

# Submission

to

Senate Employment, Workplace Relations and Education  
Legislation Committee

## ***Inquiry into the provisions of the *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004****

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ACCI made an earlier submission in August 2004 regarding the iteration of this Bill introduced into the previous Parliament in May 2004.

This fresh submission replaces that submission, and is the sole submission of ACCI in regard to the above listed bill introduced into the House of Representatives on 8 December 2004.

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*ACCI SUBMISSION  
TO THE SENATE  
EMPLOYMENT, WORKPLACE RELATIONS AND  
EDUCATION COMMITTEE*

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INQUIRY INTO THE PROVISIONS OF THE  
*WORKPLACE RELATIONS AMENDMENT (SMALL BUSINESS  
EMPLOYMENT PROTECTION) BILL 2004*

FEBRUARY 2005

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## ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia’s peak council of business associations.
- ACCI is Australia’s largest and most representative business organisation.
  - Through our membership, ACCI represents over 350,000 businesses nationwide, including:
    - Australia’s top 100 companies.
    - Over 55,000 medium sized enterprises employing 20 to 100 people.
    - Over 280,000 smaller enterprises employing less than 20 people.
- Businesses within the ACCI member network employ over 4 million working Australians.
- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.
- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.
- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.
- ACCI members actively participate in developing national policy on a collective and individual basis.
- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

### **ACCI and Small Business Redundancy**

- ACCI is Australia’s largest and most representative organisation representing smaller businesses.
- ACCI members represent and advise small businesses during all stages of their development, their growth, and their travails.
- ACCI members represent and advise small business employers on redundancies and on restructuring when faced by serious business adversity and downturns.

- ACCI represents, and makes this submission on behalf of, precisely the small businesses who:
  - Are currently protected by the small business exemption from redundancy payments.
  - Will be forced by the AIRC’s Redundancy Test Case decision to try to make substantial redundancy payments at precisely the time their business is least viable and cash flows poorest.
  - Stand to secure essential relief from unbalanced, unmerited and highly damaging additional redundancy obligations as a function of the passage of the *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004* (the Bill).

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## PART 1 - EXECUTIVE SUMMARY AND KEY CONSIDERATIONS

1. **Pass the Bill:** The *Workplace Relations (Small Business Employment Protection) Bill 2004* ('the Bill') should be enacted by the federal parliament.
2. **Preserve the Status Quo:** The Bill would preserve an exemption from the obligation to make redundancy payments by small business, an exemption that has existed for 20-years under the federal industrial system and continues to represent a valid, reasonable and balanced approach to the operation of minimum redundancy payments in Australia.
3. **The 2004 AIRC decision represents no proper alternative and is poor public policy:** Properly analysed, the AIRC's decision to impose massive additional redundancy costs is in no way rigorous or defensible. The AIRC reached a conclusion which was far from compelled by the evidence before it, and which was at odds with clear competing evidence on the fundamental incapacity of small business to assume additional obligations.
4. **A Real, Not Theoretical, Problem Exists:** The Bill is necessary to overcome a real and present threat to labour costs and employment in small business arising from decisions of the Australian Industrial Relations Commission on 26 March 2004 (Redundancy Case, PR032004) and 8 June 2004 (Redundancy Case – Supplementary Decision PR062004).
5. **An Urgent Problem Exists:** This is a matter of utmost urgency. In the absence of leadership from Parliament on this issue, small businesses will be forced to assume massive increases in their redundancy obligations from June 2005.
6. **Small Business Is Unique:** The nature and circumstances of small business justify the preservation of the redundancy pay exemption. Small business does not have the same access to cash to fund or plan for redundancies that larger businesses do.
7. **This is a Substantial Matter:** The increased costs that the redundancy pay obligation would impose on small business are substantial.
8. **Small Business Employment is At Risk:** Small business is the engine room of jobs growth. Substantial negative impacts on costs, cash flows, profitability or viability damages employment in Australia.
9. **Redundancy Obligations Are On Top of Existing Termination Payments:** The new redundancy pay obligation arises on top of the existing mandatory termination payments that small business must make to employees in lieu of notice.
10. **Redundancy Obligations Are On Top of Unfair Dismissal Laws:** The decision imposes a redundancy obligation on small business, which is in addition to small business exposure to unfair dismissal laws. Small business

already experiences an inappropriate and damaging compliance burden as a function of the complexity of termination of employment.

Additional costs of making essential redundancies compounds this cost, confusion and uncertainty.

11. **The AIRC Decision to end the exemption of small business from redundancy pay was based on manifest error:** The AIRC decision to remove the exemption was a serious error that, in the public interest, should be rectified. That error, at its most fundamental level was to confuse profitability with the capacity to afford these increased costs without damage to employment.
12. **The AIRC Decision Fails the Common Sense Test:** Common sense supports the retention of an exemption for small business on the basis that they simply lack the resources to make redundancy payments, particularly where business is going so badly that the business is being forced to put people off. In direct contrast to the AIRC decision, people in the high streets of Australia know that the small business operators in their communities simply lack the resources to make such payments.
13. **No Government Supported What the AIRC Did:** No government, Coalition or Labor, appearing before the federal AIRC in the Redundancy Case supported the removal of the small business exemption. Its removal was specifically opposed by the federal government, and by the governments of New South Wales, Queensland and Western Australia. The Western Australian Government is maintaining this position in the state test case currently occurring in Western Australia.
14. **Precedent for a Legislated Redundancy Exemption Exists:** In New South Wales, the parliament has legislated a small business exemption from redundancy pay obligations.
15. **Precedent for Legislated Termination Payment Arrangements Already Exists:** This Parliament already regulates payments in lieu of notice on termination of employment, illustrating that there is nothing new or novel in Parliament acting to set parameters for dismissal / redundancy.
16. **Other industrial tribunals have reached a completely different and more balanced and sensible conclusion:** The Queensland Industrial Relations has twice reached a completely different conclusion to the AIRC in regard to an identical claim, most recently in December 2004. There is therefore a genuine, and more sensible, alternative body of thought in this area which this Parliament can accept.
17. **Industrial Remedies Have Been Exhausted:** There are no appeal rights from the AIRC decision, despite what error may exist in the decision.
18. **The Parliament Has the Power to Legislate the Small Business Exemption:** The AIRC is a creature of the parliament. The parliament has the legislative

right to set minimum standards relating to redundancy pay, including a small business exemption.

19. **This Parliament has altered the implementation of AIRC decisions for decades:** There is nothing new in this Parliament correcting decisions of the AIRC which are not consistent with national considerations/the public interest. Counteracting and correcting AIRC decisions is a perfectly legitimate and accepted public policy approach in appropriate circumstances. Correcting amendments have been a constant driver of the evolving *Workplace Relations Act 1996* for many decades. Indeed, at various times the Commission has effectively invited statutory intervention via the terms of its decisions<sup>1</sup>.
20. **This is a circumstance in which it is appropriate to alter the implementation of an AIRC decision:** Given the above, unique circumstances exist which justify the passage of the Bill, notwithstanding the AIRC decision.
21. **Making ‘Incapacity to Pay’ claims in the AIRC does not work for small business:** The scope given by the AIRC decision for applications to be made by small business relating to incapacity to pay is not a practical or viable solution to the problem that the decision creates for small business.
22. **The Supplementary Decision of the AIRC Does Not Solve the Problem:** The June 2004 supplementary ruling by the AIRC relating to the meaning of “service” for the purposes of redundancy pay obligations was welcome as it provided a transitional basis before the full impact of the substantive March 2004 decision will be felt.
23. However, the supplementary decision does not obviate the need for the passage of this Bill given that the full impact of the decision will be felt for new staff and existing staff once the service requirements are met. As stated above, the passage of this Bill is urgent during the immediate term to ensure the national interest is met in regard to the viability and survival of struggling small business.

## PART 2 - WHY THE BILL SHOULD BE PASSED

24. The Bill seeks to amend the *Workplace Relations Act 1996* to limit the allowability of redundancy pay to those businesses who employ 15 or more employees.
25. The Bill also makes associated changes to achieve the overall policy aim of ensuring that small business is protected from provisions which would force compulsory payment of severance pay to small business employees.
26. ACCI strongly supports the proposed Bill. It should be passed.
27. The Bill would preserve the exemption from the obligation to make redundancy payments, an exemption which has existed for 20 years under the federal award system, and an exemption that was fundamental to the creation of a redundancy pay standard in awards.
28. It is appropriate that the unique circumstances of small business are recognised by our industrial system. Small business does not have the same financial capacities to fund or plan redundancies that larger businesses do.
  - a. The Parliament has, in other respects, previously recognised the commercial, cash flow and cost differences between larger and smaller differences.
  - b. The Commission in both 1984 and (to a certain extent) in 2004 has clearly recognised that small business has differing, reduced capacities to make redundancy payments than their larger colleagues.
29. It is accepted that small business is the ‘engine room’ of jobs growth in this country. However, the increased costs associated with redundancy pay provisions would impact negatively profitability, viability, investment and employment growth. As such, the case for retaining this tried and tested exemption is overwhelming.
30. These obligations, when considered in conjunction with existing exposure to unfair dismissal laws, would have an extremely damaging effect on the employment capacities of small business. Unfair dismissal laws already provide avenues for ‘top up’ of redundancy or termination payments and would still do so.
31. The Parliament should not refrain from correcting damaging decisions of the Australian Industrial Relations Commission (AIRC) when they arise. The AIRC is not a court of law; it is a tribunal and a creature of statute. As such, it is subject to oversight by Parliament when its decisions result in inappropriate workplace relations policy, or when they stray from the policy objectives that Parliament has established for the workplace relations system and the award safety net.

32. Arrangements negotiated at the workplace level currently work well – it is not the case that all small business employees do not receive redundancy payments. In this sector it is more appropriately a matter for workplace level bargaining.
33. The passage of the Bill will not reduce or remove existing rights or entitlements. Particularly in light of the Supplementary Redundancy Decision (discussed below), the decision will do no more than maintain the status quo.
  - a. It would be disingenuous and inaccurate to represent or consider this Bill as any form of diminution of award entitlements. This is not the case. The Bill does no more than preserve a tried and tested, inherently balanced, status quo arrangement.
  - b. In part the Commission itself sought to extend the status quo approach in the June 2004 supplementary decision.

### **Overcoming a decision containing manifest error**

34. Paragraphs [192] to [276] of the AIRC’s March 2004 decision identify the basis upon which the AIRC concluded that the tried and proven exemption based approach for small business should cease. Specifically, the AIRC concluded that:

*[222] It seems to us that the available evidence does not support the general proposition that small business has a relative lack of financial resilience and has less ability to bear the costs of severance pay than larger businesses. We accept that this is true of some small businesses, but the evidence falls well short of establishing, as a general proposition, that small business does not have the capacity to pay severance pay. Three considerations support our conclusion. The first is that small business is generally profitable. The second is that some small businesses make severance payments despite the absence of a legal liability to do so. A third consideration is the absence of evidence from those jurisdictions where the small business exemption does not exist, or in those industry sectors where it has been removed from the relevant federal award, that small business is less profitable or more likely to fail.*

35. This conclusion does not stand up to scrutiny. It does not yield a balanced policy outcome.
36. The AIRC’s decision to remove the exemption for small business contains manifest error. The exposition of the three considerations which the Commission relied upon to end the exemption do not withstand scrutiny sufficient to merit such a major deviation from an established approach.
37. That error, at its most fundamental level, was to confuse profitability with the capacity to afford these increased costs without damage to employment.
  - a. The Commission’s analysis of profit at [223] to [226] is simplistic and uncritical.

- b. Foremost of the errors is a failure to properly engage what being in profit meant under the data cited, and in particular whether small businesses decreasing employment are in fact sufficiently in profit to assume such massive obligations.
  - c. In addition of course a nominal or very minor profit is not illustrative of a capacity to meet such payments.
38. The AIRC also based its decision on the fact that a single small business was able to voluntarily pay severance pay to its employees, *at the time of its closure*.
- a. Such AIRC findings were unfortunately and inappropriately based on a single set of highly atypical redundancies in the closure of one Queensland employer.
  - b. ACCI was very disappointed in the reliance placed in the AIRC decision on the evidence of employees in this unique circumstance (in which the business was (apparently) being closed due to the age of the proprietors and their familial considerations).
  - c. This cannot have told the Commission anything about the capacities of other small business, outside this unique factual situation, to make such payments whilst still retaining other staff and continuing to trade.
39. This approach by the Commission was also manifestly at odds with the safety net approach to awards under the *Workplace Relations Act 1996*. The fact that some small businesses (in fact, just one) had the capacity to make some redundancy payments does not mean all small businesses can do so. This is a strong argument against varying the safety net and in favour of retaining the status quo.
40. The *Workplace Relations Act 1996* also restricts the matters which can be included in the award safety net. Therefore within the context of the contemporary award safety net it is entirely appropriate that Parliament give thought to and make laws regarding what matters should be included in awards, and what matters should be the subject of workplace bargaining.
41. The Commission also clearly accepts that its decision will have a negative impact on small businesses<sup>2</sup>, stating that:

*[213] The ACTU contended that under cross-examination a number of the AiG witnesses conceded that they could find the additional funds to meet redundancy costs. We accept that this is so but the evidence also establishes that such payments would have a negative impact on the business. For example Mr Jukes conceded that if he had to find a sum in the order of \$12 000-\$15 000 he could do so, but only by selling assets, such as a truck, and "then it makes you less profitable because you've got less equipment to operate with . . .". Mr T Butchard made a similar observation.*

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<sup>2</sup> AIRC Redundancy Decision, March 2004, [213], p.58

42. It is hard therefore to see how the Commission then determined that it should act to ensure that this detriment is suffered by all small businesses, and that selling capital assets should become a more widespread phenomena for struggling small businesses being forced to make redundancies.
43. The AIRC describes itself as having only partially removed the small business exemption (paragraph [272]). This is not accurate. The AIRC has (without a proper or rigorous foundation) reversed its previous fundamental acceptance that small businesses cannot afford between one and two months pay in circumstances where they are forced to put employees off.
44. That small businesses were not hit with the full ACTU claim (a four month obligation) is immaterial and merely reflects the ambit in the ACTU claims.

## PART 3 - CONTEXT FOR CONSIDERATION OF THE BILL

45. Two recent test case decisions of the AIRC – the *Redundancy Case Decision* (PR032004, 26 March 2004) and the *Supplementary Redundancy Decision* (PR062004, 8 June 2004) have resulted in the removal of the exemption for small businesses from redundancy pay provisions in federal awards.
46. The decision will require small businesses to provide severance pay to employees made redundant, on a scale that increases according to years of service (capped at 8 weeks pay).
47. These payments must be made in addition to existing termination payments such as pay in lieu of notice (in many circumstances), pro rata annual leave and long service leave (depending on length of service).
48. The decision removes a key component of balance from award redundancy provisions which has existed since the creation of the federal award redundancy standard in 1984.
49. There is no possibility of appeal on the merits of this decision, no matter how damaging. This is why there is an imperative for the Parliament to act in the public interest.

### Effect of the Supplementary Decision

50. As a result of the AIRC's Supplementary Redundancy Decision, it will be several years before the full impact of the removal of the exemption is felt by small business and the economy in general.
51. As a result of paragraph 21 of the Supplementary Decision, only prospective service will be counted in establishing the redundancy pay liability of small business employers:

*"It is unfortunate that this has been raised at this late stage in the proceedings. Nevertheless we think there is some merit in the proposal advanced by ACCI. In particular, we accept that small business employers may not have the financial reserves necessary to meet a redundancy situation immediately, even though currently trading profitably. For those reasons, notwithstanding its lateness, we have some sympathy for the submission. The reasons which have already lead us to adopt a less onerous severance pay scale for small business should not take into account service rendered prior to the operative date of any order giving effect to the March decision".<sup>3</sup>*

52. This aspect of the Supplementary Decision provides the Parliament with an historic opportunity to overcome the damage this decision will cause before it begins to occur.

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<sup>3</sup> PR062004, para 21.



53. The decision will begin to impact on small business 12 months from the date that orders to vary awards to reflect the decision has been made.
54. Many awards have already been varied to include the new test case standard – therefore as an estimate the decision will begin to directly impact on small business in July 2005.
55. However, the indirect impact of this decision on small business – who have to come to terms with the significantly increased liabilities they will incur if they employ someone – has already began.
56. ACCI can report through its member network that is an issue of very real and serious concern for small business.
57. This is another reason for prompt, decisive action on the part of Parliament: to restore balance to award redundancy pay provisions and protect small business employment.

### **This is now urgent**

58. This matter is now urgent. The temporary respite offered in the June 2004 supplementary decision is now coming to an end.
59. 12 months after the variation of specific awards, the transitional approach changes and all employees made redundant by small business will receive an entitlement based on 12 months service.
60. This means that as of early July 2005, small businesses would be forced to assume major new redundancy pay obligations (4 weeks pay).
61. This will generally equate to finding at least an additional \$2,000 when small businesses are forced to make redundancies.
62. As ACCI and employers have consistently maintained, this obligation would come into play precisely when small businesses are least likely to be able to assume such additional costs (i.e. when they are being forced to make staff redundant).
63. This will occur automatically unless Parliament passes this Bill as a matter of urgency.

### **Incapacity to Pay Provisions**

64. The decision has resulted, as a result of submissions advanced by ACCI, in an amendment to award incapacity to pay provisions:

*“On the basis that ACCI has submitted that its proposal is not designed to weaken the incapacity to pay principle but to simply improve access to*

*it, we will make the alteration sought. It must be clearly understood, however, that for relief to be granted the concept of averaging cannot be used and incapacity must be shown in the case of each employer.”<sup>4</sup>*

65. It is important that undue weight is not placed on the potential role of incapacity provisions, even with the amendment achieved by ACCI. Fundamentally, incapacity to pay processes reverse the proper onus that should apply in this matter – that is, small business should not be subject to compulsory redundancy pay obligations and then have to demonstrate to a tribunal why they should be exempted.
66. There are many other reasons for concluding that incapacity provisions will provide limited and only theoretical relief to small business faced with having to make redundancy payments to employees:
  - a. The amendment achieved is a minor one – every small business will still have to face a tribunal and justify, according to their particular circumstances, that they are incapable of making redundancy payments. The AIRC’s decision in fact makes clear that little will change in the operation of incapacity to pay matters.
  - b. The history of incapacity provisions demonstrates that they are not frequently used due to the cost, complexity and litigious or adversarial nature of Commission proceedings.
  - c. The presentation of evidence and grounds in favour of incapacity requires a small business to engage specialist legal and industrial services (at the exact time when it can reasonably be assumed financial capacities for small business are extremely limited).
  - d. Making an incapacity application can involve divulging sensitive financial information, something many businesses are reluctant to do.

