance costs already heavy, particularly for SMEs• Management prerogative is fundamental tenet	<ul style="list-style-type: none">• Many workers unable to negotiate redundancy provisions and require statutory protection• Good faith requirements of ERA overly broad and often avoided• Compensation should be statutorily prescribed (and tax-free)• Consultation and notice provisions should be strengthened• Clarification of law/ statutory definitions needed• Education about rights and responsibilities needed

Views of those advocating change

A common thread among the submissions which saw current law as lacking was the view that many workers in low paid employment or on individual employment agreements are not in a position to bargain for redundancy entitlements, and can only gain these by statutory means.

"We continue to see significant numbers of clients who do not have written employment agreements and therefore rely on statutory protection for enforcement of their rights."⁴

It was suggested by several submitters that many employers are either unaware of their obligations under current law or deliberately avoid them because of the cost of compliance.

Some submitters⁵ suggested that current law provides an incentive for employers to use restructuring to avoid the personal grievance provisions of the ERA and to justify dismissal of employees, rather than justify a dismissal for cause.

"Performancing a person out means paper trails, meetings, external involvement (perhaps where training is needed and god forbid unions being involved), loads of internal resources It could take weeks or months to compile enough evidence to show that you have done everything in your power (as per the ACT) to help the person improve in their job. Whereas, if you restructure, that person could be gone in a couple of months..."⁶

Legal and academic groups suggested that a statutory framework would be useful for those interpreting the broad good faith requirement of the ERA. It would also provide needed guidance to the courts. CWaLMS noted that, as case law currently stands,

⁴ Community Law Canterbury

⁵ Angelina Matekahi (Tuia Union), Community Law Canterbury, CWaLMS

⁶ Angelina Matekahi, (Tuia Union)

the Court of Appeal's decision in *Aoraki Corporation Ltd v McGavin* [1998], which found that redundancy compensation could not be paid in the absence of specified contractual provision, still holds despite "the enactment of subsequent legislation premised on a very different legislative policy."

*"Legislative clarification of entitlement to redundancy compensation is therefore required."*⁷

Another concern raised was the lack of protection in current employment law for workers employed by temporary work agencies and labour hire firms:

*"Because the employees have employment agreements with the agency or hire company who says it has not dismissed the employee, and not with the company they have been contracted to, it is difficult to pursue remedies in employment law for these people"*⁸

It was suggested that the current legal framework provided incentives for employers to use temporary positions as a means of avoiding their obligations under the ERA.

Several submitters – including some who otherwise advocated no change to the current state of law – recommended that redundancy compensation payments should be tax-exempt or at a lower rate.

Views of those advocating status quo

The strength of views among those who supported the current state of law varied, from human resource professionals who simply noted that current laws were reasonably settled and working well, to those who were more adamantly opposed to any change:

"absolutely no desire whatsoever to have... any more costs associated with employment; the current employment provisions are onerous enough and ECANZ believes fair if slightly weighted in favour of the employee".⁹

Overall, this group considered that the current legislative framework adequately covered restructuring and redundancy situations.

*"A balance has been struck by the requirements to act in good faith, to deal fairly with employees and to provide genuine consultation together with the personal grievance remedies set out in the ERA such that no further legislation or regulation is required."*¹⁰

A similar point made in some submissions¹¹ was that any law change should come only after careful identification that a problem exists with the current law, and that such "problem definition" had not been established.

"The closest thing to a "problem" the Institute can think of is that employees simply aren't aware of the cost/risk of unemployment, and therefore have not made adequate provision, e.g. savings or insurance. [...] if information problems are found to be the issue, the answer is more likely to involve

⁷ Centre for Work and Labour Market Studies (CWaLMS). AUT University

⁸ Community Law Canterbury

⁹ ECANZ

¹⁰ Telecom

¹¹ Institute of Chartered Accountants and Small Business Advisory Group

*providing better information to employees on unemployment risk across sectors, than to mandate minimum redundancy entitlements.*¹²

A common thread among this group was the view that the circumstances of each employer and employee in a restructuring or redundancy situation differed so widely that there could be no "one size fits all" solution.¹³ Further legislation was therefore inappropriate as it would be overly prescriptive and inflexible.

*"We believe there are some things that simply cannot be legislated for. Businesses and their workers are so diverse that those parties must work out for themselves a solution that works for them both. Restructuring and redundancy is one such example."*¹⁴

The need for flexibility in both business management and employee relations was emphasised in numerous submissions. Several submitters also cited the importance of flexibility in connection with the Government's aim of promoting productivity and innovation.

*"Implementing new ideas is a big decision for budding entrepreneurs. A major concern at the early stages is 'what if it doesn't work out'. Any regulation that makes it hard for these ideas to end if they do not work out as planned will mean that some of them are not even attempted in the first place."*¹⁵

Similarly, the need for competitiveness in the regulatory environment vis-à-vis overseas trading partners was stressed in some submissions.

A large number of submissions¹⁶ commented on the heavy burden compliance with existing regulations is already placing on businesses, especially small and medium enterprises (SMEs). Such pressures intensified in times of restructuring or redundancy. Any further legislative requirements, particularly regarding payment of compensation, could place the viability of the enterprise in jeopardy.

¹² NZ Institute of Chartered Accountants

¹³ HRINZ, RCSA, Ports of Auckland, Manufacturers and Exporters Association, Employers and Manufacturers Association, Master Builders, ECANZ, Air New Zealand, Small Business Advisory Group

¹⁴ Employers and Manufacturers Association

¹⁵ Employers and Manufacturers Association

¹⁶ HRINZ, Tom Ryan, RCSA, Ports of Auckland, Manufacturers and Exporters Association, Employers and Manufacturers Association, Master Builders, ECANZ, Air New Zealand, Meat Industry Authority, Small Business Advisory Group

*"SME's only resort to restructuring when they are under financial pressure and this move is required to save the business and possibly any remaining jobs left after the restructuring... statutory redundancy provisions will only increase the pain. Some SME's may not be able to meet these costs and may either close up or may trade on into receivership with the loss of all jobs in the business."*¹⁷

Similarly, several submitters¹⁸ expressed concern about the financial implications of any legislative change, noting that a contingent liability for redundancy settlements could unnecessarily reduce the value of an enterprise or mean less money available for current employees.

*"introduction of another compliance cost around redundancy would mean a further reduction in the amount of money available to pay employees. Our strong preference is to give the increases to current staff rather than spending it on a contingency liability for those who leave on the grounds of redundancy."*¹⁹

On this point, the Institute of Chartered Accountants noted that redundancy liabilities would not tend to be disclosed in accounts until the liability had been legally settled or was close to settlement (i.e. certain and material). However, the issue became more significant for a company with insolvency risk.

*"By increasing the liabilities of a company with insolvency risk, a government mandated redundancy scheme could be expected, at the margin, to bring forward the point of insolvency for some companies and lead to redundancy where it may have been possible for the company to otherwise have continued to operate (i.e., by laying off a proportion of its workers)"*²⁰.

Finally, several submitters emphasised that a business owner's right to manage their business is a fundamental principle of employment law in New Zealand.²¹ One submitter (Air New Zealand) suggested that legislation should support this principle more explicitly.

¹⁷ Tom Ryan

¹⁸ Tom Ryan, Community Law Canterbury, Ports of Auckland, Manufacturers and Exporters Association, Telecom

¹⁹ Telecom

²⁰ NZ Institute of Chartered Accountants

²¹ Ports of Auckland, Manufacturers and Exporters Association, Air New Zealand, Meat Industry Association

Major areas of review

Consultation

Adequate	Some Change	Not Adequate
HRINZ Tom Ryan RCSA Manufacturers and Exporters Assn Employers and Manufacturers Assn PEL Master Builders ECANZ Air New Zealand (but some change "useful") Telecom Small Business Advisory Group	Air New Zealand (suggests better definition to acknowledge circumstances in which no obligation to consult)	Community Law Canterbury Finsec Dunedin Community Law Centre

Most of the "status quo" submissions considered that consultation was appropriately covered by the good faith requirement of the ERA, bolstered by common law, and was generally provided for in employment agreements. This framework provided the necessary flexibility to meet the circumstances of each case.²²

*"We are not sure that adding a further consultation requirement... over what is already contained in an Employment Agreement which will suit a particular environment, will add to the decision making process."*²³

In particular, consultation was not considered a problem with SMEs:

*"Many of our members are in the SME category and therefore work directly alongside their employees, the current good faith provisions are very comprehensive and enable good communication..."*²⁴

Some of these submissions²⁵ also noted that an overly-long consultation process could create additional uncertainty and difficulties, particularly for SMEs, and that one needed to consider the impact on those who remain in an enterprise after redundancies.

*"A consultation process of 7-10 days is sufficient in most cases to gather input and consider this if correctly facilitated. Anything longer just increases stress levels."*²⁶

²² Telecom, for example, submitted that one-on-one consultation was preferable to collective as it preserves employee privacy and can be personalised to suit individual needs and career ambitions.

²³ RCSA

²⁴ ECANZ

²⁵ HRINZ, Tom Ryan, Manufacturers and Exporters Association

²⁶ Tom Ryan

Three submissions, however, said that the current framework was not adequate, and should be strengthened:

- Finsec recommended that consultation should be required at an earlier stage, with greater information, and should include unions in a formal advisory committee “in any situation in which redundancy or restructuring is a possible outcome”, in order to allow workers and their unions a more meaningful and effective opportunity to participate in decision making.

