SUBMISSION OF
THE SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION
TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE ENQUIRY
INTO THE WORKPLACE RELATIONS AMENDMENT
(PROTECTING SMALL BUSINESS EMPLOYMENT) BILL 2004

The Association has identified a number of fundamental flaws in the language of the Bill which make it unacceptable. Whilst the rhetoric of the Minister in his second readings speech refers to the need to protect small businesses from the decision of the Australian Industrial Relations Commission, it is apparent that the Bill has been structured so as to provide a wider benefit to employers.

EMPLOYER EMPLOYING FEWER THAN 15 EMPLOYEES

The language used in the Bill describes the class of businesses to be excluded from the redundancy decision in terms of those who employ fewer than 15 employees. The difficulty with this concept is that once written into law, it becomes a relatively inflexible creature. It is apparent that employers will be permitted to structure their businesses in such a way that a constitutional corporation could have a number of subsidiary enterprises acting as the employers of labour.

If each subsidiary or associated entity employs fewer than 15 employees, then they will be small businesses for the purposes of the Minister's approach and will be able to avoid the redundancy provisions of the Commission's decision. 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.

This is not a fanciful scenario. It is not rare for businesses to establish stand alone subsidiary companies for each of their retailing outlets so that a separate company is the employer of the staff at each particular outlet. This can occur even where a business may have 10 or 20 or more individual outlets. The sum total of staff numbers can therefore be in the hundreds,

whilst the individual entity used as the employer may have fewer than 15 employees.

With the structure of the Act the rigidity of the legislation will permit and, in fact, would encourage employers to structure their operations so as to use a multiplicity of employer entities, each of which employs fewer than 15 employees so as to avoid, in its entirety, the operation of the redundancy test case decision.

In the context of the government's approach through this Bill to exempt constitutional corporations that employ fewer than 15 employees from the operation of state laws or state awards which have a redundancy component, the effect of the Bill is even more pronounced. Whilst it is possible, although it would be difficult to argue, that a reference to an employer employing fewer than 15 employees may exclude an employing entity which is merely one of a number of employing entities forming part of a larger business, such cannot be the case in relation to proposed Section 153A where the Section relates solely to the concept of a constitutional corporation who employs fewer than 15 employees.

Under this proposed Section, it is absolutely and unambiguously clear that any constitutional corporation that employs fewer than 15 employees, even where the constitutional corporation is itself merely an associated entity or a subsidiary of a larger constitutional corporation, will automatically be excluded from the operation of state laws and state awards having redundancy provisions.

It is obvious that the government has not bothered to consider the real impact of the proposed legislation and the drafting of this legislation allows significant abuse of the proposed legislation by any employer who was seeking to avoid the effects of the Australian Industrial Relations Commission Redundancy Test Case decision.

COUNTING 15 EMPLOYEES

The second major fault and failing of the proposed legislation is the definition of "15 employees". The Bill specifically excludes two classes of

employees when calculating the magic number of 15. The definitional approach throughout the Bill makes it clear that when counting the 15 employees, any casual employee with less than 12 months service and all casuals with more than 12 months service, where they are not employed on a regular and systematic basis, are to be excluded from the count of the 15 employees.

In a retail environment this means that an employer could have in excess of 100 or more employees and still be excluded on the basis that they are not an employer of more than 15 employees as defined by this Bill. In other words, where the normal person in the street would clearly consider an employer to have in excess of 15 employees, this Bill creates an artificial concept so as to protect employers who have more than 15 actual employees from the operation of the redundancy provisions.

The reality in the retail industry is that there are large numbers of employees who will be in their first 12 months of employment as casuals and also there is a further large number of long term casual employees in the retail industry who may not necessarily fall within the definition of a casual employed on a regular and systematic basis for at least 12 months.

The effect of this definitional approach within the Bill will mean that large numbers of employers who have been previously covered by the operation of the Australian Industrial Relations Commission's Redundancy Test Case provision and who would also have been covered by relevant state awards or state laws, will be excised out of the operation of those laws and awards.