### **Grounds for an ongoing exemption for small business from award redundancy pay provisions**

67. ACCI in no way opposes small business employers making redundancy payments to their employees, where this can be accomplished without threatening business viability and the capacity to continue employment of other staff. This is entirely consistent with the contemporary schema of the *Workplace Relations Act 1996*, including in particular the emphasis on determination of outcomes at the workplace level.
68. ACCI however opposes the creation of an arbitrated, compulsory award safety net obligation which compels small business to make payments to their employees in all redundancy situations – regardless of the detriment this

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<sup>4</sup> PR032004, para. 355.

would cause to the small business concerned, to its viability and to its capacity to offer ongoing employment to other staff.

69. When the award redundancy pay standard was created in 1984, small businesses were exempted from such obligations for extremely good reasons.
70. At heart, these reasons are based on the financial capacities of smaller businesses, and the absolutely paralysing effect redundancy pay obligations can have on small business viability and employment growth.
71. The basis for the exemption in 1984 remains valid. The exemption was the product of a detailed consideration of various options and approaches in 1984. The concept is a sound and balanced one, as has been proven by the effective operation of the exemption since 1984.
72. This was recognised by the Queensland Industrial Relations Commission in the recent state Redundancy Pay Test Case:

*“In our view, the small business exemption should be retained. Many small businesses operate in marginal circumstances. An obligation to make severance payments has the very real potential to result in the insolvency of a number of small businesses. The lack of financial resilience in small business previously referred to has not changed since 1994. We accept the Queensland Government's submission that small business would generally have smaller cash reserves to meet severance pay requirements, and redundancies occurring would represent a greater proportion of the overall labour costs of the business. It is likely that small business facing a downturn or restructure sufficient to generate redundancies would not have sufficient cash reserves to launch a case in the Commission against an industrial organisation of employees (with perhaps greater access to financial resources) seeking an exemption from the application of severance pay provisions - see Building Products, Manufacture and Minor Maintenance Award - State (1997) 154 QGIG 458. Importantly, the majority of other States and the federal jurisdiction retain a small business exemption”<sup>5</sup>*

73. The retention of the small business exemption was unambiguously reiterated by the Queensland Commission as recently as December 2004, when it stated that:

*[14] We based our decision of 18 August 2003 on the evidence that was before us on that occasion. There are substantial reasons for a small business exemption and we again adopt those reasons referred to in our previous decision.*

*[15] Further, it is important to note the QCU and the AWU had the opportunity to have the matter before us adjourned to await the decision of the AIRC. They opposed that application and were successful in that*

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<sup>5</sup> Queensland Redundancy Test Case Decision, No. B209 of 2002. para 100

*opposition. Had consistency of outcomes been a priority then the logical position would have been to await the outcome of the AIRC deliberations. Instead, the QCU and the AWU decided to pursue their applications before this Full Bench in the knowledge that the AIRC was in the process of hearing the matter before it and in the knowledge that different outcomes might result.*

*[16] To now change our position because the AIRC adopted a different view on the (apparently different) evidence before it would be tantamount to saying we made the wrong decision on the evidence before us originally. We are of the view that our original decision was correct given the material and evidence before us on that occasion.*

*[17] We have not been persuaded by the QCU and AWU submissions that we should vary our earlier decisions. As such our decisions of 18 August 2003 and 15 October 2003 will stand. We reject the claim to remove, or vary, the small business exemption.*

74. The QIRC expressly:
- a. Considered the evidence in the federal matter, and refused to alter its earlier decision.
  - b. Refused to abandon the proven approach of exempting small business from obligations they are simply unable to viably meet.
  - c. Expressly considered comparable arguments and materials to those from the federal matter, and reached a differing, superior, and more sensible conclusion.
75. Small business is the employment growth engine room of the economy. It is vital that small businesses continue to have the confidence to employ staff without attracting significant potential liabilities.
76. The fundamental ground for a small business exemption is therefore the limited financial capacities of small business and the profound effects that the removal of such an exemption will have on small business employment and on the economy more generally.
77. In the Redundancy Case, ACCI provided substantial submissions and evidence in support of this proposition<sup>6</sup>. An extract of these submissions is attached and we commend it to the Committee.
- a. The ACCI submissions provide substantial information on the reasons why small business requires an ongoing exemption, and the financial effects of that exemption being removed. In particular, the cost impacts of redundancy pay obligations on small business are examined in detail.

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<sup>6</sup> ACCI, Submissions in Response to ACTU Applications, April 2003

- b. This material makes clear that the AIRC's decision to remove the small business exemption from redundancy payments was based on a paucity of proper information, and stems from only looking at part of the story it was told.

## **PART 4 - PARTICULAR SCHEDULES OF THE BILL**

78. Overall, the various sections of the Bill will operate to ensure that small businesses remain exempt from compulsory redundancy pay provisions and that the various avenues by which such compulsory obligations may be imposed, under either federal or state workplace relations law, are closed off.

### **Calculation of 15 employees for the purposes of the exemption**

79. Schedule 1(4) of the Bill establishes the method of calculating whether a business employees 15 or more employees. The restriction of casual employees to those engaged on a regular and systematic basis for at least 12 months is appropriate and establishes a nexus with ongoing employment within a business.
80. The lack of such a restriction could lead to difficulties in correctly calculating when a business is, or is not, a small business for the purposes of the legislation.

### **Transitional arrangements**

81. In several of the Bill's schedules there are transitional provisions that seek to ensure that, where awards have been varied to include the new redundancy pay obligations, these orders cease to have effect.
82. These transitional arrangements are necessary to ensure the maintenance of the status quo in relation to small business redundancy pay obligations, to prevent any confusion regarding what the obligations of small businesses are, and to give small business confidence regarding decisions they are seeking to make, particularly in relation to hiring.
83. As stated above, this area is confusing enough and urgent action is required to restore the status quo. It is essential that the problems that will be caused by attempting to end the exemption be addressed urgently and unambiguously. The transitional arrangements in the Bill appear to do this, and should be supported.

**ATTACHMENT A - ACCI SUBMISSION IN REPLY  
REDUNDANCY CASE - APRIL 2003  
(EXTRACT)**

**Chapters 5-11 (Addressing Small Business Matters)**

## **A5. INTRODUCTION – SMALL BUSINESS**

[A5.1] The ACTU has applied in this matter to extend award severance pay obligations to small business employers for the first time.

[A5.2] Having regard to the *Metal, Engineering and Associated Industries Award 1999* example in the table of positions following conciliation<sup>7</sup>, the ACTU:

- a. Opposes the creation of a supporting definition delineating small from large businesses in subclause 4.4.1.
- b. Opposes differing redundancy obligations for small and large businesses as set out in subclause 4.4.2

[A5.3] In terms of the existing *Metal, Engineering and Associated Industries Award 1999* redundancy provisions, the ACTU is effectively seeking to delete the Full Bench arbitrated exemption set out in subclause 4.4.4:

### *4.4.4 Employers Exempted*

*This clause shall not apply to employers who employ less than 15 employees.*

[A5.4] This exemption forms an indivisible part of the test case provision on redundancy which has been included in federal awards. The vast majority of federal awards that contain redundancy provisions do so based on the provisions of the 1984 test case decision, and do so based on the exemption of small business employers which was the only way in which severance pay could be applied under the federal award system having proper regard to the balance of interests of both employers and employees.

[A5.5] This remains a firmly non-agreed matter. Employers strongly oppose the deletion of the existing exemption in the award which ensures that smaller employers are not subject to onerous and inappropriate severance pay obligations.

### **Reversing the Test Case Determination**

[A5.6] The approach to severance pay entitlements contained in the 1984 TCR test case decision is strongly supported by ACCI. It remains an indivisible balance for the awarding of severance pay, which was intrinsically linked to the quantum awarded. ACCI considers that the small business exemption was in effect the only basis on which severance pay could be awarded, and remains the only basis on which severance pay can viably operate in the award system. If the exemption was not there, one could reasonably expect that in the balance of interests the Commission was required to

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<sup>7</sup> Attachment A to ACCI's December 2002 Outline of Contentions.

apply in 1984 that the quantum of severance pay determined may well be lower than it was, and is.

### **The Onus on the ACTU**

[A5.7] The ACTU’s outline of contentions in this matter justifies the imposition of a massive and damaging increase in costs upon small business in just 10 paragraphs<sup>8</sup>. Only some of these paragraphs could validly be said to constitute contentions which may be under consideration in this matter.

[A5.8] Apparent in these contentions, and indeed in much of the ACTU submission is an attempt to reverse the onus of proof in this matter, and for the ACTU to shift the evidentiary burden it carries onto respondent parties. For example, the ACTU must prove contentions such as the following, rather than respondent parties and intervenors having to disprove them<sup>9</sup>:

- a. That the 1984 Test Case findings giving rise to the treatment of small business under standard redundancy provisions should be overturned.
- b. That there has been material change since 1984 in regard to small business, and in particular their capacities to award severance pay, such that a clear finding of the Commission should be reversed. (Decisions of the Commission do not have a “use by date” after which they expire, and be retried – a party seeking to re-open and reverse a decision of the Commission must prove this is warranted).
- c. That the capacities of small business to viably pay severance pay have changed since 1984, or that the then Commission erred in some way in handing down the exemption in 1984.
- d. That comparative materials on approaches in other jurisdictions, and some deviations from the test case, are relevant, how, and in what way it may inform the Commission.

[A5.9] The ACTU misrepresents what is effectively a double onus or double burden of proof which it bears in this matter. It must satisfy the Commission that:

- a. The Commission should vary awards to give effect to the applications sought.  
AND
- b. In doing so, the Commission should reverse a major structural element of one of its most important test cases, which has been included in very many awards of this Commission, including most awards of multi employer application.

<sup>8</sup> (C2002/4659 and ors) *ACTU December 2002 Submission*, Volume 1, 20 December 2002. [29] – [38], pp.13-15.

<sup>9</sup> This is an indicative rather than comprehensive list of possible matters which the ACTU must successfully address to even begin to advance this claim.



[A5.10] It should be recalled that this is not an abstract consideration about whether severance pay may extend to small business employees, nor some form of equity proposition as the ACTU attempts in its contentions. It is also not:

- a. An application in the first instance to have small business pay severance pay along with other businesses (this has been heard by the then Commission in 1984, and was rejected). Even in this scenario, the ACTU would still bear an onus of proof, which it could not, Teflon like, slide off onto the respondent parties.
- b. An application to extend the existing severance pay standard to small business (i.e. severance pay of up to 8 weeks on the existing scale). (This would also see the ACTU assume a substantial burden of proof which it could not simply transfer to respondent parties).

[A5.11] This is a claim to increase the costs of severance pay to small business by between 167% and 400% depending on age and length of employee service. It proposes a multiple hit on employers:

- a. Small business being forced to pay severance payments not arbitrated with any regard to the circumstances of small business or any consideration of their needs and challenges (the 1984 decision proceeded in the basis of excluding them).
- b. Small businesses being forced to pay severance payments of the vastly inflated ambit level sought by the ACTU in this matter.
- c. Small business being forced to pay penalties, loadings and allowances for time which has not been worked (the ACTU claim in regard to the rate at which severance must be paid).
- d. Small business being forced to pay severance pay to their casual employees.
- e. Small business being forced to pay a post employment amount to employees under the nominal title of a “Professional Services Allowance”, despite such services being distinctly limited even in Australia’s largest businesses.

[A5.12] It is in fact a claim for small businesses to pay up to an additional 20 weeks pay.

- a. At the minimum wage level, this would impose an additional cost of at least an additional 167% (\$1,725.60), and up to an additional 400% (\$8,628.00) on small business (+ \$300 under the ACTU’s additional claim).

- b. At the trade level, this would impose an additional cost of at least an additional 167% (\$2,100.80), and up to an additional 400% (\$10,504.00) on small business (+ \$300 under the ACTU’s additional claim).
- c. At the C1(a) level, this would impose an additional cost of at least an additional 167% (\$2,267.60), and up to an additional 400% (\$11,338.00) on small business (+ \$300 under the ACTU’s additional claim).

[A5.13] This would become payable in circumstances in which small businesses are most financially and operationally vulnerable, and employment is most at risk.

## A6. STARTING WITH THE FACTS – THE COST IMPACT ON SMALL BUSINESS

[A6.1] The starting point for a consideration of this issue must be the additional cost impact which the ACTU proposes can, and should be borne by Australian small business.

[A6.2] Attachment A is a spreadsheet illustrating the impact of the ACTU and ACCI propositions in this matter in regard to a wide range of redundancy scenarios.

[A6.3] It shows that:

- a. This is a proposal for an up to 400% increase in the amounts that small business employers must pay in making essential business restructuring.

[A5.14] The following table is drawn from Attachment A illustrating the low end impact of the claim based on the federal minimum wage.

**Table X.1 Cost Impact of the ACTU Claim  
On Small Business – Min Wage<sup>10</sup>**

Yrs	Current			ACTU			ACCI			Rate	Current	ACTU	ACCI	%↑
	Notice	Sev	Total	Notice	Sev	Total	Notice	Sev	Total					
<1	2	0	2	2	0	2	2	0	2	\$431.40	\$862.80	\$862.80	\$862.80	0%
1	3	0	3	3	5	8	3	0	3	\$431.40	\$1,294.20	\$3,451.20	\$1,294.20	167%
2	3	0	3	3	8.75	11.8	3	0	3	\$431.40	\$1,294.20	\$5,068.95	\$1,294.20	292%
3	4	0	4	4	12.5	16.5	4	0	4	\$431.40	\$1,725.60	\$7,118.10	\$1,725.60	313%
4	4	0	4	4	15	19	4	0	4	\$431.40	\$1,725.60	\$8,196.60	\$1,725.60	375%
5	5	0	5	5	17.5	22.5	5	0	5	\$431.40	\$2,157.00	\$9,706.50	\$2,157.00	350%
6>	5	0	5	5	20	25	5	0	5	\$431.40	\$2,157.00	\$10,785.00	\$2,157.00	400%

[A5.15] The proposed level of cost impost is completely inappropriate for small business, especially at those times when redundancies occur, and the business is most vulnerable and under threat. ACCI intends to return in detail during consideration of this matter to the costs of the ACTU proposal to small business and the impact this will have.

### Examples of the Cost Impact of the Claim

[A6.4] The best way to illustrate the practical impact of what is proposed by the ACTU for Australian small businesses is to consider some practical examples, and some practical cost impact scenarios for small business.

<sup>10</sup> Example based on an employee of over 45 years old.

### Example 6.1 – The Small Shop

[A6.5] One of the awards subject to the union applications in this matter is the *Retail and Wholesale Industry - Shop Employees – ACT - Award 2000*. A small shop in Canberra is covered by this award under its common rule application in the ACT, and employs a full time shop assistant with responsibility for purchasing – effectively a shop manager. He receives \$502.20 per week in accordance with cl.18 of the award, and has worked in the shop for a period of three years. (He is in his late 20s, and therefore under 45 years old).

[A6.6] Due to a downturn in custom and retail confidence, the owner of the shop decides that costs dictate that operating hours, and days of operation must be reduced, and that she must move from occasional, and relief work in the shop, to become an owner operator. In short, she simply is not securing the cash flow to maintain a full time manager, and must undertake the work herself.

[A6.7] Under the current award provisions, and in particular the exemption set out in subclause 14.11 of the award, the shop employee may be made redundant on provision of due notice. This would be as follows:

$$\begin{array}{rcccccc} \text{Notice} & 3 \text{ weeks} & \times & \$502.20 & = & \underline{\underline{\$1,506.60}} \\ & & & & & \underline{\underline{\$1,506.60}} \end{array}$$

[A6.8] The employer and employee may agree on some other, higher, arrangement, but at very least, the employer must pay the employee at a time when her business and cash flow are struggling, over \$1,500. Whilst the employer has capacity to have the employee work out this notice period, given his role in purchasing and contact with customers, this may not be appropriate.

[A6.9] Compare this with the ACTU's proposal:

$$\begin{array}{rcccccc} \text{Notice} & 3 \text{ weeks} & \times & \$502.20 & = & \$1,506.60 \\ \text{Severance} & 10 \text{ weeks} & \times & \$502.20 & = & \$5,022.00 \\ & & & & & \underline{\underline{\$6,528.60}} \end{array}$$

[A6.10] Thus under the ACTU proposal, the small ACT shop, that is experiencing such difficulties in cash flow, that the proprietor must come back into her business to run it, must come up with 13 weeks pay, or over six and a half thousand dollars.

[A6.11] Where is this going to come from?

- a. 10 weeks cash flow is not going to magically appear.
- b. The landlord is not going to grant a 10 week rent holiday.
- c. The bank is not going to grant a 10 week relief from repayments.

- d. Suppliers are not going to suddenly move this employer from 30 day payment terms to 60 or 90 day payment terms (especially when her purchases have slowed due to a downturn in customer demand).

[A6.12] That the employee must be paid an additional 10 weeks pay, will have no impact on the factors which have led to the downturn in cash flow for the business. It will not put more money in the pockets of local Canberrans, nor make them more likely to purchase at this shop.

[A6.13] The proprietor may be able to weather her commercial storm through the hard work of coming back into her store and managing it, and her resultant increased capacity for discounting and purchase of stock. She may be able to weather a \$1,500 exit payment for her ex-shop manager. She may well be able to re-employ if business expands in the future. This may well be rendered all but impossible if the payment were over four times higher at \$6,500.

### **Example 6.2 – The Small Restaurant**

[A6.14] A small suburban Melbourne restaurant is experiencing hard times. Due to competition in the local area from increasingly fashionable international cuisines and changes in the socio economics of the neighbourhood, it is losing custom. It is also in an uncomfortable mid-pricing range, above fast food and some local restaurants, but below the best restaurants in the area.

[A6.15] Due to her stage of life, the restaurateur cannot turn to family members to staff the operation as some competitors can. She also cannot afford to redecorate or re-launch. However, she and the head chef have worked together for many years, and believe (perhaps correctly, perhaps not) that this storm can be weathered like others have been in the past with some adjustments.

[A6.16] They propose that:

- a. The restaurant shift from two chefs to one, with the second chef position being made redundant.
- b. The owner to become the head waiter, requiring less hours from the waiting staff.
- c. There be one less day of operation – with the restaurant closing for Monday and Tuesday.
- d. A reduced menu, requiring the holding of less stock (and discarding of less out of date produce).
- e. Not redecorating as planned for at least 2 years.