“Currently, unions are frequently presented with a full and largely finalised proposal, and experience great difficulty in having these proposals altered. Indeed in our experience, consultation at this stage is often “surface consultation” only.”²⁷

- Both the community law centres pointed out that the ERA contained no penalty for failure to comply with the good faith consultation requirement.
- Dunedin Community Law Centre recommended statutorily prescribed consultation requirements “*which involve informing employees of possible and future redundancies, and allowing opportunities for both parties to discuss and consider alternative employment options for the employee. Reasonable time must be given to employees... to assess their position and to find alternative employment.*” It recommended that requirements include trade practices such as voluntary redundancy, “last on, first off”, and redeployment.²⁸
- Finally, one submission (from Air New Zealand, which otherwise supported the status quo) suggested that there will be some circumstances in which consultation will have no relevance (such as a decision to close a business). It was submitted that this is not adequately acknowledged under the “good faith” requirement and could usefully be clarified by legislation. It recommends better definition of:
 - what amounts to a proposal on which consultation is required, particularly where transactions are still subject to negotiation or which contain material conditions to implementation
 - when consultation finishes, and
 - what comprises relevant information.

Notice

Adequate	Some Change	Not Adequate
HRINZ RCSA Employers and Manufacturers Assn Air New Zealand	Dunedin Community Law Centre (Need to define “reasonable notice”)	Helen Brosnan Finsec

²⁷ Finsec

²⁸ A contrasting view was expressed by the Manufacturers and Exporters Association, which submitted: “*length of service approach is irrelevant when companies are responding to change; last in first out approach loses skills that might be needed to support viability after the reorganization.*”

Of those who commented specifically on this issue, the "status quo" group suggested that statutorily prescribed notice periods would be inflexible and potentially unfair on some employees. It was suggested that common law was well settled in this area, stating that in the absence of specific provision in an employment agreement, "reasonable notice" must be given, and was generally 4 weeks.

Dunedin Community Law Centre recommends that a statutory definition of "reasonable notice" be provided. It submits that in most cases 4 weeks would be considered sufficiently "reasonable", however the length of time the employee has held their position must be a factor. Factors employers must consider in determining "reasonable" notice should be included in the statutory definition.

Of those seeking statutory notice provisions, Finsec proposed a paid notice period of 8 weeks. Helen Brosnan, an individual contractor, noted with dissatisfaction that her contract provides "little notice" for restructuring and only 6 weeks for redundancy.

Consultation to avoid mass redundancies

Adequate	Some Change	Not Adequate
HRINZ RCSA Manufacturers and Exporters Assn	Air New Zealand Limited (obligation to consult does not arise)	Finsec Dunedin Community Law

The general view of the "status quo" group was that statutorily prescribed consultation would not help to avoid mass redundancies, and could simply add to uncertainty and unrest.

"Many of these situations are outside the control of the local employer and consultation with others; no matter how wide will not remedy a situation".²⁹

"Employers do not take the decision to make any of their employees redundant lightly. There are costs in employee morale, productivity, market-place perceptions and community regard. Most would look to creating other alternatives for the redundant, such as redeployment, retraining and relocation to avoid such costs before they chose mass restructure or redundancy."³⁰

Air New Zealand submitted that the obligation to consult does not arise in some circumstances, and legislation should make this more explicit:

"The decision to close a business or part of a business (which could result in mass redundancies, although often in the nature of a technical redundancy) should be recognised as a restructure to which the obligation to consult does not arise. If an employer decides it does not want to continue with a particular part of its business or does not want to continue in business at all, there should be no obligation to consult. These are pure management decisions (and often personal decisions) and associated consultation is burdensome and generally a sham."

Finsec and Dunedin Community Law Centre favoured statutorily prescribed consultation requirements, noting that it was especially critical in such situations for all employees to be involved from the earliest stages³¹. The later stages of

²⁹ RCSA

³⁰ HRINZ

³¹ It was noted that even those not made redundant will be affected by mass

consultation should contain a strong focus on redeployment options, and should allow reasonable time for an employer to discuss alternative employment opportunities for all employees affected.

Compensation

Adequate	Some Change	Not Adequate
HRINZ Tom Ryan RCSA Manufacturers and Exporters Assn (but lower tax) Employers and Manufacturers Assn Master Builders Federation ECANZ Air New Zealand (but if compulsory, Gov't pays) Meat Industry Association Ports of Auckland Telecom Corporation Small Business Advisory Group	Make redundancy payments tax-free or reduced rate: Bob Hewitt Manufacturers and Exporters PEL Finsec (and priority debt in insolvency) Government should pay: Air NZ	Helen Brosnan Angelina Matekohi Community Law Canterbury Himanshu Khamar Finsec Dunedin Community Law Centre CWaLMS, AUT University

This issue elicited strong views from submitters, both for and against.

Those favouring legislated compensation

Individuals, union representatives, and community law advisers strongly favoured statutory entitlement to compensation for redundancy. It was noted that such a requirement would protect employees who are not in a position to negotiate entitlements in individual agreements, or who are unaware of their rights under the Act and have been made redundant on questionable grounds.³²

Community Law Canterbury also suggested, as an alternative if the cost of minimum entitlements was considered too onerous for employers, that there should at least be default minimum entitlements in legislation where the issue has not been addressed in an employment agreement.

The Centre for Work and Labour Market Studies also favoured enacting a regime of statutory entitlement to compensation for redundancy because of the curious current state of common law on the issue. CWaLMS submits that legislative clarification of entitlement to redundancy compensation is required in light of the Court of Appeal’s 1998 decision in *Aoraki*³³, which overturned the principles which had previously made

redundancies, for example, employees may experience increased work obligations.
³² Dunedin Community Law Centre, noting that the absence of statutory provision also raised the need for “good faith” requirement to be more clearly defined, and for increased education for both employees and employers regarding their rights and obligations under the Act.

³³ *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601

it possible to award compensation for redundancy when an employment agreement was silent on the matter.

"In finding that redundancy compensation could not be paid in the absence of specific contractual provision, the Court adverted very specifically to the effect of the legislative policy of the Employment Contracts Act 1991 in shaping its decision. The enactment of subsequent legislation premised on a very different legislative policy, however, has not led to any judicial reconsideration of the precedent in Aoraki."

CWaLMS also noted that the Court of Appeal³⁴, in a 1994 judgement superseded by *Aoraki*, stated that the following could be relevant in assessing whether compensation was payable:

- the reason for redundancy
- the length of the employee's service
- the period of notice, and
- the ability of the employer to pay.

On the amount of compensation, several submissions³⁵ suggested this should be based on length of service. Finsec proposed seven weeks' salary for the first year's service, and four weeks' salary for each subsequent year's service. The ability of an employer to pay was referred to in a few submissions on both sides of the debate. For example, union representatives suggested that there should be a set amount for all companies to pay, related to their "profit margin"³⁶, and that employers should be required to pay higher levels of compensation when the redundancy arises from restructuring of a business which remains a going concern, as opposed to a business which is ceasing operations.³⁷ HRINZ suggested that the amount "...would have to take into account an employer's ability to pay at the time—especially in those situations where the reasons for redundancy relate to survival and the retention of other jobs, especially in small businesses."

One submission³⁸ proposed that a redundant employee should have first right to reemployment at the same rate if a position is refilled within 24 months.

Those opposed

Of those who considered the current legal framework adequate, several suggested that introducing statutorily prescribed redundancy compensation could do more harm than good, particularly in the case of SMEs.

*"We are concerned that if compensation be provided for at a Regulatory level the payment of compensation will put a business under additional financial stress resulting in even more loss of jobs."*³⁹

*"We believe any minimum redundancy compensation regulation will have a dramatic effect on the health of New Zealand businesses – a consequence that should not be under-estimated."*⁴⁰

³⁴ *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243

³⁵ Dunedin Community Law Centre, Helen Brosnan, Himanshu Kamar, Angelina Matekohi.

³⁶ Angelina Matekohi

³⁷ Finsec

³⁸ Himanshu Kamar

³⁹ RCSA

Potential consequences cited in submissions included:

- disincentive to recruiting more labour
- employers cutting labour costs in other areas
- greater use of temporary or contract labour
- loss of competitiveness vis-à-vis trading partners overseas
- redundancies more likely because of the additional liability
- second and third round redundancies more likely to follow, and
- viability of the business at risk.

Overall, this group generally considered that redundancy compensation is adequately addressed currently through bargaining for contractual terms by those employers who can afford it, supported by the existing safety net of the benefit system.

Some businesses⁴¹ suggested there was a windfall nature to redundancy payments in the current economic climate, citing experiences with employees electing to be made redundant and finding rapid re-employment, on occasion with essentially the same company.

"We are... increasingly finding that the power rests with the employee who is choosing to take redundancy compensation when another job which pays the same amount of money and has the same terms and conditions, is offered as a redeployment option"⁴²

PEL suggested in this context that legislative clarification would be useful to enhance the distinction between redundancy of a role versus redundancy of a person's employment.

"Treating the two as the same circumstance results in an entitlement mentality around mandatory termination of employment and redundancy compensation."

Further, PEL submitted that the ERA does not adequately address issues which arise where employment may need to be varied through transfer to another employing entity within a group of companies on the same terms and conditions.

Telecom noted that labour market projections by Statistics NZ in 2004 indicated that such labour market conditions were likely to continue over the next 15 years, suggesting that "any statutory compensation should be set at a low level indeed".

Some submissions⁴³ noted that if statutory redundancy compensation is proposed:

- it should not increase the burden on employers whose contractual redundancy compensation is more beneficial
- It should take account of technical redundancy situations, i.e. should not be payable where suitable alternative employment is offered by a third party.

⁴⁰ Employers and Manufacturers Association

⁴¹ PEL, Air New Zealand, Telecom

⁴² Telecom

⁴³ Air New Zealand, PEL

Who pays?

Government

Air New Zealand submitted that if statutory redundancy compensation is introduced, it should be funded by the Government as maternity pay is, on the basis that there will be savings in unemployment benefits paid.

Insurance

Some submissions⁴⁴ raised, but did not favour, the idea of compulsory redundancy insurance. The Institute of Chartered Accountants examined three options in some depth: employee funded, tax payer funded, and employer funded. While it did not support any of the options, it did view an employee-funded option as "easily the best":

"Treating redundancy provision more like a "private" good, which it clearly is, is appropriate. Where the same party that benefits also pays, there are good reasons for that party to correctly state how much, in this case minimum redundancy entitlement, should be provided for. The Institute suspects the demand would not be strong."

