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EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE

**Reference: Workplace Relations Amendment (Small Business Employment Protec-
tion) Bill 2004**

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SENATE
EMPLOYMENT, WORKPLACE RELATIONS, AND
EDUCATION LEGISLATION COMMITTEE

Monday, 28 February 2005

Members: Senator Tierney (*Chair*), Senator Marshall (*Deputy Chair*), Senators Barnett, Johnston, Stott Despoja and Wong

Substitute members: Senator Murray for Senator Stott Despoja

Participating members: Senators Abetz, Bartlett, Boswell, Buckland, George Campbell, Carr, Chapman, Cherry, Colbeck, Jacinta Collins, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Fifield, Forshaw, Harradine, Hogg, Humphries, Hutchins, Knowles, Lightfoot, Ludwig, Lundy, Mackay, Mason, McGauran, Nettle, O'Brien, Payne, Robert Ray, Santoro, Sherry, Stephens, Watson and Webber

Senators in attendance: Senators Barnett, Crossin, Marshall, Murray and Tierney

Terms of reference for the inquiry:

Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

WITNESSES

BARKLAMB, Mr Scott Cameron, Manager, Workplace Relations, Australian Chamber of Commerce and Industry 28

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Committee met at 9.35 a.m.

ACTING CHAIR (Senator Marshall)—I declare open this public hearing of the inquiry into the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004. On 9 December 2004, the Senate referred the bill to the Senate Employment, Workplace Relations and Education Legislation Committee for inquiry. The committee is due to report on 14 March. This proposed amendment to the Workplace Relations Act 1996 is intended to maintain the exemption for small business from the requirement to make redundancy payments to employees. The effect of the amendment will be to overturn a decision of the Australian Industrial Relations Commission in 2004 in relation to redundancy pay obligations. Legislation is necessary because under the current system there is no review or appeal process available to reconsider the merits of the test case decision made by the full bench of the Australian Industrial Relations Commission.

I remind all witnesses that in giving evidence they are protected by parliamentary privilege. Parliamentary privilege gives special rights and immunities to senators and members and those who appear before committees of the parliament. Parliament must function without obstruction, and people must be able to give evidence to its committees without prejudice to themselves. Any act by any person which disadvantages a witness as a result of evidence given before the Senate or any of its committees is treated as a breach of privilege. I welcome observers to the public hearing.

[9.37 a.m.]

BISSETT, Ms Michelle Patricia, Industrial Officer, Australian Council of Trade Unions

BOWTELL, Ms Cath, Industrial Officer, Australian Council of Trade Unions

ACTING CHAIR—Welcome. The committee prefers to take evidence in public but we will consider any requests for all or part of evidence to be given in camera. The committee has before it submission No. 2. Are there any changes or additions that you wish to make?

Ms Bissett—We would like to make an alteration to paragraph 46 of the submission. The submission currently reads:

The ACTU is apposed to the passage of the Workplace Reactions Amendment (Small Business Employment Protection) Bill 2004.

It should, of course, read: 'The ACTU is opposed to the passage of the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004.'

ACTING CHAIR—I now invite you to make a brief opening statement before we begin our questions.

Ms Bissett—I refer members of the committee to the ACTU's written submissions on this matter. I rely on those written submissions in addition to the comments that I make now. It is the submission of the ACTU that the bill should be rejected on several grounds. Firstly, the bill seeks to override a decision of the commission that was made after lengthy, detailed submissions to the commission by employer associations, the ACTU, and state and federal governments. Secondly, the bill seeks to do more than just undo the decision of the commission made in 2004; it seeks to remove rights that existed prior to the commission making that decision. The bill, we say, is based on a flawed analysis of the ability of small business to make redundancy payments. Lastly, the bill fundamentally alters the power of the commission in the future to determine on merit grounds a range of matters related to redundancy.

This bill is not just about overturning the 2004 commission decision. In his speech during the second reading debate on the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004, on which this bill is based, the Minister for Employment and Workplace Relations stated that the bill would:

... amend the Workplace Relations Act 1996 to maintain the exemption for small business from redundancy pay by overturning the recent decision of the Australian Industrial Relations Commission.

The decision referred to by the minister is actually two decisions by the commission that were made in 2004. There was, firstly, the redundancy case—the first and primary decision that was made by the commission last year—and, secondly, the redundancy supplementary decision, which amended some of the aspects of the original decision and was handed down in July 2004. In our submission, the bill does not just overturn the 2004 decision that the commission made; it actually goes further. This bill creates an absolute exemption for employers of fewer than 15 employees from the requirement to make redundancy payments—an absolute exemption that did not exist for small business prior to the 2004 decisions of the commission. As such, this bill actually proposes to undo provisions that were inserted into

federal awards arising from the termination change and redundancy case in 1984 and it undoes redundancy pay as an allowable award matter for all employees, which of course was inserted into the legislation in 1996.

This bill removes from the commission the ability of the commission to make orders with respect to redundancy pay by small business as the commission may see fit, based on the evidence placed before the commission, an approach which has never been raised as problematic by any of the parties appearing before the committee today and which was certainly not raised as a substantive issue—or as an issue at all—in the hearings in 2003 leading up to the 2004 decision. The bill changes the accepted method of how you count 15 employees for determining whether a business is exempt from the payment of redundancy pay or not. Previously, casual employees were counted in the count of employees in a company. Under the legislation, that will be changed so that only casual employees who have continuous ongoing employment for more than 12 months are counted in the number of employees. Again, this is an issue that was not raised in the hearings before the Industrial Relations Commission leading up to the 2004 decision.

The bill affects the operation of state jurisdictions and limits their capacity to hear and determine matters associated with redundancy for small business in accordance with the developed laws in those states. What we say of this bill is that it actually goes a lot further than it purports to. It does not just take us back to how things were 12 months ago; it takes us further and determines to do things that were not subject to any of the hearings in the commission that were not part of the consideration of the commission in its 2004 decision. I notice that the ACCI, in their submission to this inquiry, say that this bill is okay because it just restores the status quo. We say that the status quo is not restored; it is actually a change in the way redundancies were handled for small business prior to the 2004 decision.

One of the critical issues that this bill raises is why the commission sought to remove the exemption that had previously existed for employers of fewer than 15 employees. In determining to remove the exemption that existed, the bench took into account a whole range of material that was put before it. It noted that the exemption for what I will just call ‘small businesses’—I mean employers of fewer than 15 employees—does not exist in South Australia or Tasmania and has never existed in South Australia or Tasmania. This has had no apparent ill effects in terms of the states’ economies, the number of small businesses that are in the states or the number of small businesses that have become insolvent in those states. So the lack of exemption for small business from making redundancy payments in South Australia appears to have no ill effect in that state or in Tasmania.

In industries and awards where the exemption had been removed—and there had been a process from 1984 where you could apply to remove the exemption on an award-by-award basis—the commission, in considering those applications, consistently rejected the notion that there is a link between the size of a business and capacity to pay. The commission also found that there appeared to be no discernible ill effect of the removal of the small business exemption in those industries. They were still moving along and going through the structural changes they would have gone through whether or not the exemption was there. The bench also noted that 70 per cent of small businesses are profitable. It is not just that they are profitable but that the percentage that is profitable is not substantially different, particularly

from medium sized businesses. It is a bit different from larger businesses but not substantially different from medium sized businesses.