[A6.17] The second chef has been with the business for a period of 2 years, this was his first job post-apprenticeship. Presently to make this redundancy, the costs would be as follows:

$$\text{Notice} \quad 2 \text{ weeks} \quad \times \quad \$600.00 \quad = \quad \$1,200.00$$

[A6.18] The second chef was substantially trained in the business, and has been with them post-apprenticeship for a period of 2 years. Presently to make this redundancy, the costs would be as follows:

<u>Notice</u>	2 weeks	x	\$600.00	=	\$1,200.00
<u>Sev Pay</u>	7 weeks	x	\$600.00	=	\$4,200.00
					\$4,200.00

[A6.19] So, this small and struggling restaurant which is proposing to take unavoidable decisions which decrease its competitiveness (cutting the menu, and not redecorating) is thought by the applicants to be able to come up with and additional \$4,500 (including the \$300 allowance sought). In this case, it may in fact be much more due to the claim in regard to the rate at which redundancy is to be paid.

[A6.20] All the waiting staff are casual. It is not clear how this would interact with the ACTU claim. One of the casual staff has been with the restaurant for 2 years whilst studying (for a career outside the hospitality industry). The owner coming in to the workplace as a Maître'd will not necessarily see any casual staff member excised from the roster permanently. Rather it is likely to cut the hours which are available on the roster to each staff member (which would be cut anyway due to the additional days closure). It is not clear how this would work under the ACTU proposal for casuals. Are these casuals redundant even though there is an ongoing offer of casual work? What would happen when the hours went up again in the future after the storm was weathered – would the casual employee refund the severance he or she had been paid?

[A6.21] Relevantly in the example, the casual may well have varied their hours by choice over the period of their engagements. The employer may have been flexible to their study and social needs, but be expected by the ACTU to pay (above the casual loading) for additional flexibility when required in the interests of the business staying open.

**Example 6.3 – The Small Manufacturer**

[A6.22] Five years ago an industrial design practice designed a unique, and effective point of sale display which is used throughout Australia in retailing a major national product. The commissioning company was, and remains highly satisfied with the display, although there were initially substantial difficulties in contracting a company

to manufacture, and assemble the units. After some research and evaluation, the designers expanded their company to include a small factory which assembles, packs, and distributes the units. Employment in the company is now:

- a. 5 people in the design office.
- b. 8 people in the factory (1 foreman and 7 general hands).

[A6.23] This has proceeded highly satisfactorily. However, after 5 years intellectual property ownership and production rights of the design are to revert to the commissioning company, which has been taken over by an international company. The company intends to shift production of the display units overseas, and to expand the number produced significantly.

[A6.24] After some discussion, the designers conclude that whilst the design company has successfully run the assembly factory, design is its core business, and offers better prospects for the future than small manufacturing. They conclude that they do not have an interest in pitching for further, potentially far less secure contracts just to keep the factory going.

[A6.25] The factory is to close, all 8 positions in the factory are to be made redundant. No expansion of the design office is planned at this stage, but this is sought. Any expansion is likely to be through the employment of a qualified designer with high levels of IT skill, especially in computer-aided draughting (CAD).

[A6.26] The employment of the employees is as follows:

<b>Position</b>	<b>Wage</b>	<b>Service</b>
Foreman	\$600.00	5 years
General Hand 1	\$500.00	5 years
General Hand 2	\$500.00	5 years
General Hand 3	\$500.00	5 years
General Hand 4 <sup>11</sup>	\$470.60	4 years
General Hand 5	\$470.60	4 years
General Hand 6	\$470.60	3 years
General Hand 7	\$470.60	2 years

[A6.27] None of the employees are over 45 years old.

[A6.28] Under the present arrangements, this yields the following labour cost of closing the factory:

<sup>11</sup> Rubber Plastic and Cable Making Award, Clause 21, Level 3 Production Employee

<b>Position</b>	<b>Wage</b>	<b>Notice</b>	<b>Payment</b>
Foreman	\$600.00	4 weeks	\$2,400.00
General Hand 1	\$500.00	4 weeks	\$2,000.00
General Hand 2	\$500.00	4 weeks	\$2,000.00
General Hand 3	\$500.00	4 weeks	\$2,000.00
General Hand 4	\$470.60	3 weeks	\$1,411.80
General Hand 5	\$470.60	3 weeks	\$1,411.80
General Hand 6	\$470.60	3 weeks	\$1,411.80
General Hand 7	\$470.60	2 weeks	\$941.20
<b>Total</b>			<b>\$13,576.60</b>

[A6.29] However under the ACTU's proposal, the costs to the small design company would be as follows:

<b>Position</b>	<b>Wage</b>	<b>Notice</b>	<b>Sev</b>	<b>Total</b>
Foreman	\$600.00	4 weeks	14 weeks	\$10,800.00
General Hand 1	\$500.00	4 weeks	14 weeks	\$9,000.00
General Hand 2	\$500.00	4 weeks	14 weeks	\$9,000.00
General Hand 3	\$500.00	4 weeks	14 weeks	\$9,000.00
General Hand 4	\$470.60	3 weeks	12 weeks	\$7,059.00
General Hand 5	\$470.60	3 weeks	12 weeks	\$7,059.00
General Hand 6	\$470.60	3 weeks	12 weeks	\$7,059.00
General Hand 7	\$470.60	2 weeks	7 weeks	\$4,235.40
<b>Total</b>				<b>\$63,212.40</b>

[A6.30] The difference between closing the assembly arm of the design company under the ACTU proposal and the current arrangement is over \$50,000. (\$49,636 + (8 x \$300)). This is a highly material amount of money for a small business, which is set to get much smaller.

[A6.31] The ACTU must be asked what the proprietors are to do under this scenario. Does this force them to shut down the company as a whole (with the remaining staff in the design office then also losing their jobs)? Are they forced to try to maintain an unproductive operation in the factory?



**Example 6.4 – The Small Accountant**

[A6.32] A small suburban Melbourne accounting practice (less than fifteen staff) employs an experienced higher level clerk in the preparation of financial documentation, including returns and some less technical taxation, bookkeeping and compliance matters. She is responsible for the supervision of some more junior staff in the office.

[A6.33] The clerk has been with the company for 9 years, and is over 45 years old. She has extensive accounts and office experience at the level of an unqualified, senior clerk.

[A6.34] Her classification under the grading structure set out in cl.16 of the *Clerical And Administrative Employees (Victoria) Award 1999*, is as a Grade 6 Clerk, the highest award grading. Whilst her accounting duties do not exceed those of a Grade 5, her supervisory responsibility is that of a Grade 6 clerk. The rate of pay of under the award is \$626.00 per week, however, in reflection of the market and her experience, she and the accountant have agreed to a rate of \$35,000 per year (\$670.80 per week).

[A6.35] Whilst she can type, her computer use is very limited. She is less computer literate than the firm's clientele, and is certainly not able to develop user applications, nor to set up sophisticated spreadsheets and online resources. She is also not an accountant. She has not formally studied accountancy, is not eligible for professional recognition or admission to professional bodies, not to assume professional legal responsibilities.

[A6.36] Unfortunately the nature of the business has changed during recent years. The accountant is facing a very different operating climate from that which had enabled him to employ her happily to date. Key changes include:

- a. The advent of PC accounting software specially geared to small business (MYOB, Quick Books etc). This has changed the work of the accountant considerably, and he earns less income from smaller, more routine work with small businesses on an ongoing basis than was the case in previous decades. His clients are increasingly computerised, and are demanding an increasingly computerised, and computer integrated service from their accountant.
- b. The GST and taxation reform have created an ongoing change in customer demand from his local small business clients. There is less demand for regular systemic or process work, and more demand for strategic advice and financial problem solving.
- c. There is increasing legalism and complication in the taxation compliance queries being referred to the accountant from his local small and medium size

business clients. Their problems have become increasingly complex, and their demand for strategic advice, from a one stop provider with a wide range of skills, more widespread.

- d. There is a change in his clientele. Many of his former small business clients within the local community (the service station, the hardware, the supermarket etc) are now parts of chains and are company owned. They either have no demand for his services, or demand a very different service than would previously have been the case. To an increasing extent, sellers of services are clients of our accountant, and there is a change their demands and the accounting expertise required.
- e. There is a growing blurring of the previous distinction between business accounting and personal accounting, as the number of home office workers, consultants and part time workers grows in the accountant's local community. Where once his clientele was substantially small business based in traditional activities (the local hardware, the butcher etc), he is now called upon to address personal taxation queries in relation to complex issues such as personal trusts, businesses etc, personal superannuation schemes etc.

[A6.37] The managing accountant is 50, and intends to work in his business for another 15 years prior to retirement. He has a substantial investment in the business, and believes that his community profile and reputation provide a sound basis to grow the businesses with some structural adjustment to reflect changing demand. He is well aware of the trends outlined above, and the changes they demand that he make to his business.

[A6.38] He has determined that he must hire another qualified accountant, able to join him in providing strategic advice to his changing client base. He is looking for someone younger than he is, with an IT orientation to meet the changing needs of clients, and more recent professional development studies to re-energise the practice in regard to changing areas of tax and compliance. Allied with the principal accountant's experience, reputation and strategic perspectives, he believes this will position the business well to meet the changing trends facing it from the market.

[A6.39] He intends to hire the new accountant on a salary of \$100,000. This is a significant additional wages cost and is close to the maximum he can access, but his assessment is that the additional business which can be attracted will pay off after a period of approximately 2 years, and will allow access to sufficient liquidity to meet the additional recurrent wages expenditure.

[A6.40] To achieve this fundamental and essential restructuring, the position of the existing senior clerk will need to be made redundant. The fundamental and essential restructuring, along with the change in the work to date, dictates that her essentially unqualified, manual position is no longer required if the business is to survive in its changing market.

[A6.41] Under the current award provisions, and in particular the exemption set out in subclause 14.9 of the award, the Grade 6 clerk may be made redundant on provision of due notice. This would be as follows:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$670.80 & = & \$3,354.00 \end{array}$$

[A6.42] Due to her long service with the company, her redundancy due to no fault on her part, and his having made provision for it after her seventh year of service, the accountant also intends to pay the clerk pro-rata long service leave. This is effectively another “overaward” or “over-minima” payment<sup>12</sup>. Her total redundancy payment will therefore be:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$670.80 & = & \$3,354.00 \\ \text{LSL} & 7.8 \text{ weeks}^{13} & \times & \$670.80 & = & \$5,232.30 \\ & & & & & \hline & & & & & \$8,586.30 \end{array}$$

[A6.43] The Accountant is having some cash flow problems due to the factors outlined above, but due to having made accounting provision for the long service leave, can make this payment.

[A6.44] Contrast this with the ACTU proposal for the above scenario:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$670.80 & = & \$3,354.00 \\ \text{Severance} & 20 \text{ weeks} & \times & \$670.80 & = & \$13,416.00 \\ & & & & & \hline & & & & & \$16,770.60 \end{array}$$

[A6.45] Thus under the ACTU proposal, the small accounting company which is suffering economic adversity and is seeking to remain in business and to continue to provide employment to perhaps five staff on an ongoing basis, will be required to come up with almost \$17,000 to achieve an essential business restructuring.

[A6.46] This would be over \$22,000 if the employer were to still wish to pay out pro-rata long service leave. Conversely, the accountant may be forced to use this provision to fund the redundancy payment, and no formal additional payment for long service leave may be possible despite the accountant’s intentions.

<sup>12</sup> As she is paid above the Grade 6 rate.

<sup>13</sup> The entitlement under Schedule 1A of the *Workplace Relations Act 1996* is to 13 weeks long service leave after 15 years. Pro rata, 9/15 of this is 7.8 weeks.

[A6.47] Where is this additional 25 weeks pay going to come from?

- a. 25 weeks cash flow is not going to magically appear.
- b. The landlord is not going to grant a 25 week rent holiday.
- c. The bank is not going to grant a 25 week relief from repayments.
- d. Suppliers are not going to suddenly move the firm from 30 day payment terms to 60 or 90 day payment terms.

[A6.48] Most importantly, that the employee must be paid 25 weeks pay, will have no impact on the factors which have demanded the restructuring of the accountancy business. Competing companies will not give the employer a competitive breather, clients will be no less likely to want to minimise the costs of the accountancy services they require. Clients will also be no less likely to walk to competitors as a function of the ACTU claim.

[A6.49] This additional cost will also come at a time when the very small business had to absorb the loss of one of its key staff. No one would pretend that losing the senior clerk's work would be simple to absorb in this scenario, nor that it would not reduce efficiency, output and turnaround times for clients, nor that it would not cost money to make this transition. The redundancy and re-engineering outlined scenario is based on a managerial assessment of the correct strategic approach in the ultimate interests of viability and capacity to employ. Such an assessment is materially altered by such an increase in costs.

[A6.50] What of the employment of the second accountant? The additional transition costs proposed by the ACTU come about at a time when the business was already having to make significant transitional expenditures, including:

- a. Advertising, recruitment and selection costs for the new staff member. (This is not an add in the local paper job – a major professional selection is required).
- b. New investment in computer equipment to maximise the utility of the new staff member.
- c. The time and consideration of the accountant.
- d. Administrative time of other existing staff to coordinate interviewing, employment, accommodation etc. (i.e. recruitment, selection, and induction costs).
- e. That inherent period of new employment when someone new costs the business money whilst getting to know the ropes – learning the business, the clients etc.

[A6.51] There is also the relationship between the massively increased redundancy expenditure and the capacity to purchase the work of the new accountant, and the quality and experience of the new staff which can be purchased. \$17,000 is 17% of the proposed annual salary of the new accountant.

- a. Does the business take a decision to now hire an \$80,000 accountant rather than the \$100,000 accountant who would be optimal and who would represent the best balance of cost against capacity to grow the business.
- b. Does the business take on significant additional financial risk by extending itself beyond financial prudence by still taking on a \$100,000 accountant, despite not having the money to do so.
- c. Does the business access additional, and costly debt to achieve this restructuring? How does the ACTU say an additional \$17,000 debt be serviced in the above scenario?

[A6.52] The \$100,000 annual salary was the most the principal accountant calculated his business could afford to pay for essential new staff. In the above scenario, the accountant would need to return to his calculations of the utility of restructuring.

[A6.53] Another consideration which the principal accountant may be forced to address is ending his commitment to training, and no longer taking on an office trainee in a bid to find the additional \$17,000 required for the redundancy.

[A6.54] It is difficult to escape the conclusion that an un-stated, but clear component of the ACTU proposal is punitive. The ACTU is raising redundancy costs to such a level that employers cannot effectively afford to undertake essential business restructuring and to make staff redundant without severe prejudice to their business. If a pejorative or discouraging function of severance payments is accepted as a legitimate basis for their calculation, businesses will not undertake essential restructuring based on a calculation of cost verses benefits – and will go out the back door rather than adapt and adjust to their environment. In the above scenario for example, our accountant may be forced to chose to simply shut the business, or run it into insolvency and then work for someone else (one of his newer, larger competitors).

### **Additional Examples – The ACTU Witnesses**

[A6.55] The applicability and accuracy of the above examples is confirmed even by some of the hand picked examples brought forward by the ACTU. It should however be noted that there is a paucity of small business witness material from the ACTU, only a minority of the ACTU witnesses appear to have clearly worked in small businesses, and there is little in the way of informed witness information on affordability and impact of the ACTU proposal.

[A6.56] **Mr William Albury<sup>14</sup>** and **Mr Bruce Bedford<sup>15</sup>** worked for Webb and Sons Printers in Queensland. This is a carefully selected example, in which there is extended service, and an intention to close down the business rather than to restructure to continue operation. It has been carefully selected to be advantageous to the applicant's case, and its representativeness of redundancy more generally needs to be examined.

[A6.57] This said, we can consider the dollar impact of the ACTU's claim. For Mr Albury, current obligations are in regard to paying due notice:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$740.00 & = & \$3,700.00 \end{array}$$

[A6.58] Under the ACTU proposal, this will go up by 400%:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$740.00 & = & \$3,700.00 \\ \text{Severance} & 20 \text{ weeks} & \times & \$740.00 & = & \$14,800.00 \\ & & & & & \hline & & & & & \$18,500.00 \end{array}$$

[A6.59] When the additional claim for a \$300 post employment payment is factored in, this a proposal to increase costs by over \$15,000 for Mr Albury.

[A6.60] Turing to Mr Bedford, we see that the current obligation is:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$746.00 & = & \$3,730.00 \end{array}$$

[A6.61] Under the ACTU proposal, this will go up by 400%<sup>16</sup>:

$$\begin{array}{rcccccc} \text{Notice} & 5 \text{ weeks} & \times & \$746.00 & = & \$3,730.00 \\ \text{Severance} & 20 \text{ weeks} & \times & \$746.00 & = & \$14,920.00 \\ & & & & & \hline & & & & & \$18,650.00 \end{array}$$

[A6.62] When the additional claim for a \$300 post employment payment is factored in, this a proposal to increase costs by over \$15,000 for Mr Bedford.

[A6.63] When considered together, the payments to Mr Albury and Mr Bedford:

- a. Require the small business to find **\$37,750.00<sup>17</sup>**.
- b. Require the small business to find **\$30,320.00<sup>18</sup>** more than would presently be the case.

<sup>14</sup> ACTU Written Outline of Contentions – Vol 6 – Witness Statements (C2002/4659 and ors), 20 December 2002, [Tag 1], p.1

<sup>15</sup> ACTU Written Outline of Contentions – Vol 6 – Witness Statements (C2002/4659 and ors), 20 December 2002, [Tag 3], p.11

<sup>16</sup> This is an underestimate given the ACTU claim to increase the calculation base for severance pay and for a \$300 redundancy bonus payment.

<sup>17</sup> Including the \$300 additional payment sought by the ACTU.

<sup>18</sup> Including the \$300 additional payment sought by the ACTU.

[A6.64] Consider for one moment the impact of this if Webb and Sons were seeking to reinvest, restructure and reposition rather than closing the business. The Graphic Arts industry has changed fundamentally and continuously for many years. For example, Webb and Sons may to date have earned their money from traditional printing (forms, business cards, small posters etc in one or two colours). This can increasingly be done cost effectively by instant printers, laser printers in offices, and by advanced copy centres. Clients may also be demanding from printers that work be able to be turned around very quickly, without waiting for plates to be produced etc.

[A6.65] Webb and Sons may have chosen to adjust their expertise and product rather than close up. They may for example have accessed additional capital to invest in IT based production and pre-production machinery, and sought to restructure away Mr Albury and Mr Bedford's positions in favour of an IT based desktop publisher. This would be a very expensive and risky exercise, and would almost certainly have involved a substantial investment and substantial borrowings (and the costs on employment for the new staff member).

