NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO

THE WORKPLACE RELATIONS AMENDMENT (SMALL BUSINESS EMPLOYMENT PROTECTION) BILL 2004

FEBRUARY 2005

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Introduction and Overview

1. The *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004* proposes, amongst other things, that certain changes to the operation of the federal redundancy system be extended to constitutional corporations operating within the state industrial relations system. These changes arise directly from the Redundancy Test Case Decision of the Australian Industrial Relations Commission handed down in March 2004.

2. New South Wales was one of the first jurisdictions in Australia to empower an industrial tribunal to deal with the respective rights and obligations of employers and employees in redundancy situations. As a consequence, most New South Wales industrial instruments now contain redundancy provisions. The *Employment Protection Act 1982* and *Employment Protection Regulation 2001* operate as a safety net for employers and employees whose awards do not contain redundancy provisions.

3. It can be argued that New South Wales has been an innovator in the area of redundancy and employment protection. This is exemplified by the fact that much of the current federal redundancy requirements have been modelled on New South Wales provisions. This in itself is a glowing endorsement of the capacity of the New South Wales Commission to develop and implement provisions which are sensible, balanced and workable.

4. The law relating to redundancy and its operation within the New South Wales jurisdiction is well settled and of long standing. There has been little or no public or formal criticism of the way in which the jurisdiction operates. It is also difficult to discern any detrimental economic or social effects arising out of the jurisdiction.

5. Industrial matters affecting participants in the New South Wales industrial relations system should be matters of concern to those participants, the Industrial Relations Commission of New South Wales and the New South Wales Government. They are not matters to be interfered with by the Commonwealth. New South Wales therefore rejects, and urges the Parliament to reject, this attempt by the Commonwealth to impose its views on how redundancy should be dealt with on employers otherwise covered by the New South Wales industrial relations system.

6. The federal bill is in large part a response to the Federal Test Case Decision. In light of this, the following pages begin with a description of that decision including a brief summary of the ACTU claim and a review of the main elements of the Full Bench decision. Section 1 concludes with an examination of the New South Wales procedure for consideration of national decisions.

7. Section 2 of this submission presents an outline of the main elements of the bill and their corresponding implications. An overview of the operation of employment protection and redundancy provisions in New South Wales is provided in Section 3. Concluding remarks can be found at page 12.

The Federal Test Case Decision

Background

9. The Australian Council of Trade Unions (ACTU) federal Redundancy Test Case proceedings commenced in the Australian Industrial Relations Commission (AIRC) on 26 May, 2003. Central to the ACTU claims was the removal of the existing small business exemption which denied employees of businesses with fewer than 15 employees an entitlement to redundancy severance pay.

10. The New South Wales Government was granted leave to intervene in support of the ACTU's claim to the extent that it would achieve comity between the redundancy provisions which apply to New South Wales workers who are covered by federal industrial instruments and those New South Wales workers covered by New South Wales awards and the *Employment Protection Act 1982* and *Regulation 2001* redundancy standards.

11. An element of the ACTU proposal which was inconsistent with the New South Wales standard and therefore not supported, included the claim that employers who employ less than 15 employees should no longer be exempt from redundancy provisions. The small business exemption was consistent with the 1994 Redundancy Test Case standard and s9 of the Employment Protection Act. Furthermore, it was consistent with major industry awards under which redundancy provisions are only applicable to employers who employ 15 or more employees.

Elements of the Decision

12. A Full Bench of the AIRC handed down its decision on 26 March 2004.

13. Major elements of the decision included:

- an increase in the severance pay scale from four years of service to ten years
- partial removal of the small business exemption from severance pay by creating a separate lower scale of severance payments for small business
- an increase in access for employers to the incapacity to pay principle
- no alteration of the retirement date limitation and no introduction of award severance pay for casual employees
- refusal of the ACTU's professional services allowance claim and the AiG claim to provide a reduced level of entitlements for redundant employees of all insolvent employers

- refusal of the employers 'cover the field' application
- agreement that the redundancy dispute procedure was an allowable award matter
- effective date 28 days from the date of the decision in the awards covered by the application and in other awards having regard to the terms of the Workplace Relations Act (WRA) (s.146) in the circumstances of the case.

