Australian Democrats' report

Background

The Workplace Relations Amendment (Small Business Employment Protection) Bill 2004 proposes to overturn the redundancy test case decision of the Australian Industrial Relations Commission (AIRC) on 26 March and 8 June 2004, which extended redundancy pay entitlements to federal award employees retrenched by small business.

The effect of the June 2004 decision was to defer any requirement of small businesses to make redundancy payments arising out of the March 2004 decision until 1 July 2005, and to delay the full effect of the decision for all small businesses until four years after 1 July 2005.

Contrary to the belief of some, the AIRC decision did not extend redundancy entitlements to *all* small business employees. It affected full-time and regular part-time employees who are subject to federal laws.

The very large numbers of casuals and contract employees working in small business can range from a majority in an industry to a minority. After the AIRC decision these employees continued to be exempt from redundancy provisions unless there is a voluntary agreement to the contrary[1].

Redundancy will also not generally arise where there has been a transmission of business and employees have continued to do the same job.[2]

Formerly, both in State and Federal jurisdictions, large numbers of employees in small business had been exempted from redundancy provisions, although such exemptions were far from universal, and either an IRC discretion or an IRC determination existed in most circumstances.

The bill goes further than returning to the pre-March 2004 situation by exempting all small business under Federal jurisdiction, or exempting small businesses that were under State jurisdiction that are constitutional corporations, by making redundancy pay an allowable award matter only for businesses with 15 or more employees.

Prior to the March 2004 AIRC decision, redundancy exemptions generally prevailed for federal small business. The evidence is that out of two thousand awards, only

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1 Mr John Ryan, Shop Distributive and Allied Employee's Association, *Committee Hansard*, 28 February 2005, p.33-34.

2 High Court of Australia, 9 March 2005, [2005] HCA 10. These matters were on appeal from a decision of the Full Bench of the Federal Court, Amcor Ltd v Construction, Forestry, Mining and Energy Union [2003] FCAFC 57, in which the Minister for Employment and Workplace Relations intervened.

seven federal awards had the small business exemption from redundancy pay obligations removed, which meant that most small businesses were exempt.[3]

This is why there has been such concern from the small business sector. Very many small businesses that were formerly exempt are no longer exempt. The AIRC has decided that on the evidence, such large scale exemption was no longer warranted.

The bill alters the power of the AIRC in the future to determine a range of matters related to redundancies on merit grounds.

For purposes of calculating the number of employees, the Bill covers full-time and regular part-time employees. Only casuals employed on a long term systemic basis for at least 12 months are included in the employee count.

The Bill also goes beyond the federal award system by relieving incorporated small business of redundancy liabilities whose employees are presently regulated under State employment jurisdictions.

Was there a problem that needed to be addressed?

In short, there was a significant problem that needed to be addressed.

Firstly, the AIRC test case decision highlighted the need for the law to be made far clearer and simpler than it had been. Once mass exemption had been removed, the focus swung far more onto process issues, and how incapacity to pay had to be proven.

Secondly, like many industrial relations matters, there are conflicting laws and Commission practice, between the States, and between the Federal and State jurisdictions. Exemptions that applied in one industry in one jurisdiction did not apply in that same industry in another jurisdiction.

Thirdly the process under Federal law was unnecessarily complex and aggravated already difficult process circumstances. Expecting those among 1.6 million plus businesses that fall under federal laws to understand and anticipate the process by which they could achieve a legitimate exemption from redundancy requirements is simply unrealistic and unreasonable.

Fourthly the AIRC is limited in its powers to address problems of natural justice, administration and process. It can only go as far as the law and jurisprudence allow it. New statute is necessary.

The Democrats have a long history of supporting the independence and outcomes of the AIRC. We recognise that the Commission's decision was made after considerable

3 Submission No. 2, ACTU, p. 5.

consideration of the issues, and we are reluctant to be a party to overturning decisions carefully made by the Full Bench.

However given the greatly expanded numbers now subject to redundancy pay obligations, we do think the issues surrounding redundancy need to be clarified by Parliament.