The other options would entail compliance costs and "deadweight loss", with an employer-funded option potentially reducing both non-redundancy employee remuneration and employment, and impacting negatively at a macroeconomic level on output, interest rates and the exchange rate.

Tax treatment

Three submitters⁴⁵ proposed that negotiated and/or statutorily-mandated compensation payments should be tax-free to the recipient.

"It is unfair and inconsistent that it is currently taxed, while money paid as compensation for humiliation and distress under S123 1 c (i) of the Employment Relations Act is not taxed."⁴⁶

The Manufacturers and Exporters Association submitted that lower tax rates on negotiated redundancy payments "would be helpful."

"It is equitable that the Crown (on behalf of us all) carries some of the reorganization load."

Other issues raised in submissions

Code in lieu of regulation

Two submissions, from HRINZ and Telecom, suggested that in lieu of regulation, a Code of Good Practice or Code of Good Faith could be developed to cover restructuring and redundancy situations.

"Such a Code has worked well in defining good-faith wage negotiations and a similar Code could provide clear information and guidance on the process. We believe all parties should be informed and consulted on the "whys" "whats" and "possible alternatives" to determine the appropriate models to be used in the

⁴⁴ Manufacturers & Exporters Association, Institute of Chartered Accountants

⁴⁵ Bob Hewitt, Finsec, PEL

⁴⁶ Finsec, which also submitted that "the full quantum of redundancy compensation should apply as a standalone priority debt in the event of insolvency."

*circumstances. Issues of fairness and equity can be challenged through the employment courts.*⁴⁷

*"Any proposed changes in this area can simply be clarified under the Code of Good Faith which can easily be extended to specifically refer to obligations of good faith with respect to redundancy."*⁴⁸

Trend toward contracting out and temporary labour

The changing nature of employment in the current global market was raised in submissions on both sides of the debate.⁴⁹ Some submitters saw the trend toward "contracting out" and use of temporary labour as a means of employers cutting costs (eg CWaLMS) or avoiding responsibilities, while others (eg Telecom) submitted that this approach provided needed business flexibility and was employee-driven. Some suggested that imposition of statutory redundancy compensation could see the trend increase.

*"We are concerned that if redundancy provisions were to become regulated without at the same time strengthening the rights of temporary workers, firms would be further encouraged to use temporary workers to avoid obligations in employment law. The end result would be that more workers would fall outside the code of protection currently provided in employment law."*⁵⁰

Extension of Part 6A of the ERA (see below) was proposed by CWaLMS in this context.

Extension of ERA Provisions – Part 6A and s103A:

Several submissions⁵¹ discussed the desirability or otherwise of extending the application of the ERA's "Vulnerable Employee" and Grievance Procedure provisions to specifically cover restructuring and redundancy situations:

Part 6A of the ERA - "Vulnerable Employees"

The Centre for Work and Labour Market Studies (CWaLMS) submits that that the Employment Relations Act is inconsistent in its treatment of personal grievance procedures and redundancy situations. CWaLMS recommends extending to all employees the protection currently provided to "Vulnerable Workers" under Part 6A of the ERA. It notes:

"Recent economic conditions of high labour force participation and extremely low unemployment levels have to some extent masked the "vulnerability" of most employees in a global market."

CWaLMS submits that extension of the provisions of Part 6A "would acknowledge the unmitigated business risk carried by all employees in a business restructure", and suggests that The UK Transfer of Undertakings (Protection of Employment) Regulations 1981 (S11981/1794), usually referred to as TUPE, provides a good model.

⁴⁷ HRINZ

⁴⁸ Telecom

⁴⁹ RCSA, Community Law Canterbury, CWaLMS, Master Builders Federation

⁵⁰ Community Law Canterbury

⁵¹ RCSA, CWaLMS, Master Builders Federation, Air New Zealand, Telecom

Some other submitters⁵² were opposed to any extension of these provisions, or saw no need.

"Companies should be able to pay market rates for work performed. Business Asset transfers and outsourcing should continue to be mechanisms available for improving profitability"⁵³.

Telecom submitted that not all employees are "vulnerable"; its employees – mostly knowledge workers – do not need the additional protection of legislation. Any extension of Part 6A should therefore be done selectively.

"...if the Advisory Group is intent on regulating redundancy entitlements, that it consider providing those protections for those vulnerable workers in a similar way to the provisions set out in the Employment Relations Amendment Act which specified particular groups of employees who were particularly vulnerable."

s103A of the ERA – Grievance Procedures

CWaLMS submits that as case law currently stands⁵⁴, the protection of s103A of the ERA (grievance procedure) does not apply in relation to redundancy dismissals, which appears to be at odds with Parliament's intention. As the Employment Court has found itself unable to review the decision, legislative clarification is required.

"It is difficult to see why Parliament would require [an objective] test for dismissals for cause, but not dismissals for redundancy. ... The failure to apply s103A to redundancy dismissals means that employees are not protected from harsh and unreasonable decisions making them redundant."

CWaLMS suggests that s103A be clarified with the following wording proposed by Professor Gordon Anderson (Professor of Employment Law at Victoria University of Wellington): *"genuine reasons based on reasonable grounds"*. CWaLMS notes that such a change "still enables an employer to manage their business and to effect change where necessary. It simply means that the decisions need to be justified on an objective basis."

It should be noted in this context that some other submissions⁵⁵ regarded the ERA's grievance provisions as overly complex and cautioned against following suit in the case of restructuring and redundancy.

"The common law requirements around redundancy and restructuring are relatively settled. Compare the personal grievance process that has become so intricate that there is no longer a settled process... We caution against creating a legal process for restructuring that becomes so intricate and variable that businesses cannot get it right."⁵⁶

⁵² Air New Zealand, Telecom, RCSA

⁵³ Air New Zealand

⁵⁴ Employment Court in *Simpson Farms Limited v Averhart* [2006] 1 ERNZ 825

⁵⁵ Ports of Auckland, Employers & Manufacturers Association

⁵⁶ Employers & Manufacturers Association

Impact on specific groups

Small and medium enterprises (SMEs)

As noted throughout this summary, a large number of submissions⁵⁷ commented on the burden SMEs already feel themselves to be under in complying with existing regulations, and the negative impact further requirements around redundancy would have on their ability to recruit additional staff, manage their business and compete. Many submissions cautioned against a "one size fits all" legislative approach. The Small Business Advisory Group added that *"if anything, the solution should be designed for small business first, which make up 97 percent of businesses, (Think-Small-First), then adapted for large businesses with greater resources."*

Large corporates can recover redundancy costs with marginal increases in prices over a large number of sales. For an SME with a much smaller turnover, it is not possible to significantly increase prices to meet one-off costs like a redundancy payment - this could put the very viability of the business on the line Many SME owners have their life-saving and homes on-the-line with their business... If the business goes under, the family loses its home and life investment, and legal credibility in the case of bankruptcy"⁵⁸.

"SME's particularly stressed to us that they already struggle with the current consultation requirements and any further legislative requirements would make the process even harder for them in the current market place." ... "For them, all terminations are already a real minefield through which they must negotiate very carefully. To put extra compliance in terms of redundancy is an additional consideration which we believe is not in the interests of either the economy or the Government."⁵⁹

Other groups

Others mentioned in some submissions⁶⁰ as deserving special consideration were:

- Temporary, fixed-term, and individual contract workers
 - Community Law Canterbury recommends increased protection for the rights of temporary workers. Such protection could include a requirement that there be a genuine reason and limited time period for the employment of temporary workers similar to the current requirements around fixed term agreements.
 - It also notes that it sees as clients "significant numbers" of individuals who do not have written employment agreements and so rely on statutory protection, and that *"many workers in low paid employment on individual employment agreements... are not in a position to bargain for redundancy entitlement"*. It cites lack of knowledge about rights and responsibilities as one of the reasons for this, along with employers' costs of compliance and avoidance.

⁵⁷ HRINZ, Tom Ryan, RCSA, Ports of Auckland, Manufacturers and Exporters Association, Employers and Manufacturers Association, Master Builders, ECANZ, Air New Zealand, Meat Industry Authority, Small Business Advisory Group

⁵⁸ Small Business Advisory Group

⁵⁹ HRINZ

⁶⁰ Community Law Canterbury, Dunedin Community Law Centre, Helen Brosnan

- Non-profit organisations

Dunedin Community Law Centre has submitted that if statutorily prescribed redundancy compensation were introduced, voluntary groups such as theirs should be exempt as they would not be able to sustain their role in the community with such additional costs.

Statutory clarification / definitions

Various submissions touched on the need for clarification of the current legal framework. In addition to the points noted above regarding Part 6A and s103A of the ERA and the current state of common law regarding redundancy compensation, the following suggestions were made about statutory definitions:

"Good Faith"

The Dunedin Community Law Centre submits that a statutory framework would serve a valuable educational purpose for those interpreting the "overly broad" good faith requirement of the ERA, so that both employees and employers have a clear understanding of their rights and obligations. *"This framework should accord with the overall aim of building 'productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment'".*⁶¹

"Redundancy"

- Some submitters⁶² stressed that a definition would be helpful, and that it was important to distinguish between redundancy of a role and redundancy of a person or a person's employment. *"Treating the two as the same circumstance results in an entitlement mentality around mandatory termination of employment and redundancy compensation."*(PEL)
- The RCSA noted that redundancy is widely accepted to mean "a situation where a position currently filled by an employee is no longer required by the employer"⁶³, and that any statutory definition would also require defining "employee" and "position", which would be "fraught with difficulty" given the changing nature of the modern work environment.
- Telecom submitted that it is important to clearly define what does not constitute a redundancy, noting that Telecom's employment agreements specifically exclude:
 - changes in reporting line
 - changes to a position description, and
 - changes to performance or incentive targets
 - changes to the employee's location of work (so long as it is within the greater metropolitan area in which the employee usually works)
 - changing business units, and
 - redeploying or offering an employee a different role which although not identical to their latest role, utilises their skills and experience and is on substantially the same terms and conditions.