Some of the submissions that are before this committee say that profitability should not be confused with the ability to make redundancy pay. We agree with that—profitability should not be confused with that—but neither should the size of the business be confused with the ability to make redundancy payments. It would be wrong to assume that the commission used any single factor or took into account only one matter in determining to remove the exemption. It is our view—and I was part of the ACTU advocacy team on that particular case—that the commission took into account and properly considered the wealth of material that was put before it by all the parties. That the commission took such a wide range of matters into account about the operation of small businesses and their financial circumstances is evidenced by their decision to actually award a lower level of severance pay or redundancy pay to employees of small business. Also, in the hearing for the supplementary decision, the commission, taking into account the submissions that were made about the effect of the primary decision on small business, determined that only the prospective service of employees in small business should be taken into account.

That leaves us with how you protect any business that does not have the ability to make redundancy payments. We agree that, where employers do not have the capacity to make redundancy payments, there must be a mechanism whereby they can seek relief from that obligation, and that mechanism, we say, is appropriately through the Industrial Relations Commission, which is setting those industrial standards. Incapacity to pay provisions have operated since 1984 with respect to redundancy pay and have been used by employers successfully over the years. Not a lot of applications have been made, but applications have been made and they have been resolved. It is proper that applications under capacity to pay should require the employer to show that they do not have the capacity to pay. The employer saying, ‘We don’t have the capacity,’ is not proof that they do not have the capacity, and there must be a requirement that they show it.

In passing, we note that in the 1984 redundancy decision, the first decision that was made federally, the employers complained that capacity to pay provisions did not help them. But we note that since 1984 they have done little to try to address what they perceive to be the problems in the capacity to pay provisions. We also note that the commission has over the last few years streamlined quite substantially the operation of capacity to pay provisions in an attempt to assist small business in particular in dealing with applications, particularly as they relate to the national wage case, but the streamlined provisions are available for redundancy applications as well.

CHAIR—I am sorry to interrupt, but we have questions.

Ms Bissett—That is about where I was going to end.

CHAIR—I should just say that Senator Crossin will be participating by telephone. Senator Marshall, would you start the questions.

Senator MARSHALL—I want to talk about the capacity to pay issue a little bit more. You indicated in your comments earlier that employer organisations have done little to raise the issue that they say is there relating to their ability to deal with the capacity to pay provisions. I

note that in the ACCI submission they actually talk about that in some detail. What you are saying is that that issue has never actually been raised.

Ms Bissett—Beyond the small amendment that ACCI made successfully to the incapacity to pay provisions, it was not raised at all in terms of it being a problem in the hearings before the commission.

Senator MARSHALL—What about the ACTU generally? Has it been raised with you as an issue that the employer organisations may seek to negotiate through to get an agreed position on?

Ms Bissett—It was not raised, again beyond the very small amendment that the ACCI made to the redundancy provisions, in any of the discussions that we had with them over the six-month period prior to the main hearings in the redundancy matter. I am aware that it has been raised as part of the national wage case as well and the modifications that have been made to processes in the commission to try and make it easier for employers by the commission doing things like sitting in the countryside, sitting out of hours and so on. Those changes were made following submissions made by the parties in national wage hearings, but not as a substantive matter, no.

Senator MARSHALL—The hearings before the commission went for how long?

Ms Bissett—The hearings before the commission went for over a year. It started obviously with some preliminary timetabling but there were 16 days of formal hearings of the commission spread over a 3½-month period, if memory serves me correctly; it was a very long time. The commission was willing to hear all parties and actually left the determination of the number of days required up to the parties to sort out. So there was no limitation imposed on the parties in terms of how much time they could take and how many witnesses they were allowed to call or cross-examine. The commission gave all parties the absolute opportunity to determine the matter. As I mentioned, there was a supplementary decision that involved further hearings before the commission and substantial written submissions by all of the parties where a number of issues were reventilated and dealt with again by the commission.

Senator MARSHALL—So there is no chance that all the evidence that was required by the commission to make the decision that they did was not available to the commission? No-one would be able to complain that there was evidence that they wanted to put before the commission but they were unable to do so, because there was no limitation on time.

Ms Bissett—No, no-one could make that complaint. Our experience with the commission is that when new, later evidence becomes available they are more often than not quite prepared to take that evidence to make sure that they have the most up-to-date information on which to base their decision. The commission also had a period of about three months between the end of the hearings and the release of their decision in which they considered all of the material that was put before them.

Ms Bowtell—I can add to that that I think this case is somewhat different to others. I note that the department's submission says that the commission did not understand some of the evidence before it in reaching its decision. Because we had this process of the bench reconvening to hear arguments again after it had produced its written decision, there was an

opportunity for parties to come back and say, ‘Your written decision indicates you did not understand the evidence,’ and to put that to the bench again. So in fact people have had two bites of the cherry where normally they would only get one chance to explain their evidence to the commission. They probably have a better opportunity in these proceedings than they normally would.

Senator MARSHALL—Did anyone actually take up the opportunity to run the argument with the commission that they had not understood the evidence that was before them?

Ms Bissett—No, I do not recall that anyone put that submission.

Senator MARSHALL—I notice in ACCI’s submission to us that the bulk of it actually comprises an extract of their submission to the commission. A lot of it goes to rebutting your submission—and I thank you for not including your full submission to the commission in your submission to us; it saved us quite a bit of time. It occurs to me, when looking at that, that all the arguments were adequately put before the full bench of the AIRC over 16-plus days of hearings over a 12-month period.

Ms Bissett—Yes.

Senator MARSHALL—The commission—which, I dare say, probably has more experience in industrial relations than this committee, with due respect to the senators here—came down with a decision which was based on all the evidence put before it.

Ms Bissett—Yes, that is correct.

Senator MARSHALL—And this legislation simply seeks to overturn that decision because elements do not like it.

Ms Bissett—Yes, that is right.

Senator MARSHALL—What we are being asked to do here, in a single morning, is to consider the evidence that the full bench of the Australian Industrial Relations Commission took over 12 months to consider, in 16 days of hearings, plus supplementary hearings after the decision was taken.

Ms Bissett—Yes, that is correct.

CHAIR—Looking at the impact of this on small business—and I hear what Senator Marshall just said; we are both, of course, in furious agreement on this matter!—it seems to me that a small business employing a few people will suddenly have this redundancy matter that they have to meet. Isn’t the AiG right when it says that this will strike a body blow to small business? It is pointed out in the AiG submission that, in terms of costs, cash flow, profitability and viability, it could have a major effect on a lot of businesses, which could then flow on to employment. Explain to me where the AiG is wrong in that assessment of the impact of this measure on small business.