We recognise that this is a complex issue and that you need to balance the reasonable rights and needs of small business against the legitimate rights of employees to expect fair and just treatment in an advanced first world democracy and economy.

Some suggestions as to guiding principles

The Democrats would suggest the following principles should guide redundancy policy.

The first principle is driven by social values - that redundancy provisions for employees should not just be a matter for an employer's voluntary discretion, but should be determined by statute and regulation in specified circumstances.

We have so much law and regulation because society recognises that you cannot rely on people to do the right thing. If employers do not do the right thing they shift the cost onto society, and a private responsibility becomes a public cost.

If redundancy is not paid by an employer when warranted, the taxpayer often picks up a welfare cost instead. The second principle is therefore that employers must meet their obligations so that unnecessary welfare costs are avoided.

The third principle is that the circumstances under which redundancy do or do not apply should be clearly spelt out by statute, subject to the detailed fleshing out required under industrial instruments – awards, certified collective agreements, and individual agreements.

The fourth principle is that classes of employers should be exempted under specified circumstances. While that means some private interests may suffer, the public good of certainty, lower compliance costs and ease of administration override that consideration.

The fifth principle is that the size of the business is only relevant with respect to the ability to comply. The size of a business should not be used as a reason to absolve employers of their duty and social obligation, and it should not remove equity and natural justice from employees.

There is the rather self-serving rhetoric that pictures all small businesses as battling 'mums and dads'.[4] There are retailers, professional practices, and contracting

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

companies with as few as 5 employees that are extremely profitable, professional and viable businesses. There are other small businesses with many more employees that are in hopeless trouble. There are companies with no assets that can easily afford redundancies, and others with high-value assets that are broke.

A clash of philosophies and attitudes

Long ago I came to the conclusion that nearly all businesses just want to hire and fire at will. The less law, regulation and enforcement, the better they like it. This is a quite natural attitude, given that it is in their self-interest to retain as much discretion and control over their own affairs as possible, at least cost.

This attitude is mostly faithfully reflected by the employer organisations, with some moral misgivings on occasion.

The Coalition by and large agrees with this attitude.

It is my judgement that the Coalition recognise that the public outcry of allowing all business their head makes it not worth the effort, but rightly judge that there is less community opposition to greater freedoms and latitude for small businesses.

This redundancy issue for small business has to be seen in the context of Coalition policy on unfair dismissal exemptions. Employer organisations and the Coalition propose to put small business employees under double jeopardy under Workplace Relations law - to remove their right to appeal against unfair dismissal, and to remove their right to receive redundancy pay.

For a Liberal/National government, this has the odd consequence that they therefore support all taxpayers picking up the welfare costs resulting from employees being unfairly dismissed, or from being made redundant without compensation from the small business concerned - a blatant cost-shifting from the private to the public.

Impact on small business

The Government has argued that the Commission's redundancy decision will increase the contingent liabilities of small business, potentially harming the ability of employers to employ.

Important to this debate is how many small business employees are actually made redundant. As the High Court has confirmed, redundancy will not generally arise where there has been a transmission of business and employees have continued to do the same job.

Employee turnover is most likely through natural attrition, moving on to a new job, rather than a result of redundancies. In addition approximately 1 in 4 employees are casuals, making them ineligible for redundancies. A further huge number are excluded because they are on contract.

This ratio of casual exemptions is greater in some industries than others. For example the NFF supplied employment figures in the agricultural industry, saying there were 370,500 employees, and that probably about 40-50 per cent would be casuals.