⁶¹ Section 4 of the Employment Relations Act 2000

⁶² HRINZ, Finsec, PEL

⁶³ as supported by case law, eg Court of Appeal in *G N Hale & Son Ltd v Wellington etc Caretakers etc IUOW (1990) ERNZ*

It considered that these provisions "are fair and reasonable and fit within the common law exclusions from the definition of redundancy."

- *Consultation*

See recommendation by Air New Zealand under section 3A above specifying that consultation will have no relevance in some circumstances.)

- *"Comparable Role"*

Finsec suggests that any definition should specify "for a role to be comparable to the worker's current role it must be reasonable in terms of:

- the worker's skills and experience
- the worker's personal circumstances, including child care and other family commitments
- commuting distance
- the similarity in job roles between the redundant role and the comparable role, and
- having remuneration which is not less favourable than the role being made redundant in regards to quantum and grading.

- *"Mass Redundancy"*

While some submitters (e.g. Finsec) took this to mean those involving more than 100 workers, others noted that a plain-English definition would be needed if changes were effected in this area ⁶⁴

- *"Reasonable Notice"*

See recommendation by Dunedin Community Law Centre under section 3B: Notice, above)

⁶⁴ Referred to by HRINZ, RCSA

ANNEX A: WRITTEN SUBMISSIONS RECEIVED FROM

Name	Role / Organisation
Human Resources Institute of New Zealand	HRINZ is the professional organisation for human resource practitioners with 3500 individual members representing 48% of the industry
Tom Ryan	Manager Accounts, NZ Wool Testing Authority Limited
Helen Brosnan	Individual- contract worker recently returned from UK
Angelina Matekahi	National Secretary of Tuia Union Incorporated
Bob Hewitt	Individual
Community Law Canterbury	Community law centre providing free legal services to individuals
Himanshu Khamar	Individual
Recruitment and Consulting Services Association Ltd	RCSA has 3200 members in New Zealand and Australia comprising recruitment companies and individual recruitment consultants
New Zealand Manufacturers and Exporters Association	Representative body for manufacturers and exporters in New Zealand; members account for over \$2 billion in annual sales and \$1 billion in exports
Employers and Manufacturers Association (Northern) Inc	With 7,500 members covering 52% of the economy, the EMA (Northern) is largest representative of business in New Zealand
Finsec	Union representing workers in the finance sector
Progressive Enterprises Limited	PEL conducts wholesale and retail supermarket operations throughout New Zealand; it is a wholly-owned operating division of PEL Australia
Dunedin Community Law Centre	Volunteer organisation offering free legal advice, education, law reform and information services
Centre for Work and Labour Market Studies, AUT University	Research centre based in the Faculty of Business at AUT University, Auckland
Registered Master Builders Federation	
ECANZ	Represents over 1500 electrical contracting businesses in New Zealand, from large employers to SMEs
Air New Zealand Limited	
Meat Industry Association of New Zealand (Inc)	Voluntary trade association representing New Zealand meat processors, marketers and exporters
Ports of Auckland Ltd	Business operating New Zealand's largest port for general cargo and containers.
Telecom Corporation of New Zealand Ltd	
New Zealand Institute of Chartered Accountants	
Small Business Advisory Group	

Oral submissions

The Group consulted expert advice from key stakeholders, business groups, government agencies and academics to provide written and/or oral submissions. Oral submissions were received from eight submitters, other experts were invited but were unable to meet with the Group due to other commitments.

Key themes to emerge from oral consultation included:

- a greater focus was required for vulnerable employees and vulnerable sectors in the labour market
- the scale and impact of mass redundancies – especially in smaller centre and towns
- the balance between disclosure and notification – both for the employee and also for the market to manage
- current good faith principles are adequate for consultation requirements, and
- compensation – a fund model may create perverse business behaviour amongst employers e.g. 'soft-landings' (see ICANZ).

Summary of expert advice

New Zealand Stock Exchange

The Group invited advice on how consultation regulations could impact on publicly listed companies from the New Zealand Stock Exchange:

- it is a difficult time in New Zealand to introduce interventions around redundancy and restructuring especially as the market is slowing down
- the focus needs to be on the lower end of the workforce who are more at risk e.g. type of job, vulnerable worker
- confidentiality and lack of assurance is an issue with notification due to the risk of the market falling
- disclosure and similar information affects corporate competitiveness
- ERA already requires consultation with employers and unions, and
- key issues lie with efficiency and equity.

New Zealand Institute of Chartered Accountants (NZICA) (also provided a written submission)

The Group consulted NZICA about any costs that prescribed redundancy compensation would have on business and how these regulations may steer business behaviour. The Group was also keen to develop an understanding of how companies currently consider and disclose liabilities related to redundancy and restructuring:

- NZICA do not support a regulatory option and are supportive of the status quo
- more work needs to be done around accountable mechanisms for insolvency practitioners
- redundancy provisions for accounting purposes are not an issue until redundancy actually occurs

- redundancy provisions would not appear as a contingent liability (but could be accounted in other areas of the accounts)
- NZICA is not supportive of compulsory compensation
- priority payments should line – up as pro rata, and
- the scope for soft landings could develop if there is a considerable fund available for businesses to draw upon (businesses deliberately going under as they know that there is a fund available to support them; it may also be an easy option in getting rid of trouble employees).

Small Business Advisory Group (SBAG)

- A statutory option is a disincentive for SMEs due to the costs and effect of industrial relations on the business
- opposes regulatory options particularly anything prescriptive in employment agreements
- one size does not fit all
- opposed to any form of insurance model
- good faith needs to be equitable between both parties, and
- need to be more comparable to Australia.

Te Puni Kokiri

- Often the people element is taken out of a redundancy situation – which is otherwise based more on a technical response;
- need to consider employee displacement – demographic movement from urban to rural areas in event of redundancy, connecting with Whanau, iwi and land;
- potential to lose skills from key areas in demographic movement
- Maori take a collective approach to a redundancy situation – share the impact and compensation as a whole e.g. share with Whanau, take back to iwi to invest the compensation;
- job transitions – need to engage further with the Maori sector
- compensation needs to be based on flexible options e.g. being able to provide for training, and
- Iwi training initiatives could be important in a training option.

Industrial Relations Centre – Victoria University

The data and information presented is already captured under the Collective Agreements section in the paper.

MED – Companies Office

The data and information provided by MED are captured under the Insolvency section of the paper. MED suggests legislative changes could be made around the insolvency framework to make it tighter particularly around reporting requirements and for insolvency practitioners e.g. strict regulations under legislation to indicate how companies should report on business finances.

Legal academic experts

Peter Churchman – Employment law expert

- Redundancy situations in New Zealand are not simply a market/contractual issue although current statutes treat them as such
- there is sufficient reason to look at the redundancy and restructuring framework, especially for the more vulnerable workers and in vulnerable labour markets
- the earlier the warning provided to the employee - the better as it allows the employee to prepare for the event
- compulsory compensation would be a big change for businesses – should consider a phased transition, and
- big employers maybe able to cover costs but it will be difficult for smaller businesses unless they are covered by some form of third party e.g. State.

Gordon Anderson – Convenor of Employment Law Committee, New Zealand Law Society

- This is a transitional work issue – moving redundant employees into other job opportunities
- vulnerable workers take on more risk, e.g. not receiving a redundancy payment
- smaller firms are more at risk i.e. they take on more risk in the event of redundancy
- any possible mandatory compensatory option would need to understand the concept of unemployment insurance
- explore increasing notice requirement so as to help alleviate the impact of redundancy
- consultation – is adequately covered by good faith principles
- need to ensure co-ordinated Govt approach particularly in the event of a large scale redundancy
- need to consider the scale issue such as the impact of large scale redundancy in smaller centres/towns, and
- need minimum code around redundancy compensation and which may have an impact on other employment areas, e.g. sick leave.

Key stakeholders invited for written and/or oral submissions

- Gordon Anderson – Professor of Law, Victoria University
- Mark Harcourt – Professor of Strategy and Human Resource Management, Waikato University
- Bill Hodge – Professor of Law, Auckland University
- John Hughes – Senior Lecturer of Law, Canterbury University
- George Lafferty - Professor of Industrial Relations, Victoria University
- Natia Laurenson - Executive Officer, New Zealand Pacific Business Council
- Ian McAndrew – Senior Lecturer of Management, Otago University
- Beverley Main – Chief Executive, Human Resources Institute of New Zealand
- Ray Markey – Professor of Employment Relations, Auckland University of Technology
- Paul Morgan – Chief Executive, Federation of Maori Authorities
- Michael Quigg - Convenor of the Employment Law Committee, New Zealand Law Society
- Erling Rasmussen – Professor of Work and Employment, Auckland University of Technology
- Paul Roth – Professor of Law, Otago University

APPENDIX I

AUSTRALIAN NATIONAL EMPLOYMENT STANDARDS

Notice of termination

Section 57 of the Australian National Employment Standards provides for notice of termination or payment in lieu.

In summary:

- (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of termination (which cannot be before the day the notice is given).
- (2) The employer must not terminate the employee's employment unless:
 - (a) the time between giving the notice and the day of the termination is at least the minimum period of notice (see table below); or
 - (b) the employer has paid the employee payment in lieu of notice of at least the amount the employer would have been liable to pay the employee at the full rate of pay for the hours he or she would have worked had the employment continued until the end of the minimum period of notice.

The minimum period of notice is worked out as follows:

Employee's period of continuous service with the employer at the end of the day the notice is given	Period
Not more than 1 year	1 week
More than 1 year but no more than 3 years	2 weeks
More than 3 years but no more than 5 years	3 weeks
More than 5 years	4 weeks

The period of notice is increased by one week if the employee is over 45 years old and has completed at least two years continuous service with the employer at the end of the day the notice is given.