This Bill does not seek to maintain the exemption that was previously in the Australian Industrial Relations Commission's Redundancy decision but in fact goes significantly further and now exempts an entire new class of employers who were, and have been since 1984, covered by the redundancy provisions of the Australian Industrial Relations Commission.

RELEVANT TIME

The third major defect of the proposed legislation concerns the concept introduced into the legislation of "relevant time". The purpose of having a

"relevant time" is to provide clear legislative direction as to the point of time in which a decision is to be made as to whether or not an employer or constitutional corporation employs fewer than 15 employees.

The approach taken by the Bill is to define the "relevant time" as being the time when the notice of redundancy is given by the employer to the employees who become redundant or when the redundancy occurs, whichever happens first.

In a practical sense, this approach of the Bill will permit employers to structure a redundancy situation so as to achieve the best possible outcome for themselves. For example, an employer employing 30 employees, as defined in the Bill, where the first 16 employees have minimal service and the second 14 employees have very long service, the employer could have a two step redundancy. The first step would be to declare redundant the 16 employees with very little service. As the employer would at that point of time, the "relevant time", be covered by the operation of the Australian Industrial Relations Commission Redundancy decision, then the employees with minimal service would receive whatever redundancy entitlement they will be required to be paid under the redundancy decision.

However, for the second redundancy exercise, the employer would then be an employer who employs fewer than 15 employees and would escape a requirement to pay any redundancy payment to its longest serving employees.

Again, this is not a fanciful scenario, but would be a practical and realistic expectation on the use of the Bill by employers who would seek to use the language of the Bill to minimise their redundancy payment obligations.

IMPACT OF REDUNDANCY PAY

As part of his justification for the Bill, the Minister says in his second readings speech:

> "*In the government's view, the AIRC's decision seriously underestimates the impact that redundancy pay would have on small businesses. For*

> *instance, a typical retail small business with 7 employees, each with six years continuous employment, would now face a contingent liability for redundancy pay of nearly $30,000."*

Whilst this sounds impressive, it is clearly far from the reality. The Association is not aware of any typical small business which would have 7 full time employees, each of whom have more than six years of continuous service and where the employer employs fewer than 15 employees. From the Association's experience, an employer who had 7 employees who were all full time employees and each of whom had more than six years of continuous service, would invariably be quite a large retailer. For every full time employee, an employer would invariably have a larger number of either part time or casual employees.

The Association is of the very strong view that this is not a typical employer as the Minister asserts, but much more is a mythical employer.

This mythical example is clearly given by the Minister merely to create an impression that there is a large financial burden that will flow from the operation of the Industrial Relations Commission's Redundancy Test Case decision. Unfortunately, as with all myths, it lacks substance. A fairy story, no matter how well told, still remains a fairy story and a myth is always a myth.

The Association is not aware of any retail employer whose entire staff complement consists of 7 full time employees who have each worked for more than six years. From the Association's knowledge, the only retailers who would be in a position of having 7 full time employees, each of whom has worked for more than six years, are those employers who would have a large number of part time employees, long term casuals and short term casuals making up a workforce many times greater than seven.

Where such an employer is faced with economic downturn, the logical approach of the employer is first of all to shed that labour which can easily be removed, i.e. short term casuals and longer term casuals. If economic downturn or business problems persist, then the next level of restructuring would be to remove the part time employees. An employer who had 7 full

time employees, each of whom had more than six years continuous service, would have kept those employees in the capacity as full time employees and for that length of service, because of their ability to contribute to the profitability of the enterprise, thus these persons would in fact be the last to be removed.

Unfortunately, the reality would be that by the time an employer got to the stage of then having to terminate the services of the 7 full time employees, each of whom has more than six years continuous service, the Association generally finds that the employer has no funds left, that the employer is close to being in a position of insolvent trading, and by the time actual redundancies are declared for such employees, there isn't any money left.