Ms Bissett—Part of the problem that I have in assessing the claims of ACCI, I think it was, with respect to the effect on small business is that they say that, but all of the other evidence that was placed before the commission showed differently. They brought no evidence to sustain the position that they put. The evidence that was before the commission was that, in redundancy circumstances, small businesses are not necessarily going to the wall at the time

they are making people redundant; that small businesses make people redundant for a whole range of reasons. It could be that the business is closing down so that the owners can realise a profit and retire. That is good for them; they have worked hard and they need to retire. We do not have a problem with that. But they are not broke. It is not that they have no money and they cannot afford to make the redundancy payments. So that evidence was before the commission.

The evidence before the commission also was that small businesses, even when they are downsizing, are still profitable. Seventy per cent of small businesses when they are downsizing or reducing staff numbers are making a profit. So we are not necessarily in a circumstance where, every time a business is downsizing, it is because it is having substantial financial woes. We say that the capacity to pay provisions actually give those businesses an out. But even if you say, 'That's not good enough,' what this bill does is remove any ability for anyone working in small business to receive redundancy payments through the commission system—an ability that was there prior to the 2004 decision that changed the small business arrangements. This bill actually takes us further back than that. So even if you accept the ACCI arguments—and we do not accept them, and the commission did not accept them—this bill does not just undo that aspect of the commission's decision; it says that the commission can never make a decision about redundancy for small business employees.

CHAIR—I want to come back to the incapacity to pay provision in a minute, but I will just challenge the logic of what you are saying. You are saying there was no evidence put before the commission. But surely it is manifest logic that it is going to affect the costs and perhaps the viability of businesses. You did mention a number of cases in your answer where it would not necessarily affect the viability of a business. But surely there must be, with the number of small businesses in this country, a massive number of other cases where it would have an effect that are not covered by the examples that you gave. They are struggling small businesses, just keeping their heads above water, then this matter hits them and makes them unviable. Surely there must be a lot of businesses out there like that.

Ms Bissett—There are two things that I would say to that. Firstly, the commission did recognise that small business is different by awarding a lower level of redundancy pay to workers in small business. Secondly, in terms of the operation of the commission, my logic and your logic, with respect, Senator, may be quite different. The commission needs to make its decision on the basis of material that is placed before it and not on a perceived logic that may not be shared by all of the members of the commission. The commission must make a decision based on the material that is placed before it. The material that was placed before the commission showed that a proportion of small business are making profits and that the profitability of small business, even when they are decreasing employment, can still exist. The commission needs to take into account the evidence that is given.

CHAIR—I appreciate that, but when that evidence was given it was looking to a situation in the future—a new measure was going to come in. You could not really predict the impact across a wide range of small businesses and a range of varying circumstances from that point in time. So I am a bit curious as to what sort of evidence they could have produced to prove the point when it was looking at something into the future. I think you really have to come back to logic. Isn't this going to affect a whole range of businesses for the reasons I

mentioned—costs, cash flow, profitability and viability? It will not affect every small business but a large number.

Ms Bissett—The commission did have material before it, though, with respect to South Australia and business operations in South Australia. There was no evidence put before the commission from the seven industries where the small business exemption had already been removed from awards. No material was put that showed that those industries were any worse off or were having great problems. So it did have some material before it to relate to post-exemption behaviours and outcomes.

CHAIR—I want to turn to the incapacity provision which you are putting up as a safety net for this situation. I would like you to comment on evidence from the National Farmers Federation, which said that the incapacity to pay is neither a practical nor a viable solution to the problems that the commission's decision has created for small business. The NFF went as far as to claim that current incapacity to pay procedures effectively put the provision beyond the reach of small businesses. Would you like to comment on these claims by the NFF?

Ms Bissett—My understanding is that in the last few years at least there has been one claim by a member of the NFF—my assumption is that they were a farmer—under the incapacity to pay provisions with respect to the national wage case. That employer withdrew their application very early on in the process. My understanding is that after some work had been done with the employer to assist them in getting material to the commission they decided not to proceed with their application.

Very few applications under the incapacity to pay provisions are processed. The NFF certainly say that they are not workable—and they have been saying that for quite some time—but there is no evidence that they have then attempted to do anything remedial to overcome those problems. As I said, in the redundancy case they made no application to change the incapacity to pay provisions to make them easier to use—whatever they might perceive the term 'easier' to be. I think that the lack of applications under incapacity to pay is evidence of no more than a lack of applications. The lack of evidence cannot be taken as evidence of something else.

Senator MURRAY—Ms Bissett, you would know that with respect to Queensland matters Premier Beattie is pretty one-eyed. He thinks Queensland is the best, and I suppose that is a natural attitude. But in recent times he has consistently been saying that the Queensland industrial relations system and its various institutions are the best in the country. The Queensland state termination and redundancy test case decision was different to the AIRC's view. Of course, any parliamentary committee examining the government's proposals is affected by a circumstance where the industrial relations tribunals are of a differing opinion on the matter. What is your view about the different opinion of the Queensland IRC?

Ms Bissett—One of the interesting things about redundancy matters is that there has never been a single view across the federal tribunal and the state tribunals. It is one of those matters where you do not regularly get the federal commission making a decision and the state commissions then effectively picking up and flowing on that decision. The pathways are very different. Each of the states has quite different redundancy provisions. As I said, South Australia has no exemption; New South Wales has a much higher level of payment; and

Queensland has a higher level of payment for some, but it is very strong in its view on what should happen to small business. On that, we say the state tribunals have developed solutions that they believe are appropriate in their jurisdictions.

Senator MURRAY—But the Queensland solution is an exemption.

Ms Bissett—Yes, that is the Queensland view. The South Australian view is that there should be no exemption.

Senator MURRAY—What that means is that, if this legislation were to pass, it would be consistent with Queensland and inconsistent with South Australia. That is correct, isn't it?

Ms Bissett—Yes.

Senator MURRAY—But you can see the difficulty that throws up for us—if one tribunal in a Labor state, supported by the Premier of that state, has exemptions and another tribunal in another Labor state does not?

Ms Bissett—Yes.

Senator MURRAY—How do you explain that to us? How are we to deal with that? You are not critical of the Queensland tribunal, and that is what is behind my question. I did not hear you answer and say, 'They got it all wrong.'

Ms Bissett—With respect to small business, my view is that they did get it wrong. We believe the evidence shows that small business can deal with the removal of the exemption and the implementation of incapacity to pay provisions. As I said, redundancy matters seem to be determined on a state-by-state basis. I do not think it is appropriate for us to cherry-pick the best out of the state systems. If we did that, what the ACTU would have presented in terms of the claim made that led to the 2004 decision would have been quite different to the claim that we did lead. New South Wales, for example, has a substantially better payment process, but we do not go to New South Wales and say, 'Why aren't you complaining about the federal system because you didn't get the payment that is available in New South Wales?'

Senator MURRAY—But doesn't New South Wales also have an exemption?

Ms Bissett—Yes, it does have an exemption for small business.

CHAIR—And Western Australia?

Ms Bissett—Yes, Western Australia does.

CHAIR—It sounds like a good case for a national system of industrial relations. They are all over the place, aren't they?