Section 58 provides for what should happen to notices of termination or payment in lieu when there has been a transmission of business.

A transferring employee's period of continuous service includes each period of continuous service of the employee with an old employer in the business being transferred (whether or not the old employer was previously a new employer in connection with the business).

However, the employees' continuous service with an old employer is disregarded so far as the employee had previously received notice of termination, or payment in lieu of such notice, in respect of that service

The Standard also provides for modern awards to specify the notice an employee must give in order to terminate their employment.

Redundancy pay

Section 60 provides for an employees entitlement to redundancy pay if the employee's employment is terminated:

- at the employers initiative because the employer 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, or
- because of the insolvency or bankruptcy of the employer

The amount of redundancy pay owed can be worked out using the table below:

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

Section 60 does not apply if:

- his or her period of continuous service with the employer on termination is less than 12 months, or
- at the earlier of the following times, the employer employed fewer than 15 employees:
 - the time the employee is given notice of the termination as described in subsection 57(1)
 - immediately before the termination.

Certain exclusions also apply where there has been a transmission of business. The Standard also excludes some types of employees from being entitled to a redundancy payment.

APPENDIX J

INTERNATIONAL REVIEW

Pre-dismissal requirements

Conditions to trigger requirements

In many jurisdictions to trigger employee and employer protections the redundancy must be collective, the definition of this varies by jurisdiction. This is to limit requirements upon employers unless the redundancy situation is deemed significant.

For Australia, Canada and the United States this ranges from at least 15 employees through to at least 50 employees.

Europe

In 1998 the European Union Council issued a directive to member states for collective redundancies. The directive arose after economic difficulties following the oil crisis of 1973, which led to many closures and restructuring of enterprises. Hence, the Directive is limited to dismissals of an economic, redundancy or technical kind. The underlying principle of the Directive is that dismissals are a collective issue, to be dealt with through collective information and consultation rights. The directive states that it is "important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the country".

A collective redundancy occurs where it is proposed that either:

- over a period of 30 days, at least 10 dismissals in establishments normally employing more than 20 and less than 100 workers may occur or
- at least 10 percent of workers in establishments normally employing at least 100 but less than 300 workers are to be dismissed or
- at least 30 workers in establishments normally employing 300 workers or more are to be dismissed or
- over a period of 90 days, at least 20 dismissals are proposed, regardless of the size of the establishment.

This definition has been generally accepted, with slight variations, in the European countries surveyed (France, United Kingdom, Ireland, Denmark, Hungary, Czech Republic and Poland).

Consultation

Consultation as a requirement that employers must undertake, is widely incorporated in international jurisdictions, either explicitly or via good faith requirements. All jurisdictions (excluding the United States) provided a legal obligation to undertake consultation with varying degrees of complexity.

Europe

International standards place emphasis on governments encouraging employers to consult with worker representatives to consider alternatives to mass layoffs. EU standards require employers to consult with worker representatives when contemplating

collective redundancies. It requires the consultation process to cover ways and means of avoiding collective redundancies, reducing the numbers affected or mitigating the consequences by recourse to accompanying social measures aimed at aid for redeploying or retraining workers made redundant.

The EU Directive on collective redundancies provides that dismissals are a collective issue, to be dealt with through collective information and consultation rights. This requires employers in member states to:

- where contemplating collective redundancies, begin consultations with the workers' representatives in good time with a view to reaching an agreement
- these consultations shall cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant
- to enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations supply them with all relevant information, including:
 - the reasons for the projected redundancies
 - the number of categories of workers to be made redundant
 - the number and categories of workers normally employed
 - the period over which the projected redundancies are to be effected
 - the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefore upon the employer, and
 - the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

This requirement has been generally accepted, with slight variations, in the European countries surveyed (France, United Kingdom, Ireland, Denmark, Hungary, Czech Republic and Poland). In a number of countries this consultation must begin at least 30 days before the redundancy takes effect, in the United Kingdom this is extended to 90 days where more than 100 employees are involved.

The United Kingdom

In the UK, an employer proposing to make collective redundancies (covering 20 or more employees) is required to consult in advance with representatives of the affected employees. UK regulations include a range of detailed requirements relating to the timing, consultation and what information must be provided by the employer. It also specifically requires employers to consult on ways of avoiding the redundancy situation or dismissals, of reducing the number of dismissals involved and mitigating the effects of the dismissals.

The scope of what must be disclosed by the employer in consultation is prescribed in statute and includes:

- the reasons for the proposals
- the numbers and descriptions of employees it is proposed to dismiss as redundant

- the total number of employees of any such description employed by the employer at the establishment in question
- the proposed method of selecting the employees who may be dismissed
- the proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect
- the proposed method of calculating any redundancy payments, other than those required by statute, that the employer proposes to make, and
- ways of avoiding the redundancy situation or dismissals, of reducing the number of dismissals involved and mitigating the effects of the dismissals.

A pre-dismissal requirement to consult with employee representatives (including unions) to avoid mass redundancies would require careful consideration of how commercial risks for companies would be managed. In the UK, stock exchange rules do not preclude employee representatives being informed and consulted in advance where collective redundancies are planned in connection with a restructuring which may involve price sensitive information. In these cases, employers can impose confidentiality constraints on employee representatives.

Canada

In a collective redundancy, after providing notice to the public authority, it is required that the employer set up a joint planning committee consisting of at least four members, at least half of whom must represent the employees' interests. This committee is to develop an adjustment programme, to eliminate the need for the termination, or look at ways to minimise the impact of the termination. Provision is also made for an inspector to monitor the committee, and for the committee to apply to the Minister of Labour for an arbitrator. These provisions allow for employee involvement in not only consultation but in decision-making.

International Labour Organisation

The International Labour Convention No 158 on Termination of Employment, provides that workers representatives are provided with relevant information in good time, and given an opportunity for consultation. Only 35 out of 181 member states have ratified the convention.

Redundancy notice

In most jurisdictions notice must be provided to employees and/or their representatives a minimum period prior to redundancies take effect. This ranges from one week to six months notice. This is often on a sliding scale based upon length of service to reflect the greater time period required for some employees to prepare for their dismissal.

Australia

The minimum notice period is statutorily based upon length of service:

Employee's period of continuous service with the employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

This is then increased by one week if the employee is over 45 years old and has completed at least two years of continuous service with the employer. This takes into consideration the difference that increased age can make to re-entering the workforce, to give greater opportunity to find new employment.

The United Kingdom

A minimum notice period is provided by statute. However notice can only be given once consultation is completed, to allow for effective consultation.

In the UK the Employment Rights Act 1996 sets out the minimum period of notice that must be given to an employee who is being made redundant. It provides for at least one week's notice if employed for between one month and two years, one week's notice for each year if employed for between two and twelve years, and twelve weeks' notice if employed for twelve years or more.

Notification of authorities

A common requirement in many jurisdictions is that an employer must notify a designated public authority in the event of a collective redundancy. This allows for the monitoring of redundancies and the intervention of the state, if required, to prevent excessive job loss and employee impact. In the majority of jurisdictions surveyed it was required notification occur at least 30 days prior to the redundancy is to take effect.

Europe

The European Union Directive requires employers to notify competent public authorities in writing of any projected collective redundancies at least 30 days before the redundancies take effect. The same notification must also be provided to workers' representatives.

This has been enacted in all of the jurisdictions surveyed (France, United Kingdom, Ireland, Denmark, Hungary, Czech Republic and Poland). Examples of designated authorities include:

- France – Minister of Labour, Employment and Vocational Training
- United Kingdom – Secretary of State
- Ireland – Minister for Enterprise, Trade and Employment, and
- Denmark – Regional Labour Market Council.

United Kingdom

In the UK an employer is required to notify projected redundancies (where there are more than 20 employees affected) to the Department of Trade and Industry. This enables government departments and agencies and the Jobcentre Plus Rapid Response Service to be alerted and prepared to take any appropriate measures to assist or retrain employees.

Ireland

Upon notification to the requisite authority, a redundancy panel is provided to which collective redundancies may be referred for consideration. This panel includes representatives from the Business and Employers' Confederation and the Congress of Trade Unions. The panel ensures that the redundancies are genuine as opposed to situations where workers are replaced by new workers doing the same job for lower wages.

The United States

The United States the Federal Worker Adjustment and Retraining Notification Act has a similar arrangement. It requires employers with more than 100 employees¹ to provide 60 days notice to employees, their union and appropriate State authorities that deal with displaced workers, in advance of plant closings and mass layoffs. Some exceptions do exist, such as unforeseeable business circumstances and natural disaster. The US Department of Labour also administers a rapid response service to assist redundant workers in collective redundancies.

Post-dismissal Requirements

Redundancy Compensation

The provision of compensation to redundant employees is highly varied throughout different jurisdictions. There appears to be a split between jurisdictions who provide for compensation statutorily and those who rely upon collective bargaining to negotiate compensation. Many jurisdictions, including the United States, Canada, Norway and Australia, do not provide any statutory compensation entitlement, however compensation is generally included within collective agreements as the result of collective bargaining.

Those jurisdictions with compensation schemes vary significantly, some based upon years of service and others upon age at the time being employed or made redundant.

International Labour Organisation

ILO Convention 158² on the Termination of Employment provides that on termination for redundancy an employee should be entitled to a severance allowance funded directly by the employer or a fund constituted by employer contributions, or social security benefits, or a combination of both.

Europe

In Europe, it is more common for states to legislate specifically for redundancy payments. For example, in the UK, the Employment Rights Act 1996 sets out a general scheme for redundancy entitlements for employees. It specifically prescribes entitlements to redundancy payments and a calculation formula. Generally an employee is required to have two years service with their employer to be entitled to claim a payment. The exact amount payable is determined taking into account a person's length of service, age and weekly pay. Weekly payments are capped at £310 (from 1 February 2007).

