

Majority report

Background

1.1 The committee's inquiry in to the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004, which was introduced into the parliament in May 2004, lapsed when parliament was prorogued for the 2004 federal election. The committee resumed its inquiry when the Government introduced into the parliament a similar bill, but under a different title, the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004.

The purpose of the bill

1.2 The purpose of the bill is to amend the *Workplace Relations Act 1996* to limit redundancy pay obligations to businesses which employ fifteen or more employees. The bill overturns the March 2004 Test Case decision of the full bench of the Australian Industrial Relations Commission (AIRC), which imposed redundancy pay obligations on small businesses with fewer than fifteen employees. The imposition of redundancy pay on small businesses was not a serious issue in state jurisdiction before the AIRC decision in 2004. The majority of states had long recognised the need to protect small businesses from redundancy pay.¹ However, the AIRC decision has created conflict between state and commonwealth jurisdictions, with different small businesses in the same area facing vastly different redundancy obligations on the basis of whether or not they are covered by a federal award.² The bill removes this conflict between state and commonwealth jurisdictions arising from the AIRC decision.

1.3 Under the provisions of the bill, any variations to awards made after the Test Case decision which have imposed pay obligations on small businesses will have no effect. The bill excludes constitutional corporations which employ fewer than fifteen employees from redundancy pay obligations which may be imposed by state laws or state awards. Also, under the bill only casuals employed on a long term systemic basis for twelve months will be included for the purpose of determining the number of workers employed by a small business.

1.4 A supplementary decision by the AIRC in June 2004 recognised that small businesses may not have the financial reserves necessary to meet redundancy obligations immediately. The Commission decided that the severance pay scale to apply to small business should not take into account service rendered prior to the operative date of any order giving effect to the original decision.³ The effect of the supplementary decision is to defer any requirement for small businesses to make

1 DEWR, *Submission 3*, p.25

2 AiG, *Submission 17*, p.8

3 Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004, *Bills Digest*, No. 161 2003-04, Department of the Parliamentary Library, 2004, p.12

redundancy payments for one year, and to defer full payments for up to four years. However, as the submission by DEWR pointed out, after four years the redundancy pay scale will apply in full and small businesses will be exposed to the full cost impact of redundancy pay.⁴

1.5 The committee emphasises that the bill is designed to preserve the status quo; that is, it preserves an exemption that has existed for twenty years under the federal industrial system which, in ACCI's view, represents a valid, reasonable and balanced approach to the operation of minimum redundancy payments in Australia. The committee agrees with DEWR's assessment that the history of the exemption from redundancy pay for small business demonstrates that the original rationale for the exemption remains valid today. This is why the committee accepts the view advanced by industry groups that the AIRC's decision is at odds with a range of evidence on the fundamental incapacity of small businesses to meet additional financial obligations. A fuller response to the AIRC's decision is provided later in this report.

1.6 The committee notes that under the current industrial relations system there is no review or appeal process to reconsider the merits of the Commissions' Test Case decisions. It believes the legislation should be passed as a matter of urgency because most small businesses covered by federal awards will eventually be subject to redundancy payments for their employees. There is nothing unusual or new in parliament correcting decisions of the AIRC. ACCI noted in its submission that correcting AIRC decisions is a perfectly legitimate and accepted approach to public policy, in appropriate circumstances. The committee believes that the Commission has invited statutory intervention upon itself on this occasion as a result of its decision. The committee also notes that the Commission's decision is already beginning to be felt in a number of state jurisdictions. UnionsWA, the peak union body in Western Australia, has already lodged proceedings with the Western Australian Industrial relations Commission. The Queensland Council of Unions has also requested the Queensland Industrial relations Commission to re-list the redundancy test case in that jurisdiction.⁵

Why the AIRC Test Case decision should be overturned

1.7 The committee believes that the Commission's decision seriously underestimated the impact that redundancy pay obligations will have on economic growth and further job creation in the small business sector. The AiG was forthright in its submission, describing the Commission's decision as delivering a 'body blow' to jobs. Small business is the largest employer of full-time labour in Australia, with approximately half a million small businesses operating which employ around 2 million Australians.⁶

4 DEWR, *Submission 3*, p.34

5 *ibid.*, p.25

6 AiG, *Submission 17*, p.1

1.8 It is common sense to expect that if left unattended, the Commission's decision will result in a significant decline in jobs growth and an increase in insolvencies in the small business sector. This is because small businesses generally lack the financial resilience to meet redundancy pay obligations, routinely encounter difficulties obtaining adequate finance to address business restructures and redundancies, and find it difficult to build up financial reserves to cover the costs of retrenchment. Small businesses' lack of financial resilience is the main reason why state industrial tribunals in the past have exempted small businesses from redundancy pay. The committee notes that the redundancy obligations arising from the Commission's decision are in addition to the exposure of small businesses to termination payments and unfair dismissal laws.

