

Submission

to

Senate Employment, Workplace Relations and Education Legislation
Committee

Inquiry into the provisions of the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004

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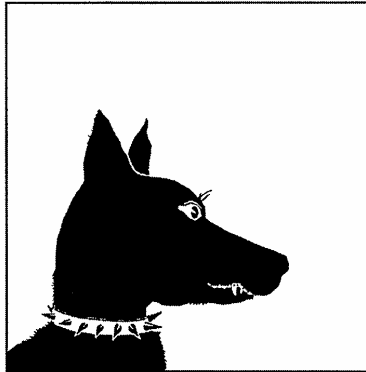
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Job Watch



The Employment Rights Watchdog

Submission to:

THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE

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

By Gabrielle Marchetti on behalf of Job Watch

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INTRODUCTION

Job Watch

Job Watch Inc is a community legal centre that specialises in employment law. Its core activities are:

- The provision of advice, information and referral to Victorian workers via its free and confidential telephone advisory service¹.
- A community education program that includes publications, information via the Internet, and talks aimed at workers, students and other organisations.
- A legal casework service to disadvantaged workers and workers experiencing abuses of human rights.
- Research and policy advice on employment and industrial law issues.
- Advocacy on behalf of those workers in greatest need and disadvantage.

Job Watch was established in 1980 and is the only service of its type operating in Victoria. The organisation is funded primarily by the Victorian State Government (the Department of State and Regional Development – Industrial Relations Victoria) and also receives funding from the Office of the Employment Advocate.

Job Watch's client base/constituency

Job Watch has a state-wide focus and services a broad range of Victorian workers. Each year we respond to approximately 19,000 telephone enquiries. We maintain a database record of our callers, from which it is possible to identify the following key characteristics:

- a large proportion of our callers are employed in a business with less than 20² employees;
- redundancy is one of the top five problem categories of enquiry by our callers;³
- over a quarter of callers' enquiries relate to unfair dismissal issues;⁴
- the majority of our callers are not members of unions;
- many of our callers are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, socio-economic status; or because of the potential for exploitation due to the nature of the employment arrangement.

¹The Job Watch advice service has 11 incoming phone lines, including a designated 1800 telephone number which prioritises calls from rural and remote areas of Victoria.

² Job Watch acknowledges that the *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004* (the Bill) differentiates between employers on the basis of whether they have fewer than 15 permanent employees (or casual employees who have been engaged on a regular and systematic basis for at least 12 months). For the purpose of this submission it should be noted that our database captures the size of the business in which our callers work according to different categories, two of which are "less than 5 employees" and "from 5 to 19 employees". Hence, Job Watch is able to comment on the experiences of callers who are employed in businesses with less than 20 employees, not those with specifically fewer than 15 employees. Nevertheless, we also note that many of the businesses which we would categorise as having fewer than 20 employees (but still 15 or more) are likely to fall within the ambit of the Bill, as Job Watch would ordinarily calculate short term casuals as forming part of the total number of a business' employees. In any event, during the 2003-04 financial year, 45.4% of our callers were employed in a business with less than 20 employees.

³ During the 2003-04 financial year, we received over 1300 telephone enquiries specifically related to redundancy.

⁴ Our database captures "redundancy" and "unfair dismissal" as separate problem categories.

Job Watch's submission in relation to the *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004* (the Bill)

Job Watch is strongly opposed to the passage of the Bill. Large numbers of Victorian workers will be adversely affected if a statutory exemption from severance pay provisions is introduced in relation to small businesses, particularly if the Bill is passed in its current format.⁵

Our objection to the proposed legislation is based on the following considerations:

1. It is unjust and unnecessary to exclude employees who work in small businesses from severance pay entitlements simply because of their employer's business size.
 - a. It cannot be in the best interests of Australian society to create industrial relations laws which, rather than promoting the values of equity and fairness for all, result in the entrenchment of an entire class of disadvantaged workers with limited rights.
 - b. The purpose of severance payments, as expounded in a number of decisions of the AIRC, is to compensate an employee for the loss of non-transferable credits (such as sick leave and long service leave) where the termination of employment occurs through no fault of the employee. All employees, regardless of business size, suffer losses upon retrenchment for which they ought to be compensated.⁶
 - c. Job Watch rejects any suggestion that there is a valid rationale for the exemption in 2005, such as to warrant legislative change, particularly as we consider the exemption to be drafted in unnecessarily narrow terms (both with respect to the number of employees required for the purpose of coming within the small business definition, being 15, and the exclusion of short-term casuals from any reference to "employees" when assessing the size of a business).
2. When the Full Bench of the Conciliation and Arbitration Commission in the 1984 TCR case decided that small businesses ought to be exempted from the requirement to make severance payments, it did so "*in the interests of uniformity with New South Wales and in the light of the material presented about the effect of taking into account previous service...*"⁷ That exemption was nevertheless still subject to further order of the Commission.⁸ Twenty years later, when the full Bench of the AIRC re-considered the issue in the

⁵ The case studies in the Appendix reflect the types of problems faced by small business employees who have contacted the Job Watch telephone advice service following their retrenchment. If the Bill is passed in its current format, employees in situations like these will not be entitled to any relief by way of severance pay.