It was argued by Mr Ryan from the Shop Distributive and Allied Employees Association (SDA) that casuals in actual fact already receive a redundancy pay built in to their casual rate:

> Therefore they [employers] already pay redundancy pay to those employees [casuals], and that is because the concept of what constitutes a casual loading builds into it elements of lost benefits—the loss of security of employment, the loss of annual leave, the loss of sick leave. In that circumstance, where small businesses are quite prepared to pay 25 per cent above the award cost of an employee by virtue of employing casual labour, they are accepting and paying a component which takes into account redundancy type provisions, which is payment for service forgone.[5]

The profitability of small business is another consideration that affects capacity to pay redundancy. ABS data shows that 70% of small business is profitable compared to 75% of medium sized business and 80% of large business, and that 70% of small business which reduced employment still made a profit.[6]

A report cited in the AIRC Redundancy Test Case by Bickerdale, Lattimore and Madge, in *Business Failure and Change: An Australian Perspective*, found that while small business accounts for 97.5% of all business, the single greatest reason for business exit is realising profit, and that of the 7.5% of business which exit in any year, only 0.5% do so for reasons of bankruptcy or insolvency[7].

The Australian Council of Trade Unions (ACTU) gave evidence at the hearing that:

> In industries and awards where the exemption had been removed—and there had been a process from 1984 where you could apply to remove the exemption on an award-by-award basis—the Commission, in considering those applications, consistently rejected the notion that there is a link between the size of a business and capacity to pay. The Commission also found that there appeared to be no discernible ill effect of the removal of the small business exemption in those industries.[8]

The Australian Chamber of Commerce and Industry (ACCI) argued that profit should not be confused with capacity to pay. That may be true at times, but it is a most relevant threshold to consider when deciding whether a business could pay redundancy.

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5 Mr John Ryan, Shop Distributive and Allied Employees Association, *Committee Hansard*, 28 February 2005, p. 30.

6 AIRC Redundancy Test Case

7 AIRC Redundancy Test Case

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

The ACTU in the evidence agreed with ACCI but added:

> ……neither should the size of the business be confused with the ability to make redundancy payments.[9]

The Minister for Workplace Relations argued in his second reading speech that:

> In the Government's view, the AIRC's (Commission) decision seriously underestimates the impact that redundancy pay would have on small businesses. For instance, a retail small business with seven employees, each with four years' continuous employment, would now face a contingent liability for redundancy pay of nearly $30,000.[10]

Mr Ryan from the Shop Distributive and Allied Employees Association (SDA) argued that the Government example is not a realistic proposition, that the Government scenario in general happens when a business closes and too often no-one gets anything:

> If I found a retail employer who had seven full-time employees—they would have to be full-time employees to obtain that sort of money—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 employees. The employer never pays redundancy payments that are owed. In fact, we do not even see the annual leave entitlements that are owed. And, invariably, our members lose anything up to a week or two weeks pay.[11]

ACCI argued that it is unfair to force small business to pay redundancies when they are already facing adversity:

> It seems to us a relatively simple proposition that Australia's smallest businesses, at the community and local level—run, to be slightly trite, 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.[12]

ACCI also argued that small business have significantly lower expertise, especially in terms of technical financial expertise and the like.[13]

There is a point that has been absent from this debate. Small business owners when they start a small business have responsibilities and obligations; they have

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

10 The Hon Kevin Andrews, second reading Speech: Workplace relations Amendment (Small Business Employment protection) Bill 2004.

11 Mr John Ryan, Shop Distributive and Allied Employees Association, *Committee Hansard*, 28 February 2005, p. 31.

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

13 ibid.

responsibilities to consumers for their products and services, to government in the form of taxes, and to their employees. Part of their responsibility to their employees is understanding employee rights and conditions, and managing and making provision for employee payments such as wage, tax, superannuation, annual leave and so on. There seems to be a view that they shouldn't have these obligations. We disagree.

I certainly do not accept that a *'lack of financial expertise'* should be an excuse for shirking responsibilities to employees, no more than I would accept it as an excuse for not paying taxes.

Equality, equity and fairness

The bill creates an environment of inequality and inequity between employers and employees, and between employees.

Mr Barklamb from the ACCI argued that:

> Employee losses, we say, are outweighed by the interests of continued business viability and the consequences both on families running small businesses and on other employees and their scope to be retained.[14]

I wonder if the employee who was made redundant, who because of the narrow skill set or their mature age struggled to find other work, struggled to meet mortgage repayments, struggled to meet their family obligations, would agree with ACCI as they walked passed their old employer six months later to find that the employer had rebounded from their financial crisis and that business was booming.

