Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the provisions of the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

Submitter: Michelle Bissett

Organisation: Australian Council of Trade Unions

Address: Level 2
393 Swanston Street
Melbourne Vic 3000

Phone: 03 9664 7347

Fax: 03 9663 4051

Email: mbissett@actu.asn.au

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

ACTU SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (SMALL BUSINESS EMPLOYMENT PROTECTION) BILL 2004

February 2005

INTRODUCTION

1. The ACTU is opposed to the passage of the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004.

2. First, the Bill is based on a flawed analysis of the ability of small business to meet ordinary standards of employee entitlements.

3. Second, it seeks to overturn the *Redundancy Case* decision of the Industrial Relations Commission[1] which dealt extensively with the merits of the issue, including the financial capacity of small business to meet a redundancy pay standard. The Commission took account of any relevant issues by setting the entitlement at a level lower than that applying to businesses employing 15 or more employees;

4. Third, it seeks to constrain the discretion of state industrial tribunals that have, in the past, set different standards in relation to redundancy.

5. Fourth, the Bill goes further than merely overturning the *Redundancy Case* decision in relation to redundancy pay entitlements for employees of small business.

6. Fifth, the bill will create uncertainty and confusion by overriding state and territory laws and state industrial instruments.

THE REDUNDANCY STANDARD

The *Termination, Change and Redundancy Case*[2] (TCR) (1984)

7. In 1984 the (then) Australian Conciliation & Arbitration Commission handed down their decision in the *TCR Case.* This decision established a federal award standard for redundancy pay to employees made redundant.

8. This decision did not exempt employers of fewer than 15 employees from the obligation to pay redundancy pay. It did however exempt employers of fewer than 15 employees from the requirement to consult and the notification provisions that applied to other employers.

9. The later *TCR Supplementary Decision*[3] determined to exempt employers of fewer than15 employees from the requirement to make redundancy payments. The decision however allowed for application to be made on an award by award basis to vary this exemption.

[1] PR032004
[2] (1984) 8 IR 34
[3] (1984) 9 IR 115

10. Subsequent to these decisions there have been seven successful separate applications to the Commission for the removal of the exemption from employers of fewer than 15 employees of the requirement to make redundancy payments. These applications went to the following awards:

- Re Municipal Employees (WA) Award 1982 and other awards;[4]
- Building and Construction Industry TCR Case;[5]
- Re Clothing Trades Award 1982;[6]
- Re Furnishing Trades Award, 1981;[7]
- Australian Municipal, Administrative, Clerical and Services Union and Armidale Family Day Care Ltd and others;[8]
- Re Timber Industry Award 1990;[9] and
- Re National Joinery and Building Trades Products Award 1993.[10]

11. This case by case approach to the removal of the exemption was effectively brought to a halt in 1996 by the Full Bench in the *Graphic Arts Case*[11] which, after concluding that the union had made out a case that the industry covered by the award was not relevantly distinguishable from other industries where the exemption had been deleted, refused to vary the award, saying that a review of the test case standard would be the most appropriate way of dealing with the issue.

12. The *TCR Case* also contains a general provision that allows an employer, regardless of size, to seek to reduce or remove their obligation to make redundancy payments based on incapacity to make such payments on a case-by-case basis.

The *Redundancy Case* (2004)

13. A full bench of the Commission in the *Redundancy Case* reiterated that the primary purpose of redundancy pay is to compensate employees for the loss of non-transferable credits and the inconvenience and hardship imposed on employees in circumstances of redundancy. The full bench found that the term "hardship" should be given its ordinary and natural meaning.

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[4] (1986) 16 IR 76.
[5] (1989) 31 IR 450.
[6] Print K7074 (March 1993).
[7] Print L5424 (September 1994).
[8] Print L9065 (February 1995).
[9] Print M1434 (May 1995).
[10] Print N3619 (July 1996).
[11] Print N7314

14. The Commission found that it was not contested that the nature and extent of the losses suffered by employees of small business (that is those employing fewer than 15 employees) are broadly the same as those suffered by employees of medium and large businesses.

15. Specifically, the Commission considered a number of matters relating to small business.

15.1 Should the exemption for small business be removed from the standard federal award provision?

15.2 Should small business be exempted from the agreed consultation procedure in relation to redundancy?

15.3 If redundancy pay entitlements are extended to small business employees should insolvent small business be exempted?

16. These issues were the subject of extensive evidence and submissions by the ACTU, the employer organisations, state government and the Commonwealth and received detailed consideration by the Commission.

17. In determining that the exemption should be removed, the Commission set out a number of reasons for its decision.

17.1 The nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as for those employed by medium and larger businesses.

17.2 The level of exemption (that is, employers with fewer than 15 employees) is, to some extent, arbitrary, and can lead to unfairness.