Ms Bowtell—Following on from the reconsideration by the federal commission, if this bill were not in play you may well have seen a revisitation of those issues in some of the jurisdictions. An application had been made in Queensland to come back and look at the small business exemption, and you would expect that to have been done in the other states where it applied as well. So we may have ended up with something uniform or we may not have ended up with something uniform if this bill had not been introduced. But the capacity to look at a national economy and try to assess the impact across the nation is unique to the AIRC, and we say they got it right. We would have supported our affiliates in the states seeking then to reopen the issue before the state tribunals. If we did not get the same outcome, that would

have created a problem. But we would have supported them to reopen that and try to get the small business exemption lifted, based on the equity issue, first of all, that the size of your employer should not make a difference, based on the issues around employers being able to manipulate the size of employer to avoid obligations—which is something we pick up on in our submission and I notice some of the other submitters have also picked up on that—and based on the economic evidence that in those jurisdictions without an exemption there are no grounds to believe that the existence of redundancy pay has led to greater levels of insolvency or other problems for employers with fewer than 15 employees. So we would have supported our affiliates in those states seeking to get the exemptions lifted in those test cases.

Senator MURRAY—Has the ACTU argued in any case for an automatic exemption in particular circumstances? For instance, if an employer's tax return for the last financial year showed that they were not profitable, that there was no taxable profit, that could be an automatic exemption mechanism. The prime argument is incapable of being assessed, because the incapacity to pay argument cannot be proven one way or another when you are talking about 1.6 million small businesses. How are you ever going to work it out? Surely you need automatic instances of whether you are in or out. You do not want everybody trying to apply in those circumstances. If you were to deal with the incapacity to pay argument, the ability to generate a profit is surely the first step. Isn't that a better route for you to go down than the idea of individual applications?

Ms Bissett—Certainly the ACTU would be prepared to consider any proposals along those lines. No proposals have been put to us.

Senator MURRAY—But you were arguing the test case. Surely there is an issue in which cases automatic exemptions would apply and in which cases they would not.

Ms Bissett—Our *prima facie* position in the submissions made was that the first assumption should be that you are in, that you do make redundancy payments. No proposals were put to us for consideration or to the commission for consideration by the ACCI, the NFF, the Commonwealth or the Australian Industry Group—and I think they were the key players in the hearings. There was no proposition from any of them that said: 'Why don't we see if we can find the cut-off point? Why don't we see if we can identify those who should not be *prima facie* in and should stay outside the system?'

Senator MURRAY—It is my reading of the evidence put to us at this inquiry that incapacity to pay is the central proposition put by the employer groups.

Ms Bissett—In the hearings in the commission incapacity to pay was not a central issue for the employers. They—

Senator MURRAY—But in these submissions, is that your impression?

Ms Bissett—Yes, it would appear that in these submissions the issue for them is in part the incapacity to pay provisions.

Ms Bowtell—The problem that they have, in bowling up now and saying, 'Incapacity to pay doesn't work; therefore you've got to have the exemption,' is that what should be said is, 'Let's have a *prima facie* position that it's not employer size that determines whether you're in or out. We have a *prima facie* position that you're in, but if there are problems with incapacity

to pay, let's fix that up,' rather than saying, 'Incapacity to pay doesn't work.' We do not necessarily accept that is the case. We say that has never been argued in any full way. But if it does not work, let us see whether we can make that work, and that could apply to a business of any size. That is a much fairer way of assessing whether you are in or out. It removes the capacity for the creation of loopholes. It removes the capacity for people to shift around this arbitrary fixed point of 15.

I think the SDA submission puts forward the proposal that someone might get rid of their short-term employees first to get them down to a figure of 14, and then suddenly their long-term employees are not entitled to any payment. You should have something that is structured around the real issue that you want to get to, which is whether they can afford to make the payment. In a very large corporate failure there might be hundreds and hundreds of employees affected and the employer may be unable to pay. As Michelle indicated, with things like a sale to realise profit, there is absolutely no reason why that employer should not pay retrenchment pay to employees while keeping their holiday house, their smart cars and all the rest of it. It is a fairly fundamental principle, I think, and that is where we come from as a starting point. But if there is evidence about incapacity to pay, put it on the table and we will deal with it. We are more than happy to do that.

CHAIR—Senator Crossin, do you have any questions?

Senator CROSSIN—I have a couple of questions. With the current opting out provisions, which is the regime we have now, where employers can obtain exemptions, what have you witnessed as being some of the problems with the current system?

Ms Bissett—Senator, are you referring to the ability of employers under the current system to apply under the incapacity to pay provisions?

Senator CROSSIN—Yes. In other words, employers, I assume, are also arguing that the system is not working. Have you seen evidence that that is the case?

Ms Bissett—The evidence that we have seen on this has been applications that have been made to the commission under the capacity to pay provisions in redundancy. There have not been a lot of those submissions, but in the decisions of the commission, where they have been determined, what is evident is that the employers and the unions respondent to the award have been able to sit down and work through the majority of the issues associated with their capacity to pay, with normally one or two outstanding issues that they have then taken to the commission for resolution. So the experience that we have had with the capacity to pay provisions is that, where application is made, it has been worked through and it appears to have been worked through successfully. It is not necessarily the case that the employees received the total redundancy payment or that they received the total redundancy payment straightaway. There have been a range of innovative solutions from the commission to try to resolve the disagreement between the union and the employer over their capacity to pay.

Ms Bowtell—I think also that the solution that the commission found for the NFF during the national wage case—to get the exemption for farmers who had qualified for drought relief—was an example of the commission being able to do exactly what Senator Murray asked about. The commission said, 'Here is a category of employers who have already satisfied a test of business difficulty so we will find a streamlined way for those employers to

mount their argument in relation to their capacity to, in this case, pay the wage increases.’ This could also apply in the case of redundancy and there could well be other situations where you could say that it is not sensible that people have to jump the bureaucratic hurdles in a number of forums where there are similar hurdles.

I am not sure that Senator Murray’s idea about filing a negative tax return is necessarily the best one, as there may well be other reasons that people display losses on their tax returns that do not have to do with their capacities to make redundancy payments, but the ACTU is more than happy to look at those kinds of things that might make it easier. But when the commission takes the approach of saying, ‘Yes, we do have a group of employers who everybody recognises are potentially drought affected and therefore may be having business difficulties: we can find a streamlined process for those employers,’ that is exactly the sort of thing it can do when parties make application to it.

Senator CROSSIN—The NFF is arguing that the current system is onerous and puts a stress on their businesses. Have you found that that is the case, or have you got evidence to offer to support a belief that the current system for applying for exemptions is not onerous?

Ms Bissett—We would say that there are too few applications for us to be able to make that sort of assessment. There is a lack of evidence that the current system is onerous. I think that is all you can say about how onerous it may or may not be. There is a lack of evidence that it is, but that is about all.

Senator CROSSIN—Is that evidence in itself—the fact that perhaps employers do not actually make the applications?

Ms Bissett—I think it is difficult to draw that conclusion from the lack of applications. It may be just as safe to conclude that the lack of applications shows that most employers do have the capacity to pay.

Senator CROSSIN—In the ACCI submission they claim that the redundancy case decision is contrary to the public interest, and they put forward a view that it significantly errs in its conclusions. You have read their submission. What response have you got to those claims?