France

Minimum redundancy payments for economic collective redundancies for employees with more than two years' service: 2/10 of a month's salary per year of service for up to 10 years' service; and an additional 2/15 of a month's salary per year of service after 10 years. These minimum payments are frequently topped up by company agreements.

The United Kingdom

Minimum redundancy payments, based on a sliding scale dependent on each completed year of continuous service and age:

1 Does not count employees who have worked for less than 6 months service or who work for less than 20 hours per week.

² ILO Convention 158 has not been ratified by New Zealand, however, the courts have taken its provisions into account.

- between the age of 18 and 21, an employee will receive half a week's pay
- between the age of 22 and 40, an employee will receive one week's pay, and
- between the age of 41 and 65, an employee will receive one and a half weeks' pay.

The maximum number of years to be taken into account for length of service is 20 years, and the statutory limit for weekly pay is currently £280. No income tax is payable on statutory redundancy payments.

Ireland

Employees with more than two years continuous service with the employer, over the age of 16 in employment insurable under the Social Welfare Acts, are entitled to redundancy payments. These are tax-free lump sum payments on being made redundant. Employees are entitled to three weeks for the first year of service and two weeks' pay for each year thereafter. The statutory limit for weekly pay is currently €600.00.

Employers who comply with all redundancy requirements are entitled to a 60 percent rebate from the Social Insurance Fund. Employers are required to make regular payments into this fund through Pay Related Social Insurance contributions. Where an employer is unable to pay the employee their entitlement, the Department of Enterprise, Trade and Employment pays the full amount directly to the employees from the Social Insurance Fund. This system guarantees payment to employees, and provides incentives for employers to comply with redundancy requirements such as notice.

Pay Related Social insurance is a compulsory scheme, which covers everything from health and safety benefit to state pension. The level of contribution is determined by the employee's class, determined by the nature of the person's employment. All employers are required to make contributions to PRSI on behalf of all their employees, and employers may deduct the employees' share from wages. The employee's class determines which benefits the employee is entitled to, this being related to the level of contribution provided. Criteria for redundancy payments includes that employees be within Class A of employment. This class covers people in industrial, commercial and service-type employment, who are employed under a contract of service with gross earnings of €38 or more per week from all employments; Civil and Public Servants recruited from 6 April, 1995 and Community Employment participants from 6 April, 1996.

Social plans

A number of jurisdictions provide varying degrees of social plans and measures designed to assist employees in redundancy situations. These range from retraining, job-search assistance and financial assistance for employees who must relocate to find employment.

As discussed below the European Union provides a Fund which all member states may apply to, to assist in collective redundancy situations. This is in recognition of the effects of globalisation upon employees both directly and indirectly.

Ireland

As discussed under Redundancy Compensation, employers are required to contribute to the Social Insurance Fund through Pay Related Social Insurance contributions, which guarantees redundancy payments to employees.

Employees are statutorily entitled to time off to find alternative employment, and the Minister of Labour may, for the purpose of promoting national economic policy, provide assistance to persons who are obliged to change their normal place of residence in order to take up employment offered or approved by the National Manpower Service, or to

enable persons to travel for selection for training at approved training centres or to undertake courses of training at such centres.

The United States

The United States provides Rapid Response teams that work with employers and any employee representatives', in collective redundancies, to quickly maximise public and private resources to minimise the disruptions on companies, affected workers, and communities that are associated with job loss. Rapid Response can provide customised services on-site at an affected company, accommodate any work schedules, and assist companies and workers through the painful transitions associated with job loss.

As there is no statutory entitlement to compensation, the Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no fault of their own, to assist employees who have not received compensation under their contract of employment.

Europe Union

European Globalisation Fund regulations provide for assistance to employees through the following strategies:

- job-search assistance, career guidance, tailor-made training and re-training in areas such as information and communication technology (ICT) skills, certification of acquired experience, outplacement assistance and entrepreneurship promotion or aid for self-employment
- special time-limited measures, such as job-search allowances, mobility allowances or allowances for individuals participating in lifelong learning and training activities, and
- measures targeting disadvantaged groups or older workers, aimed at enabling them to remain in or return to the labour market.

The regulation does not act as a substitute for welfare benefits provided by the member states. Instead the financial support aims to help individuals become more proactive in boosting their chances of re-entering the labour market. An application by an accredited authority to the fund must demonstrate that a programme of support has been designed. A valid application can result in financing of up to 50 percent of the programme's overall costs.

Denmark

In the event of closure of a business, employers are obliged to draw up social plans regarding the training and/or redeployment of the redundant employees. After the Regional Labour Market Council is informed, the Public Employment Service becomes involved and contacts the company in order to evaluate the possibilities for reducing the problems arising in connection with the announced redundancies. It can set up retraining schemes, and the regional Service is also involved in finding new jobs in the area for the redundant employees. There is also a new job creation initiative in Denmark which consists of a group who are dedicated to finding jobs and setting up a 'job bank' which assists redundant workers to find employment.

The United Kingdom

A Redundancy Support fund has been set up in the South West region of the United Kingdom which supports union initiatives assisting employees facing redundancy to increase their employability and access new opportunities. Funding comes from South West of England Regional Development Agency, which gets support from the European

Social Fund, the regional Learning and Skills Councils and the Department for Education and Skills. Unions may apply for either:

- immediate Response to Redundancy funding, up to £5000, for:
 - resources to provide an office facility where people can come for advice
 - IT resources to help workers access learning of job opportunity, and
 - funding to assist with payment for special training opportunities, or
- sustained Response to Redundancy funding, up to approximately £25000, budget dependant, for:
 - helping redundant employees to continue to access support services i.e. learning opportunities, information, advice and job search
 - assist redundant employees to maintain skills and morale, and
 - innovative employment creation projects and projects offering skill development.

Insolvency

Europe

European Union Directive 80/987/EEC requires member states to establish an independent body to guarantee redundancy payments to employees with outstanding insolvency claims. This is usually implemented through national insurance schemes such as that in the UK. In the UK if the employer is declared insolvent or refuses to pay, the employee may apply for a direct payment from the National Insurance Fund. Specific criteria must be met before an employee can claim from the fund.

The International Labour Organisation

ILO Convention 173 relating to the Protection of Workers' Claims generally requires that workers claims relating to wages, holiday pay and pay on termination of employment should be privileged.

	Consultation	Notice	Compensation	Government notification	Collective redundancy	Breaches	Social measures														
International Labour Organisation Convention 158	Provide workers representatives in good time with relevant information and give an opportunity for consultation			Notify the competent authority a minimum period of time before carrying out the terminations																	
New Zealand Duty of Good Faith	Consultation is required under Good Faith, including access to relevant information	"Reasonable notice" in regards to the position of the employee	No entitlement unless under contract	Not required																	
European Union	Information, consultation and participation for workers and representatives Full disclosure of relevant information to allow make constructive proposals	Notification of employees representatives at least 30 days prior to taking effect		Notification of public authorities at least 30 days prior to taking effect	<table border="1"> <tr> <th colspan="2">Over 30 days</th> </tr> <tr> <th># employed</th> <th># redundant</th> </tr> <tr> <td>20-100</td> <td>>10</td> </tr> <tr> <td>100-299</td> <td>>10%</td> </tr> <tr> <td>300+</td> <td>>30</td> </tr> <tr> <th colspan="2">Over 90 days</th> </tr> <tr> <td colspan="2">20 redundant irrespective of number employed</td> </tr> </table>	Over 30 days		# employed	# redundant	20-100	>10	100-299	>10%	300+	>30	Over 90 days		20 redundant irrespective of number employed		If requirements are breached then the collective redundancy is nullified	Employees can seek financial support for the European Globalisation Adjustment Fund (EGF) to help them gain reemployment The EGF also provides regulations on measures to assist redundant employees.
Over 30 days																					
# employed	# redundant																				
20-100	>10																				
100-299	>10%																				
300+	>30																				
Over 90 days																					
20 redundant irrespective of number employed																					
France Ratified ILC 158 EU Directive	All employees get consultation, not just collective redundancies	<table border="1"> <tr> <th colspan="2">Minimum notice based upon years of service</th> </tr> <tr> <th>Years</th> <th>Wks Notice</th> </tr> <tr> <td>6mths<2</td> <td>4</td> </tr> <tr> <td>>2</td> <td>8</td> </tr> </table>	Minimum notice based upon years of service		Years	Wks Notice	6mths<2	4	>2	8	<table border="1"> <tr> <th colspan="2">20% of a months pay p/a up to 10years</th> </tr> <tr> <th colspan="2">33% of a months pay p/a for each year over 10 years</th> </tr> </table>	20% of a months pay p/a up to 10years		33% of a months pay p/a for each year over 10 years		Information to local Minister of Labour, Employment and Vocational Training office	More than 10 employees within 30 days		The employer has to set up a Social Plan containing concrete and precise measures to avoid as many dismissals as possible, i.e. Job offers within other departments, establishments or subsidiaries, training offers.		
Minimum notice based upon years of service																					
Years	Wks Notice																				
6mths<2	4																				
>2	8																				
20% of a months pay p/a up to 10years																					
33% of a months pay p/a for each year over 10 years																					
United Kingdom EU Directive	<p>< 20 Employees No statutory obligation, except procedural fairness</p> <p>> 20 Employees Statutory duty, consult 30 days before first dismissal</p> <p>> 100 Employees Statutory duty, consult 90 days before first dismissal</p>	<p>Notice can only be issued once consultation complete, as set out in employment contract.</p> <p>Statutory minimum of one week</p>	<p>Statutory requirement where worked for greater then 2 years for employer, based upon age:</p> <table border="1"> <tr> <th>Age</th> <th>Wks pay</th> </tr> <tr> <td>< 22</td> <td>.5</td> </tr> <tr> <td>22-40</td> <td>1</td> </tr> <tr> <td>> 41</td> <td>1.5</td> </tr> </table> <p>Up to 20 years service, limit of £280 per week, no income tax.</p>	Age	Wks pay	< 22	.5	22-40	1	> 41	1.5	Duty to notify Secretary of State of all proposed redundancies of 20+ employees	20 or more employees over 90 days or less	<p>Failure to consult: Can lead to a protective award of up to 90 days pay on top of redundancy entitlements</p> <p>Failure to notify govt: Fine up to £5,000</p> <p>Failure to compensate: Employee must make an application within 6 months of termination</p>	<p>After two years service, employees are entitled to reasonable time off with pay during working hours to look for another job or make arrangements for training for future employment</p> <p>A Redundancy Support Fund is available in the South West for unions to assist with redundancy</p>						
Age	Wks pay																				
< 22	.5																				
22-40	1																				
> 41	1.5																				