17.3 Contrary to some employer submissions and evidence, there is no requirement for employers to provide for possible redundancy payments as contingent liabilities, as the relevant Accounting Standards make it clear that provision need be made only where the employer has a present obligation to make these payments.

17.4 The Commission gave three reasons for coming to the conclusion that:

"The evidence does not support the general proposition that small business has a relative lack of financial resilience and has less ability to bear the costs of severance pay than larger business. We accept that this is true of some small businesses, but the evidence falls well short of establishing, as a general proposition that small business does not have the capacity to pay severance pay."

17.4.1 Around 70 per cent of small businesses are profitable (68.3 per cent of micro businesses, with fewer than five employees, and 74.9 per cent of other small businesses) compared to 75.3 per cent of middle size businesses and 80.1 per cent of large businesses. The evidence also showed that 70 per cent of small

businesses which reduced employment still made a profit, and that the pattern of profitability amongst small businesses does not vary, regardless of whether the number of persons they employed is increasing, decreasing or static. Very few small businesses close for reasons of bankruptcy or insolvency; the most common reason is to realise a profit.

17.4.2 Some small businesses voluntarily make redundancy payments, including more than 90 per cent of small companies surveyed by the Australian Industry Group.

17.4.3 There is no evidence that in South Australia and Tasmania, where state awards do not exempt small business from redundancy pay, that this has had an effect on the profitability or failure rate of small business.

17.5 While the general thrust of state and federal arbitral decisions in relation to this issue has included an exemption for small business, this has not been consistent in all jurisdictions.

17.6 The Commission also noted seven federal awards (identified above) in which the exemption had been removed, and that in these cases:

"…the Commission has consistently rejected the notion that the number of employees and the capacity of an organisation to make severance payments was directly linked."

17.7 The Commission then concluded:

"The existence of a small business exemption in most state jurisdictions is clearly a factor which supports the retention of the exemption in federal awards. But it is not a determinative consideration. It must be balanced against other factors such as the inequities that may arise in circumstances where a business reduces employment over time, and the inconsistency of treatment of redundant employees based on the number of persons their employer employ.

"In relation to the potential for industrial unrest arising from inconsistent state and federal standards, we note that such inconsistency already exists. There is no general exemption for small businesses in South Australia and Tasmania, and the severance pay standard in New South Wales and Queensland differs from that in other states and in federal awards. No evidence was adduced to support the proposition that such different standards have given rise to industrial disputation."

17.8 Although ILO instruments permit an exemption from standard entitlements for employees of small business, this is not required. Little information was given about international practice in this regard and, in any event, international comparisons can be problematic because of different contexts.

17.9 The availability of enterprise bargaining is not an impediment for the removal of the exemption and, in any event, can also be used to waive or reduce

redundancy pay entitlements where this would not be contrary to the public interest, such as where it is part of a strategy to deal with a short-term crisis in, and to assist in the revival of, the business.

18. Although the Commission decided to remove the blanket exemption for small business, a number of elements of the decision are directed towards recognising the specific needs of small business.

18.1 The scale of redundancy pay applying to small business is less than that applying to employees with 15 or more employees; that is, the maximum is eight weeks pay after four years service, compared to a maximum of 16 weeks pay after nine years service for larger businesses.

18.2 Small business is exempted from the requirement to consult with affected employees and the relevant union when contemplating retrenchments due to redundancy and a dispute arises.

18.3 In the *Redundancy Case Supplementary Decision*[12] the Commission determined that only service after the operative date of any order giving effect to removal of the small business exemption should count for the purpose of calculating redundancy pay for employees of businesses employing fewer than 15 employees.

THE BEST OPTION IS TO ENSURE THAT SMALL BUSINESSES WHICH GENUINELY CANNOT AFFORD TO MAKE REDUNDANCY PAYMENTS CAN READILY OBTAIN AN EXEMPTION FROM DOING SO

19. As noted above while the Redundancy Case decision removed the exemption from employers of fewer than 15 employees from the requirement to make redundancy payments, a number of provisions were put in place that specifically recognised the needs of such businesses.

20. In addition, the ACTU accepts the principle that where employers can demonstrate incapacity to pay redundancy entitlements they may apply to have their obligations reduced or removed altogether.

21. In this process, it is submitted, the onus must be on the employer to provide evidence of this incapacity to pay. There must not be a trade-off between the need to provide evidence of genuine incapacity to pay and the desirability of simplifying and expediting the process.

22. Employers raised two issues relevant to this issue in the *Redundancy Case.*

23. The first was a claim that where employees were made redundant due to insolvency (as opposed, for example, to restructuring, relocation and the like) larger businesses should be required to meet only the current standard of

[12] PR062004

redundancy pay entitlements, while small business should continue to be exempted.