Ms Bissett—In response to that, we say that the 16 days of hearings and the mountain of paperwork put to the commission—resulting from the ability of all the parties to make their primary submissions, to reply to everyone else’s submissions, to put in, following evidence, further written submissions that dealt with the evidence before the commission—gave all the parties an absolutely adequate opportunity to deal with these substantial issues. That there were aspects of the decision that the ACCI did not agree with does not make it a bad decision. There were aspects of the decision that the ACTU was not overly happy with, but that does not make it a bad or wrong decision.

Senator BARNETT—At point 49 in your submission, in the concluding, second last paragraph, you say it is inappropriate to use legislation to override a decision of the AIRC just because the government disagrees with the decision. I want to put to you that that is a fundamentally flawed conclusion and in fact that is exactly the role of an Australian government and of any government—to make law, to change law, and to amend law as they see fit. This policy was in fact put before the Australian people last year and the Howard

government was given an election winning mandate, so there is even a further imperative to proceed along the lines that the government is actually proceeding along. I just throw that up for you to think about and respond to in a minute.

The second point is that there seems to be a fundamental misunderstanding of history: you actually say that the bill changes the law fundamentally, whereas, in the first line of its second reading speech, the government says that the bill proposes to amend the law ‘to maintain the exemption for small business from redundancy pay’. In part 1, point 2 of the ACCI submission it says:

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

So we have two diametrically opposed positions: you say there is a fundamental change; the government says it is maintaining something that, but for the AIRC decision, would continue.

The third point I want to put to you is that you had four states, I understand, involved in participating in the AIRC test case. None of them argued the arguments you are arguing today. In fact, two of them—Queensland and Western Australia—specifically opposed the removal of the exemption. Then there is Senator Murray’s point about Queensland’s Industrial Relations Commission: that the decision was made unanimously—was it last year?—and it was not a majority decision but a unanimous decision which argued and decided that the redundancy pay exemption should remain. Do you want to tackle some of those points?

Ms Bissett—Certainly. I will go to the second point first—that is, the question of what this bill does. As well as exempting small businesses from the requirement to pay redundancy pay, it also makes redundancy pay for small business a non-allowable matter. So it makes it a matter on which the commission cannot make any decision. The commission cannot deal with it as an industrial dispute. That is not the situation that existed prior to the redundancy case decision in 2004. Prior to the redundancy case decision in 2004, the standard redundancy provisions provided that, subject to an order of the commission, these redundancy provisions do not apply to businesses employing fewer than 15 employees. It was still subject to an order of the commission. The commission had the capacity—

Senator BARNETT—So that is the main difference, from your perspective—

Ms Bissett—Yes.

Senator BARNETT—that it was subject to an order of the commission?

Ms Bissett—It was an allowable matter, certainly. It was subject to an order of the commission and, under section 170FA, the commission had the power to consider these matters—and make an order as well, if it saw fit. This bill amends section 89A, and it amends section 170FA to things that were not there. In that respect, it is not the status quo, we say.

Senator BARNETT—I appreciate your response.

Ms Bissett—With respect to the role of the parliament in dealing with these matters, we accept the parliamentary role—and I am sorry if our submission suggests otherwise; we do not suggest that the parliament does not have a role; we accept that. What we say is that the parliament also passed the legislation. The parliament owns the law that creates the Industrial

Relations Commission and needs to be careful in performing its parliamentary business in overturning decisions that are made by that tribunal that it has set up.

Senator BARNETT—I am not disagreeing that we should not be careful.

Senator MARSHALL—Did the Commonwealth made a submission to the commission in the test case?

Ms Bissett—Yes, they did.

Senator BARNETT—Thank you for that intervention, Senator Marshall. That assists the objectives, I think. Do you want to tackle the third question?

Ms Bissett—With respect to the states, four states did make submissions. With respect to the small business exemption, two of them opposed the removal of the exemption and two of them were silent on it.

Senator BARNETT—That is correct.

Ms Bissett—The commission must make its decision on the basis of all of the material put before it, and I am not quite sure why Queensland's submission all of a sudden takes on this mammoth level of importance—that somehow or other because the states say something should happen that is how things should happen. We might get some joy out of that if that were the way the system worked, but that is not the way the system works.

Senator BARNETT—I put it to you that it is the government that must take into account all of the relevant factors and you have got four states, two of which were silent, as you said, and two that opposed it. Then you have got this Queensland decision. Surely we must take all of that into account when we are making our decisions. You just want to accept the decision of the AIRC as golden and without disrepute.

Ms Bissett—I do not suggest that the AIRC always get it all right. As I said, there are aspects of the decision that we disagree with, I am sure there are aspects of the decision that the states may well disagree with and there are aspects that the employer associations disagree with. It becomes a question of looking at the totality of the evidence.

Senator BARNETT—Thank you for your response.

Ms Bowtell—Just to be complete on the issue of—

CHAIR—We are way out of time. You will need to be brief.

Ms Bowtell—In relation to the status quo, the issues of the counting of employees, there are other changes where the bill goes further than simply restoring things to the pre-2004 position. You would have, potentially, an employer of many more than 15 employees now exempt because of some of the definitional changes that are included in the bill that were not part of the previous test case standard included in awards of the federal commission. I say that for the sake of completeness. Those details are in our submission, and a number of the other submissions pick up that issue as well.

CHAIR—I thank the witnesses for appearing.

[10.33 a.m.]

WAWN, Mrs Denita Anne, Policy Manager and Industrial Relations Advocate, National Farmers' Federation

CHAIR—Welcome. The committee has before it submission No. 1. Are there any changes or additions?

Mrs Wawn—No, there are not.

CHAIR—The committee prefers to take evidence in public but will consider requests for any evidence or part of evidence to be given in camera. I now invite you to make a brief opening statement and then we will go to questions.

Mrs Wawn—The National Farmers' Federation appeared in the redundancy test case as an intervener. Prior to the decision, agricultural awards had an automatic exemption from small business payment of redundancy. There was no need to actually make an application to the commission; it was an automatic exemption. Concurrent with the redundancy test case were the final steps in the NFF incapacity to pay case which has been referred to earlier with questions to the ACTU. The National Farmers' Federation final submission on the redundancy test case included an outline of the problems inherent in the incapacity to pay cases and the particular problems NFF have had in the most recent NFF case.

The submission we have before you predominantly focuses on claims of incapacity to pay and hence we would like to outline very briefly some of the inherent problems we faced with the most recent incapacity case. This should also rectify some of the misconceptions put forward by the ACTU in their evidence. The NFF has a 20-year history of making claims for economic incapacity. Usually those claims have been associated with drought conditions and have sought the freezing of national wage cases. All of those industry wide claims have been totally and utterly unsuccessful. Hence, when we hit the most recent drought we decided to change tack and make a different application before the commission seeking a specific type of economic incapacity to pay case. That related to farmers receiving drought assistance through exceptional circumstance relief payments.