⁶ The Full Bench of the AIRC found, in the 2004 test case decision, that "*The evidence establishes that the nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as suffered by persons employed by medium and larger businesses.*" *Redundancy Test Case – Statement*, Giudice J, Ross VP, Smith and Deegan CC, 26 March 2004 at paragraph 11.

⁷ TCR Supplementary decision, Print F7262, Moore J, Maddern J and Brown C, 14 December 1984, 9 IR 115 at 136-137.

⁸ *Ibid*, at 137.

2004 test case decision, it concluded that "...the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay."⁹ That is, having extensively considered the merits of all the arguments submitted regarding the ability of small businesses to meet severance pay requirements, the AIRC held that the small business exemption is no longer warranted. The AIRC's decision ought to be taken into account as a considered and substantiated decision.

3. The Bill does not manage to strike the necessary balance between the competing interests of employees and small business employers. Rather, the Bill appears to reflect a disproportionate preoccupation with the purported needs of small business, with a consequential detriment to employees.¹⁰
 - a. There is insufficient evidence to suggest that an obligation on small businesses (ie, businesses with fewer than 15 long-term employees) to make severance payments will adversely affect, to a significant degree, not only the individual business concerned but also, more generally, employment opportunities and economic prosperity in Australia. Yet these are the arguments being advanced in support of the Bill.
 - b. In his Second Reading of the Bill, Mr Andrews, Minister for Employment and Workplace Relations, claimed that "[a]n obligation on small businesses to make redundancy payments will result in a cost impost that is unaffordable to many small businesses. The end result will of course be a significant decline in job growth in the small business sector and likely small business insolvencies."¹¹ He does not, however, substantiate this assertion with any evidence. Further, in its submission to this Inquiry, the Department of Employment and Workplace Relations (DEWR) states that "[t]he imposition of redundancy pay on small businesses will severely retard opportunities for both economic growth and further job creation."¹² However, to the extent that DEWR provides any evidence in support of this proposition, it is either not extensive or constitutes evidence that was put before, and ultimately rejected by, the Full Bench of the AIRC in the 2004 test case.
 - c. We acknowledge that DEWR, in its submission, gives an outline of the reasons why small businesses may find it more difficult to cope with redundancy payments.¹³ We submit, however, that such reasons - ranging from claims that small businesses lack financial resilience because they tend to be undercapitalised, to claims that small businesses may be penalised by current tax laws if they build up

⁹ 2004 test case decision, Print PR032004 at paragraph 273.

¹⁰ In delivering his Second Reading Speech of the Bill, the Minister for Employment and Workplace Relations, Mr Andrews, made it clear that this Bill is concerned with the interests of small business as opposed to the interests of employees: "In introducing this Bill the government is demonstrating its ongoing commitment to the small business sector...", second last paragraph. The Federal Government's commitment to the small business sector is also evidenced by further bills that are currently being considered by the Federal Parliament, such as the *Workplace Relations Amendment (Fair Dismissal) Bill*. Commitment to the small business sector is not of itself an issue for Job Watch; rather, it is the adverse impact on employees which is of concern.

¹¹ *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004*, Second Reading Speech, paragraph 17.

¹² DEWR submission at paragraph 90.

¹³ DEWR submission, paragraphs 103 to 121; and Attachments A and B.

reserves to cover redundancy pay - are not compelling. This last point, in particular, highlights Job Watch's concern that the Bill's focus is misguided. Indeed, Job Watch would welcome a more thorough consultative process and consideration of possible alternatives, such as practical ways in which small businesses might be encouraged to meet their severance pay obligations so as to achieve a win-win scenario for employers and employees alike (for example, by requiring small businesses to build up reserves over time to cover severance pay without counting those amounts as profit for the purpose of tax liability). All businesses, regardless of their size, ought to be accountable for some form of severance pay, in the same way as they are obliged to comply with other minimum standards, including the requirement to pay out any accumulated annual leave and long service leave upon termination of employment, the requirement to meet the costs of workers' compensation insurance and the requirement to provide for parental leave. The safety net should not be lowered for employees, especially where it might be more appropriate to adopt alternative (statutory) ways of achieving the same outcome for small businesses (so as to alleviate the perceived considerable financial burdens on small businesses). To the extent that there is an issue of undercapitalisation¹⁴ and a difficulty in building up the financial reserves necessary to meet severance pay obligations because of limited access to borrowings¹⁵ then these issues are better addressed in ways other than by simply exempting small businesses from any requirement to make severance payments.

