Opposition senators' report

2.1 The bill before the committee seeks to overturn the March 2004 redundancy case decision of the full bench of the Australian Industrial Relations Commission (AIRC), which removed the exemption from redundancy pay obligations for businesses with fewer than 15 employees. In reaching its decision, the Commission reiterated that the primary purpose of redundancy pay is to compensate employees for the loss of non-transferable credits and for the hardship imposed on employees when they are facing redundancy.[1]

2.2 The decision dealt extensively with the merits of the issue over a period of sixteen days of formal hearings followed by supplementary hearings. The Commission set out three main considerations in support of its conclusions: small business is generally profitable; some small businesses make severance payments despite the absence of a legal liability to do so; and an absence of evidence to show that in jurisdictions where the exemption does not exist, small business is less profitable or more likely to fail.

2.3 It is important to note that the Commission considered evidence presented in detailed submissions by employer groups, the ACTU and state and Commonwealth governments. It took into consideration a number of matters relating to small businesses by setting the entitlement at a level lower than that which applies to businesses employing fifteen or more employees. However, it found that 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 large businesses.

2.4 This dissenting report examines the evidence before the committee from various unions and state governments who are opposed to the Workplace Relations (Small Business Employment Protection) Bill 2004. It finds that the changes being proposed are far reaching, and extend beyond issues raised by Minister Andrews in his second reading speech. It finds that employer groups were not able to demonstrate during the inquiry the need for this legislation, and made ridiculous claims about the damaging effect of the Commission's decision on the employment capacities of small business. Put simply, the case made by employer groups about the incapacity of small business to make redundancy payments and the inadequacy of the current incapacity to pay process, are not borne out by the evidence.

Main reasons for opposing the bill

2.5 Opposition senators are opposed to the bill on several grounds. First, contrary to the assertion by the Australian Chamber of Commerce and Industry (ACCI) that the bill only seeks to preserve the status quo by retaining an exemption for small business from redundancy pay, the bill actually goes much further in two respects. It removes

1 ACTU, *Submission 2*, p.3

rights that existed before the Commission's redundancy decision, and fundamentally alters the powers of the Commission to hear redundancy cases. The ACTU told the committee at the public hearing that the bill creates an absolute exemption for employers of fewer that fifteen employees, an exemption that did not exist before the Commission made its decision: 'As such, the bill actually proposes to undo provisions that were inserted into federal awards arising from the termination change and redundancy case in 1984…'.[2]

2.6 The bill also makes redundancy pay for small business a non-allowable matter; that is, it removes the Commission's ability to make orders with respect to redundancy pay by small businesses. According to the ACTU, the Commission's role in these matters was not raised as a substantive issue in hearings leading up to the redundancy case. Opposition senators note that the issue also was not raised by employer groups in submissions to this inquiry.

2.7 Second, the bill changes the accepted method of counting employees to determine whether an exemption from redundancy pay exists. Previously, all casuals were included in the count of employees. However under this legislation, only casual employees who have continuous employment of more than twelve months service are counted. This will have a major impact in areas such as retail where an employer can have in excess of 100 employees but, under the terms of the bill, be excluded from an obligation to pay redundancy pay because the employer is not considered to employ more than 15 workers.

2.8 Third, the Shop, Distributive & Allied Employees' Association (SDA) submission expressed concern that the bill will allow employers to structure their businesses in order to gain access to the redundancy pay exemption. It is possible, for example, for a constitutional corporation to have a number of subsidiary enterprises acting as the employers of labour, and for employment-only companies with no assets to be established in such a way as to avoid having to pay redundancy payments:

> If each subsidiary or associated entity employs fewer that 15 employees, then they will be small businesses for the purposes of [the bill] and will be able to avoid the redundancy provisions of the Commission's decisions. This would be the case notwithstanding that the sum total of employees of the various subsidiary entities of a major corporation could total in the hundreds.[3]

2.9 Fourth, there is a concern that the Government's attempt to extend the Commonwealth's jurisdiction to encompass constitutional corporations is a misuse of the corporations head of power contained within the Constitution. The New South Wales Government submission took exception to the Commonwealth attempting to take over areas currently covered by state law, and without any consultation with the states, 'if it cannot provide convincing evidence that there are real problems with the

---

2 Ms Michelle Bissett, ACTU*, Committee Hansard*, 28 February 2005, p.2

3 SDA, *Submission 7*, p.1

state systems as they presently operate and that its proposed solution would be superior'.[4] The submission emphasised that the redundancy provisions operating in New South Wales have worked effectively for many years, and have drawn no public or formal criticism of the way in which the jurisdiction operates.[5]