The argument was put to the commission that if a farmer was in receipt of exceptional circumstance relief payments they should automatically have a freeze for a period of 12 months on increases in the national wage, as a consequence of their economic incapacity. This was based on the fundamental premise that the Commonwealth had already acknowledged that the farmer's financial conditions were so dire that they actually had to get what were effectively social security payments. This was automatic evidence of incapacity to pay. The position put by the NFF at the time was that we wanted to maintain as much employment in the bush as possible. We discovered that 100,000 jobs were lost due to drought.

Senator BARNETT—How many was that?

Mrs Wawn—One hundred thousand jobs were lost in the drought, which is around about a quarter of the work force in agriculture. Only 30,000 of those have returned to date. The problem now is that we have shortages because everyone has gone to the city—but I am digressing. In the case of economic incapacity through exceptional circumstance relief

payments, the commission felt that they did not want to change the principles in a generic sense and that we would need to make a claim under the specific pastoral industry award, which we did about four months later.

The commission held in that case that instead of incapacity automatically applying to those on exceptional circumstance relief payments there was simply a prima facie case that incapacity applied. The commission said that it was prima facie evidence but to establish incapacity the farmer still had to supply three years of financial records to the commission and to the union for consideration, and the union had the right to object to the claim by that person in receipt of exceptional circumstance relief payments.

As a consequence, we used two applicants in the first instance as our test, so to speak, of how the system would work. In one instance, the farmer employed one employee; in the other instance, the farmer employed two employees. None of those employees were union members. When the union took particular interest in looking at their financial records in some detail—and we note that they are private financial records; the employer certainly was not a public company—the employer felt that was inappropriate and decided to withdraw their application after the first hearing. This was because they did not want union focus and involvement in their business.

As a consequence of that, our members—particularly in New South Wales, where the bulk of recipients of exceptional circumstance relief payments were located—made the decision that they would not put in applications. This was because our members did not think that in principle it was appropriate that the union had the right to look at their financial records and the right to object to their claim when the farmer had already gone through the very tedious process of getting the relief payment in the first instance and when they did not have any union members on their property. Therefore, we have not had any claims since. We would submit that as a consequence of union involvement where there are no union members on site the incapacity claims are not filed. The applicants simply do not want union involvement. They are certainly happy for the commission to look at their financial records and they are happy to provide evidence that they are in difficulty, but they do not think it is appropriate for the union to look at that when there are no union members on site. That is the reason there have been only two applications and why both were withdrawn.

So we say the incapacity to pay case is simply too onerous and too complex. Even in the situation where farmers were in drought and had been acknowledged by the government as qualifying for exceptional circumstance relief payments, they still could not get automatic exemption for the freezing of wages. We think that is inherently wrong. As a consequence, when the redundancy test case relied so heavily on the small business capacity to use the economic incapacity to pay claim, we were extraordinarily frustrated that they were relying so heavily on that particular provision when we had put to the commission on numerous occasions that that is simply unworkable. I hope that gives you an overview of the difficulties we have with the incapacity to pay claim and hence explains why we say that you cannot rely on it to support small business and why we support the bill. I am sorry that took a little longer than anticipated, but I was very conscious of the fact that we needed to set the record straight.

Senator MARSHALL—It never ceases to amaze me how employer organisations can always steer every problem back to being the union's fault. I guess your submission to us is

that, because unions exist and are parties to awards, somehow that has stopped employers utilising the processes established by the commission. I find that rather difficult to accept, to be honest. What evidence do you plan to put before this committee to back up that claim that people withdrew from these cases based on the union being involved in the process?

Mrs Wawn—It was on transcript, and I am more than happy to provide the transcript on that basis.

Senator MARSHALL—I would like you to do that.

Mrs Wawn—They were submissions put by me, as the industrial advocate, on behalf of those two employers. It was not from the employers directly. But I met with the employers on their properties and had significant discussions with them, and the point was very clearly made by them that they did not want to get involved because of the structure the commission had put in place.

Senator MARSHALL—So they then did not get the exemption that they were looking for?

Mrs Wawn—That is correct.

Senator MARSHALL—Are they out of business now?

Mrs Wawn—No. They withdrew hours from their employees. I think one employee lost his job and the second one was on reduced hours—from full time to about six hours a week—until such time as the drought improved. These claims both came in prior to the introduction of the redundancy test case standard, which was introduced in the pastoral industry award as a consequence of the case. So at that particular time they did not need to pay redundancy if it did occur.

Senator MARSHALL—I thought you indicated that part of the claim was also to avoid the flow-on from the minimum wage case.

Mrs Wawn—The incapacity to pay claim from the NFF was a flow-on from the national wage case. We have utilised the difficulties we have had in that case to highlight the difficulties that would also be inherent if the same situation arose with the redundancy provisions.

Senator MARSHALL—In the test case, did you make any specific application to try to amend the incapacity to pay provisions?

Mrs Wawn—No, we did not, because it was being run concurrently with our case on incapacity to pay.

Senator MARSHALL—For the minimum wage flow-on?

Mrs Wawn—That is right.

Senator MARSHALL—Why wouldn't you raise it in this? You have come back now saying that it is all about incapacity to pay. Again, I probably should not say what I am thinking, but it seems a little convenient to me that it was not actually raised in the 16 days of hearings over the 12 months but seems to have appeared as a major issue at the end of the day when you are unhappy with the decision.

Mrs Wawn—I disagree with you. We had a claim before the commission concurrently with the redundancy test case where we were going through a process. As a party to the commission, we had to give that process due credence in terms of going through that particular implementation stage. Near the end of the redundancy test case we also withdrew the two applications on the wage case claim. Hence, our final submission to the redundancy test case, because that was when we had our information that the new system—the supposedly simplified system that the commission put in place for farmers—did not work. Therefore, our final submission that went to the commission in the last instance supported the fact that the incapacity to pay claims did not work. Even the simplified version did not work. So there was a difficulty. We could not present all the evidence that we had as a consequence of that minimum rates case, because it was being held at the same time that all the hearings were on. This has occurred effectively subsequent to the decision.

Senator MARSHALL—Subsequent to the supplementary hearings after the decision?

Mrs Wawn—I would have to double-check, but certainly I can recall putting in as a final submission that we did not support the utilisation by the commission of the incapacity to pay claim as a support mechanism for small business because in our experience the system did not work.

Senator MARSHALL—You have supplied us with some employment figures in the industries that you cover and you say that in 2004 there were 370,500 employees. How many of those would be casual and would not be subject to the redundancy provisions anyway?

Mrs Wawn—I do not have those figures in front of me. I am happy to supply the break-up in writing. Certainly my understanding is that it would probably be about 40 per cent—maybe 50 per cent—but I would have to check that. I am happy to supply those figures to the committee.

Senator MARSHALL—They are not covered?

Mrs Wawn—No, they are not.

Senator MARSHALL—Are people working as part of the family on a farm covered by redundancy provisions?

Mrs Wawn—If they are an employee, yes. Obviously it depends on how the business is organised.

Senator MARSHALL—You talked about the most recent case and you also talked about the history over 20 years of unsuccessful claims. How many of your members have lodged incapacity to pay applications in the federal commission, say, over the last five years?

Mrs Wawn—In last five years it has been the two in the most recent case. Previous applications have been by the industrial associations on behalf of their members as industry-wide claims. There have only ever been two individuals.