I would suggest redundancy as a result of employer financial crisis is hard on all parties and that a balance must be found.

Let us remember that not all employers are in financial crisis when they make redundancies. Seventy per cent of small business which reduced employment still made a profit.[15] Gross inequity arises in those cases where the employer has the clear capacity to pay and the employee is still not entitled to a redundancy payment.

The bill also creates inequality between employees who work for small business and those who work for medium to large business. It is difficult to logically argue that because a person for whatever reason works for a small business they should automatically be penalised and have lesser conditions.

As noted earlier, Mr Ryan from the SDA stated that casuals are already effectively in receipt of a redundancy pay built in to their casual rate. He argues that:

> In that sense, therefore, this bill treats only one class of employee as the exception—that is, the full-time and part-time employees of small

14 ibid.

15 AIRC Redundancy Test Case

businesses. It draws the distinction not between small business and large business but between two classes of employees of small business.[16]

Federal versus State

The Australian Democrats' are strong supporters of a unitary national IR system. We need one industrial relations system not six. We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations.

The Democrats preference is for the move to a unitary system to occur without diminution of rights, achieving simplicity, efficiency and greater fairness, and achieving better coverage of workers.

With respect to redundancies, Victoria is under the Federal jurisdiction, there are two states that do not have small business redundancy exemptions and the remaining three have small business exemptions but with differing mechanisms for protection.

The ACTU argued at the hearing that there has never been a single view across the federal tribunal and state tribunals with respect to redundancy matters. That is true.

The Government's amendment to expand the federal regime to cover constitutional corporations that are small business presently under states jurisdictions is appealing for efficiency and simplicity reasons.

However what we need to consider is why this system proposed in this bill, why not the Queensland system, that better defines 'small business'; or the NSW system which only gives a small business exemption insofar as the compulsory notification requirements are affected? In other words, redundancy exemption is a threshold issue, an access issue, and should not be an exemption based on the numbers in a business per se; or even indeed on the post 2004 redundancy test case system.

When should there be an exemption?

Deciding exemptions based on the size of a business is a random and arbitrary decision.

The ABS classifies small business as 20 or less employees, except for manufacturing businesses, which is 100 or less. The Government has chosen 20 or less as the size for the small business unfair dismissal exemption, yet in this Bill has chosen 15 or less. Then there is micro business, officially classified as 5 or less.

We have the danger, as the SDA pointed out, that someone might get rid of their short-term employees first and reduce the employee size to fewer than 15 and then

16 Mr John Ryan, Shop Distributive and Allied Employees Association, *Committee Hansard*, 28 February 2005, p. 30.

suddenly their long-term employees will no longer be entitled to a redundancy payment.

In their evidence the ACTU said:

> We agree that, where employers do not have the capacity to make redundancy payments, there must be a mechanism whereby they can seek relief from that obligation, and that mechanism, we say, is appropriately through the Industrial Relations Commission, which is setting those industrial standards.[17]
>
> Let's have a prima facie position that it's not employer size that determines whether you're in or out. We have a prima facie position that you're in, but if there are problems with incapacity to pay, let's fix that up,' rather than saying, 'incapacity to pay doesn't work…...it removes the capacity for people to shift around this arbitrary fixed point of 15. [18]

Both ACCI and National Farmers Federation (NFF) also stated at the hearing that they believe that if employers have the capacity to pay then they should.

The Democrats would support this view and believe that all employees should have in-principle access to redundancy pay, and that subject to legislative criteria establishing fair process and automatic exemptions, that the onus should remain on the employer to demonstrate incapacity to pay.