[A6.66] The ACTU proposes that **\$30,000** be added to the cost side of the ledger for this restructuring. That is, the ACTU effectively proposes that the restructuring be \$30,000 more cost effective than it would otherwise be (all other things being equal). They claim that for the restructuring to occur, and for any employment to be maintained in this workplace, that the cost benefit analysis must withstand an additional \$30,000 of costs without productive return.

[A6.67] Remember, this would occur without the new staff member taking any less pay. Market competition for productive, creative desktop publishers will not diminish as a function of the ACTU claim. The cost of the essential new IT production machinery will not be diminished by the ACTU claim. Currency prices will not become more advantageous for the importation of new machinery purely as a function of the ACTU claim.

[A6.68] Again, it is difficult to escape the conclusion that the ACTU is in fact proposing that severance pay be set in awards to discourage employers, including small business employers from actually making redundancies, and undertaking restructuring.

[A6.69] **Ms Maree Carter**<sup>19</sup> works for a small rural doctor's surgery. She does not state her rate of pay, but under the *Health and Allied Services – Private Sector – Victoria - Award 1998* she may well have been classified as a Wage Group 6, and be

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<sup>19</sup> ACTU *Written Outline of Contentions* – Vol 6 – Witness Statements (C2002/4659 and ors), 20 December 2002, [Tag 6], p.79

in receipt of \$537.33 per week<sup>20</sup>, pro rata for 2 days (15.2 hours per week). This would be \$214.93 per week.

[A6.70] With 18 months service, her employers would currently have to provide her with due notice of the pending redundancy of three (3) weeks. This would be \$644.79 at her part time rate.

[A6.71] Under the ACTU proposal, the employer would need to provide a total of 8 weeks pay (three weeks notice + four weeks severance pay + an extra week as she is 45 years old). This would be a total of \$1,719.44.

[A6.72] This is an increase in costs to the small medical practice of \$1,074.65, or 167%.

[A6.73] The financial difficulties increasingly experienced by Australia's GPs, and those in rural areas in particular, are a matter of extensive public debate, and significant analysis and representation by the AMA in particular. These challenges are well understood matters in public policy debate in Australia.

[A6.74] The AMA has for some time expressed concern at levels of remuneration for GPs under current Medicare arrangements, and in particular has recently highlighted a decline in bulk billing by GPs, as (it is claimed) they cannot afford to bulk bill under the levels of remuneration provided. On 14 February 2003, AMA President, Dr Kerryn Phelps stated that:

*"Many Australian towns and suburbs are losing their community GPs and there is nobody available to replace them.*

*"This should not be happening in a modern society. Poor remuneration, long hours, excessive red tape, and insufficient training places for young doctors are all contributing to this crisis."*<sup>21</sup>

[A6.75] The AMA has also stated that:

*There is a declining participation rate by GPs as a consequence of a relative fall in remuneration, increased stress and worsening general working conditions, particularly among GPs in outer urban and rural areas.*<sup>22</sup>

[A6.76] Such developments add up to likely low margins for medical practices such as that which formerly employed Ms Carter. They also add up to a situation in which such practices already under financial stress, and personal difficulty would not be able

<sup>20</sup> Rates in this award increase with experience in the industry. The second stage of the group 6 rates has been chosen based on her 18 months service. Given her age however, it is very likely that a higher rate under this award would have been payable.

<sup>21</sup> AMA Media Release, 14 February 2003, "Bulk Billing On Last Legs – AMA": [www.ama.com.au](http://www.ama.com.au)

<sup>22</sup> AMA (2002) *General Practice Key Health Strategy Proposal: Increasing The Australian General Practice Workforce* – Discussion Paper,



to easily accommodate a 167% / \$1,074.65 increase in costs (+ \$300 under the ACTU's additional claim).

[A6.77] What the ACTU effectively proposes is that a small medical practice experiencing the financial and operational adversity outlined over many years by the AMA, should be hindered / discouraged from undertaking essential organisational restructuring.

[A6.78] (It is not clear whether Ms Beryl Burrows worked for a business of more or less than 15 staff – as such she was not addressed in this subsection. Many of the same sub-points could validly be made however about her employment and her employer).

### **Compounding The Costs To Small Business**

[A6.79] As we have indicated, this is not just a claim to extend redundancy pay costs to small business for the first time. It is claim for multiple quantum cost increases to be imposed on small business at the time at which they are most vulnerable.

[A6.80] It is again hard to escape the conclusion that the ACTU is proposing that a punitive/discouraging factor become material to calculation of redundancy obligations for small business.

[A6.81] It is also hard to escape the conclusion that the ACTU claim is advanced with no regard to the adverse circumstances facing small businesses when redundancies come into consideration.

## **A7. THE STATE OF AUSTRALIAN SMALL BUSINESS**

[A7.1] On 6 February 2003, the Senate Employment, Workplace Relations and Education References Committee handed down its detailed report into Small Business Employment, following a Senate inquiry undertaken during 2002.

[A7.2] The analysis in the report, and a number of the recommendations are valid to the Commission's consideration of the propositions under consideration in this matter in regard to increasing the cost imposts upon Australian small business. A number of these are examined in this section. The full report appears at Attachment E.

### **The Importance of Small Business**

[A7.3] The report commences as follows:

*Small business is a vital part of the Australian economy and community. Almost half of all those employed in the non-agricultural private sector work in small business either as owners or part-owners or employees. Small business accounts for one-third of Australia's GDP and plays a critical role in developing new goods and services. The small business sector is also playing an increasingly important role in lifting Australia's export performance. No less importantly, small businesses have a unique and important role in the social and economic life of communities, particularly in regional Australia.*<sup>23</sup>

[A7.4] This is not the only parliamentary initiated report into small business which is of assistance to the Commission in this matter. The report of the 1997 inquiry into small business "Time For Business" (the Bell Committee report) is of a similar and detailed character. Its findings and recommendations are also relevant to these matters, and sit comfortably aside the propositions advanced by ACCI in opposition to the ACTU claim.

### **Key Issues**

[A7.5] A number of key issues were found to have emerged during the inquiry<sup>24</sup>.

[A7.6] The first and most obvious is that small business profile, needs and capacities differ markedly from those of larger businesses. Whilst this is an accepted proposition throughout the report, it is a proposition that the ACTU would have the award system ignore as if it did not exist.

<sup>23</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.xix

<sup>24</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, pp.6-7

[A7.7] Moreover, as the inquiry finds, a wide range of public policy decisions ought to reflect differences between the needs and circumstances of small and larger businesses. More specifically, the inquiry identified:

- a. *the enormous diversity within the small business sector and its relatively fragmented, isolated and unorganised nature, which complicates the tasks of consultation, information dissemination, and policy formulation and implementation;*
  - i) Given this diversity, how can the ACTU propose that one size can fit all in regard to severance pay? How can the ACTU say that all businesses can viably assume the additional burden proposed?
  - ii) Given the fragmented, isolated and unorganised nature of small business, and complication in information dissemination, how could the Commission viably conclude that small businesses could move from an opt in approach (i.e. the present situation in which unions can apply for orders extending payment to all small businesses in a given industry, or for orders against specific employers – as has periodically been done in the Graphic Arts Award for example) to an opt out approach (in which all businesses are subject to award severance pay unless they run an incapacity case)? Given the difficulties of information flow for small business – how could this be practical?
- b. *the changing nature of small business and the environment in which it operates, including the rise of home-based business, the growing number of small business exporters, the increasing participation of women and Indigenous people in small business and the challenges, opportunities and potential arising from more open, globally oriented markets, the knowledge economy and technological change;*
  - i) Such findings indicate that small business is exposed to the changes in the contemporary labour market explored extensively in ACCI's December 2002 written submission. These are changes away from the fundamental rationales for the awarding of severance pay, and therefore mitigate strongly against any extension of the payment.
  - ii) These new directions for small business would be linked to high employee mobility, differing career aspirations and different employment identification. They would seem to dictate that an essentially old style, blue collar based approach to employment transition is unwarranted.
  - iii) This is a dynamic driver in the Australian economy and labour market, and many of these small businesses may be set to make the transitions to become employers, or to expand their employment. Extreme caution is

warranted in considering imposing any additional regulation on this dynamic market.

- c. *the determinants of employment in the small business sector are complex and not well enough understood so developing a better information base is an important precondition for more effective policy development. Business growth is clearly a precondition and an area where a range of government interventions could be effective;*
- i) The complexity of small business employment, and the marked lack of understanding of drivers of this employment, further mitigate in favour of caution in the application of substantial cost and regulatory imposts upon small business.
  - ii) Put simply, if we don't understand this crucial area of job generation in Australia fully, we need to be very cautious in key settings such as labour costs which may affect this. The ACTU approach in this matter is to wrench the lever of labour costs.
  - iii) The present approach of examining this issue closely based on industry data and evidence, or evidence based on a particular employer, appears a superior approach in light of this lack of understanding.
- d. *the critical role that business management skills play in the survival and growth of small business and the need for many small business operators to upgrade their skills in this area, including their people management skills;*
- i) The issue here is that small businesses are different from larger businesses in formal management structure and responsibilities; the issue of survival and growth of small business can be a factor of management skill, pointing to the vulnerability of businesses in this sector, and the dangers of large increases in costs to business well being.
- e. *the difficulties and disadvantage that small business faces in obtaining the key inputs of capital and skilled labour, and the less favourable treatment that it receives from big business in many areas including settling of accounts, terms of trade, and bank fees and charges;*
- i) This key theme is taken up in other sections of this submission. We have already noted that small businesses facing economic adversity will not receive any beneficial terms of trade, charges or account arrangements when they are asked to meet massively unbalanced and increased redundancy costs.
- f. *the ad hoc and disparate range of Commonwealth, state and local government assistance programs for small business, the large number of agencies and organisations involved and the lack of formal coordination arrangements is confusing for small business and limits the effectiveness of the total investment;*

- i) Perhaps the relevance of this for the Commission in this matter is to appreciate that the ACTU proposes an addition to the complication of award regulation for small business.
- g. *the compliance burden associated with government regulation is a major and growing concern for small business (although this varies with the business size and industry sector), with many small business operators unaware of the full extent and nature of their obligations and many others struggling to come to terms with identifying, understanding and meeting those obligations. Regulatory requirements associated with taxation (particularly the new taxation system and the Goods and Services Tax or GST), employment and the environment are particular areas of concern along with the pace of change and growing complexity of requirements.*
- i) The ACTU proposes to substantially add to the compliance burden upon small business through this application.
- ii) This will be a struggle to identify, understand and most of all meet for small business.

### **Flexibility and Adaptability**

[A7.8] The Report also notes the disadvantages which can flow from limited management layers in small business:

*In a rapidly changing environment, small business operators do not necessarily have the capacity to adapt to that change as quickly as corporations with a multitude of layers able to focus on single issues, particularly in the areas of technology and accounting.<sup>25</sup>*

[A7.9] Thus, we see that in the context of change already being challenging for small businesses, the ACTU proposes the addition of a level of payments which would undermine the capacity for small business to adapt to changing commercial and industrial circumstances.

### **Financial Resources**

[A7.10] The Committee makes a number of findings on the financial resources of small business which directly mitigate against the proposal of the ACTU.

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<sup>25</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.12

## Small Business Financial Resources

[A7.11] *The limited financial resources of many small businesses is also a constraint on their capacity to weather revenue downturns and grow and compete with larger businesses*<sup>26</sup>.

- a. The Senate Committee has found that small businesses have limited financial resources.
- b. The Senate Committee has found that the limited financial resources of small business constrain their capacities to weather revenue downturns. The Senate Committee is thereby finding that the present demands on small business in times of business challenge endanger their viability and capacity for future trade.
- c. Small businesses will seek to make redundancies precisely when trade and thereby revenue downturns – precisely when their limited financial resources are most exposed.
- d. The ACTU proposes that it is precisely at this most vulnerable point that the small business should assume an additional cost impost amounting to many thousands of dollars in most cases, and up to 20 additional weeks pay.

[A7.12] *Many small businesses operate on small margins, with highly variable cash flow, particularly in their early years. As a result they have little capacity to absorb delays in payments. Late payments were raised as a problem by several witnesses...*<sup>27</sup>

- a. Precisely.
- b. Many small businesses operate in so hand-to-mouth a manner due to these variable cash flows that they already have trouble operating viably.
- c. Small businesses are more likely to finance labour costs from debt and by increasing debt than larger businesses due to variable case flows. Yet small businesses generally have more difficulty in accessing funds than larger businesses. This dilemma highlights the predicament small business faces when confronted by large labour cost increases that are mandatory but unaffordable.
- d. It is into this precise context that the ACTU believes (or purports to believe) that additional obligations of up to 20 weeks pay, and many thousands of dollars can be integrated. This beggars belief.

<sup>26</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.12

<sup>27</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.12

## Raising Capital

[A7.13] And how is the money to be raised? The Senate Committee also found the following:

*Most small businesses rely on their own equity or borrowings, frequently using the family home as security. This is a particular problem for those in areas with depressed housing markets, including some rural and regional areas. In addition, small business is often subject to higher interest rates, and higher bank fees and charges, partly because of a more limited bargaining capacity and also because of perceptions of increased risk.<sup>28</sup>*

[A7.14] Small businesses currently raise capital from personal equity or borrowings, and frequently using the family home. If asked to come up with many thousands of additional dollars (even over \$10,000 in some cases) at the time business is at its very lowest ebb (when redundancies are being implemented) – where else would a small business person look? The only conclusion possible, is that to the extent that small businesses believe that they can raise capital to meet these obligations they will do so through these highly concerning and undesirable sources of finance.

[A7.15] Small business people mortgage houses, reduce retirement incomes, prioritise monies away from their children and families, and crucially take money away from any opportunity to trade out of their difficulties in order to meet increases in business costs (you can't bring in new stock if you have to transfer \$10,000+ to an ex employee, you can't advertise if you have to transfer \$10,000+ to an ex employee etc).

[A7.16] The ACTU's claim at paragraph 38 that the exemption of small business from TCR redundancy is unfair is completely shattered by any proper recognition of the unfair outcomes proposed for small business, and the detriment that would be suffered by small business families.

## Security, Equity and Recovery

[A7.17] The extract from the submission of the Brisbane Office of Economic Development cited by the Senate Committee is also highly instructive:

*Unlike big business, small to medium businesses tend to operate on much tighter inventory controls, have less financial flexibility and are more closely monitored by their banks. They are more susceptible to being given risk finance and require a strong cash-flow and ability to repay debts. It is a true adage that if you owe the bank \$100 million it is their problem but to owe them \$1 million it is your problem!...Banks, for instance, tend to find small customers more of a burden than the larger corporations by way of service costs. It seems that there is a need to re-evaluate exactly how much small business impacts on the*

<sup>28</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.12

*economy and for banks, insurance companies and the like to adopt different approaches to their issues.*<sup>29</sup>

[A7.18] This is an important consideration. What the witness appears to effectively be saying is that small businesses are more closely monitored for financial risk by their financiers than larger businesses, and are more likely to have their debts called in during times of operational adversity. Consider what the ACTU proposes in this context – a massive increase in the financial obligations of small business employers.

[A7.19] There is only one possible consequence of this – were the ACTU claim to be accepted for small business, then the lenders must rationally call in their loans sooner, and wind small companies up when they even begin to face adversity. This is completely inconsistent with the duties of the Act in regard to employment creation, productivity, trade and national prosperity (Section 3).

[A7.20] These statutory objects are activist in their nature. Decisions and determinations of the Commission must seek to bring about or actively contribute to such outcomes. These economic objects are not just directed at larger businesses. Commission decisions must be directed to these outcomes in small business as well.

## **Conclusion**

[A7.21] The findings of the Senate Committee make a mockery of the ACTU's completely unrealistic contention that "*There is no evidence that small business has any less capacity to pay severance than larger businesses*"<sup>30</sup>. The ACTU is asking the Commission to effectively determine that the interests of an income transfer to employees outweighs continued trading by any specific small business – nothing more, nothing less.

## **Further Consideration – NATSEM Research**

[A7.22] Linked to this, a further appreciation of the limited financial resources of small business is provided by research from NATSEM brought forward in the recent wage case. This included following drawn from Chapter 8 of ACCI's reply submission:

[A7.23] In November 2001, the Smith Family released a report prepared by the National Centre for Social and Economic Modelling (NATSEM) entitled *Financial Disadvantage in Australia 1990-2000*.

[A7.24] The Smith Family/NATSEM report examines poverty using one available measure adopted by NATSEM for the analysis, and then examines the poverty

<sup>29</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.13

<sup>30</sup> ACTU *Written Outline of Contentions*, (C2002/4659 and ors), 20 December 2002, [31], p.13



experience of various subgroups of the community on a household basis. Particular variables examined include: family arrangements, care of dependent children, source of income, education, gender and age.

[A7.25] Importantly this is a report on financial disadvantage and poverty in Australian society generally. There is no particular emphasis or concentration on the poverty experience of persons / households reliant on wages income.

[A7.26] Very relevantly for these proceedings however, the Smith Family/NATSEM report does examine the poverty experience of Australians by their source of income.<sup>31</sup> In doing so, it provides one of the very rare pieces of evidence of the hidden level of low incomes flowing to those running Australian businesses. It shows:

- a. 14.3% of households reliant on income from their “own business” – or approximately 1 in every 7 households running businesses, falling under the NATSEM poverty line.
- b. A consistent 8% - 10% of Australia’s poor being persons who rely for their household income on their own business.

[A7.27] Effectively, the NATSEM research indicates that 14.3% of persons running businesses, and relying on income from their business to finance their household needs and expenditures, are in “poverty” as defined.

**Natsem Data: Estimates of poverty among individuals,  
by main income source of family, 1990 to 2000<sup>32</sup>**

	1990	1995	1996	1998	2000
<b>Poverty rates</b>					
Zero income	100	100	100	100	100
Government cash benefits	23.9	24.9	24.8	25	31.1
Other income sources	25.3	22.7	26.8	23.8	20.3
Own business	14.7	12.9	14.6	17.4	14.3
Wage and salary	2.9	3.4	3.2	3.5	3.2

[A7.28] The proportion of those running businesses living in poverty (14.3%) is far higher than the proportion of those whose primary source of income is from wages and salary (3.2%). It appears from this data, that a business person is four times more likely to be in poverty than a wage or salary earner, although both clearly less than those on government benefits, including the unemployed.

<sup>31</sup> (2002) Smith Family/NATSEM, *Financial Disadvantage in Australia 1990-2000*, Chapter 4, pp.10-11

<sup>32</sup> (2002) Smith Family/NATSEM, *Financial Disadvantage in Australia 1990-2000*, p.10, Using the before-housing half average income poverty line (Henderson equivalence scale).