1.9 At the public hearing, Mr Scott Barklamb from the Australian Chamber of Commerce and Industry (ACCI), told the committee that not only does the Commission's decision fail to meet the commonsense test, it also defies logic particularly in relation to the impact of the decision on business costs, cash flow, profitability and the viability of small business:

It seems to us a relatively simple proposition that Australia's smallest businesses, at the community and local level – run...by the mums and dads in the local strip shopping centres – simply do not have these amounts of money to access to pay additional benefits precisely when they are facing adversity.⁷

1.10 It is widely recognised that small businesses differ in many important ways from medium to large businesses, which was not given sufficient weight by the Commission in its decision. As DEWR pointed out in its submission, small businesses tend to be chronically undercapitalised, they lack the financial resilience to meet large commitments such as redundancy pay, and are more likely to go out of business in the earlier years of operation.⁸ The imposition of redundancy pay on small businesses is therefore unacceptable, given that they account for nearly half of private sector, non-agricultural employment in Australia.

1.11 The committee notes a recent decision of the Full Bench of the Queensland Industrial Relations Commission (QIRC), in which significant arguments and evidence were presented about the detrimental impact on small business of removing the redundancy pay exemption. According to the AiG, the QIRC's decision to retain the exemption for small businesses pointed to the unique characteristics of small businesses including their lack of financial resilience, their smaller cash reserves and the potential for redundancy pay obligations resulting in small business insolvencies.⁹

7 Mr Scott Barklamb, ACCI, *Committee Hansard*, 28 February 2005, p.20

8 DEWR, *Submission 3*, p.26

9 AiG, *Submission 17*, pp.2-3.

1.12 The Commission's decision also places Australia at odds with international regulatory practice. The AiG drew the committee's attention to an international comparative study of redundancy pay obligations across jurisdictions, carried out by Melbourne University researcher, Mr Mark Roberts. The study shows that relatively few advanced countries provide for employer-funded severance payments to be made to employees upon redundancy.¹⁰

1.13 In reaching its decision, the Commission gave consideration to three main arguments: small business is generally profitable, some small businesses make severance payments despite the absence of a legal liability to do so, and the absence of any evidence to suggest that small business is less profitable or more likely to fail in jurisdictions where the small business exemption does not exist. The committee was told repeatedly by employer groups that the reasoning used by the AIRC to support its conclusion about the capacity of most small businesses to cope with redundancy pay is fundamentally flawed and does not bear close scrutiny. The submission from ACCI argued that the Commission's decision contained 'manifest error', principally because it confused the profitability of small businesses with their capacity to afford the cost of redundancy payments without damaging employment growth.¹¹ The committee accepts the evidence from DEWR and ACCI that each of the arguments advanced by the Commission, or the inference drawn from them, is flawed.

1.14 The conclusion reached by DEWR in its submissions is worth quoting at length because it captures the flavour of industry concerns:

The central flaw in the AIRC's decision was to confuse profitability with capacity to pay redundancy. The decision did not give sufficient regard to the substantial body of evidence and argument that shows that small businesses generally do not have the financial resilience to cope with redundancy pay, irrespective of whether or not they are making a profit.¹²

Why the incapacity to pay provisions are inadequate

1.15 The committee heard less than convincing evidence from the ACTU and other unions about the effectiveness of provisions which were first put in place by the Commission in 1984, which enable employers to argue incapacity to pay. Incapacity to pay enables employers who genuinely cannot afford redundancy pay to apply to the Commission to have their obligations reduced or removed altogether. While unions hold the view that the current incapacity to pay system provides sufficient flexibility to enable employers who genuinely cannot meet their redundancy pay obligations to readily seek an exemption, evidence to support this claim was not presented to the committee.¹³