Ms Wawn for the NFF argued that:

> Our preference is to provide exemptions because it is simply easier for small business. They do not have to go through this process of providing documentation. If, however, that primary position is not accepted, then, yes, we would consider looking at automatic exemptions.[19]

Problems were identified with the current system which in some cases had lead to withdrawal of applications. For example, the NFF argued that:

> They [farmers] 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 on site.[20]

However, the NFF also argued that:

> The fundamental difficulty we have with the Commission is that there is a high reliance on the arbitration system that obviously makes it difficult for any small business to pursue their case. Hence, they put up barriers to make things extraordinarily difficult for small business to pursue things that

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

18 Ms Cath Bowtell, ACTU, *Committee Hansard*, 28 February 2005, p. 7.

19 Mrs Denita Wawn, NFF, *Committee Hansard*, 28 February 2005, p. 18.

20 ibid., p. 11.

> are in the interests of their individual businesses because of the centralisation of the system.[21]

The NFF provided evidence that in their industry it would be useful if a farmer could submit to the Commissioner a letter from Centrelink saying that this farmer is in receipt of exceptional circumstances relief payments, which should then automatically allow him or her an exemption from redundancy.

However ACCI believed that a universal standard using incapacity as an avenue for opting out simply could not operate.[22]

What was obvious from the inquiry submissions and the evidence provided at the hearing was neither the employer representatives nor the employee representatives had put enough thought into improving the incapacity to pay process. Their approach was predicated on going the exemption route.

As I and my party have done with unfair dismissals, I am not averse to making significant administrative improvements to streamline administrative processes and to alleviate the time and costs associated with compliance.

It is often forgotten how spectacularly successful the Coalition/Democrats reforms to unfair dismissal process in 1996 and 2002 were, resulting in a reduction of over 60% in unfair dismissal applications in the federal jurisdiction.

Conclusion

The harsh reality is that from 1 July 2005, the Coalition will have the numbers in the Senate to pass any legislation they wish, subject to their sensitivity to community views, concern as to any notable political backlash, and to their obligation to govern on behalf of all Australians.

The other harsh reality is that (as far as we can see) the Coalition simply does not agree with the Democrats' values or judgement in this matter, making compromise difficult.

The Democrats are left with three options:

- Subject to non-Coalition support in the Senate, seek to reject the Bill and let the Government do as it intends after 1 July 2005;
- Gain agreement to amend the Bill to simply set aside the effect of the AIRC decision until 1 July 2006, giving the Coalition time to reconsider its position, while the redundancy situation continues largely as it has been;
- Seek to amend the Bill to reflect the principles we outlined earlier.

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

22 Mr Scott Barklamb, ACCI, *Committee Hansard*, 28 February 2005, p. 19.

If the last of these were to occur, the incapacity to pay process needs to be tightened up along the lines of the more rigorous processes adopted for unfair dismissal applications. In no way can it be acceptable for businesses to have to provide the sort of detailed information for general scrutiny that we have been advised is the case. Neither should they have to invest the time and money on threshold issues that they seem presently to have to do.

Next, the question arises as to what classes of exemptions might qualify for automatic exemption from redundancy provisions?

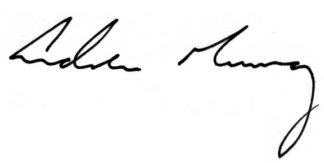
I have tried to use circumstances that would provide a reasonable prima facie case of incapacity to pay.

Without going into the arguments for and against, the following non-exhaustive classes of small business exemptions might be considered as candidates for automatic exclusion from redundancy provisions:

- Any business in voluntary liquidation, or being the subject of bankruptcy (for proprietors) or insolvency (for entities) processes;
- Any rural or regional business which in the last three years has been the subject of state or federal relief similar to that under the Federal 'Exceptional Circumstances' scheme;
- Any business where the proprietors are in receipt of welfare payments (excluding those that are universally applicable, such as for the birth or care of children);
- Any business that has a tax return for the previous financial year showing a loss, or nil tax paid, (subject to safeguards for abnormal losses); and
- Employees who are genuine casuals.

The AIRC should also retain the discretion to make further exemptions from redundancy with respect to specific awards and agreements.

If challenged on redundancy, the employer's ability to access and confirm these exemptions should be the provision of the relevant document, certificate or return, by fax if possible, to the Industrial Register.



Senator Andrew Murray