14. The most significant aspect of the decision was the removal of the longstanding small business exemption and the granting of severance pay up to a maximum of eight weeks pay after four years of service for employees of businesses employing fewer than 15 employees.

15. The AIRC found as a general proposition that employees of small businesses are entitled to some level of severance pay. The Full Bench was satisfied that the nature and extent of losses suffered by small business employees upon being made redundant are broadly the same as those employed by medium and larger businesses. The Full Bench also acknowledged that the level of the exemption is to some extent arbitrary and can give rise to inequities in circumstances where a business reduces employment levels over time.

16. The AIRC also acknowledged that the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay. For those businesses that are unable to meet their redundancy pay obligations, an enhanced incapacity to pay provision provides an avenue for relief.

17. In a supplementary decision handed down on 8 June, 2004, the Full Bench agreed to allow employers of fewer than 15 employees to count service for the purpose of calculating redundancy entitlements prospectively, recognising that some small businesses lack the 'financial reserves to meet a redundancy situation immediately'.

18. As a result of these orders, no small business employer would face severance pay obligations for at least a year from the decision date, and none would face the maximum payout of eight weeks severance until four years has lapsed from the date of the decision.

19. The Commonwealth immediately announced that it would introduce legislation to restore the small business exemption. Of more concern, the Commonwealth also indicated that it intended to intervene in any relevant proceedings before state tribunals to oppose any flow on.

New South Wales Consideration of the Federal Test Case Decision

20. The Industrial Relations Commission of New South Wales (IRC) has not yet considered the Federal Redundancy Test Case Decision.

21. As a national decision, a Full Bench of the New South Wales Industrial Relations Commission (IRC) must give consideration to the decision having regard to ss50 (1) – (4) of the NSW *Industrial Relations Act 1996*.

22. The NSW Commission must adopt the provisions of the national decision unless satisfied that it is not consistent with the objects of the *Industrial Relations Act 1996* or that there are other good reasons for not doing so. Specifically s50 (3) provides that:

> The provisions of a national decision may be adopted:
>
> - wholly or partly and with or without modification, and
> - generally for all awards or other matters under this Act or only for particular awards or other matters under this Act.

23. It is the view of the New South Wales Government that this s50 process is the most appropriate mechanism to trigger a review of the New South Wales redundancy test case standard including the *Employment Protection Act 1982* and *Regulation 2001*.

24. The New South Wales Government sees no place for the Commonwealth in this process. We consider that the potential consequences of this decision are best dealt with at the state level. It is our firm belief that the New South Wales IRC should be allowed to follow due process without unnecessary interference from the Commonwealth.

The Federal Government Bill

Objective

25. The Commonwealth has revived the bill it first introduced in May 2004, immediately following the decision of the AIRC. Now known as the *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004*, it seeks to restore the exemption for small business from redundancy pay obligations by legislatively overturning the Federal Test Case Decision.

26. The bill goes further than simply dealing with federal issues. It extends the exemption to all constitutional corporations with less than 15 employees. Such corporations will be released from any obligation to pay redundancy under state laws or state awards.

27. In the interim, the Commonwealth also foreshadowed that it would intervene in any relevant proceedings before state tribunals to oppose any flow on and called on state governments to legislate to maintain the small business exemption.

28. The bill highlights the Commonwealth's lack of respect for state government industrial relations processes and the abilities and functions of state Commissions.

Elements of the bill

29. The bill seeks to amend paragraph 89A(2)(m) of the *Workplace Relations Act 1996* to make redundancy pay by employers with more than 15 employees an allowable award matter.

30. This amendment would therefore result in redundancy payments by an employer with less than 15 employees not being considered an 'allowable award matter', thereby neutralising the effect of the Redundancy Test Case for small businesses subject to federal awards. It would mean that no award could be made providing for redundancy payments to be made by small business.

31. The Bill also seeks to exclude constitutional corporations with fewer than 15 employees from redundancy payment obligations in state laws or state awards.