[A7.29] To the extent that Australia has a working poor, it may be that very many of these people are those who are taking the risk of investing to create their own businesses, and who are taking the risk of employing others. It should be recognised though, that amongst this 14.3% would be components of employers, and the self employed who do not currently employ.

[A7.30] It is likely that a large number (perhaps a majority) of these self employed working poor would be running smaller businesses and which, if they are employers of labour, would have the least financial capacities to viably apply significant increases in award wage rates arising from this matter.

[A7.31] This is useful data in providing an appropriate context for these proceedings. A business which cannot viably provide even its owner's household, and its owner's family with an income above "poverty" levels, is scarcely likely to be able to viably pay any redundant employee with many thousands of additional dollars (up to and above \$10,000 in some cases).

### **Employment Sustainability and Employment Cost**

[A7.32] The Senate Committee also turned its consideration to job security and job quality in small business. It found that:

*Employment in small business, like small business itself, can be highly volatile. New businesses account for almost half of all the jobs created by small business. As a result, job security can be very limited, particularly in the years soon after business formation when the risk of business failure is relatively high. Measures that would promote more sustainable small businesses can therefore contribute to more durable jobs.*

[A7.33] ACCI strongly supports this final finding – measures that will promote more sustainable small business will contribute to more durable jobs. This is the primary contribution which any area of regulation, including employment regulation, can make to small business employment.

[A7.34] The ACTU's claim in regard to small business is completely inimical to this. The ACTU's claim is a claim which would make small business less sustainable, less viable, and less able to trade out of difficulty. It must therefore, consistent with the Senate Committee findings lead to less durable jobs in this vital area of the economy.

[A7.35] Section 3 of the report focuses extensively on the quality of small business employment, noting both arguably positive and arguably less positive dimensions of the unique nature of small business employment. Recommendation three of the Committee is as follows:

*The committee considers that the governments should promote awareness among the small business community of avenues open to them to improve*

*business performance and to enhance their attractiveness as employers through improving the quality of jobs without necessarily adding to costs.*

[A7.36] The Committee thereby recognises the unique and particular sensitivity of small business to additional costs, and the lack of capacity of small business to take on additional costs. This stands in direct contrast to the ACTU position which is recklessly cavalier on imposing additional costs upon small business, and blind to the inevitable consequences of these additional costs.

### **The Impact of Employment Regulation**

[A7.37] The Committee finds that:

*The scale and complexity of employment-related regulations in particular can act as a deterrent to employment:*

*There is a growing number of home based businesses and there is a growing number of owner-operators who are reluctant to take that next step of becoming owner-managers and starting to employ people. There is a perceived barrier there: the barrier of suddenly having to employ people. There is a whole heap of regulations and red tape that they need to come to grips with. For me, as an owner-operator, it is a lot easier to work 65 hours a week than to suddenly take the next step and say, 'Well, hang on, maybe I could work 35 hours a week, grow the business a bit further and employ somebody'.<sup>33</sup>*

[A7.38] The ACTU proposes a massive increase in the scale of employment regulation affecting small business.

[A7.39] The Committee also notes the impact of the cost of employment for small business brought forward by many giving evidence to the committee<sup>34</sup>.

### **The Importance of Small Business Growth**

[A7.40] One the central themes in the Senate Committee report is the fundamental need for small business growth for small business employment. The Committee finds that: *A clear message from all surveys and from evidence presented to the committee is that, while the factors that determine employment trends in the small business sector are complex, business growth is an essential precondition.*<sup>35</sup>

<sup>33</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, [3.74], p.47

<sup>34</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, [3.79], p.49

<sup>35</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, p.36

[A7.41] Again, the committee finds that the costs which small businesses must bear are a crucial factor influencing their growth, and their perceptions of options for growth.<sup>36</sup>

### **Impediments to Growth**

[A7.42] The Committee also examines factors considered to be impeding growth, and employment growth in small business. A list of factors considered includes the following which are germane to the consideration at hand:

- a. limited access to personal and investor capital;
- b. uncertain cash flow streams - amplified in regional economies by fluctuations in commodity markets;
- c. the costs of employing, including recruitment, training, leave and conditions, insurance and superannuation, and payroll tax (to which the ACTU proposes to add a massive additional cost of possible redundancy);
- d. the potential negative consequences of employing staff if problems arise (amplified by the ACTU claim);<sup>37</sup>

### **Diversity**

[A7.43] In examining options for growth, the committee also underscores the diversity of small business, and the need for diverse approaches:

*The evidence on the growth potential of small business, like much else in small business, presents a very mixed picture... One implication is that extreme care needs to be taken in extrapolating the results of surveys of employment intentions from a sample of small businesses to the sector at large.... The different needs and circumstances of small business, and the range of paths to growth, will require a diverse range of assistance mechanisms and greater flexibility within business support programs to accommodate these needs and circumstances.*

[A7.44] This is brought into sharp focus below in the section examining AIRC decisions to date to derogate from the exemption of small business from severance pay under some industry awards. This has been done (to a greater or lesser extent) based on industry information on the particular small businesses whose cost structures were to be affected.

[A7.45] The diversity of small business determinants is however at odds with the one size fits all model commended by the ACTU, and the ACTU's attempt to gloss over

<sup>36</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, [3.33], p.37

<sup>37</sup> Senate Employment, Workplace Relations and Education References Committee: (2003) *Small Business Employment Report*, [3.61], p.44

the diverse needs and circumstances of small business with a catch all extension of costs.

## **Conclusion**

[A7.46] The recent Senate Committee report provides an interesting, relevant and up to date confirmation of core ACCI positions in this matter. The factors which the Senators have identified in their attempts to harness options to further employment growth in small business, strongly mitigate against the ACTU's proposed approach. The Senate report provides an important source of evidence against the ACTU's reckless proposal.

## **A8. THE RESEARCH CITED BY THE ACTU**

[A8.1] Volume 3 of the ACTU’s material in support of its claim reproduces 3 pieces of “research” on small business that the ACTU claims is relevant to these proceedings. ACCI has examined these materials in detail, and:

- a. Does not concede their relevance, nor that they represent a comprehensive set of materials upon which the Commission could rely to determine the ACTU claim.
- b. Disputes the conclusions that the ACTU has drawn from these papers, and proposes alternative conclusions.

### **Parliamentary Library Excerpt (2002)**

[A8.2] The first document brought forward by the ACTU on small business is a table of employment levels between 1990 and 2001 by business size, and sector. It is effectively a compositional breakdown of the Australian labour force at 14 points over a 10-year period.

[A8.3] Paragraphs [29]-[38] of the ACTU’s outline of contentions purport to prosecute the ACTU’s claim to make a massive increase, including some under-detailed references to the material in Volume 3 of the ACTU written submission of December 2003.

### **The Contentions**

[A8.4] The ACTU links only a single contention to this document [Paragraph 34], relating to growth rates. This is an advantageous cutting of the data – this section reveals other approaches to this data which cast it in an equally valid light for a conclusion which underscores the vital importance of small business employment.

[A8.5] This said we have:

- a. Returned to the original Australian Parliamentary Library document from which it was drawn.
- b. Examined the ACTU’s 10 threadbare paragraphs in support of the extension of redundancy pay to small business, with consideration of this table.

### **The Australian Parliamentary Library Research Document**

[A8.6] The ACTU’s table is drawn from a research note on “Small Business Employment” prepared by the Australian Parliamentary Library.

[A8.7] The full research note emphasises the importance of small business employment to the Australian economy and labour market.

*The small business sector is the largest employer in Australia. With 1,162,000 small businesses in operation, the sector employs well over three million people, accounting for nearly half of all private sector non-agricultural employment.*<sup>38</sup>

[A8.8] In making such points, the paper underscores the capacity for negative consequences as a result of increased labour costs through the current redundancy claim. To the extent that small business becomes less likely to employ, or reduces employment as a result of the ACTU model, there is scope for a very real impact on the Australian economy and labour market which would be inimical to the Commission's duties under the *Workplace Relations Act 1996*.

[A8.9] The research note also emphasises the current challenges facing small business, and the potential fragility of employment creation in this area:

*But the trend in small business employment has turned downward from March 2001 despite the best economic conditions for businesses in almost three years.*<sup>39</sup>

*Remarkably, employment growth in big business has outpaced that of small business since the last recession in 1991–92. Average annual growth in small business employment for the period March 1992 to March 2001 was 2.3 per cent, compared to 3.5 per cent for big business.*<sup>40</sup>

[A8.10] This is accurate in regard to the percentages, the following should also be considered:

- a. According to the table 1,373,800 additional “jobs”<sup>41</sup> were created between March 1990 and December 2001.
- b. Of these, over half (52.3%) were created in small business (719,100).

[A8.11] The level of non-employment amongst small business has also declined from 36.2% in 1990 to 31.5% in 2001. This makes a lie of any potential argument that small business is essentially typified by non-employment, and that small business data should be accorded lesser weight due to levels of non-employment (i.e. the self employed).

### **What Does the Table Show**

[A8.12] What the table in fact demonstrates is:

- a. There is substantial employment growth in small business,

<sup>38</sup> Australian Parliamentary Library (2002) *Research Note: Small Business Employment*, No. 10, 17 September 2002

<sup>39</sup> Australian Parliamentary Library (2002) *Research Note: Small Business Employment*, No. 10, 17 September 2002

<sup>40</sup> Australian Parliamentary Library (2002) *Research Note: Small Business Employment*, No. 10, 17 September 2002

<sup>41</sup> Including self-employment and non-employment in small business.

- b. 42% of all employees work in small business.
- c. 51% of private sector employees work in small business (2001).
- d. This is essentially unchanged from 1990 (52.2%). This indicates that small business is at least as important an engine of job creation as larger businesses.
- e. This is underscored by an examination of the jobs that have been created during the period. 1,452,800 new jobs<sup>42</sup> have been created during the period. Of these, 640,800 are new small business employment. This is 44.1% of the new jobs created, higher than the (stable) share of small business to total employment (41.0% in 1990, and 41.7% in 2001).

### **Productivity Commission Staff Research Paper (2000)**

[A8.13] The second document brought forward by the ACTU on small business is a Productivity Commission staff research paper dating from December 2000. The PC paper centres on “Business Failure and Change”.

### **The Contentions**

[A8.14] The ACTU’s contentions based on the Productivity Commission report are limited to the following:

- 32. Further, whilst small business accounts for more than 97.5% of all business exits.*
- (a) the single greatest reason for business exit is realising a profit;*
  - (b) of the 7.5% of businesses who exit in any year only 0.5% are bankruptcies or insolvencies;*
  - (c) just over a quarter of small businesses cease in their first 5 years and around half cease in their first 15 years; and*
  - (d) many business exits are anticipated years before they actually occur.*
- See Bickerdyke et al at 135, 26, xvii-xviii and 30 [ACTU 3 at 83, 52, 19-20 and 56].*

[A8.15] The references to the PC Report are the pages 19-20, 52 and 56 of the ACTU Volume 3.

- a. The reference to realising a profit appears to come from p.56. It is not however clear that realising a profit is the greatest reason for business exit – ACCI cannot see where this is drawn from.
- b. What the ACTU does not point out is that the data for each contention is for the economy as a whole, and businesses of all sizes. It is not clear what the comparable data is for small business, nor whether there are or are not differences between small and large businesses.

<sup>42</sup> Net number of small business employees + big business employees (excludes public sector and small business non-employees).



## The Productivity Commission Paper

[A8.16] The PC paper finds a low incidence of business failure in Australia. However, the ACTU fundamentally fails to consider the extent to which this is a function of appropriate policy settings over many years, that have been sensitive to differing business circumstances. This includes fundamental policy settings such as the then Commission’s 1984 decision to not demand inappropriate, impractical and damaging severance payments from Australia’s smallest and most vulnerable businesses.

[A8.17] The PC paper at p.4<sup>43</sup> under the heading of “Relationship Between Business Exits and Entrepreneurship” echoes many of the themes and trends outlined by ACCI in this submission, and the previous submission in support of the ACCI applications in this matter, on the importance of viable restructuring and business change for innovation and successful entrepreneurship.

- a. The learning experience for those involved in business failures (how to do things differently next time).
- b. The creation of information about risks. Information about business failure – including, for example, the relative riskiness of industries – can provide guidance to those entrepreneurs contemplating starting a business.
- c. The transfer of skills. Business exits may hasten technological diffusion as both owners and employees with specialist skills and knowledge are freed to work in new ventures. However the exit of a business may also involve the loss to society of intangible skills and knowledge possessed by some owners or employees.

[A8.18] The PC Report also makes the following major point in support of effective ongoing access to restructuring:

*Business exits perform an important function in a market economy. It can be argued that government policies premised on allowing businesses to fail will generally result in an appropriate allocation of resources and facilitate economic efficiency improvements. The businesses that survive are the most efficient and those with products most in demand. And the economy further benefits from improved technological and learning processes.*<sup>44</sup>

[A8.19] Significantly, the PC report makes the following point:

*...in view of the potential dynamic gains from business failures, there is a need to ensure that insolvency policy does not make the cost of failure too*

<sup>43</sup> Page 31 of the ACTU Written Submission, Volume 3.

<sup>44</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper

*high. An insolvency regime that imposed high failure costs could stifle risky – but high returning – investments, and discourage entrepreneurship and experimentation.*

[A8.20] This is precisely what is proposed by the ACTU in this matter – raising the cost of redundancy to such a point that investment and entrepreneurship will be discouraged. The Productivity Commission paper underscores the risks to the Australian economy that would result from a level of severance pay which stifles small business investment, entrepreneurship, and experimentation.

### **Findings By Business Size**

[A8.21] The PC paper was not targeted to smaller business. It examines Australian business as a whole, without regard to size. However, there is some examination of factors relating to business size at pp.44-46. This is not material from the PC report which the ACTU has sought to take the Commission and parties to.

[A8.22] The report<sup>45</sup> cites the work of Storey<sup>46</sup> showing that “*the fundamental characteristic that distinguishes small businesses from large businesses is their higher probability of ceasing to trade*”, and small businesses are twice as likely to exit their industries in any given year than their larger counterparts<sup>47</sup>.

[A8.23] What the ACTU commends to the Commission, and to Australia’s employers and employees is an amplification of this risk, and an increase in the probability of small business having to attempt to trade through a level of financial impost which many small businesses simply could not viably bear.

[A8.24] Factors explaining this are identified to be<sup>48</sup>:

- a. Small businesses are typically owner–operated. If the owner dies, gets sick or seeks a lifestyle change, business cessation is the likely outcome. For larger firms with more diversified ownership, any individual shareholder can relinquish ownership without threatening the survival of the business as a whole.
- b. In addition, smaller businesses may be less likely to continue than larger businesses due to absolute size considerations. For example, Dunne and Hughes (1994) suggest that small, declining businesses hit a boundary of minimum sustainable size and then exit, while larger declining businesses can fall down

<sup>45</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper, p.44

<sup>46</sup> Storey, D.J. (1994) *Understanding the Small Business Sector*, Routledge, London and New York.

<sup>47</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper, pp.44-45.

<sup>48</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper, p.19

through the size distribution for a long time before reaching this boundary. Even if shocks to output growth in businesses are random across different size classes, smaller businesses facing negative growth shocks tend to exit, while larger businesses usually do not.

[A8.25] This second factor bears further consideration. To the extent that there is a boundary or threshold at which businesses exit, the ACTU proposes shifting this boundary closer, and moving more small businesses into potential endangerment.

### **Business Age and Business Size Factors**

[A8.26] Another very interesting fact revealed by the PC Paper is its analysis of business size and the age of business as factors in business closure<sup>49</sup>. Figure 2.5 (p.47) from the PC Paper shows:

- a. Higher levels of small business exit at all points of business age.
- b. Substantial levels of small business exit regardless of the age of business.

### **Unsuccessful Businesses**

[A8.27] The PC Paper reproduces a table of data from an ABS publication on small business<sup>50</sup> showing small business perceptions of their success. Crucially, it reveals a near universal decline in perceived business success between 1995 and 1997 by business size, and the age of the business.

[A8.28] According to the paper which the ACTU brought forward, operating a small business has become more challenging, and the perceived risk of closure greater. This is at odds with the ACTU's assumption that small business can simply assume the additional proposed cost without impact.

### **Business Exists By Industry**

[A8.29] Tables in the back of the PC Report<sup>51</sup> show that the following industries have the highest level of business exists, both for smaller and larger businesses:

- a. Retail trade.
- b. Accommodation, Cafes and Restaurants.
- c. Property and business services.

<sup>49</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper, pp.46-47.

<sup>50</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper, p.48, Table 2.5

<sup>51</sup> Productivity Commission (2000) *Business Failure and Change: An Australian Perspective*, Staff Research Paper, p.48, Table A.5, and A.7, pp.83-84

[A8.30] These (along with the health industry) are the most award reliant industries according to the ACTU's own data<sup>52</sup>.

Industry	% Employees in Industry Who Are Award Only	% of Award Only Employees in Industry
Mining	6.2**	0.3**
Manufacturing	12.8	7
Electricity, Gas and Water	7.4	0.2
Construction	18.7	5.1*
Wholesale Trade	11.8	3.3
Retail Trade	35.8	24.1
Accommodation, Cafes & Restaurants	61.3	15.6
Transport and Storage	19.2	4.4
Communication Services	2.6*	0.2*
Finance and Insurance	4.9*	0.9*
Property and Business Services	17.8	11.5
Government & Defence	6.6	1.6
Education	7.8	3.3
Health and Community Services	31.1	17
Cultural and Recreational Services	11.3	1.4*
Personal and Other Services	22.2	4.2
<b>Total</b>	<b>21.0</b>	<b>100</b>

\* Estimate has relative standard error of between 25% and 50% and should be used with caution.

\*\* Estimate has a relative standard error greater than 50% and considered too unreliable for general use.

Source: ABS Cat No. 6305.0

## Industry Commission Staff Research Paper (1997)

[A8.31] The final paper raised by the ACTU is from the former Industry Commission<sup>53</sup>.

### The Contentions

[A8.32] The ACTU's contentions based on the 1997 Industry Commission report appear to be limited to paragraph 35:

*35. Claims regarding the job generating role of small business do not constitute a cogent basis for selective and assistance to small business in the form of regulatory exemption: see Revesz and Latimore at 69, 95-99 [ACTU 3 at 181 and 207-211].*

<sup>52</sup> ACTU Written Submission, 2003 Safety Net Review Case, 5 February 2003, Table 2.3, p.13

<sup>53</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3.

