

# Submission

to

Senate Employment, Workplace Relations and Education  
References Committee

## **Provisions of the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004**

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**Submission no:** 4

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**Submitter:** Mr John Sutton  
National Secretary

**Organisation:** Construction, Forestry, Mining and Energy Union

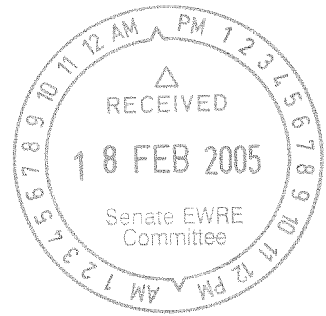
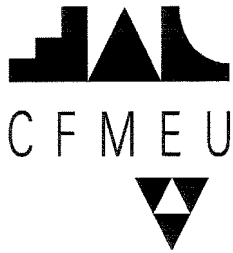
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**Senate Employment, Workplace Relations and Education  
Committee**

**Submission by the  
Construction, Forestry, Mining and Energy Union  
(Construction and General Division)  
on the**

***Workplace Relations Amendment (Small Business Employment  
Protection) Bill 2004.***

**February, 2005.**

1. The Construction, Forestry, Mining and Energy Union (Construction and General Division) [the CFMEU] opposes the *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004* [The Bill].
2. In general terms, the provisions of the Bill are opposed for the reasons set out in the submissions of the ACTU. Through this Bill the Government is proposing to move away from a notion of redundancy pay generally as being an “allowable” award matter<sup>1</sup>, to a more restricted concept. Redundancy pay for small businesses with fewer than 15 employees is to be removed from the jurisdiction of the Australian Industrial Relations Commission [AIRC].
3. In introducing the Bill the Government seems content to rely on a broad and unsubstantiated assertion that an obligation to make redundancy payments inevitably leads to “*a significant decline in job growth*”<sup>2</sup> The same bare assertions were made by the present Government in respect of legislative protection from unfair dismissal. On that issue the Full Federal Court said in *Hamzy* that:-

*“It seems unfortunate that nobody has investigated whether there is any relationship between unfair dismissal legislation and employment growth. There has been much assertion on this topic during recent years, but apparently no effort to ascertain the factual situation.”*<sup>3</sup>

Rather than accept a carefully considered decision of the Full Bench of the AIRC that:-

- caps the maximum payout for small business at 8 weeks,
- only takes into account service with such businesses after the decision, thus effectively deferring such maximum payment until 2008 and

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<sup>1</sup> See s 89A(2)(m) *Workplace Relations Act 1996*.

<sup>2</sup> Second Reading Speech 8 December, 2004.

<sup>3</sup> *Hamzy v. Tricon International Restaurants trading as KFC* [2001]FCA 1589 16 November, 2001.

- permits employers to approach the Commission on the basis of incapacity to pay

the Government has pre-emptively moved to abolish an entitlement to redundancy pay for employees of small business.

4. The Government has also asserted that “*small businesses are twice as likely as larger businesses to go out of business in the earlier years of operation*”<sup>4</sup>. From an employee perspective, a higher probability of facing the hardship caused by redundancy is a powerful reason why the protection afforded by redundancy payments should be available to them.
5. “Small business” does not automatically equate to low profitability. The Government accepts that “*without doubt many small businesses are profitable.*”<sup>5</sup> According to the ABS almost 75% of construction industry profit before tax comes from businesses employing less than 5 employees and higher profit margins were reported by smaller businesses, so the numerical dominance of businesses with fewer than 5 employees pushes the industry average above the profit margins of those with 5 or more<sup>6</sup>.
6. The effects of redundancy are felt by employees irrespective of the causes of redundancy or other factors such as length of service. In the 1984 TCR Test Case the Full Bench observed:-

*“..employees, no matter what the reason for redundancy, equally experience the inconvenience of hardship associated with searching for another job...we do not believe that there should be any fundamental distinction, in principle, based on the causes of redundancy.”*<sup>7</sup>

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<sup>4</sup> Second Reading Speech.

<sup>5</sup> Ibid.

<sup>6</sup> ABS Private Sector Construction Industry, 1996-97: Australia, Cat. No. 8772.0

<sup>7</sup> 1984 8 (IR) 34 at 62.

More recently in the 2004 decision the Commission noted:-

*“The various aspects of hardship – in particular the trauma associated with termination of employment, loss of seniority and loss of transferable credits – continue to increase after four years of service and more.”*<sup>8</sup>

Equally, arbitrary limitations such as restricting entitlements to those in a workforce of 15 or more, unjustifiably elevate employer interests above all else.

7. The Government has failed to make out a case for overriding the decision of the AIRC by legislation and thereby denying redundancy benefits to employees of small employers.

#### **Need to Clarify the Effect of the Legislation**

8. A number of clear commitments as to the effect of this Bill were given by the Minister in the Second Reading Speech. These were that the legislation would not affect any actual entitlement that arose before the legislation commenced. This is dealt with at Item 10 of the Bill. Secondly, the Minister said that the legislation would not affect any redundancy pay provisions that were in awards prior to the AIRC’s 2004 redundancy decision. The stated rationale for both of these commitments was that it was not *“the Government’s objective ... to take away something that employees already have.”*<sup>9</sup>
9. If Parliament were to proceed with this legislation, (and for reasons already stated it should not), care should be taken to ensure that the commitments referred to above are unambiguously translated into the terms of the

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<sup>8</sup> PR 032004 26 March, 2004.

<sup>9</sup> Second Reading Speech.

legislation itself. At present, Item 7 in particular does not provide that certainty. Although it seems that the effect of that Item would be that it would not be possible to seek to vary an existing award in a way that was inconsistent with the Bill, i.e. by providing for redundancy provisions applying to employers of fewer than 15 employees, it is not clear that these provisions would preclude a variation aimed at introducing the “15 or more” exclusion into an award that does not now contain that exclusion. The Item should therefore be amended to ensure that it is not possible to re-open industrial disputes/awards to introduce exclusions where none now exist. Unless that is clear there remains a risk that employees might lose an entitlement they enjoyed before the Bill took effect contrary to the clear intent enunciated in the Minister’s Second Reading Speech.

### **Conclusion**

10. The Committee should unreservedly recommend the rejection of this Bill.

18 February, 2005.