32. Proposed s167 of the Bill provides that 'eligible instruments' (including state laws, awards, and authority orders) will have no effect to the extent that they would require a relevant employer that employers fewer than 15 employees to pay redundancy pay. A 'relevant employer' is defined in the case of a state law, a state award or a state authority order as a constitutional corporation.

33. In this regard this bill (as do many others) relies on the use of the corporations head of power contained within the Australian Constitution.

34. The bill has three effects:

- remove redundancy pay for small businesses with fewer than 15 employees from the jurisdiction of the AIRC
- cancel the effect of any variations that were made by the AIRC to awards from the time of the decision until the legislation commences
- prevent flow on of the AIRC's decision to small businesses that are constitutional corporations and that are covered by state awards.

35. The New South Wales Government would urge the Senate to reject this intrusion into an area well established in state law.

History of redundancy provisions in NSW

Employment Protection Act 1982 and Regulation 2001

36. The first time that general redundancy provisions were introduced in New South Wales was in December 1982 with the introduction of the *Employment Protection Act 1982* (EPA) which imposed specific obligations on employers and provided benefits for employees. Prior to this, redundancy awards or orders were made on an ad hoc basis according to the individual circumstances of a particular case.

37. Seeking a declaration of general standards in relation to redundancy under the EPA and the *Industrial Arbitration Act 1940*, the New South Wales Labor Council initiated proceedings before the IRC in 1983. The claims the Labor Council were pursuing were equivalent to those sought by the ACTU which was at that time before a Full Bench of the Federal Commission relating to job security, retrenchment and technological change.

38. IRC President Fisher considered that the primary intention of the EPA was to provide machinery to compensate for hardship whereby severance payments could be directed to employees being dismissed as a result of circumstances beyond their control. He recommended a scale of severance payments which became known as the 'Fisher Formula' which was subsequently enshrined into state industrial law through the enactment of regulation 5B of the *Employment Protection Regulation 1983.*

39. The Fisher formula was adopted by the Federal Commission in the 1984 Termination, Change and Redundancy (TCR) Case, as the appropriate level of severance payments to be prescribed in federal awards dealing with redundancy.

40. The scale which is currently featured in Schedule 1 of the 2001 Regulation (and the former 1995 regulation) is no longer in accordance with the Fisher formula, but reflects the new scale of severance payments established by the Commission in the New South Wales 1994 Redundancy Test Case.

41. Neither the EPA nor the associated regulations feature an explicit exclusion from severance pay. What they do provide, however, is an exemption for employers of fewer than 15 employees from the 'compulsory notification procedures' to the Registrar when an employer proposes to terminate the employment of one or more employees (set out in ss 7 and 8).

42. This exemption is contained within s9 of the EPA which states as follows:

> Non-application of sections 7 and 8 to employers of fewer than 15 employees

Neither section 7 nor section 8 requires a notice to be served on the Registrar in relation to the termination or proposed termination of an employee's employment if, immediately before the termination or proposed termination of employment, the employer employed fewer than 15 employees.

43. The EPA has limited application for a number of reasons. Firstly, the EPA has no application to an employee who is not covered by an award or industrial instrument. Where an employee is covered by an industrial instrument, the EPA has no application where that instrument contains a clause dealing with employment protection. Furthermore the EPA does not apply to employees of the Crown, nor does it apply to federal award employees.

NSW Awards

44. New South Wales was the first state to introduce specific employment protection provisions into its principal industrial statute (s88G of the former *Industrial Arbitration Act 1940*). Those provisions were inserted in 1986 and empowered the New South Wales Industrial Commission (IRC) to insert employment protection provisions (including severance pay) into industrial awards or agreements upon application to the Commission. The provisions have been carried over into subsequent industrial statutes and are currently contained in the *Industrial Relations Act 1996* (s21(1)(c)).

45. Redundancy clauses are now common in most New South Wales state awards. Some industries even have separate redundancy awards particular to their fields, such as the transport industry. These clauses/awards contain redundancy provisions arising from the New South Wales Redundancy Test Case standard established by the IRC in 1994.