- d. The Senate Committee is urged to thoroughly and critically analyse the veracity of the sweeping generalisations that have to date been made by those in favour of the Bill about the unsustainable nature of the severance pay liability on small businesses.
4. It is not surprising that DEWR, in its submission to this Inquiry,¹⁶ reminds us that even in the absence of applicable award provisions it will nevertheless be possible for employees and employers to negotiate severance pay entitlements through a process of workplace bargaining. However, Job Watch submits that workplace negotiations are not likely to result in favourable outcomes for employees in situations where a workforce, which is already small in number, is comprised largely of workers who are in disadvantaged bargaining positions, whether the disadvantage is connected to their youth, sex, racial or ethnic origin, socio-economic status or to the nature of their employment.
 5. The Bill seeks to do more than simply overturn the 2004 test case decision in so far as it removed a pre-existing exemption for small businesses with fewer than 15 employees from the requirement to make severance payments and adopted the old severance payment scale to small businesses (with payments capped at 8 weeks for retrenched employees with more than four years' service). That is, the Bill is not merely concerned with re-introducing the same small business exemption which existed prior to 26 March 2004.

¹⁴ DEWR submission at paragraph 121.

¹⁵ Ibid at paragraph 116.

¹⁶ At paragraph 100.

- a. The Bill further narrows the scope of those employees who may be eligible for severance payments by excluding short-term casuals for the purpose of calculating the number of a business' employees.
- b. In addition, the Bill seeks to amend section 89A of the WR Act so as to (i) exclude severance pay by small business employers as an allowable award matter; and (ii) prevent the AIRC from making exceptional matters orders in relation to the severance pay obligations of small businesses.
- c. The Bill also seeks the introduction of a new provision in the WR Act, which would have the effect of negating any State award or law (including any Territory law) which imposes severance pay obligations on constitutional corporations with fewer than 15 employees (again, with the number of employees to be determined so as to exclude short-term casuals). Job Watch submits that such an attempt to prevent the flow-on effect from the 2004 test case decision to State systems is unjustified.
- d. The Bill proposes an amendment to section 170FA of the WR Act so as to deny the AIRC any power to make severance pay orders which would give effect to Article 12 of the Termination of Employment Convention. This is a curious proposal given that section 170FA in its terms does not, in any event, apply to small businesses with fewer than 15 employees. The presence of this proposed amendment in the Bill suggests that it is there for a purpose other than that nominated by the Minister when the Bill was introduced.

Conclusion

Job Watch recognises the need to support the small business sector but submits that the Bill manifestly fails to achieve the necessary balance between the interests of employees, who are not in sufficiently strong bargaining position to protect their interests, and the legitimate interests of small business. The Senate Committee is urged to reach the same conclusion in its report to be tabled on 14 March 2005.

APPENDIX

Case Studies from Job Watch's Telephone Advice Service

The following case studies represent a small cross section of calls received by the Job Watch Telephone Advice Service regarding redundancy issues in businesses with less than 20 employees. First initials are used in order to protect the anonymity of the callers.

Case Study 1

T, who does not speak fluent English, has been employed as a cleaner for more than 16 years. He is not sure whether he is a permanent or casual employee, or whether he has been receiving annual or sick leave. He has worked five hours a day, seven days a week and has been based at a bowling club that is going to be demolished. He has been told his employment has finished and has been paid last week's wages but nothing else.

Case Study 2

A is a supervisor in a small manufacturing business. Due to a downturn in business, his employer recently reduced his hours, first from full time hours to four days a week and then to two days per week. He verbally objected to this cut in hours but nevertheless worked the reduced hours. He has now been told that any severance payment he will receive will be calculated on the basis of his two days per week.

Case Study 3

B, aged 53, worked as a Pharmacy Assistant for over 19 years. The owner of the pharmacy restructured the business, cutting the positions from five to two full-time and two part-time, which the employees had to re-apply for. B did not get any of the positions (her boss told her privately because she was too old and too fat). She received a cheque for \$3,000, which included her annual leave. B believes she did not receive long service leave that was due, and she did not know whether she received any notice or severance pay. B has not been able to find any work in the two years since she was made redundant. *"I was in my mid-50s and planning to stay in work until I was 60. I wanted to finish renovating our house and bought a car 2 years earlier, which I was paying off. It made living very difficult on a day-to-day basis. Emotionally, it distressed me. I'm still being treated for nerves. You get to the point where you believe you as a person are redundant and can't find work again."*

Case Study 4

D, aged 49, worked as a machine operator for a paper manufacturing company for 23 years. The owner informed all the staff that the business was being sold and that they would be retrenched in one to two months' time. D worked out her notice period and upon termination she was paid out her annual leave and long service leave, but she received no severance pay. She has been looking for a new job for three months: *"I just did not think it was fair. I expected to get something for all the time I worked there."*

Case Study 5

C worked as a medical research assistant for 20 years for a small medical practice. The practice was restructured and C's job was made redundant. She received 4

weeks' severance pay as well as all her other entitlements like notice pay and long service leave, but she was unemployed for 3 months before she found another job.

Case Study 6

T, aged 40, has worked as a workshop manager for 17 years. His employer is moving the business to a different location and no longer requires the workshop. T and 3 other employees in the workshop section were given 4 weeks' notice of their positions being made redundant. On termination T received his annual leave, notice pay and long service leave entitlements but no severance pay. At 40, T believes that no one will re-employ him.