In this scenario, which unfortunately is all too common, the contingent liability, which the Minister speaks of is totally illusory as there is no liability ultimately borne by the employer when the employer is insolvent and is in receivership. The Association is only too well aware of the numerous occasions where employees with long service with a retail employer get nothing at the end of the day on a redundancy because the employer, having shed all of the cheaper labour in a downturn, ends up with those workers with the longest service only at the very end and where the employer has no money left to pay them.

In the sense of this example, the Bill neither protects the small employer nor does it protect the worker. In fact, the Bill would do nothing other than to give such an employer a false sense of security on the basis that they would never bother to contemplate providing for any form of termination pay for their long serving employees and this would, in our Submission, increase the likelihood of employers trading right through to the bitter end of going into receivership or insolvency.

THE QUEENSLAND APPROACH

As part of his general justification for this Bill, the Minister waxes lyrical about the decision of the Queensland Industrial Relations Commission which identified that small business employers should not be subject to redundancy payments. The Minister says in his second readings speech:

"This government agrees with the conclusions of the Queensland Commission."

Unfortunately, from any reading of the Minister's second readings speech, it would appear that the Minister has only read part of the decision of the Queensland Industrial Relations Commission. One aspect of the Queensland Industrial Relations Commission decision which is critical to this debate is the fact that the Queensland Commission specifically adopted a course of action to prevent employers rorting the system through the use of multiple employers so as to create an environment where each and every employer was a small business, even though the multiple employers were effectively controlled by a single corporation.

The Queensland Industrial Relations Commission at paragraph 104 of its 2003 decision on a Statement of Policy in relation to redundancy said:

> *"Furthermore, the Commission is concerned about contrived arrangements through corporate restructuring to avoid the liability to make severance payments as highlighted in Re; Clothing Trades Award 1982. We consider that there should be a definition inserted into the Statement of Policy which defines 'a company' using similar terms to those used in Section 45A of the Corporations Act 2001, where a small proprietary company includes the 'company and the entities it controls'. The definition should also include related companies and companies having common directors or a common director or shareholder. In other words, the number of hours over which the calculation is made should include all hours worked by employees in these related entities. In any event, the circumstances of the particular case can be considered by the Commission if, and when, an application is made seeking and Order under the current provisions i.e. sub-clause 12 of clause C of the TCR Statement of Policy."*

The Queensland Industrial Relations Commission does have a general exclusion of small businesses who employ less than 15 employees. The Association does not endorse this approach. However, this approach is qualified importantly by the matter referred to above which aims at

companies contriving corporate structures to get under the 15 employee limit. In addition, the Queensland Industrial Relations Commission has, in its Statement of Policy, a very clear provision that even with the general exclusion of employers employing less than 15 employees, it is still possible, on a particular application to the Commission, to have a redundancy payment awarded in any particular case of an employer who employs less than 15 employees. As the Commission said in its 2003 decision, at paragraph 105:

> *"The clause (sub clause 12 of clause C of the TCR Statement of Policy) also covers the case of an employer with few employees conducting a very lucrative business, a situation drawn to our attention by the QCU, in the past, a number of cases heard and determined by the QIRC have highlighted the types of matters to be considered in such applications. Nothing in this decision should alter that position, save and except that we have clarified how the small business exemption shall be calculated and that contrived arrangements should not be omitted."*

The very fact that the Minister can wax lyrical about the Queensland Industrial Relations Commission maintaining an exemption on employers employing less that 15 employees but at the very same time, drafts legislation which deliberately and specifically ignores two very important aspects of the Queensland Industrial Relations Commission, raises the very real prospect that the Minister does not intend to be fair and even handed, nor does he intend to provide any protections for employees, even in circumstances where a small business employer can afford a redundancy payment or to protect employees in circumstances where employers have used artificial and contrived arrangements to fall within the exemption.

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