[A8.33] This is not however an exercise in extending new assistance to Australian small business which can be viably compared to those examined in the IC paper:

- a. The ACTU is asking the Commission to vastly increase the cost impost upon Australian small business, and contends that the shift it proposes can be made consistent with the requirements of the *Workplace Relations Act 1996*.
- b. The ACTU is seeking to disturb an established and effective underpinning of a properly operating condition of the Commission.

### **The Industry Commission Paper**

[A8.34] The IC Paper directly contradicts<sup>54</sup> the ACTU contention set out at paragraph 34. It shows (admittedly using a differing definition of small business) that employment growth in small business is higher than in business generally, though an increasing employment share for businesses of less than 20 employees.

[A8.35] The IC finds that:

*In all cases, however, the rate of employment growth in small business has exceeded the average rate of employment growth.*<sup>55</sup>

[A8.36] The IC also found that data on jobs growth in small businesses may be an underestimate: “*anomalies in the employment data (which are currently being revised by the ABS) suggest that small business may well have accounted for an even higher percentage of new jobs in the economy*”<sup>56</sup>.

[A8.37] The IC Paper examines differences between employment in small and large businesses, as follows:

- *labour turnover tends to be higher in small firms than in large ones;*
- *expenditure on staff training is lower in small firms; and*
- *casual employment (ie employees who are not entitled to paid leave) is more widespread in small firms.*

[A8.38] This indicates that the stings in the tail of the ACTU claim, including in particular the claim to extend additional payments to casual employees, will disproportionately impact upon those smaller businesses least able to afford them.

<sup>54</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.109

<sup>55</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.110

<sup>56</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.110

## Job Generation

[A8.39] The IC Paper includes an analysis of relative job creation in small business using a variety of definitions of small business. Using that closest to the threshold applied in the exiting award standard (i.e. 15 employees), the IC found:

*It appears that, as measured, most new net jobs generated over the period from 1983–84 to 1994–95 have been located in small business, and particularly in businesses employing under 10 persons. This is true regardless of whether we compute such dynamic measures of employment change for wage and salary earners (table 3.1), total non-farm private employment (table 3.2) or national employment (table 3.3).*

[A8.40] Again, the IC paper also notes that the ABS data may underestimate small business employment growth.<sup>57</sup>

## Policy Implications

[A8.41] The IC Paper addresses the policy implications of its findings on small business employment. These include:

*Small business is a highly significant sector in the economy — responsible for around half total employment. Clearly, it is important to ensure that this sector, like others, is not hamstrung by any major impediments. This is the main message emerging from recent reviews, such as the Bell report.<sup>58</sup>*

[A8.42] The IC also addresses the issue of particular policy measures for small business. The paper notes that special provision for small business may not be effective or warranted in some cases. The following points must however be noted in considering such material:

- a. The IC comments appear centred on the impact of the introduction of new subsidies for small business, including in particular government financial subsidies. The award standard on severance pay is neither a subsidy, nor is it new. There is a fundamental difference between consideration of a new measure and consideration of a claim to end a measure which has operated effectively for almost two decades.
- b. Linked to the preceding, the proof is in the pudding in this case. The small business approach in award severance provisions works. It is up to the ACTU to prove that its proposal will better serve the objects and considerations of the *Workplace Relations Act 1996*.

<sup>57</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.140.

<sup>58</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.112

- c. The comments on possibilities for increases small business “turbulence” (more openings, more closures) in the IC paper cannot be said to apply in this context<sup>59</sup>, as severance payments are an established part of Australian labour market regulation. The only option for turbulence in this matter is that proposed by the ACTU.

[A8.43] The ultimate policy conclusions of the IC offer little comfort to the ACTU. The IC commends regulatory reforms, and in particular regulatory reforms in the interests of increased employment<sup>60</sup>. Whatever conclusion may be reached on the interaction of the ACTU claim and employment, the ACTU has certainly not proposed any measures which will assist businesses in creating jobs as proposed by the IC paper.

### **Internal Labour Markets and Small Business**

[A8.44] A key theme of ACCI’s written submission and this submission is the decline of internal labour markets, and the inappropriateness of extending an employment condition which is a direct function of internal labour markets, in a general labour market context in which they are of decreasing relevance.

[A8.45] The accuracy of ACCI’s submission on this is directly underscored by the IC in regard to smaller business:

*To the extent that there is higher labour turnover in small firms, a number of explanations can be offered, including...more limited internal labour markets. Internal labour markets refer to different job opportunities within the firm. For employees within large enterprises the most important labour market is often the internal labour market. If one looks at job turnover (i.e. substantial changes in employment) rather than employee turnover (severance between employee and employer), then it may be that turnover is actually higher in big firms.*

[A8.46] Thus, the IC has effectively found that the internal labour market concept is particularly irrelevant to small business employment, and that small business employees suffer different losses to their large business counterparts.

[A8.47] A very interesting explanation of internal labour markets is contained in a footnote to the IC paper:

<sup>59</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.112

<sup>60</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.113

*If, for example, a clerical worker at BHP does a computer science degree at night he/she will most probably look for computer science work within BHP. A clerical worker at a three person law firm, or other small business, will probably have to leave the firm to change jobs. In other words, there is scope for a broader career path and a more extensive promotion ladder within large firms.*<sup>61</sup>

### **Job Creation and Small Business**

[A8.48] The IC paper contains the following on the interaction of employment protection measures and job creation in small business:

*Such legislation determines conditions for the exit of an employee, governing issues such as notice and unfair dismissal. They can adversely affect hiring in a firm.*

*This is because all recruitment is a gamble — a worker may not meet expectations or demand may fall. A firm may be less willing to hire labour if there is a risk of a subsequent higher cost from dismissal. This also increases the insider power of already hired workers and increases wage pressure. Arguably, small employing firms may find such legislation more costly than larger business because:*

- *they have less capacity to economically develop high quality recruitment practices which reduce the probability of an employee mismatch; and*
- *are more likely to need to develop a protocol for the dismissal of a worker than a large business. Larger businesses would often have such systems in place, even if not legislatively required.*

[A8.49] Linked to this, the extracts of small business comments reproduced by the IC are instructive of the practical responses of small business proprietors to small business regulation, and in particular to proposals such as that advanced by the ACTU.

[A8.50] The Industry Commission paper, brought forward by the ACTU, states that:

*In either case, the impacts of employment protection legislation on employment may be greater for small employing firms than large ones. Part of the purpose of the new Workplace Relations Act 1996 was to ameliorate some of these impacts.*

[A8.51] This is again consistent with contentions advanced by ACCI in this matter. It is also relevant to note that the ACTU seeks to advance a massive increase and extension of severance obligations under the very legislation which the IC authors identify as designed to ameliorate the impacts of employment protection costs on small business.

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<sup>61</sup> Industry Commission (1997) *Small Business Employment*: ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, Volume 3, Tag 3, p.168



## **Conclusion**

[A8.52] This is just the start of the matters raised by the IC Paper. The IC raise a range of complex matters relating to small business employment, and small business job generation at odds with the simplistic material put forward by the ACTU in its December 2002 submission. ACCI is likely to wish to return to this research during the course of consideration of this matter.

## A9. DEPARTURES FROM THE 1984 STANDARD

[A9.1] There have been some decisions since 1984 at an award level departing from the terms of the 1984 Test Case standard in regard to small business. They effectively extend the 1984 standard of severance payments to small businesses employing less than 15 employees, and do not “exempt” such businesses as is the case in awards more generally.

[A9.2] Eight such decisions were provided to the Commission in Section 3, of Volume 5 of the ACTU’s December 2002 submission.

### Contentions

[A9.3] The ACTU cites these decisions in support of the following contentions:

- a. *“There is no evidence that small business has any less capacity to pay severance than larger businesses”* [ACTU Paragraph 31].
- b. *“The existing 15 employee exemption clause creates anomalous situations where businesses restructure or reduce employment over time”* [ACTU Paragraph 33].
- c. (and by implication)...” *There is no small business exclusion existing under...a significant number of Federal Awards.”* [ACTU Paragraph 36(c)].

[A9.4] ACCI has examined in detail the cases brought forward by the ACTU, and the points which may validly be drawn from the periodic and isolated derogations from the fundamental and essential exclusion of smaller businesses from severance payments enshrined in 1984. These are examined in this section.

### The Decisions – Considerations For the Commission

***Municipal Employees (Western Australia) Award [Print G1801], (Coldham J, Isaac DP, and Coleman C), 24 January 1986***<sup>62</sup>

[A9.5] The decision of the Commission was split. The majority decision makes clear the fundamental differences between local government and small commercial enterprises.

*We turn now to the other two subclauses - exclusion of employers with less than 15 employees from the provisions of the redundancy clause, and incapacity to pay as a ground for varying the redundancy pay prescription. The two subclauses are interrelated in the sense that financial capacity and*

<sup>62</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 11]

*profitability underlie both. The Test Case Bench was concerned that very small businesses might have special difficulty in meeting the financial burden of redundancy pay and should therefore be exempt from such liability under the award; and further that it should be open for the larger employers to apply for partial or full exemption on the grounds of incapacity to pay.*

*In the matters before us, it is clear that an analogy with private employers is not appropriate. Local authorities are not profit-making enterprises. The sources of their funds are assured by legislation. Their size does not measure capacity to pay but is rather related to the population, area and activities for which they are responsible. Nearly one-quarter of the 139 local authorities in Western Australia employ less than 15 or just above 15 employees. Evidence was brought to show that the very few occasions on which local authorities have had financial difficulties, bad management has been the cause; and that the financial outlay which might arise for redundancy pay, would be well within their budgets, especially as local authorities can generally be expected to anticipate and provide for redundancy payments.*

*In these circumstances, we do not regard the inclusion of these subclauses as warranted and they will not be included in the order we propose to make.*

[A9.6] Two primary conclusions may be drawn from this majority decision:

- a. The direct relevance of this decision to consideration of the ACTU proposal on this occasion is clearly highly limited.
- b. However, by implication, the decision (and the above passages) makes clear the Commission’s understanding of the basis upon which small businesses were treated differently in the 1984 decision.
  - i) *“The Test Case Bench was concerned that very small businesses might have special difficulty in meeting the financial burden of redundancy pay and should therefore be exempt from such liability under the award”.*
  - ii) *“The sources of their (Local Government) funds are assured by legislation.”* – Clearly the then Commission was very concerned regarding the capacity of smaller businesses in the private sector to source funds necessary to meet obligations under the award redundancy pay standard. This was directly contrasted with publicly funded bodies and larger private sector employers.
  - iii) *“Their (Local Government) size does not measure capacity to pay but is rather related to the population, area and activities for which they are responsible.”* – by implication the Commission in the Municipal Employees

matter was underscoring the clear determination of the Commission that the size of a business did (and does) offer an appropriate measure in the broad of capacity to pay of a business essential for the effective implementation of these payments.

- iv) *“Evidence was brought to show that the very few occasions on which local authorities have had financial difficulties, bad management has been the cause”* – by implication, the Commission was underscoring its understanding that small business can experience financial difficulties and without deficient management, and apparently that additional cost imposts of the level proposed would subject them to further damaging adversity.
- v) *“The financial outlay which might arise for redundancy pay, would be well within their (Local Government) budgets”* – by implication, the Commission was underscoring its understanding that small business does not have the budgetary resources to meet the level of redundancy payments included in awards for their larger counterparts.
- vi) *“especially as local authorities can generally be expected to anticipate and provide for redundancy payments.”* – by implication, the Commission was underscoring its understanding that small business cannot anticipate or financially provide for redundancy payments of the level currently applying to larger businesses.

[A9.7] The minority decision of Coldham J, agreeing with the majority, is also instructive:

- i) *“It seems to me that the exemption made in the Redundancy case was aimed to protect small businesses in private industry.”* – This is exactly the point made by ACCI and denied by the ACTU. The clear protective function of the exemption was an indivisible element of the test case determination, and is one which is erroneously being sought to be removed by the ACTU.
- ii) Coldham J also links the application of the TCR severance standard to small business with “profit making bodies”, and with the threat of interruption to “continuous funding”.
- iii) He also notes the extent to which the arbitrators of the 1984 TCR standard clearly contemplated that “small business in private industry” could “go under if the redundancy provisions were to be applied”. These remain very relevant characterisations of the TCR decision which should be considered in this case.

**Re: National Building Trades Construction Award and Ors [Print H7465], (Maddern J, Keogh DP, Riordan DP, Leary C, Smith C:), 22 March 1989<sup>63</sup>**

[A9.8] This matter concerned a number of applications by various unions to vary a number of building and construction awards to include the TCR test case provisions, with modifications including the deletion of the less than 15 employees clause.

[A9.9] The unions submitted that the exclusion of the less than 15 employees exemption was appropriate due to the nature of employment in the building and construction industry which they argued was "quite different from an established business in other industry sectors".

[A9.10] The unions submitted that due to the nature of subcontracting, employee numbers fluctuated. Furthermore, they argued disputes over different conditions on the one site would occur if the TCR provisions were implemented un-amended, as on a single site there may be a number of different contractors or subcontractors with widely varying numbers of employees to which the TCR provisions would apply differently.

[A9.11] The decision states:

*"the principal argument put by (the union) was the unique pattern of employment in the building and construction industry."*<sup>64</sup>

[A9.12] The Full Bench found the unions' arguments persuasive. It held that the industry had "special characteristics of employment" and decided in favour of excluding the exemption.

**Re Clothing Trades Award 1982 [Print K7074], (Riordan SDP, Maher DP, and Lawson C), 23 March 1993<sup>65</sup>**

[A9.13] This decision is one of those which varied a major industry award contrary to the Commission's 1984 Test Case decision in regard to the application of severance pay to small business. The TCFUA, sought and was effectively granted:

*The elimination of the current threshold number by which employers who employ less than fifteen persons are relieved of the relevant duties otherwise provided in the respective clauses contained in the Award dealing with termination and redundancy.*

[A9.14] However, in doing so, the then applicant union appears to have made very clear that its claim was based around specific evidence for that industry, which required a different approach to that of the 1984 TCR Test Case:

<sup>63</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 10], p.13

<sup>64</sup> Re: National Building Trades Construction Award and Ors [Print H7465], (Maddern J, Keogh DP, Riordan DP, Leary C, Smith C:), 22 March 1989, p.4

<sup>65</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 12]

*The TCFUA argued that the variations, which it seeks to the present provisions, are designed "to secure the intent of the TCR principles and to address demonstrated problems in the clothing industry".<sup>66</sup>*

[A9.15] The decision goes on to describe “extensive evidence” which was considered in the matter<sup>67</sup>. One suspects that more significant evidence may have been presented in support of the deletion of the small business approach from one award, than the ACTU has put forward to date to alter the current approach in hundreds of awards.

[A9.16] The 1993 case also appears to have been based on unique industry developments, and the operation of the TCR clause being detracted from in this industry due to particular industry circumstances<sup>68</sup>.

[A9.17] The Commission further makes clear that its decision is based on unique, industry specific circumstances:

*Whatever may have been the reason which persuaded the Full Bench to include such a threshold number in the standard clause which was adopted in the TCR Cases, it is now the duty of this Full Bench to consider whether, in the light of experience, the particular circumstances of the clothing industry, and having proper regard to the evidence in these proceedings, such a threshold number represents a fair and reasonable provision to be maintained in this award covering the particular class of employees in this industry.*<sup>69</sup>

*Whether there is proper justification for the removal of such a threshold in other industries is not a matter in respect of which we have any information. We are required to decide the application before us on the basis of the oral evidence given, the evidentiary material presented and the arguments advanced in these proceedings.*<sup>70</sup>

*In all of the circumstances of this case and in the light of all of the evidence and argument we determine to vary the clause by deleting the threshold number from the terms of the relevant provisions of the award.*<sup>71</sup>

[A9.18] Deliberate Structuring To Avoid Severance Obligations: The Clothing Industry Award decision cites also evidence of employers deliberately restructuring to avoid severance pay<sup>72</sup>. The Commission found:

*It was suggested in evidence that certain employers had kept the number of employees below 15 in order to avoid liability for the redundancy benefit. Such a disincentive to employ persons in the industry is*

<sup>66</sup> *Re Clothing Trades Award 1982* [Print K7074], p.2

<sup>67</sup> *Re Clothing Trades Award 1982* [Print K7074], p.3

<sup>68</sup> *Re Clothing Trades Award 1982* [Print K7074], p.3, final para.

<sup>69</sup> *Re Clothing Trades Award 1982* [Print K7074], p.11, *emphasis added*.

<sup>70</sup> *Re Clothing Trades Award 1982* [Print K7074], p.11, *emphasis added*.

<sup>71</sup> *Re Clothing Trades Award 1982* [Print K7074], p.15

<sup>72</sup> *Re Clothing Trades Award 1982* [Print K7074], p.9, final para.

*undesirable and could not reasonably be said to be an intention of the Commission in the TCR Case.*<sup>73</sup>

[A9.19] No such evidence has been brought forward by the ACTU in submissions to date, and ACCI does not understand the ACTU to be arguing that this is a basis on which its claim should be advanced. It does however further underscore the extent to which the decision to vary the exemption in the clothing industry was based on unique industry developments.

[A9.20] Practical Difficulties: The Full Bench in this matter also cited a number of practical difficulties in the application of the exemption in the particular circumstances of the TCF industries at that time:

*There is also the difficulty of the uncertainty of knowing when the test of 15 employees is to be applied. The evidence shows a contraction of employment in the clothing industry over recent years as the reduction in tariff and other protection has occurred as part of the Commonwealth Government's Textile Clothing and Footwear Industry Plan (TCF Plan). It may be that an employer could have 20 employees and reduce that number by 6 who would be paid all of the award benefits. But some or all of the remaining employees may be retrenched some months later, at which stage the employer may be seen to be exempt from the relevant provision of the Award on account of having less than 15 employees at the time of retrenchment. This situation is a very real prospect in this industry and highlights the inherent unfairness and injustice in the present provision. It is to be expected that in a situation of employment contraction an employer would be likely to maintain the most efficient employees in employment for the longest period and retrench the less experienced or the relatively less efficient employees first. The position that would be likely to arise is that the relatively more efficient employees, with perhaps the longest period of service, would have a lesser award entitlement to those with less experience who were retrenched first. This potential situation is manifestly unfair.*<sup>74</sup>

[A9.21] Conclusion: It appears that in this decision, *based on the industry circumstances at hand*, the Commission effectively determined that it should reverse the operation of the standard TCR clause. Rather than an exemption for small business, it deliberately re-set out the following:

*It is emphasised that this decision in no way affects the right of an employer to apply for relief from the provision in the event that such employer is able to show an incapacity to pay the benefits prescribed.*<sup>75</sup>

[A9.22] This followed a substantial evidentiary case brought forward by the applicant union, and the successful prosecution of industry based contentions. The ACTU does

<sup>73</sup> *Re Clothing Trades Award 1982* [Print K7074], p.14

<sup>74</sup> *Re Clothing Trades Award 1982* [Print K7074], p.14

<sup>75</sup> *Re Clothing Trades Award 1982* [Print K7074], p.15

not appear to have brought forward such evidence in support of the instant applications.

