The Senate

Employment, Workplace Relations and Education Legislation Committee

Provisions of the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

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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

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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]

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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 point 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]

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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]

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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

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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

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

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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.

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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]

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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

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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.

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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

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?

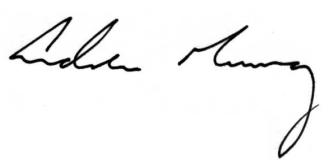
I have tried to use circumstances that would provide a reasonable prima facie case of incapacity to pay.

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

Appendix 1

List of submissions

Sub No:	From:
1	National Farmers' Federation
2	Australian Council of Trade Union
3	Department of Employment and Workplace Relations
3A	Department of Employment and Workplace Relations
4	Construction, Forestry, Mining and Energy Union
5	Australian Education Union
6	Recruitment and Consulting Services Association Ltd
7	The Shop, Distributive and Allied Employees' Association
7A	The Shop, Distributive and Allied Employees' Association
8	Employment Studies Centre, University of Newcastle
9	Australian Chamber of Commerce and Industry
10	Australian Manufacturing Workers' Union
10A	Australian Manufacturing Workers' Union
11	Independent Education Union of Australia
12	Post Office Agents Association Limited
13	Chief Minister's Department ACT
14	NSW Government
15	Australian Nursing Federation
16	Media, Entertainment and Arts Alliance
17	Australian Industry Group
18	JobWatch Inc

Appendix 2

Hearings and witnesses

Canberra, Monday, 28 February 2005

Australian Council of Trade Unions
Ms Michelle Bissett, *Industrial Officer*
Ms Cath Bowtell, *Industrial Officer*

National Farmers Federation
Mrs Danita Wawn, *Policy Manager and Industrial Relations Advocate*

Australian Chamber of Commerce and Industry
Mr Scott Barklamb, *Manager, Workplace Relations*

The Shop, Distributive and Allied Employees' Association
Mr John Ryan, *Senior Industrial Officer, National Office*

Appendix 3

Tabled documents, answers to questions on notice and additional information

Hearing: **Canberra, Monday, 28 February 2005**

Australian Chamber of Commerce and Industry – Additional severance pay obligation figures

Answers to questions on notice

Canberra, Monday, 28 February 2005

Australian Chamber of Commerce and Industry
received: 4 March 2005

Answers to questions on notice from Senator Murray

National Farmers Federation
received: 9 March 2005

Answers to questions on notice from Senators Marshall and Murray

Decision PR940769 of the Australian Industrial Relations Commission.

Additional information

Canberra, Monday, 28 February 2005

Australian Council of Trade Unions

Effect on protection of workers in small business.

Should small business be exempt from unfair dismissal procedures and from the obligation to pay redundancy pay.