10 *ibid.*, p.8

11 ACCI, *Submission 9*, p.5

12 DEWR, *Submission 3*, p.45

13 ACTU, *Submission 2*, p.12

1.16 Evidence before the committee from employer groups, particularly the National Farmers Federation (NFF), rejected the claim by the ACTU that the incapacity to pay process works effectively. The NFF submission highlighted numerous administrative shortcomings with the current process, and painted a realistic picture of the frustration experienced by farmers who have filed applications with the Commission seeking exemptions, particularly in times of prolonged drought. The NFF concluded from its experience over many years dealing with incapacity to pay claims, that the current procedures used by the AIRC for demonstrating incapacity 'effectively render the provision as inaccessible for small business'. The NFF maintained that it is nearly impossible for small businesses to successfully prosecute an incapacity to pay claim, resulting in many small businesses which may have been entitled to some financial relief not bothering to access the process:

...the evidentiary and procedural requirements are so onerous that it results in substantial stress and significant administrative and cost burdens on a small business, which effectively precludes the use of the provision by small business. NFF submits, therefore, that incapacity to pay claims cannot be regarded as an effective fallback provision for small business.¹⁴

1.17 The committee is particularly concerned by the inflexible nature of the incapacity to pay process, especially the unique circumstances canvassed in the NFF submission where farmers in receipt of Exceptional Circumstances Relief Payments (ECRP) sought an automatic delay to the 2003 national wage increase for farmers. The NFF told the committee that although it had sought a simplified incapacity to pay claim on behalf of farmers, many farmers withdrew their interest in making an application because the process was seen to be cumbersome and intrusive. The process required scrutiny of the private financial records of farmers, even when they had already qualified for ECRP under Centrelink's strict requirements. Of particular concern is the ability of unions to access and scrutinise farmers' private financial records even if the employees on site are not union members.

1.18 The committee agrees with the NFF that farmers already in receipt of emergency drought relief funding should not be required to demonstrate to the Commission incapacity to pay. This is an unnecessary duplication of process which is clearly discouraging many farmers from filing applications with the Commission. It also finds union involvement in the process inappropriate and a major disincentive for farmers. The committee does not believe that unions should have an automatic right to access private financial records and a capacity to object to any claims, especially in circumstances where claims for emergency drought relief payments have already been approved.¹⁵

1.19 Overall, the committee is concerned by the obvious deficiencies with the Commission's current incapacity to pay process. Evidence before the committee

14 NFF, *Submission 1*, p.5

15 *ibid.*, p.11

demonstrates that the process is cumbersome, inefficient and discourages small businesses, particularly in the farming sector, from filing applications for exemptions with the Commission. The time and cost of making and pursuing an application are considerable. The committee believes that the Commission should examine ways to simplify the process and make it more accessible to farmers and other small businesses experiencing financial difficulty.

Conclusion

1.20 In considering the evidence before this inquiry, the Committee majority concludes that the case mounted in support of this bill by employer groups is straightforward and compelling. Simply stated, the fundamental grounds for exempting small businesses from redundancy pay obligations are the limited financial capacities of small businesses and the effects of removing the exemption on small business employment and on the economy more generally.¹⁶

1.21 The committee is not opposed to small businesses voluntarily negotiating redundancy pay for employees where they can afford to do so. This is a sensible approach to enterprise bargaining which ensures employees receive their entitlements when an employers' actual capacity to pay exists, often resulting from an increase in workplace productivity. However, the committee does not support the creation of an arbitrated, compulsory award safety net obligation which compels small businesses to make payments to their employees in all situations. The committee can not see any sense imposing on small businesses a redundancy pay obligation which cannot be met.

1.22 The committee notes that the supplementary decision of the AIRC, which provides approximately a twelve month transitional period before the full impact of the substantive decision is felt, to some extent recognised the unique financial position of small businesses. Be that as it may, the committee believes that any respite offered by the supplementary decision will be short lived. As of July 2005, small businesses will be forced to assume redundancy pay obligations of up to 4 weeks, which equates to at least an additional \$2000 for each employee. This is an unacceptable financial burden for the small business sector. The committee is aware that the extra financial burden will come into play precisely when small businesses are least likely to be able to afford it. This is why the immediate passage of the bill is necessary before the full impact of the Commission's decision is felt, to ensure the viability and survival of struggling small businesses.

16 *ibid.*, p.8

Recommendation

The committee majority recommends that the Senate pass this bill.

Senator John Tierney
Chair