**Re: Furnishing Trades Award [Print L5424], (Hancock SDP, Watson DP, and Cross C), 26 September 1994<sup>76</sup>**

[A9.23] This was an application in the wake of the Clothing Trades Award matter.<sup>77</sup> Again, the case was a consideration of whether deviations from the TCR award standard were warranted based on industry circumstances.

[A9.24] Whilst the Commission correctly noted that the application before it was to eschew a case by case approach in favour of some more general application<sup>78</sup>, it was not for so general an application that industry and employer considerations were not the basis for the variation.

[A9.25] Again, the Commission appears to have been informed by the possibility (probability) that employers could manipulate their employment size below 15 to avoid an obligation which would otherwise apply. Based on the circumstances of the industry (as with the Clothing Industry) this was found to be a live possibility. This decision does not provide any authority for conclusions in regard to industries more generally.

[A9.26] In prosecuting its case in the 1994 matter, the CFMEU cited three factors which are markedly less relevant than they were in 1994, and which had a relevance to the furnishing industry which they did not have in industries more generally:

- a. The policy of progressive tariff reductions;
- b. Technological change; and
- c. The recession.

[A9.27] In its conclusion removing the small business exemption from the award, the Commission once again emphasised the extent to which its consideration was a function of industry information and industry evidence:

*In sum, a specific investigation of the furniture and furnishing industries leads us to the view that for these industries the threshold has little or no merit. Accordingly, we propose to grant the CFMEU's application for its removal.<sup>79</sup>*

<sup>76</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 10], p.13

<sup>77</sup> Re Furnishing Trades Award [Print L5424], p.4

<sup>78</sup> Re Furnishing Trades Award [Print L5424], p.5

<sup>79</sup> Re Furnishing Trades Award [Print L5424], p.5, *emphasis added*.



**Re: Family Day Care Services Award [Print L9065], (Ross VP, Riordan SDP, and Hoffman C), 3 February 1995<sup>80</sup>**

[A9.28] This claim was advanced on the basis that special circumstances existed which warranted a departure from the Test Case decision

[A9.29] This also appears to have been a claim applying to community, funded, and not for profit employers<sup>81</sup>, which contrast directly with the smaller businesses proposed to be affected by the ACTU claim in this matter.

[A9.30] This claim also progressed in the wake of industry restructuring, which saw employment move from large publicly funded organisations to smaller publicly funded organisations. The Commission found that:

*A number of Family Day Care operations have moved from being a part of a large organisation to a small incorporated community based management committee. In a number of cases such a structural change has resulted in the loss of the award entitlement to redundancy pay for the employees concerned as the new entity employs less than 15 employees.<sup>82</sup>*

[A9.31] Again, this was a case specific consideration, rather than a generalised claim:

*...our task is to consider whether the circumstances in this case justify granting the application. In determining such issues in the past the Commission has had regard to the following considerations:*

- any special characteristics of employment in the industry in question;*
- whether a significant proportion of the employees covered by the Award are being denied the benefits of the TCR standard;*
- whether a significant proportion of the employers covered by the Award employ less than 15 employees and hence are exempt from the TCR standard;*
- evidence of structural change in the industry such that the award entitlements of employees are being affected;*
- the industrial relations implications of employees working side by side and receiving different redundancy entitlements; and*
- the uncertainty of knowing when the 15 employee threshold is to be applied.<sup>83</sup>*

[A9.32] These are again case specific considerations. The specificity (and lack of basis for any more general approach) of this decision is underscored by the Commission's conclusion in this matter:

*On the basis of the evidence before us we are satisfied that special circumstances exist in the Family Day Care sector which warrant the removal of the 15 employee threshold.<sup>84</sup>*

<sup>80</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 13]

<sup>81</sup> Re: Family Day Care Services Award [Print L9065], p.2

<sup>82</sup> Re: Family Day Care Services Award [Print L9065], p.3

<sup>83</sup> Re: Family Day Care Services Award [Print L9065], pp.5-6, *emphasis added*

**Re: Timber Industry Award 1990 [Print M1434], (Lewin C), 8 May 1985<sup>85</sup>**

[A9.33] The first point to note is that this is a decision of a single member of the Commission:

- a. It should therefore be less persuasive in the Commission's consideration than some other Full Bench and Test Case decisions may be.
- b. It proves that the consideration of industry circumstances justifying the removal of this vital exemption can be efficiently and effectively considered by the Commission without a mandatory requirement for a Full Bench. This further mitigates in favour of an approach which allows specific applications for non-exemption to be considered where warranted by industry circumstances.
- c. Moreover, the case illustrates that capacity does exist under the existing award structure for special circumstances of an individual employer or group of employers in small business sector to be considered. In the wage case context the ACTU argues, and the Commission generally accepts that mechanisms in the wage principles that allow for individual employer relief from Commission ordered increases are appropriate and that the take up rate of such applications suggests that little grass roots demand exists for overriding the principal decision. Likewise, it can be argued in this matter that the relatively low level of application by employees of small business for relief from the Commission ordered exemption is indicative that little grass roots demand exists amongst small business employees for mandatory increases in the redundancy obligations of their employer.

[A9.34] In reaching his decision, Lewin C examined previous departures from the small business exemption. He stated that:

*In each of those cases the decision of the matter resulted in the removal of the exemption of employers of less than fifteen employees from the redundancy provisions of the award in question. In each case this aspect of the decision was reached on the basis of particular factual circumstances, albeit with certain similarities. .... it seems to me that the exemption of employers of less than fifteen employees from the redundancy provisions of federal awards may now be varied in particular factual circumstances.<sup>86</sup>*

[A9.35] This is underscored by Lewin C's later observations that:

<sup>84</sup> Re: Family Day Care Services Award [Print L9065], p.6, *emphasis added*

<sup>85</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 15].

<sup>86</sup> Re: Timber Industry Award 1990 [Print M1434], (Lewin C), 8 May 1985

*As stated earlier in this decision, my view of the effect of the three Full Bench decisions which have departed from the 1984 test case standards is to provide that such departures can occur where the facts and circumstances in an industry are such that a particular departure is warranted on its merits.<sup>87</sup>*

*Ultimately though, in my view, it is more appropriate to deal with the matter before me having regard to the following statement from page 11 of the decision in the Clothing Trades Award matter:*

*"Whatever may have been the reason which persuaded the Full Bench to include such a threshold number in the standard clause which was adopted in the TCR Cases, it is now the duty of this Full Bench to consider whether, in the light of experience, the particular circumstances of the clothing industry, and having proper regard to the evidence in these proceedings, such a threshold number represents a fair and reasonable provision to be maintained in this award covering the particular class of employees in this industry."*

[A9.36] Again, the Commission in this matter also found evidence of deliberate strategies to avoid obligations based on the exemption threshold. In this case, this was by way of stages redundancies to ensure that payment need only be made for the first stage of redundancies<sup>88</sup>. The ACTU has brought forward no evidence of such avoidance across awards such that this may assist their generalised application.

***Re: National Joinery and Building Trades Products Award 1993 [Print N3619], (McIntyre VP), 30 July 1996***<sup>89</sup>

[A9.37] This was a case in which unions called industry based evidence, directly based on employment under the award, in support of their application, and in which the employers failed to call evidence<sup>90</sup>.

***Re: Graphic Arts – General – Interim Award 1977 [Print N7314], (Munro J, Harrison DP, and Peterson C), 16 December 1996***<sup>91</sup>

[A9.38] Unlike the preceding two cases, this decision was heard by a Full Bench.

[A9.39] As with all these cases however, the application for removal of the exemption was prosecuted based on industry information. The Full Bench described the argument put by the applicant thus:

<sup>87</sup> *Re: Timber Industry Award 1990 [Print M1434], (Lewin C), 8 May 1985, p.10, emphasis added*

<sup>88</sup> *Re: Timber Industry Award 1990 [Print M1434], (Lewin C), 8 May 1985, p.7*

<sup>89</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 16].

<sup>90</sup> *Re: National Joinery and Building Trades Products Award 1993 [Print N3619], (McIntyre VP), 30 July 1996, p.5*

<sup>91</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [Vol 5, Section 3, Decision 17]

*The AFMEU contended that the decisions establish that departure from the TCR test case standard is "valid based on the particular circumstances of the industry in question".<sup>92</sup>*

[A9.40] The applicant appears to have put substantial evidentiary material before the Commission, including statistical and affidavit evidence.

[A9.41] The Commission in this matter also undertook a substantial analysis of preceding decisions on the small business exemption from severance pay. The Commission eschewed varying the award as sought, and graphic arts industry awards continue to exempt small business employers from severance pay obligations.<sup>93</sup>

### **Decisions Not Cited By The ACTU:**

#### ***Re: Building and Construction (ACT) Award 1991 [Print K8779], (Jones C), 10 August 1993 (Attachment F)***

[A9.42] As with the passage of other decisions cited, this decision addressed a claim to delete the small business exemption, and an allied application to alter superannuation provisions for redundancy.

[A9.43] In this case employers contested the applicability of the Clothing Trades Industry decision approach/reasoning to their industry, and raised particular issues with application of change in the ACT, and effect on other States.

[A9.44] The Commission declined to award the full redress as sought by the union in this matter.

[A9.45] Thus, in this decision, industry factors and the circumstances of the award at hand led the Commission to not vary the award as sought. This is the other side of the passage of decisions cited above, under the existing industry/award based approach it remains open to the Commission to decline to remove the exemption based on industry circumstances. This would not be possible under the ACTU's proposed approach.

### **Conclusions**

[A9.46] Considering the above, what then do we know about the capacity of award parties to remove the small business exemption in those circumstances where it is warranted?

[A9.47] Firstly, we know that there have been a limited number of departures from the TCR award standard as it applies to small business since the initial variation of awards in the wake of the 1984 decision.

<sup>92</sup> *Re: Graphic Arts – General – Interim Award 1977 [Print N7314], (Munro J, Harrison DP, and Peterson C), 16 December 1996, p.3, emphasis added*

<sup>93</sup> *Graphics Arts - General - Award 2000, Clause 4.2.5(h)*

[A9.48] Secondly, these departures from the TCR standard in regard to small business have been awarded only where warranted, based on evidence of industry circumstances and developments.

[A9.49] Thirdly, there is a growing body of precedent on industry grounds which may occasion removal of the small business exemption at an industry level. Some of the more recent passages of decisions appear to indicate that there may be a set of principles or a checklist of considerations drawn from decisions in the wake of the 1984 TCR test case, for the non-exemption of small business.

[A9.50] Fourthly, it now appears that where warranted, single members of the Commission may consider applications to remove the small business exemption (see the McIntyre VP<sup>94</sup> and Lewin C<sup>95</sup> decisions examined above).<sup>96</sup>

[A9.51] This adds up to a contemporary situation in which, where warranted, industry unions can successfully prosecute cases based on industry circumstances where they warrant an approach other than that contained in the 1984 decision. There is redress for industry unions with genuine beliefs that the provisions of the 1984 TCR Test Case in regard to small business are inappropriate in their industries, based on their industry circumstances and industry evidence.

[A9.52] Comparing Like With Like: It should also be recalled that the passage of cases outlined above in regard to extending severance pay to small business examined a materially different proposition to that advanced by the ACTU in this matter, such that direct comparison is not tenable.

- a. These cases examined the viability of small business accommodating an additional severance payment capped at eight weeks, providing a maximum possible payment of 13 weeks. (5 weeks notice + 8 weeks severance).
- b. The ACTU proposes that small business be subject to costs of up to 25 weeks (5 weeks notice + 20 weeks severance).
- c. This is a completely different proposition. It is not clear that any of the above decisions to extend severance pay to small business would have been made had the Commission been asked to consider a proposition based on such a clearly exorbitant additional cost impost. There is for example no basis to conclude that the *Clothing, Furnishing* etc decisions would have been handed down in their present form had the NSW level of payment been under consideration.

<sup>94</sup> *Re: National Joinery and Building Trades Products Award 1993 [Print N3619], (McIntyre VP), 30 July 1996.*

<sup>95</sup> *Re: Timber Industry Award 1990 [Print M1434], (Lewin C), 8 May 1985*

<sup>96</sup> This is not a concession that this approach is warranted in matters more generally.

[A9.53] A different Act?: Each of the above decisions, appears to have been decided under the Industrial Relations Act 1988, or the preceding Conciliation and Arbitration Act 1904. No decisions were brought forward for consideration under the Workplace Relations Act 1996, and in particular no decisions were brought forward subject to the contemporary statutory definition of the safety net, nor subject to the amended objects, nor to provisions such as s.143(1B).

[A9.54] A Little While Ago: The most recent decision dates from 1996 – can the ACTU validly seek to extrapolate this to all contemporary small businesses at least seven years later?

## **A10. STATE APPROACHES – FACT & FICTION**

### **ACTU Contentions**

[A10.1] The ACTU states the following in regard to state approaches, at paragraph 36 of the December 2002 outline of contentions:

*There is no small business exclusion existing under:*

*(a) South Australian awards;*

*(b) Tasmanian state awards;*

[A10.2] This is not really a contention, and it provides the Commission and respondent parties and intervenors with very little to go on in replying to the ACTU.

[A10.3] ACCI intends to wait for the ACTU to develop an argument based on state award developments in support of its claim before addressing state approaches in any detail in regard to small business employment.

### **State Positions In This Matter**

[A10.4] Of relevance in this matter is the apparent absence of direct State government support for the ACTU in regard to its claim to extend severance pay to small businesses in their States.

[A10.5] Four States have to date lodged submissions in this matter according to the AIRC website:

- a. Western Australia
- b. Queensland
- c. New South Wales
- d. Victoria

### **Western Australia**

[A10.6] The WA submissions address the ACTU's application to delete the small business exemption in Section 7, as follows:

*7.1. The Western Australian Government is not in favour of the removal of the exemption for employers employing fewer than 15 employees.*

*7.2. Whilst ultimately the Western Australian Government supports in principle the move towards universal redundancy in the long term, it is not convinced at this stage that removal of the current exemption is warranted. Supporting small business whilst providing protection for employees is a delicate balance. In this instance WA would fall on the side of caution.*

- 7.3. *This proposal could have a concentrated impact on small business, as redundancy payments would represent a greater proportion of the overall labour costs to small business, than it would for larger enterprises.*
- 7.4. *It is to be noted that the NSW Standard still retains an exemption for small business, and that the Queensland Government also did not support removal of the exemption in the recent case Termination Change and Redundancy before the QIRC (B209 and 308 of*

[A10.7] Key themes advanced by the WA government fundamentally at odds with the ACTU’s approach to this issue include:

- a. The delicate balance inherent in “supporting small business whilst providing protection for employees”. WA appears to recognise that the 1984 decision to exempt small business was an exercise in balancing competing imperatives. WA also appears to recognise that the ACTU would fundamentally disturb this balance, with major consequences for small business employment and small business viability. It should be noted that the 1984 TCR Test Case decision was not accepted as a Test Case by the WAIRC for all awards in that State.<sup>97</sup>
- b. The need for far more caution in this area than has been demonstrated by the ACTU in advancing this application. At very least, the WA perspective stands at odds with the paucity of information brought forward by the ACTU as applicant in this matter for such a major policy change. A State government arguing for caution would, it is imagined, wish to see far more concrete evidence brought forward to sustain any so major a change.
- c. The Western Australian government’s recognition of the probable cost impact of the ACTU proposal, and in particular the concentrated cost impact on small business, “as redundancy payments would represent a greater proportion of the overall labour costs to small business, than it would for larger enterprises”.

## **Queensland**

[A10.8] The Queensland Government appears to have repeated its submissions to that State’s reconsideration of severance pay standards in this federal matter. In doing so, it sets out its position on the small business application of severance pay as follows:

*The Queensland Government does not support the removal of the small business exemption. While the other elements are claim that are supported have a moderate cost impact across the economy, the impact of this proposal would have a concentrated impact on a particular sector, small business, that is generally more vulnerable to the imposition of new obligations. As a general rule, small business would have smaller cash*

<sup>97</sup> 66 WAIG 580



*reserves to meet severance pay requirements than would a larger business, and redundancies that occur in small business inherently represent a greater proportion of the overall labour costs of the business. In addition to these considerations, there is also the fact that small business may be less able to consider alternatives to redundancy that could be implemented in a larger organisation.*

[A10.9] This position again stands in direct contrast to many of the contentions of the ACTU, and underscores many of the key themes sought to be advanced by ACCI in these sections of our reply submission.

### **New South Wales**

[A10.10] Section 3.2 of the NSW submission addresses what is termed “Claims inconsistent with NSW Standard”. In doing so, it states the following in regard to the ACTU claim to extend redundancy pay obligations to small business employers:

*The proposal by the ACTU that redundancy provisions also apply to long-term casuals is inconsistent with the current standard in New South Wales. The EPA excludes casuals (and employees with less than 12 months continuous service) from the notice provisions in that Act. Similarly, the major industry awards are expressed only to apply to full-time and part-time employees. The State of New South Wales makes no submission in support of, or in opposition to, this claim. Whether this claim is fair and reasonable in the circumstances is a matter to be determined by the Commission on the available evidence.*

[A10.11] When contrasted with that of Western Australia and Queensland, this is a vacuous submission:

- a. NSW’s own legislation upon which the ACTU and the NSW government rely on to advocate an increase in redundancy costs specifically exempt small business from its provisions.
- b. The ACTU proposal would significantly increase costs for the 189,000 small businesses in NSW who employ staff<sup>98</sup>.
- c. The importance of small business to the NSW economy and labour market is found in data published by the NSW government itself<sup>99</sup>:
  - i) 1,083,400 people work in NSW small businesses.
  - ii) This was 33.2% of all the people working in small businesses in Australia.
  - iii) 47.9% of people who work in NSW businesses are in small businesses.

<sup>98</sup> Source: [www.smallbiz.nsw.gov.au](http://www.smallbiz.nsw.gov.au)

<sup>99</sup> Source: [www.smallbiz.nsw.gov.au](http://www.smallbiz.nsw.gov.au)

- d. According the NSW government's own data, small business is very significant to employment growth in that State:

*Small businesses provided 70.4% of the increase in employment in all NSW businesses between 1994-95 and 2000-01, whereas for the whole of Australia the figure was only 45.3%.<sup>100</sup>*

- e. NSW appears to fund 48 small business advisory centres to assist small business operators, at a cost of \$4m per year<sup>101</sup>. It is anomalous that the Government would then simply have no view on an ACTU proposal which may have the impact of detracting from the success of this substantial public spending.
- f. The ACTU seeks to act directly at odds with the will of the NSW Parliament. The NSW Parliament determined in passing s.9 of the *Employment Protection Act 1982* that severance payments should not be payable by small business.