24. The Commission rejected this submission on the basis that:

24.1 No state jurisdiction provided for a lesser redundancy entitlement in cases where the reason for the redundancy was the insolvency of the employer;

24.2 Employees made redundant due to insolvency suffer the same degree of hardship as employees made redundant for other reasons such as restructuring;

24.3 The evidence did not support a contention that higher entitlements would encourage employees to choose redundancy over continued employment in cases where the insolvent business was able to continue to operate under administration, with the Commission stating that "we do not accept that employees are incapable of looking to their long-term interests";

24.4 The real beneficiaries of lower redundancy entitlements in insolvency cases would be other creditors of the employer.

25. The second issue raised by the employers was a claim that the standard provision allowing an employer to make an application to the Commission for variation of the redundancy pay prescription on the basis of the employer's capacity to pay be amended to allow for such an application to be made by a group of employers.

26. The Commission determined to amend the incapacity to pay provision in accordance with the employer claim, accepting that applications would be able to be made on a sector basis.

27. In deciding to amend the incapacity to pay provision, the Commission held:

"We recognise that any incapacity to pay case may present the applicant or applicants with difficulties. Almost by definition, an employer's resources to conduct such a case are under serious strain. However, the Commission is experienced in these matters and has sat out of hours, on-site, and has assisted both employers and employees who may not be represented. An example of an approach adopted by the Commission is provided by a recent matter involving the Pastoral Industry Award 1998.

"On the basis that ACCI has submitted that its proposal is not designed to weaken the incapacity to pay principle but to simply improve access to it, we will make the alteration sought. It must be clearly understood, however, that for relief to be granted, the concept of averaging cannot be used and incapacity must be shown in the case of each employer.

"This is particularly so in circumstances where an incapacity to pay application is made in relation to a severance payment not simply for deferral, but for relief from the requirement to make the payment, or part thereof, at all. There may be scope to make a partial award of severance pay, but that would

be a matter for the Commission when hearing the application in relation to incapacity."

28. Taking the above into account, the ACTU submits that the current system provides sufficient flexibility to enable those employers who genuinely cannot afford to pay redundancy pay, to readily obtain exemption. In particular, the Committee is asked to note:

28.1 The Commission's rules provide for electronic lodgement of applications;

28.2 In the *Pastoral Industry Case*[13] referred to above by the Commission, a specific process was adopted for employers in the industry who had been affected by the drought, enabling them to have their application determined "on the papers" through provision of a statutory declaration, so long as the application was not opposed;

28.3 The *Redundancy Case* provides for applications to be made on behalf of a number of employers, significantly reducing the resources required by an individual employer and, in practice, allowing for the application to be handled by an employer organisation;

28.4 As pointed out above, applications in relation to incapacity to pay do not require legal representation, with the Commission prepared to assist unrepresented parties, as well as reducing costs by, for example, holding hearings on-site and/or out of business hours.

WHETHER IT IS APPROPRIATE FOR LEGISLATION TO OVERRIDE AIRC DECISIONS

29. The ACTU recognises that under the doctrine of separation of powers Parliament is sovereign, and is able to make and change laws.

30. The ACTU does not submit that it is never appropriate to legislate to overturn a decision of a court or tribunal, particularly where that decision may have highlighted an unintended consequence of or limitation in the drafting of a law.

31. However, in general, the ACTU submits that once Parliament makes laws that give discretion to courts or tribunals, it should not habitually seek to overturn decisions because of disagreement with the outcome of the exercise of that discretion. To do so, in the ACTU's submission, diminishes the respect with which the community should regard independent courts and tribunals.

32. In this case, Parliament has determined that redundancy pay is within the jurisdiction of the Commission's award-making powers.[14]

[13] PR940769
[14] WRA s89A(2)(m)

33. The background to the Commission's previous exemption for small business is set out in the *Redundancy Case* decision.

'In the TCR No. 1 decision the Commission excluded employers who employ fewer than 15 employees from the notification and consultation provisions only, not from the requirement to make severance payments. Further proceedings took place after the Commission "received a multitude of complaints from employers about the decision". The TCR No. 2 decision was subsequently issued. In that decision the Commission determined that:

> *"… in the interests of uniformity with New South Wales and in the light of the material presented about the effect of taking into account previous service, we are prepared to grant an exemption for employers of less than 15 employees. This exemption will also be subject to further order of the Commission."*'

34. Following that decision the Commission made a number of decisions to remove the exemption from the redundancy provisions in specific federal awards. This approach, as outlined above, came to a halt in 1996 by the Full Bench in the *Graphic Arts Case*.