Senator MARSHALL—How many of the industry-wide claims by your other organisations have there been?

Mrs Wawn—I think there have been five or six industry-wide claims over a 20-year period.

Senator MARSHALL—Five or six over 20 years?

Mrs Wawn—Yes. We only ever do it when there is a major drought.

Senator MARSHALL—How many droughts have we had over 20 years?

Mrs Wawn—About that.

Senator MARSHALL—Five or six?

Mrs Wawn—Yes.

Senator MARSHALL—By that are you saying that the only time we really need to consider incapacity to pay would be in times of major drought?

Mrs Wawn—No.

Senator MARSHALL—Why not—I thought that is what you just said to me?

Mrs Wawn—The reason we have pursued industry-wide claims is that major drought has an impact on the industry across the board. Obviously there are individual circumstances where, for reasons other than drought, farmers needed to utilise the small business exemption when it existed.

Senator MARSHALL—But there have only ever been three individuals claims.

Mrs Wawn—I will rephrase that. There are individual circumstances where they might need to use incapacity to pay claims other than drought, but the NFF has only ever focused on industry-wide mechanisms due to drought conditions. Certainly in the recent case it was also related to drought in limited circumstances. Only about 10 per cent of farmers received exceptional circumstances relief payments. So while we were making an application for theoretically what is deemed to be an industry-wide claim, it was only for a very small proportion of the industry that were eligible for those exceptional circumstances relief payments.

Senator MARSHALL—But there have only been three cases of individual claims ever made?

Mrs Wawn—Two.

Senator MARSHALL—Over 20 years.

Mrs Wawn—Two over 20 years that I am aware of.

Senator MARSHALL—That indicates a significant problem—I guess. In terms of employers having to demonstrate in some way that they actually have an incapacity to make payments, shouldn't there be a process to establish whether that is a fact or not—or are you suggesting that simply their word should be taken on that?

Mrs Wawn—No, we say that evidence should be established to justify that an incapacity exists. We say that we do not believe that it is appropriate for a union to become involved if there are no members of the union on site.

Senator MARSHALL—Would you say that that is the problem—that, if the unions were not involved in the process, you would have no difficulty going through the incapacity to pay provisions?

Mrs Wawn—The members have stated that, if they do not have any union members on site, the unions should not have the right to look at their private financial records but, if there are union members on site, those members have the right to seek union representation to look at those records if they believe that such a claim is inappropriate, just as an individual employee could have claim—

Senator MARSHALL—If the unions were not in that process in the way you have put it, there is nothing else wrong with the incapacity to pay provisions—is that what you are putting to us?

Mrs Wawn—That is correct, yes, because the commission can then review the application.

Senator MARSHALL—A lot of your submission focuses on the difficulty with using the current provisions for incapacity to pay, and now you say that really the only problem is that unions may have a look at the financial records when there are no union members on site. If that were fixed, there would be no difficulty with incapacity to pay provisions.

Mrs Wawn—Sorry, perhaps I have been confusing it. In terms of the simplification process of receipt of exceptional circumstance relief payment, we would say that is a good way of establishing incapacity to pay, because they have already gone through evidence to establish they have financial difficulty, so all they have to do is simply show their receipt from the Commonwealth and say that they are in financial difficulty; hence that should be an automatic exemption, regardless of union involvement. If, however, they are not in receipt of exceptional circumstance relief payment and they have to prove incapacity to a third party—that is, the commission or some other body—then, yes, they need to provide evidence to suggest that they have an incapacity.

But, ultimately, the difficulty that we have is the need for proof, the paperwork required for proof and whether or not the commission is best able to determine whether they have an incapacity, because some businesses might not have the financial basis to undertake such a review of financial records. We are getting down to the nuts and bolts of incapacity to pay claims. We say that this is a cumbersome process and there are benefits to having a small business exemption generally so that we do not have to go through these hassles in the first place. Ultimately we are saying that such mechanisms that are cumbersome throughout the process for employers inherently mean that they say, ‘Sorry, I am not going to employ you because this is all too hard.’ Instead, we should have the small business exemption so it is less of a barrier to employment. That is obviously our position.

Senator MARSHALL—Let me put this to you. It is about establishing whether there is an incapacity or not. Let us say that the employee is a very loyal long-term employee who has worked hard for the employer and who is being made redundant for nothing they have done. Don’t you think they have a right to expect a proper, thorough and challengeable process about an employer who seeks to avoid their obligations to that employee? Isn’t that a fair enough expectation?

Mrs Wawn—It is dependent upon the circumstances. You have to remember that we are looking at a minimum rates award. We are talking about minimums—

Senator MARSHALL—That is right: the people who can least afford it.

Mrs Wawn—and so in many respects, when our member organisations advise small business, you get many calls saying: ‘I still want to pay redundancy to my employee, even though I have the small business exemption. How much should I pay?’ So we are talking about a minimum and the importance of creating a minimum so we can maximise employment. That is the fundamental principle. Yes, we do believe that, if you have an incapacity to pay claim, it should be there in such a way that, firstly, the employer has the ability to argue that they have put documentation to prove they are in financial difficulty and, secondly, the employee has the right to question that.

Senator MARSHALL—So it does need to be a thorough process?

Mrs Wawn—It does, but we are saying that the thorough process means the business is concerned about that process if it occurs; hence it reduces their ability to employ, because they realise the process can be cumbersome if they are going to hit it down the track. Obviously, for farmers, that is of particular concern given the impacts of drought.

Senator MARSHALL—Is it more cumbersome than GST compliance, for instance?

Mrs Wawn—It all feeds off one over the other, I guess, but yes, it is to some degree more cumbersome because GST compliance occurs on a regular basis. So once you have set it up, you will find that it is an ongoing process, whereas this is something that happens once every so often, they get very concerned about it and, as a consequence, IR to them is just so onerous that they do not know where to start. As a consequence we need, firstly, to assist them through that process and, secondly, to minimise the difficulties they have.

Senator MURRAY—My summary of the situation is this: we had a situation with redundancy where there were differing state systems and differing state tribunal situations, and the federal industrial relations tribunal has changed its position.

Mrs Wawn—That is correct.

Senator MURRAY—Are there any circumstances where your farmers are subject to both the state and federal tribunal decisions?

Mrs Wawn—It is dependent upon their coverage in awards. All of our members that we represent in an industrial sense are members of the state farming industrial associations and, by virtue of being a member of an industrial association, you are then respondent to a federal award and come under federal jurisdiction. However, some of our members might be members of our state farming organisation but not its industrial arm; hence they would come under state provisions.

Senator MURRAY—But on one farm in New South Wales or Queensland, for instance, might workers on that farm be subject to both, or some workers subject to federal and some workers subject to state?

Mrs Wawn—Not that I am aware of. Certainly, in New South Wales, if you are a member of the industrial association, automatically all of your employees would come under the federal award.

Senator MURRAY—What about casuals?

Mrs Wawn—Casuals would as well.

Senator MURRAY—Your previous evidence to the committee has been that there are circumstances where farms and stations have workers, some of whom are under state legislation and some of whom are under federal legislation.