2.10 The ACTU agreed and, while strongly opposed to the bill's unwarranted intrusion into areas of state jurisdiction, picked up and developed the line of criticism advanced by the New South Wales Government. The ACTU argued that the bill creates confusion and uncertainty for employers and employees because it overrides some aspects of the regulation of redundancy matters within state jurisdictions but not others. This is likely to increase compliance costs for employers.[6] There is also the vexed issue facing employers of the fifteen to twenty five per cent of employees who do not fall within the scope of the corporations power and will be subject to state laws relating to redundancy: 'This issue has obvious potential for causing employers significant inconvenience, at best, and extensive involvement in litigation, at worst'.[7]

2.11 A final area of concern is the way the bill excludes employees from certain entitlements on the basis of the size of an organisation. The submission from Dr John Burgess, Employment Studies Centres, University of Newcastle, made the important point that neither the Government nor employer groups have explained why the relative financial liability of a business with 15 employees is any less than a business with 20 or 25 employees. The obvious conclusion is that the legislation discriminates against a certain class of employees by denying them a particular entitlement which is available to other employees.[8]

Profitability versus capacity to pay: where is the evidence?

2.12 Minister Andrews' second reading speech claimed that the Commission's redundancy decision is flawed because it confuses the profitability of small businesses with the inability of small business to make redundancy payments. This is a claim repeated many times in submissions to this inquiry by industry groups. Opposition senators are concerned by the lack of evidence from the Government and employer groups to support this fundamental proposition. Employer group submissions followed a familiar pattern from the committee's previous inquiries in to workplace relations where the assertions and claims being made by employers are not supported by convincing evidence. The ACTU made a valid point at the public hearing that the claims by the Government and industry about the effect of the Commission's decision on small businesses were not supported by evidence before the Commission during the redundancy case hearings in 2003 either.

---

4 NSW Government, *Submission 14*, p.12

5 ibid., p.15

6 ACTU, *Submission 2*, p.15

7 ibid., p.16

8 Dr John Burgess, Employment Studies Centre, University of Newcastle*, Submission 8*, p.1

2.13 Opposition senators accept the ACTU's view that the Government's mantra about confusing small business profitability with capacity to pay redundancy was put to the test during the Commission's hearings, and was found to be wanting. It was clearly demonstrated before the Commission that some 70 per cent of small businesses make a profit when they are in the process of downsizing or reducing staff numbers; in other words, they are not necessarily going out of business while making retrenchments.[9] The Commission found that the available evidence from industries and awards where the exemption had been removed, does not support the view that small business does not have a capacity to pay. Put simply, any link between the size of a business and capacity to pay was not established in any of the material that was put before the Commission by all the parties.

2.14 Employer groups are fond of quoting from the minister's second reading speech, to the effect that as a result of the Commission's decision, a typical retail small business with seven employees, each with six years continuous employment, would face a contingent liability for redundancy pay of nearly $30,000. At the public hearing, Mr Scott Barklamb from ACCI tabled a document purporting to show the additional severance pay obligations for small businesses without the exemption. The figures are consistent with those used by Minister Andrews in his second reading speech.

2.15 Evidence from the ACTU and SDA highlighted the fallacy underpinning these simplistic figures. Mr John Ryan, SDA, dismissed the theoretical assumptions about costs which lay behind these figures as having no basis in reality: '…[the] theoretical constructs that appear in the department's submission, where they posit a situation of a retailer with seven employees…are nonsense scenarios'. The SDA submission argues that the figures quoted by the minister create an impression that there is a large financial burden for typical employers that flow from the operation of the Commission's redundancy decision. Yet, according to SDA, the figures lack substance and apply only to mythical employers: 'A fairy story, no matter how well told, still remains a fairy story and a myth is always a myth'.[10]

2.16 The evidence from Mr Ryan at the public hearing to support these claims is worth quoting at length:

> If I found a retail employer who had seven full-time employees…who had four years service and who then went out the door, the one thing I would be sure of is that no-one would get a cent, because by the time they go out the door—and we have had this happen on many, many occasions—there is not a cent left for the employers. The employer never pays redundancy payments that are owed.[11]

---

9 Ms Michelle Bissett, ACTU*, Committee Hansard*, 28 February 2005, p.4

10 SDA, *Submission 7*, p.5

11 Mr John Ryan, SDA, *Committee Hansard*, 28 February 2005, p.31

2.17 The ACTU and SDA rejected the view put to the committee by employer groups that the Commission's decision to remove the exemption defies both logic and commonsense. Opposition senators are incensed that employer group presented this argument to a parliamentary committee hearing and expected it to be taken seriously. Appealing to common sense and logic adds no value to a debate historically as complex as the provision of redundancy pay. It displays an inability by employer groups to accept Commission rulings which do not find in their favour. ACCI in particular has made a habit of hiding behind contested concepts such as the 'national interest' and the 'public interest' when complaining about decisions by the Commission which it does not accept, instead of constructively engaging with the issues and presenting credible evidence which might further its cause.