35. The Commission has now properly considered and decided the issue through a test case, but only after stringently examining and considering the evidence presented by a range of parties.

36. The Commission's decision that past service would not count towards the new entitlement for employees of small business should be particularly noted; this means that the specific reason for granting the exemption in the original *TCR Case* does not apply in the current circumstances.

37. The ACTU submits that it would be completely inappropriate to use legislation to nullify this decision simply on the grounds that the Government disagrees with it or, worse, that it sees some electoral benefit in so doing.

THE BILL ALSO EXTINGUISHES EXISTING RIGHTS

38. The ACTU asks the Committee to note that the bill goes further than simply nullifying the effect of the recent *Redundancy Case* decision in relation to small business.

38.1 The exemption for employers with fewer than 15 employees in current awards established by the *TCR Supplementary Case* counts all employees, including casual employees, for the purpose of calculating whether or not the employer employs fewer than 15 employees. This bill seeks to exclude from the calculation of the number of employees all casuals other than those who, at the relevant time, have been engaged by the employer on a regular and systematic basis for at least 12 months. This alteration to the method of calculating the number of employees for the purpose of determining the exemption provides scope for manipulation of the number of employees and casual employees with less than 12 months service for the purpose of avoiding any obligation to

make redundancy payments.

38.2 The bill seeks to prevent the Commission from making an exceptional matters order granting redundancy pay to small business employees, even though the criteria for making an exceptional matters order include that a harsh or unjust outcome would apply if the order was not made.[15] This narrowing of the use of the exceptional matters provisions of the Workplace Relations Act diminishes the purpose of such provisions – that is to deal with circumstances that are exceptional.

38.3 The bill seeks to amend section 170FA of the Act to prevent the Commission making orders for the payment of redundancy pay in order to give effect to Article 12 of the ILO's Termination of Employment Convention. This provision has been operative since March 1994; there have been few applications brought under it, and no evidence of problems such as to justify fettering the Commission's discretion.

39. The bill seeks to exclude the jurisdiction of state tribunals to make awards providing for redundancy pay for employees of constitutional corporations with fewer than 15 employees and to override state and territory law to the extent that it would require an employer of fewer than 15 employees to make redundancy payments.

40. The ACTU submits that this is an unwarranted intrusion into areas of state jurisdiction and is strongly opposed.

41. The ACTU further submits that the bill will create confusion and uncertainty for employers and employees. The bill will have the effect of overriding some aspects of the regulation of redundancy matters within the state jurisdiction but not others. It replaces a single source of regulation of redundancy for any employer with a number of sources of regulation. This will create confusion and increase compliance costs for employers.

42. The bill will create confusion in that not all employers operating within the state jurisdiction will be affected by the bill.

43. Section 51 (xx) of the Constitution has been generally considered to authorise the Federal Parliament to legislate as to the industrial rights and obligations of persons employed by constitutional corporations[16] (that is, a foreign corporation, or a trading or financial corporation formed within the limit's of the Commonwealth).

44. The precise scope of this authorisation has not been tested and there can be no certainty as to whether a constitutional challenge to the Bill, should it be passed, would be successful. However, this does not mean that it would not create areas of constitutional complexity, mainly in relation to the issue of whether or not an employer is a constitutional corporation, but also in relation

[15] WRAs89A(7)
[16] *Victoria v The Commonwealth* (1996) 187 CLR 416

to the scope of the application of the corporations power to employment-related matters.

45. Unincorporated employers, together with those that cannot be characterised as trading or financial, pursuant to the large body of case law which has developed on this subject, would still be subject to state laws relating to redundancy. At least 15 per cent of Australian employees do not fall within the scope of the corporations power, and this rises to 25 per cent of employers in Queensland. This issue has obvious potential for causing employers significant inconvenience, at best, and extensive involvement in litigation, at worst.

CONCLUSION

46. The ACTU is apposed to the passage of the Workplace Reactions Amendment (Small Business Employment Protection) Bill 2004.

47. The Bill is unnecessary. The decision of the Australians Industrial Relations Commission considered all of the evidence placed before it by employers, unions, State Governments and the Commonwealth Government in reaching its decision with respect to redundancy pay obligations for employers employing fewer than 15 employees.

48. The Commission took into account the needs of small business in determining that the level of redundancy pay for employees in such businesses would be less than that applicable in medium and large businesses. The Commission also determined that only prospective service with an employer would count for the purpose of determining redundancy pay entitlements in small businesses.

49. It is inappropriate to use legislation to override a decision of the Australian Industrial Relations Commission just because the Government disagrees with the decision.

50. The passage of the Bill will override state laws and determinations of state tribunals leading to confusion for employers and employees.