<p>Ireland EU Directive</p>	<p>Collective Redundancy: Consult employees representatives at least 30 days before first dismissal General Statutory information and consultation requirements for employers with at least 50 employees</p>	<p>Where employed greater than 13weeks, minimum notice based upon service</p> <table border="1" data-bbox="584 288 813 528"> <thead> <tr> <th>Years</th> <th>Wks Notice</th> </tr> </thead> <tbody> <tr> <td>13wks<2</td> <td>1</td> </tr> <tr> <td>2<5</td> <td>2</td> </tr> <tr> <td>5<10</td> <td>4</td> </tr> <tr> <td>10<15</td> <td>6</td> </tr> <tr> <td>>15</td> <td>8</td> </tr> </tbody> </table>	Years	Wks Notice	13wks<2	1	2<5	2	5<10	4	10<15	6	>15	8	<p>Tax-free statutory entitlement, at least 2 years service 2wks pay per year, plus one wk bonus, maximum weekly pay €600.00 Employers are entitled to 60% rebate from Social Insurance Fund</p>	<p>Notify the Minister for Enterprise, Trade and Employment at least 30 days before redundancies commence Redundancy panel including unions and business groups to assess whether exceptional collective redundancies</p>	<table border="1" data-bbox="1337 204 1579 432"> <thead> <tr> <th colspan="2">Based upon size of business</th> </tr> <tr> <th># Employed</th> <th># redundant</th> </tr> </thead> <tbody> <tr> <td>20-49</td> <td>>5</td> </tr> <tr> <td>50-99</td> <td>>10</td> </tr> <tr> <td>100-299</td> <td>>10%</td> </tr> <tr> <td>300+</td> <td>>30</td> </tr> </tbody> </table>	Based upon size of business		# Employed	# redundant	20-49	>5	50-99	>10	100-299	>10%	300+	>30	<p>Failure to consult where less than 20 employees results in unfair dismissal Failure to notify Minister: Fine of up to €250,000</p>	<p>Employers contribute to Social Insurance Fund through Pay Related Social Insurance contributions to guarantee redundancy payments. Employees are entitled to time off to find alternative employment Minister may, provide financial service to persons who are obliged to change their normal place of residence in order to take up employment or to enable persons to travel for training.</p>
Years	Wks Notice																														
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<p>Australia (undergoing change) Ratified ILC 158</p>	<p>> 15 Employees Statutory duty, consult with trade unions</p>	<p>Minimum notice based upon years of service</p> <table border="1" data-bbox="584 635 813 831"> <thead> <tr> <th>Years</th> <th>Wks Notice</th> </tr> </thead> <tbody> <tr> <td>< 1</td> <td>1</td> </tr> <tr> <td>1<3</td> <td>2</td> </tr> <tr> <td>3<5</td> <td>3</td> </tr> <tr> <td>>5</td> <td>4</td> </tr> </tbody> </table> <p>Additional week if over 45 yrs and more then 2 years service</p>	Years	Wks Notice	< 1	1	1<3	2	3<5	3	>5	4	<p>No statutory entitlement unless negotiated in agreement No payment is business less then 15 employees, irrespective of contract Proposed Change: Compensation of 4-16wks for employers with greater then 15 employees</p>	<p>Duty to notify Centrelink (Social Work Services) for collective redundancies prior to termination of employment, including numbers and reasons</p>	<p>15 or more employees</p>	<p>Unfair dismissal: Only where not genuine reason, even if unfair process Failure to consult union: Orders reinstating or compensating employees and fines</p>	<p>Governmental Organisation "Cetrelink" responds rapidly to support employees in collective redundancies, particularly providing information on redundancy entitlements</p>														
Years	Wks Notice																														
< 1	1																														
1<3	2																														
3<5	3																														
>5	4																														
<p>Canada Duty of Good Faith</p>	<p>After Minister notification, set up a joint planning committee with at least 4 members, 50% representing employees Provision for an Inspector to monitor the committee</p>	<p>> 3 months Service At least 2 weeks notice Union notice: A copy of Minister's notice</p>	<p>> 1 year Service Greater of: 5 days <u>or</u> 2 days per year service</p>	<p>Collective Redundancies notify Minister of Human Resources Development at least 16 weeks before first dismissal</p>	<p>At least 50 employees within four weeks</p>		<p>The joint planning committee must look to ways to minimise the impact of termination of redundant employees and to assist them to obtain other employment</p>																								
<p>USA 'Employment at will'</p>	<p>No consult requirements.</p>	<p>Collective Redundancy: 60 days notice</p>	<p>No entitlement unless under Contract The Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no fault of their own</p>	<p>Notice of collective redundancies to local officials. US Dept of Labour rapid response service to assist in collective redundancies.</p>	<p>Employer must have over 100 employees <u>and</u> - closure where 50 or more employees terminated within 30 days - non-closure but over 500 employees laid off <u>or</u> 50-499 workers laid off representing more the 33% workforce</p>	<p>Breach of Contract for implied contract promises No notice, a days wages for each day notice not given</p>	<p>Rapid Response teams work with employers and employee representative(s) to quickly maximize public and private resources to minimize the disruptions on companies, affected workers, and communities that are associated with job loss.</p>																								

Norway	At the earliest opportunity enter into consultation with employees representatives	Based upon years of service, applies to collective and individual		No entitlement, but most collective agreements include a scheme		Notify public employment service 30 days prior to first dismissal	At least 10 employees within 30 days		Social welfare measure to provide support for redeploying or retraining Unemployment benefits after 5 days (Social Insurance Scheme) 'Stand off' pay for redundant public sector employees	
		Years	Months Notice							
		< 5	1							
		> 5	2							
		> 10 and over age 50	5							
Denmark EU Directive	Negotiations between company and employees at least 30 days before	Based upon years of service		No entitlement except for pay first two days of unemployment		Notification to the Regional Labour Market Council after consultation, 30 days before redundancies come into force, or 8 weeks if more than 50% of employees in a company with more than 100 employees are effected	Within 30 days		Failure to give notification of planned redundancies, 30days to 8 weeks pay compensation	Upon notification Public Employment Service evaluates possibilities for employees including retraining schemes and new employment Job creation initiative aimed at securing employment for redundant workers
		Months service	Months Notice				# Employed	# redundant		
		< 6	1				20-100	>10		
		6 < 33	3				100-299	>10%		
		33 < 68	4				300+	>30		
		68 < 103	5							
> 103	6									
Hungary EU Directive	Information provided 7 days before consultation over 15 days	Years	Days	Years	Months	Inform labour office at least 30 days prior	Within 30 days		Non-compliance results in dismissals voided	
		< 3	30	> 3	1		# Employed	# redundant		
		> 20	Up to 90	> 25	Up to 6		20-100	>10		
							100-299	>10%		
						300+	>30			
Czech Republic EU Directive	Consultation at least 30 days before dismissal	Three months		Twice average monthly earnings		Inform labour office at least 30 days prior	Within 30 days		Non-compliance results in financial penalty	
		# Employed	# redundant							
		20-100	>10							
		100-299	>10%							
		300+	>30							
Poland EU Directive	Consultation over up to 20 days	Two weeks minimum Up to 3 months for over 3 years service		Years	Months	Inform labour office at least 30 days prior	Within 30 days		Non-compliance results in reinstatement of remuneration up to 2 months pay	
		< 2	1	# Employed	# redundant					
		> 8	3	20-100	>10					
		Limited to 15times national minimum wage		100-299	>10%					
						300+	>30			

Comparative analysis

This analysis examines what protections New Zealand has and what New Zealand can draw on from other jurisdictions, and the possibility of protections existing in the New Zealand context. The analysis compares the scope of legal protections in other jurisdictions with New Zealand in two areas:

- Pre-dismissal requirements (consultation, notice to employees and/or their representatives and notification of authorities), and
- Post-dismissal requirements (including redundancy compensation, and social plans for protection such as training and redeployment).

Pre-dismissal requirements

Consultation

In New Zealand under the Employment Relations Act 2000, amendments to the good faith requirements in section 4 in 2004 increased protection for employees. Section 4(1A)(c) requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected, access to information, relevant to the continuation of the employees' employment, about the decision and an opportunity to comment on the information to their employer before the decision is made. Although redundancy is not specifically mentioned, redundancy has an adverse effect on the continuation of employment, making the section directly applicable. This requires consultation on both the substantive decision and the individual impact of redundancies.

The majority of jurisdictions limit specific consultation requirements to collective redundancies. In this respect New Zealand provides greater coverage by extending to all redundancies irrespective of size. However, New Zealand could benefit from considering the approach taken by Europe. The approach taken by countries in the European Union gives employees and their representatives increased access to information, and at least 30 days over which consultation can be undertaken prior to the redundancy taking effect. This allows employees sufficient time to use the information provided to make constructive proposals to avoid or mitigate the consequences of redundancy.

The approach taken by Canada is also of assistance, under statute a joint planning committee is required to be set up, which includes at least 50 percent employee representatives. This allows for active participation in consultation and decision-making by the employees who are most directly impacted. An employee is more likely to accept a decision that they are directly involved in the making of.