2.18 Opposition senators stress that the Commission's redundancy decision was made on the basis of all the material placed before it, and employer groups had every opportunity to present their case and challenge evidence upon which the Commission based its findings. The ACTU and SDA made the valid point at the public hearing that redundancy matters often give rise to polarised views across state and Commonwealth jurisdictions, which is a strong argument for resisting calls for a unitary system when there is no agreement on the rationale for it. Mr John Ryan claimed:

> This bill has never looked at what the underpinning philosophical rationale for redundancy is. Therefore to impose a single system over all of the states…is to do it on the basis of ignoring the debate about what the rationale for redundancy is [as] determined by the New South Wales, Tasmanian and federal systems, which probably have the three most diverse philosophical approaches.[12]

2.19 Opposition senators also point out that in supporting this legislation, the Government and employer groups selected elements of state commission decisions which are consistent with their position, and conveniently ignored those aspects which are not. DEWR, for example, drew attention in its supplementary submission to the situation in Queensland, which provides a clear exemption for small business. The submission, however, failed to mention that a very important part of the approach taken by the Queensland Industrial Relations Commission involved introducing balance into the system to ensure that an exemption would only apply to genuine small businesses.[13] This was designed to prevent rorting of the system by businesses using multiple employers, so as to create an environment where every employer is classified as a small business even though they are controlled by a single corporation.[14]

12 ibid., p.32

13 ibid., p.33

14 SDA, *Submission 7*, p.7

Incapacity to pay: inconsistent evidence from employer groups

2.20 Although the committee heard evidence from employer groups that the incapacity to pay process is ineffective, Opposition senators find that the case presented to the committee by the NFF and ACCI was flawed. There was a lack of evidence to support the view that the current system is onerous and complex. The NFF in particular seemed intent on taking a cheap shot at union involvement in the incapacity process instead of addressing the needs of its mostly rural constituency.

2.21 Opposition senators are puzzled by the inconsistency between evidence before this committee's inquiry from employer groups on the one hand, and evidence before the Commission's hearings on the redundancy case, on the other. Specifically, the ACTU and SDA told the committee that during the hearings on the redundancy case, incapacity to pay was not raised by employers as an issue causing concern. However, incapacity to pay was raised as the main issue for employer groups in written submissions to this inquiry. Opposition senators conclude that the NFF, and to a lesser extent ACCI, have used the inquiry process to exaggerate concerns with the incapacity to pay process and, in the process, have attempted to scapegoat unions.

2.22 Opposition senators would expect there to be a large number of applications for exemption under the incapacity to pay provision in the light of the strong claims made by the NFF in its submission. Yet, when questioned on the history of incapacity to pay cases at the public hearing, the NFF told the committee that there have been only five or six industry-wide claims over the past 20 years, which have coincided with periods of drought, and two individual claims over the same period.[15] The NFF argued that the general lack of applications for incapacity to pay points to weaknesses with the process which discourage employers from filing an application. This view was shared by ACCI which submitted that the small number of cases '…shows a strong level of businesses being discouraged and representative organisations and advisers being discouraged by the nature of the process and the hostility of the process to applicants'.[16]

2.23 At the public hearing, Mrs Denita Wawn, Policy Manager and Industrial Relations Advocate, NFF, went even further, making some startling accusations about the alleged effect of union involvement in redundancy cases on the incapacity to pay process:

> We would submit that as a consequence of union involvement where there are no union members on site the incapacity claims are not filed. The applicants simply do not want union involvement. They are certainly happy for the commission to look at their financial records and they are happy to provide evidence that they are in difficulty, but they do not think it is appropriate for the union to look at that when there are no union members

15 Mrs Denita Wawn, NFF, *Committee Hansard*, 28 February 2005, p.13

16 Mr Scott Barklamb, ACCI, *Committee Hansard*, 28 February 2005, p.22

> on site. This is the reason there have been only two applications and why both were withdrawn.[17]