46. The 1994 standard redundancy clause does feature an exemption for enterprises which employ fewer than 15 employees. The following serves as an appropriate example. Clause 39 – Redundancy of the Clerical and Administrative Employee (State) Consolidated Award states:

> Application
>
> (a) This clause shall apply in respect of full-time and part-time employees
>
> (b) This clause shall only apply to employers who employ 15 or more employees immediately prior to the termination of employment of employees.

47. Persons covered by awards that do not contain a redundancy clause revert to the *Employment Protection Act 1982* and *Employment Protection Regulation 2001*.

48. The IRC's approach to redundancy was reviewed in 1994. The continuation of the small business exemption was a key consideration.

49. In its 1994 Test Case Decision, the IRC Full Bench chose to maintain the existing exemption for enterprises with fewer than 15 employees. Their Honours did so noting the relative lack of financial resilience in small businesses. Further, the Bench stated:

> We note that this level of exception is contained in the Employment Protection Act and has been extensively followed elsewhere. In the circumstances…we determine to maintain the barrier in the same terms.[1]

50. Given that the issue of severance pay and specifically the small business exemption have been carefully and responsibly considered within the state jurisdiction in the past, we see no reason why the Commission cannot continue to oversee developments in these areas.

51. The New South Wales Government has full confidence in the ability of the Commission to sensibly make a determination in this regard.

[1] Re Clerks (State) Award and Other Awards NSW IRC 1987

Misuse of Corporations Power

52. The federal division of power to deal with industrial issues is mandated by the Commonwealth Constitution. The Commonwealth should not be permitted to take over areas that are currently covered by state law if it cannot provide convincing evidence that there are real problems with the state systems as they presently operate and that its proposed solution would be superior.

53. The current bill relies on the use of the corporations head of power contained within the Australian Constitution to extend the federal jurisdiction to encompass constitutional corporations.

54. A constitutional corporation is an incorporated entity that has sufficiently significant trading or financial activities to come within the constitutional meaning of 'corporation' such as a proprietary limited company but not, for example, a partnership or sole trader.

55. The 'reach' of the corporations power clearly does not extend to unincorporated entities such as sole traders and partnerships and their employees. There is some particular irony in this, as many of the small businesses in whose cause the Commonwealth is purportedly legislating are precisely the sort of unincorporated enterprises which would not be 'caught' by any legislation founded on the corporations power.

56. The bill has been introduced without consultation with the states and without due regard for its consequences. In view of the constitutional limits on unilaterally taking over the state industrial relations jurisdiction, it is strongly submitted that the Commonwealth Government engage in meaningful consultation with the states.

Conclusion

57. The *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004* proposes to reverse the effects of the Federal Redundancy Test Case decision handed down by a Full Bench of the AIRC in March 2004.

58. Of particular concern to the New South Wales Government is the intention of the Commonwealth to extend these legislative changes to the operation of the federal redundancy system to constitutional corporations operating within the state industrial relations system by exploiting the corporations head of power contained within the Australian Constitution.

59. The existing redundancy provisions in New South Wales have worked well and have been a longstanding feature in the New South Wales jurisdiction. Significantly, there has been little or no public or formal criticism of the way in which the jurisdiction operates.

60. The Commission has previously considered the issue of the small business exemption and made sensible and responsible determinations in this regard. The New South Wales Government can see no reason why the State Commission cannot continue to oversee developments in the area of redundancy and employment protection. We have full confidence in the ability of the Commission to sensibly make a determination in this regard.

61. Industrial matters affecting participants in the New South Wales industrial relations system should be matters to be settled by the participants, the State Commission and the New South Wales Government, despite the Commonwealth's current trend of interference.

62. We particularly note that the Commonwealth has (again) introduced legislation without conducting any form of consultation with the states.

63. This bill highlights the Commonwealth's lack of respect for state government industrial relations processes and the abilities and functions of state industrial tribunals.

64. The New South Wales Government strongly recommends that the Senate reject the *Workplace Relations (Small Business Employment Protection) Bill 2004*.