[A10.12] It is to be hoped that NSW will decide whether it is for or against a proposal which will negatively impact upon business and employment in that State during the course of this matter.

### **Victoria**

[A10.13] Victoria attempts the same position as NSW, stating in regard to the small business claim that:

*The Victorian Government neither supports nor opposes the other claims made by the ACTU.*

[A10.14] Again, this is an essentially an inept submission on a matter of such crucial importance in this case and to small business in Victoria. It is also at odds with the purported efforts of the Victorian government to support small business in that State.

### **South Australia and Tasmania**

[A10.15] At paragraph 36, the ACTU states that:

*36. There is no small business exclusion existing under:  
(a) South Australian state awards;  
(b) Tasmanian state awards;*

[A10.16] We only have the ACTU's word for this. These states have not come forward in this matter to provide the Commission with information on the basis for approaches in their states, nor on the consequences of these policies.

[A10.17] However the South Australian Commission when it adopted the federal TCR standard following the 1984 TCR Test Case specifically included the small

<sup>100</sup> Source: [www.smallbiz.nsw.gov.au](http://www.smallbiz.nsw.gov.au)

<sup>101</sup> Source: *Annual Report of the Department of State and Regional Development (NSW)*, 2000/01, p.29

business exemption in its orders. That exemption has been flowed on into the TCR standard in South Australian State awards. The ACTU claims on this point are simply wrong.

[A10.18] In considering state submissions, it may also be relevant to note the following at this stage:

Unemployment Rates – February 2003<sup>102</sup>

VIC	5.2%
WA	5.6%
NSW	5.9%
AUST.	6.0%
SA	6.3%
QLD	6.9%
TAS	9.7%

### Conclusion

[A10.19] The States, despite their support in full or part of ACTU proposals in regard to increased severance payments, and despite their support for other areas of the ACTU redundancy claim, clearly comprehend what the ACTU refuses to admit – extending severance payment obligations to small business would be inconsistent with the inherent financial resources and capacities of small businesses. The States realise that the vast extension of cost, and of risk to business viability proposed by the ACTU, will have a negative effect on employment in their jurisdictions, and they will not have a bar of it.

[A10.20] The State submissions effectively stand as refutations of the ACTU contentions in regard to small business, and in particular refute paragraphs 29, 31, 34, 35, 37 & 38.

[A10.21] If paragraph 36 is correct, they also stand for the authority that those states which have not extended severance pay to small business remain convinced of the validity of this approach, and are not convinced of the need for change.

<sup>102</sup> 6202.0 Labour Force, Australia, Preliminary, February 2003: Australia Now- [www.abs.gov.au](http://www.abs.gov.au) - Seasonally Adjusted.

## A11. CONCLUSION – SMALL BUSINESS

### Financial Impact & Capacity To Pay

[A11.1] The ACTU contends that there is “*There is no evidence that small business has any less capacity to pay severance than larger businesses*”<sup>103</sup>.

[A11.2] This is a contention which ACCI completely rejects – it is at odds with any clear understanding of small business in Australia, and at odds with common sense.

[A11.3] The lack of realism in this contention has been demonstrated as recently as February 2003 through the report of the Senate committee outlined in the preceding sections, and the earlier 1997 report of the Bell Committee . This includes information on small business financial resources, small business vulnerability and business failure, and small business financial reserves / capital raising.

[A11.4] The lack of sustainability in the ACTU propositions is also underscored by the positions of the States of Queensland and Western Australia, who eschew the opportunity to join the ACTU in progressing this claim.

### Onus

[A11.5] The ACTU is seeking to reverse a clear setting of this Commission through a Test Case as understood under Principle 4 of the Statement of Principles<sup>104</sup> (the 1984 TCR decisions).

[A11.6] As such it is for the ACTU to actually show the Commission that small business now has the capacity to pay severance pay, and that the 1984 Test Case should be overturned in this regard<sup>105</sup>. To do this, the ACTU will need to satisfy the Commission that small business on average, and in the broad, have financial capacities at odds with that found in a wide variety of research. – Let the ACTU not shirk its burden in regard to this, or Teflon like attempt to slide it onto respondent parties.

[A11.7] Paragraph 31 of the ACTU contentions manifestly fails to do this. It merely cites decisions between 1985 and 1995. – That is, decisions between eight and eighteen years old. It should therefore be for the ACTU to satisfy the Commission that:

- a. This material remains relevant, and may be relied upon to reach viable statutory conclusions in regard to contemporary employment and the contemporary labour market.

<sup>103</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [31], p.13

<sup>104</sup> Safety Net Review May 2002 - 9/5/2002 [Print PR002002](#)

<sup>105</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [31], p.13

- b. It is possible to generalise from this industry specific material to small business more generally, in all industries and in all areas of the economy.

[A11.8] In doing so, the ACTU contention stands in direct contrast to a the 1997 Bell Committee Inquiry, and the 2003 Senate inquiry which took a wide range of evidence from a wide range of organisations. The Bell Committee and the Senate committee clearly found substantial limitations on the capacity of small businesses to pay a wider variety of amounts, debts, wages etc. To make out its contention, the ACTU must effectively satisfy the Commission that there is something unique about severance payments which makes it affordable.

[A11.9] In paragraph 31 of its contentions, the ACTU additionally relies upon the witness statements of Albury, Bedford, Burrows and Carter. The extent to which these four witnesses, from three companies may be relied upon to determine the general capacity of small businesses throughout Australia, in all areas of the economy, will become clear during the taking of evidence.

### **Impact on Employment**

[A11.10] The ACTU states that:

*Whilst small business employment is important, average annual growth rates for the period March 1992 to March 2001 were 2.3% in small business compared to 3.5% in larger businesses.*<sup>106</sup>

*Claims regarding the job generating role of small business do not constitute a cogent basis for selective and assistance to small business in the form of regulatory exemption.*<sup>107</sup>

*There is no evidence that the imposition of a requirement on small business to pay severance will have adverse employment effects.*<sup>108</sup>

[A11.11] Again – the ACTU bears an onus to prosecute these matters.

[A11.12] ACCI has during these course of the preceding sections advanced ample evidence of the anticipated adverse employment effects of the ACTU’s proposal in regard to small business, including through:

- a. ACCI witness evidence.
- b. The Senate Committee Report into Small Business Employment.
- c. The analysis of small business reactions to increased costs.

[A11.13] The impact of the claim on small business is also underscored by the failure of State governments to come forward in support of this part of the ACTU claim.

<sup>106</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [34], p.14

<sup>107</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [35], p.14

<sup>108</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [37], p.15

[A11.14] The impact of the ACTU’s claim on small business cannot be divorced from the overall increases in labour related costs and on-costs faced in recent years by the small business sector. These include:

- a. Substantial increases in award wages.
- b. Increases in compulsory superannuation payments to 9% of earnings.
- c. In some sectors, increases in casual loadings.
- d. In Victoria, proposed increases in penalty rates and loadings.

[A11.15] All of these developments bear on the capacity of small businesses to bear further major increases in costs, and - even more importantly – whether such increases should fairly be imposed on these employers.

### **Genuine Fairness– Maintaining The Status Quo**

[A11.16] The apparently primary ground cited by the ACTU for the extension of severance pay to small businesses is purported “fairness”. The ACTU states that:

*As a matter of fairness and equity employees of small business should be treated no differently to employees of larger businesses so far as entitlements to severance pay are concerned.*<sup>109</sup>

*Employees of small businesses whose employment is terminated due to redundancy face the same losses as those whose employment is terminated due to redundancy from larger businesses.*<sup>110</sup>

[A11.17] The ACTU concludes that:

*In the circumstances the current exclusion of small business employees from an entitlement to severance is:*

*(a) arbitrary; and*

*(b) unfair.*<sup>111</sup>

[A11.18] ACCI has brought forward considerable material and analysis in these sections to begin to show where true fairness lies in this matter, and the major exercise in balancing fairness undertaken in the 1984 decisions. This includes:

- a. Evidence from employers and others with significant and pertinent experience and knowledge.
- b. Examples of the situations in which the ACTU is proposing lower income earning small business people assume substantial additional financial obligations.

<sup>109</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [29], p.13

<sup>110</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [30], p.13

<sup>111</sup> ACTU Written Outline of Contentions, (C2002/4659 and ors), 20 December 2002, [38], p.15

- c. A proper preliminary analysis of available research material, including the recent Senate committee report on small business employment.
- d. Placing those derogations from the established standard to date into their proper context, and properly identifying the relevance and applicability of industry and workplace, rather than workforce wide approaches.

[A11.19] The fair approach in this case does not lie with the proposed approach of the ACTU. Instead, it lies in maintaining the fine balance of considerations which underpins the existing, effectively operating approach.

### **Fairness in Context – The *Workplace Relations Act 1996***

[A11.20] The ACTU's core contentions going to purported fairness do so without reference to the Workplace Relations Act 1996 under which this claim is to be considered.

[A11.21] The statutory framework will however be an important consideration in this matter and is an issue to which ACCI will return during the course of these proceedings.

[A11.22] Key considerations which ACCI will pursue in relation to the ACTU claim on small business will include:

- a. The impact of the ACTU proposal on employment and living standards, the economy and the labour market, including through its impact on that major component of the Australian economy and labour market employing less than 15 persons.
  - i) This includes reconciling the ACTU's proposed approach with the desirability of attaining a high level of employment. (s.88A(2)(b))
- b. Why the ACTU should not pursue the level of entitlement claimed through bargaining at the workplace level, rather than the safety net award system.
- c. How the ACTU proposal accords with awards of this Commission operating as a safety net of minimum standards.
- d. How a one size fits all approach for small business, at odds with the financial and operational capacities of most smaller enterprises, can be suited to the efficient performance of work according to the needs of the particular workplaces concerned (s.88A(c)).
- e. How a one size fits all approach for small business, at odds with the financial and operational capacities of most smaller enterprises, can be consistent with encouraging agreement making on this issue (s.88A(d)(i)).

- f. The extent to which the ACTU claim accords with the public interest, and in particular to the likely effects on employment of the ACTU proposal (s.90).
- g. Other relevant statutory considerations, including the balancing of interests and rights between employers and employees.

[A11.23] Also relevant to the Commission's consideration may be the contrasting statutory schema prevailing at the following points:

- a. The determination of the 1984 TCR Test Case. (*Conciliation and Arbitration Act 1904*)
- b. Decisions departing from the TCR standard in regard to small business. (*Industrial Relations Act 1988*)
- c. The instant claim. (*Workplace Relations Act 1996*)

[A11.24] The fundamental statutory schema under which these matters have been considered differs, in part; those differences move in the direction against the removal of the small business exemption. If the exemption was justifiable under the 1984 legislation, and under legislation which existed since that time, it is more than sustainable under the statutory framework that now operates.

### **How the Commission Should Proceed**

[A11.25] As stated, the onus in this matter lies with the ACTU. The ACTU is the applicant party seeking to disturb a key setting and a key balance in the system. It is only on this balancing of considerations upon which the severance pay standard was able the awarded in the first place.

[A11.26] The ACTU has clearly not brought forward sufficient information to sustain the removal of the exemption. Ten scant summary paragraphs, two research papers (which are every bit as advantageous to respondents as to the applicant), and a handful of witnesses at most is not sufficient material upon which to disturb the safety net and make such a massive alteration as proposed.

[A11.27] The ACTU should be required to produce significantly more evidence, and to satisfy the very real concerns set out by ACCI and other respondent parties prior to even begin able to realistically have the Commission consider its claim.

[A11.28] ACCI strongly considers that:

- a. The ACTU evidence cannot make out its claim – it is manifestly insufficient in regard to the major cost impost proposed.
- b. All available evidence supports the retention of the established approach to small business.





## ATTACHMENT B – ACCI MEDIA RELEASES REGARDING THE REDUNDANCY TEST CASE

Friday, 26<sup>th</sup> March 2004

**A MASSIVE KICK IN THE GUTS FOR SMALL BUSINESS  
AND THE ECONOMY**

Statement by Peter Hendy, Chief Executive

Today's decision by the Australian Industrial Relations Commission to impose new and significant costs when employees are made redundant is a massive kick in the guts for Australian employers, particularly small businesses who will be forced to pay these costs for the first time.

Employers and small businesses will be penalised for doing what commercial common sense demands – restructuring their businesses to keep them efficient and competitive.

Today is a bleak day for the small business sector and the thousands of Australians who rely on it for their jobs.

This decision will add an additional \$259 million per year to the cost of employee redundancies, of which \$190 million will be borne by the nation's small businesses.

The costs of a typical redundancy (an employee with 4 years service on \$500 per week) will increase by 200% for small business, or at least, \$4000 (from about \$1500 to \$5500). Some employees will have to be paid 5 months redundancy pay.

This decision and these costs will have a profound adverse effect on employment and in particular the small business sector.

This afternoon, the Presidents and Chief Executives of Australia's 32 leading employer bodies released a joint statement of concern and condemnation of this decision. A copy is attached.

The increased costs arising from this decision can neither be afforded nor absorbed. They will result in job losses, less job security and, for struggling businesses, insolvency.

That the Commission removed the small business exemption despite contrary submissions by industry, by the Federal Government and by the Queensland, Western Australian and NSW Labor Governments is alarming.

Sadly, the perceived gains that the union movement has proclaimed from this decision will be illusory.

Employees in small business will be the losers as much as their employers.

The Commission has, in applying the existing large business obligation to small business, increased the risk of "having a go", and in particular, of taking a punt on providing employment opportunities to others within our community.

In light of this decision, it's crucial the Australian economy be well managed. The worst effects of this decision would occur if an economic downturn compelled widespread redundancies, as it did in the early 1990's.

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**Unanimous Resolution of the ACCI General Council 26<sup>th</sup> March 2004,  
Melbourne**

**National Redundancy Test Case**

*Council:*

- *Expresses extreme disappointment and concern at the decision of the Australian Industrial Relations Commission to significantly increase the costs and complexity of redundancies in Australia and impose additional employment burdens on commerce and industry;*
- *The decision will have a profound adverse impact on employment especially by and in small business;*
- *Condemns in the strongest terms the decision to extend severance pay obligations to employers currently exempt, including in particular employees of smaller businesses;*

3<sup>rd</sup> April 2004

## **PRESERVING THE SMALL BUSINESS REDUNDANCY PAY EXEMPTION IS IN THE NATIONAL INTEREST**

Statement by Peter Hendy, Chief Executive

The Australian Chamber of Commerce and Industry, Australia's leading national employer body with members representing over 280,000 small businesses, welcomes today's announcement by the Prime Minister that the Australian Government will seek to legislate to preserve the small business exemption from redundancy pay obligations.

It is necessary in the national interest.

The government has cut to the chase. The exemption is necessary to preserve jobs and prevent insolvencies because small businesses do not have the financial capacities to fund large redundancy payouts.

Unless the exemption is retained, Australia's small businesses would be required to find about \$190 million more each year in redundancy payments – on top of unfair dismissal laws and termination pay.

Whilst decisions of industrial tribunals must be respected, it is governments that are ultimately responsible for economic management and the national interest.

The Australian Industrial Relations Commission (AIRC) decided last week that the small business exemption, which has applied for 20 years under federal laws, should be removed.

That decision was made notwithstanding support for the small business exemption from the Australian Government, the state governments of New South Wales, Queensland and Western Australia and all industry bodies, including ACCI.

Only six months ago the Queensland Industrial Relations Commission decided that the small business exemption should be retained because removing it "has the very real potential to result in the insolvency of a number of small businesses."

Legislating a small business exemption from redundancy payments is not without precedent. The existing exemption in New South Wales is a legislated exemption by the parliament of that state.

**Tuesday 8 June 2004**

## **REDUNDANCY CASE SUPPLEMENTARY DECISION**

Statement by Peter Hendy, Chief Executive

The Australian Chamber of Commerce and Industry (ACCI), has welcomed the decision by the Australian Industrial Relations Commission to introduce a transitional period of up to five years before the full impact of its March 2004 Redundancy Test Case Decision will be felt by small business.

Today's Supplementary Decision arises out of proceedings initiated by ACCI on behalf of Australian business which reflect significant employer concerns about the original March decision.

While today's decision not to make the new redundancy obligations retrospective provides small business with some relief, this important sector's fundamental incapacity to meet these new obligations in the future remains.

Small businesses do not have the same capacities to access borrowings or capital as larger businesses and these new provisions will have a negative affect on employment.

Parliament must now pass the *Workplace Relations Amendment (Protecting Small Business Employees) Bill 2004* which seeks to reinstate what, up until today, has been the total exemption of small business from compulsory award redundancy obligations.

Beyond smaller businesses, ACCI remains very disappointed that the Commission has not varied the massive increases in across-the-board award redundancy standards that it handed down in March to clearly preclude double counting of differing State long service leave entitlements.

## ATTACHMENT C – ACCI MEMBER ORGANISATIONS

### **STATE/TERRITORY ASSOCIATIONS**

ACT and Region Chamber of Commerce and Industry

Australian Business Ltd

Business SA

Chamber of Commerce and Industry Western Australia

Chamber of Commerce Northern Territory  
Commerce Queensland

Employers' First <sup>TM</sup>

State Chamber of Commerce (New South Wales)

Tasmanian Chamber of Commerce and Industry

Victorian Employers' Chamber of Commerce and Industry

### **NATIONAL INDUSTRY ASSOCIATIONS**

Agribusiness Employers' Federation

The Association of Consulting Engineers Australia

Australian Beverages Council

Australian Consumer and Specialty Products Association

Australian Entertainment Industry Association

Australian Hotels Association

Australian International Airlines Operations Group

Australian Made Campaign Limited

Australian Mines and Metals Association

Australian Paint Manufacturers' Federation

Australian Retailers Association

Housing Industry Association

Insurance Council of Australia

Investment and Financial Services Association

Master Builders Australia

Master Plumbers and Mechanical Services Association Australia

National Electrical and Communications Association

National Retail Association Limited

NSW Farmers Industrial Association

Oil Industry Industrial Association

Pharmacy Guild of Australia

Plastics and Chemicals Industries Association

Printing Industries Association of Australia

Restaurant and Catering Australia

Standards Australia Limited

Victorian Automobile Chamber of Commerce