Notice to employees

In New Zealand there is no statutory notice period that an employer must comply with when an employee is advised about the redundancy. However, under the common law, in absence of a contractual period of notice, a reasonable period of notice must be given. This is applicable to all forms of termination, and is related to the position and length of service of the employee.

In most jurisdictions, it was considered that a scale of minimum statutory notice period should apply. While this may be a logical system in situations of individual redundancy or termination, it appears less practical in collective redundancies. To

have twenty employees being made redundant, many with different notice periods, can provide confusion and difficulties for workers who are uncertain as to their future. The position taken by the European Union provides a simple, practical notice requirement of at least 30 days to employee's representatives. This works to treat employees equally and prevent confusion. The United Kingdom also provides the requirement that notice can only be given after consultation is complete. This requirement is both practical, and prevents pre-decision-making, allowing for effective consultation.

Notification of authorities

New Zealand does not have a statutorily prescribed system of notification of mass redundancies. It is however recommended to large organisations that in the event of a mass redundancy they inform the Ministry of Social Development, particularly where the redundancy occurs in smaller regional communities. This allows for the involvement of the Department of Work and Income to provide support for redundant employees.

The majority of surveyed jurisdictions require notification to a designated public authority in the event of a proposed collective redundancy. This allows for the active involvement in the state to assist either in the prevention of the redundancy or the reduction of the impact upon employees. Despite the United States' 'employment at will' labour market, notification is required to local officials of a collective redundancy. This then triggers the assistance of Rapid Response teams, which work with employers and employee representatives to minimise disruptions on companies and affected workers. New Zealand can take guidance from these jurisdictions, which demonstrate how state involvement is both beneficial to employers and employees in preventing unnecessary harm to the business, employees and community.

Post-dismissal requirements

Redundancy compensation

In New Zealand, there is generally no statutory right to redundancy compensation unless employers and employees or their union have agreed to it. This can be done before or after an actual redundancy is planned. It is also up to the parties to decide what any redundancy compensation should be, however case law has suggested that where compensation has been agreed upon but an amount has not been determined, the courts may fix the amount. While Redundancy Payments are taxable, a rebate is available at 6 cents in the dollar, capped at a \$3,600 rebate (for up-to a \$60,000 compensation payment).

While concerns have been raised as to the provision of compulsory redundancy compensation, such as increased costs to employers, which are not manageable, schemes have successfully been implemented in a number of jurisdictions. In Ireland employers and employees make contributions for Pay Related Social Insurance, this covers a wide range of employee entitlements, one of these is redundancy compensation payment. Upon collective redundancies employees are entitled to redundancy compensation from their employer. If the employer has complied with statutory conditions including appropriate notice to the Minister and employees, they are entitled to a rebate of 60 percent of the lump sum. If an employer is unable to make payment, the employee may be directly paid from the Department of Enterprise, Trade and Employment. This system provides an incentive for employers to comply with statutory requirements protects employee's financial interests by guaranteeing payment and provides security for both employers and employees. Because the payments are coming from a general insurance fund that covers many different forms of benefits this reduces

employee and employer discomfort in making contributory payments, as they may benefit in other ways if not through redundancy provisions.

While a number of other jurisdictions provide redundancy entitlements, these are less stable as they do not have the level of protection of an insurance fund, and thus an insolvent employer may leave an employee without payment. Another feature of a number of jurisdictions is a cap on the weekly pay amount in redundancy payments. In the United Kingdom this is capped at £280, and in Ireland this is capped at €600. This balances interests as it reduces the burden on the employer and provides the employee with a sufficient amount of income for the interim. It should also be noted that redundancy payments in all jurisdictions are limited to collective redundancies, this prevents small businesses from bearing costs beyond their capability.

Social plans

In New Zealand there is no statutory requirement for employers to set up a social plan to assist employees upon being made redundant. Further, there is no right to Government assistance aside from that through Work and Income support programs. While collective agreements often refer to assistance such as time off to attend interviews and counselling, these cover a minority of the workforce. A number of social plans have been set up in other jurisdictions, which New Zealand can take guidance from

The European Union launched the European Globalisation Adjustment Fund in 2007, which provides up to 500 Million Euro a year in support to redundant workers. The Fund is financed through under-spending against the other budget ceilings, and from Community Funds that have been de-committed. The Fund is expected to assist 35 000 to 50 000 redundant workers a year. To apply a minimum of at least 1000 employees have to have been made redundant in a company or Member State (including employees in suppliers or downstream producers) over a period of four months. When a Member State is made aware of large-scale redundancies caused by the effects of globalisation, it immediately mobilises its employment services to design a plan to help the workers affected.

Once the plan is ready, it may submit an application to the European Union for part funding through the EGF, the application must demonstrate the link between planned redundancies and economic global structural changes. If the Council and Parliament approve the proposal, the Member State may receive up to 50 percent of the cost of its action plan. Plans may involve job-search assistance, occupational guidance, tailor-made training and re-training including ICT skills and certification of acquired experience, outplacement assistance and entrepreneurship promotion or aid for self-employment.

The fund may also be used for special time limited measures, such as job-search allowances, mobility allowances or allowances to individuals participating in lifelong learning and training activities and measures to stimulate in particular disadvantaged or older workers, to remain in or return to the labour market. Any application must be submitted by Member States, individuals or companies affected by redundancies wishing to benefit from the Fund must do so their national authorities.

In many jurisdictions it is required that as part of the consultation process employers provide a social plan to employees which sets out measures to avoid dismissals, time off to attend interviews or look for another job, or provisions for training. In Canada the planning committee must look to ways to assist redundant employees to find new employment. In Denmark the Public Employment Service assists in finding retraining schemes and new employment

for employees, and recently a job creation initiative was developed which works to identify vacancies throughout the country and create a 'job bank', which redundant employees may access. In Ireland there is statutory entitlement to time off to find alternative employment and funding may be approved by the Minister for employees who must relocate for new employment.

These measures provide protection and security for employees during a time of upheaval. Many of the social plans will assist in creating a painless transition into alternative employment. This mitigates many of the negative consequences of redundancy upon employees, such as creating financial stability, addressing emotional distress and up skilling employees so they may find other employment. While New Zealand does provide this support, there is little guaranteed entitlement, which could be improved by the consideration of some of the identified plans.

Conclusion

Following the consideration of a number of jurisdictions, there are a number of initiatives, statutory provisions and social plans which New Zealand could seek value in from either considering and adopting. While New Zealand provides consultation requirements, which are on par with other jurisdictions, this is the extent of statutory protection that employees are entitled to. The provision of notice periods and social plans in other jurisdictions are worthy of consideration.

APPENDIX K

SUPPORT FOR WORKERS AFFECTED BY REDUNDANCY

Work and Income engages regionally with industry and employers to minimise the impact of business closures and redundancies. In the situation of redundancy, Work and Income can offer a tailored programme to meet the needs of the affected business and workers.

Work and Income aims to ensure that redundant workers and their families obtain financial assistance as soon as they are entitled to it, as well as providing assistance with finding new employment.

Products and services we offer

Employment assistance

Work and Income has a range of employment programmes that can be tailored to meet the individual needs of the business and workers.

Work and Income can assist job seekers/ clients with:

- CV and letter writing
- career advice and planning
- job interview skills
- training and subsidised employment
- starting a new business
- specialist assistance for job seekers with disabilities
- in-work support.

Work Brokers will work with individual job seekers to help find new jobs, whether they are seeking full-time, part-time or casual employment. They will match the job seeker's skills and job choices with job vacancies. In addition, Work and Income offers financial assistance to employers and community organisations who have projects that generate work opportunities.

Income assistance

Work and Income has three levels of income support available. These include:

- Main Benefit or Pension, for example:
 - Unemployment Benefit
 - Domestic Purposes Benefit
 - Sickness Benefit
 - New Zealand Superannuation.

- Supplementary Assistance, for example:
 - Accommodation Allowance
 - Disability Allowance
 - Childcare Assistance.
- Emergency Assistance, for example:
 - Recoverable and Non-recoverable Special Needs Grants
 - Temporary Additional Support.

Work and Income Case Managers will need to assess an individual's circumstances to determine if they are eligible for income support, how much payments will be and when payments will start.

Benefit stand downs

All people applying for a main benefit will face a stand down period between one to two weeks, from the day after employment ceased (that is, the day after any holiday pay, redundancy or any insurance payments has expired).

The length of the stand down depends on a number of factors, such as the person's average weekly income (before tax) in the previous 26 or 52 weeks (to the client's advantage), and the number of dependent children in their care at any time during that period.

The benefit start date is the day after the stand down ends or the application date (whichever is later). As a result, it is important that you contact Work and Income as soon as possible, as this may affect the date you can receive financial assistance.

Note:

- assets do not affect your entitlement to a benefit or the stand down period
- income from assets may affect the amount of benefit and supplementary assistance
- assets may also affect entitlement to supplementary and emergency assistance.

Help for workers not eligible to receive a main benefit

Some workers may not qualify for a benefit because their partner is already working. However, families on a low income may be eligible for extra assistance with food and accommodation costs, through a Special Needs Grant and the Accommodation Supplement.

Workers will need to meet with a Work and Income Case Manager to assess their eligibility to assistance.

Additional information is available for employers affected by a change event.

If you'd like more information about how we can help, please call **0800 559 009**.

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Other issues

Companies Act 1993

The Companies Act 1993 currently provides that a maximum of \$16,420* per employee is available for priority debts for unpaid wages, holiday pay and redundancy compensation when an employer is insolvent. Priority debts currently do not include notice of termination. (* See Note on page 127 of this pdf)

* The maximum amount for priority debts for unpaid wages, holiday pay and redundancy pay may be changed through Order in Council. Please check the NZ legislation website (www.legislation.govt.nz) for the [Companies \(Maximum Priority Amount\) Order](#) which will have the current maximum amount.