2.24 Opposition senators reject the arguments by the NFF and ACCI, and take exception to employers blaming unions in public, when there is no evidence to substantiate the allegations. It is more likely that the low number of applications is due to small businesses actually having a capacity to meet their redundancy pay obligations and, therefore, having no need to apply for an exemption. The ACTU offered the view that caution is required when drawing conclusions about the lack of applications under incapacity to pay.[18] Mr John Ryan, National Industrial Officer, SDA, also refuted the suggestion that employers have not filed applications with the Commission because of unions having access to financial information: 'It is an ideological position; it is not a position based upon an understanding of how the provisions of sections 355 and 111 of the act can and do operate to protect information which is financially sensitive'.[19]

2.25 The ACTU's experience in dealing with claims before the Commission for incapacity to pay is that employers and unions have been able to work through and resolve issues associated with employers' capacity to pay without involving the Commission. The Commission would only become involved in order to resolve outstanding difficult issues. Opposition senators point out that the ACTU's experience is at odds with the evidence from the NFF:

> …the experience that we have had with the capacity to pay provisions is that, where application is made, it has been worked through and it appears to have been worked through successfully…There have been a range of innovative solutions from the commission to try and resolve the disagreement between the union and the employer over their capacity to pay.[20]

The onus should be on employers to cover redundancy pay

2.26 Opposition senators remain wedded to the fundamental principle that there should be an onus on all businesses to set aside funds to cover employee entitlements in the case of redundancy.[21] This bill effectively reverses that onus because a decision on whether or not to make a redundancy payment will be left to the employer, regardless of a capacity to pay. There will be no incentive for employers to negotiate with employees over redundancy pay. This is a significant blow to employees, especially part-time and casual workers, who will now have to bear the cost of business failure. As pointed out by Dr Burgess, the Government has not explained

---

17 Mrs Denita Wawn, NFF, *Committee Hansard*, 28 February 2005, p.11

18 ibid., p.5

19 Mr John Ryan, SDA, *Committee Hansard*, 28 February 2005, p.36

20 Ms Michelle Bissett, ACTU*, Committee Hansard*, 28 February 2005, p.8

21 Australian Education Union, *Submission 5*, p.3

why employees should be expected to bear the cost of the proposed exemption.[22] This is a very important point, given that the Commission has already established that employees of small businesses experience roughly the same losses as employees of medium to large businesses. Opposition senators believe this bill is ethically repugnant because it strips away an entitlement for small business employees which employees in larger businesses will retain. Dr Burgess described this potential situation as 'legislated discrimination' which creates different classes of employees.

2.27 It is important for employers who do not have the ability to make redundancy payments to have access to a mechanism where they can seek relief from that obligation. Opposition senators believe that small businesses that genuinely cannot afford to make redundancy payments should be able to seek an exemption. The most appropriate avenue for this resides with the Commission through the incapacity to pay application process. However, the onus should be on the employer to provide concrete evidence of incapacity to pay. This can only be achieved if unions have access to business financial records, strictly in accordance with the terms of the Workplace Relations Act. Opposition senators agree with the ACTU's assessment that there must not be any trade-off between the need to provide evidence of genuine incapacity to pay and the desirability of simplifying and expediting the process.[23]

Conclusion

2.28 Like many of the bills introduced in successive parliaments for the purpose of amending the Workplace Relations Act, the current bill is unnecessary, it does not present a fair and balanced approach to industrial relations reform, and it will introduce further unfairness and inequity into the industrial relations system.[24] As previously noted, the bill goes much further than overturning the Commission's redundancy decision, by removing the Commission's ability to make orders with respect to redundancy pay by small business, and providing that only casual employees who have continuous employment of more than twelve months service be included in the count of 15 employees. These are significant changes over and above the issues raised by Minister Andrews in his second reading speech.

2.29 Opposition senators are concerned that this legislation will act as a blunt instrument and override the flexible approach taken by state commissions towards redundancy pay issues over the past two decades. This is an unfortunate situation to have arrived at, given that the Commission's redundancy decision considered all of the evidence placed before it by employers, unions and state and Commonwealth governments.

---

22 Dr John Burgess, *Submission 8*, p.3

23 ACTU, *Submission 2*, p.6

24 AMWU, *Submission 10*, p.2

Recommendation

Opposition senators strongly recommend to the Senate that the bill be rejected.

Senator Gavin Marshall
Deputy Chair