Mrs Wawn—I would have to check. Certainly, we have members who, if they are not members of the industrial associations, will come under state jurisdiction. But if they are a member of the industrial association they will be under the federal system. I will double-check my evidence but that is what I recall that we meant. For example, under unfair dismissals, if they are not a corporation then they would come under the unfair dismissal provisions, even though they are respondent to a federal award.

Senator MURRAY—The same would apply to redundancy.

Mrs Wawn—No, because the federal award provisions would apply, regardless of whether or not they are a corporation.

Senator MURRAY—Think about it and let us know if, in any circumstance, there is a conflict. It seems to me that we are stuck with the position where the two sides are arguing exemption or no exemption, whereas most of your discourse to Senator Marshall focused on process. I asked the ACTU and they did not seem to have made submissions to the commission—they might have, but they might not have understood my questioning line—or to your organisations to make the process far easier. Surely, if you were to retain redundancy but there were legitimate cases for exemption, you would need to recognise the validity of complaints about the process. To me that means automatic exemptions.

One possibility in my mind is if the business does not generate a taxable profit. Another one is if the business proprietors are in receipt of social security payments or of relief payments for being in difficult circumstances. It should be automatic. You then do not get involved with paperwork. It means one piece of paper. Everybody has a tax return. You have one piece of social security paper. You show it to the industrial registrar. If it is challenged then that is the end of it. Why has there not been more of an attempt to resolve the process side of things?

Mrs Wawn—The process side of things was the premise of our original and our most recent application on incapacity through the minimum wage case. We submitted to the commission the idea that one piece of paper from Centrelink saying that this farmer is in receipt of exceptional circumstances relief payments should automatically allow him to have a freeze on a national wage case increase.

Senator MURRAY—Why did the commission reject that?

Mrs Wawn—They rejected it because they said that the union should still have the right to object through the adversarial process of the commission, regardless of that fact. They did not even use the words ‘prima facie’—they simply said that there is a good argument, if there are exceptional circumstances relief payments, that we are still giving the union the right to object. They also said that, as a consequence of that adversarial process within the commission, we very much had a process of having evidence come from both sides and so forth. That inherently took away the exact thing we were trying to achieve and which you have proposed—that is, a very simple system of giving one document to the commission saying: ‘Here is our proof that we have got financial difficulty. Please stamp this and give us

an exemption from whatever we are seeking at this stage.' We put that to the commission and it was rejected. It was a full bench matter relating to the pastoral award, and I am happy to supply the decision and subsequent decisions to the committee if you would like me to, to show what their thinking was. But certainly that was rejected.

Senator MURRAY—Let me get a short answer from you.

Mrs Wawn—Sorry, Senator.

Senator MURRAY—That is not me being rude; I am just conscious that others are going to want to ask questions and we haven't much time. The Senate is going to be faced with a position whereby it leaves the law as it is and then after 1 July the government will do what it wants to do, or it agrees with the government now or it offers an alternative, which may or may not be accepted. That alternative would obviously have to include automatic exemptions. Could you give the committee a list of pieces of paper you think would or should qualify as automatic exemptions?

Mrs Wawn—Certainly, Senator. I will provide that as soon as I can. Obviously, exceptional circumstances relief payments are one of those documents, and I am sure there are a number of others.

Senator MURRAY—You have mentioned Centrelink.

Mrs Wawn—Yes.

Senator MURRAY—You have mentioned automatic relief payments.

Mrs Wawn—Yes.

Senator MURRAY—Both of those come under specific current legislative provisions. I have mentioned tax returns which show no taxable profit, but there may well be others that I have not considered. I just want the opportunity to see if there are ways of tightening up the process rather than getting rid of the principle altogether.

Mrs Wawn—I will confer with our farm business policy manager and provide a written response to that question. That is perhaps the most appropriate way to ensure that we have all bases covered. We have explored a number of examples here this morning.

Senator MURRAY—I should signal on the record that this does not automatically imply a route I will take but it does imply a route I must consider. It seems to me from all the submissions that we are being faced with an either/or situation. I am not convinced that is necessarily the only way to go.

Mrs Wawn—I will furnish that information to the committee as soon as possible.

Senator MURRAY—Is it correct that, regardless of the fate of this legislation, it is always possible in common law for there to be an oral or written agreement between a farmer or any other businessperson and their employees to pay redundancy?

Mrs Wawn—As long as we meet the minimum conditions of employment from the award, we certainly can have agreements to that effect.

Senator MURRAY—Even if you were not, in common law you can have an agreement outside of that.

Mrs Wawn—If you were a respondent to the award then you would have to ensure that you were in compliance with the minimum conditions.

Senator MURRAY—You cannot be less than, but you can be more than.

Mrs Wawn—That is correct, hence the position I put earlier—that, because it is minimum rates, we have numerous situations where small business prior to this change in standard were paying redundancy where they thought it was appropriate, regardless of the fact that they had an automatic exemption from doing so.

Senator MURRAY—I must say on the record, as an aside, that I am extremely sympathetic when I think about businesspeople having to cough up intimate personal details in any public exposure. I think as far as possible if we can avoid that we should. That does not mean to say I resist the right of unions to examine employment records. I do not; I support it. But I do think people having to expose their financial details going back three years and that sort of thing is a bit much.

Senator BARNETT—I will go back to a question I asked the ACTU earlier in terms of your understanding of the law prior to the AIRC decision and the law as set out under this bill. Your submission says that the aim is to reinstate the small business exemption from redundancy payments that has been removed as a result of the decision. The ACCI say the same—that it has been there for 20 years. The first paragraph of the government's second reading speech says that it is maintaining that provision. The ACTU says the law is changing fundamentally the rights and conditions that employees once had, or words to that effect. What is your response and can you clarify the law?

Mrs Wawn—Certainly we believe that it is re-establishing what has been law for 20-odd years in this country—that is, that small business had the right to an exemption from the payment of redundancy. It is clarifying. I understood Ms Bissett from the ACTU to say that there was an issue about it now being a non-allowable matter. Putting it in the non-allowable matters section really is a clarification. We originally had a test case standard that provided a small business exemption. Over a period of time that has changed within awards. There has been a lot of inconsistency in awards. Many, such as the agricultural awards, had automatic exemptions. Other awards had exemptions from the agreement or exemptions by application to the commission and we believe that it is effectively putting into law the intent of the commission's decision 20-odd years ago and what the state commissions state. There is an overriding argument that small business should have an exemption from redundancy payments because of the impact they may have on employment opportunities in the long term. We certainly believe it is maintenance and not the creation of new law.

Senator BARNETT—I will go to the state commissions and their views. You are saying they have been supportive of the exemption, particularly in Queensland and WA. Are there different views in different states?

Mrs Wawn—From my recollection, in the case a number of applications were made. As you say, those two states particularly supported the retention of the small business exemption. The New South Wales state government did not specifically say either way in the submission. From my recollection, in the case there was evidence to show that they have a small business exemption in their law as well. I cannot remember the situation in the other states. But

certainly there were submissions or there was evidence that a number of states do have a small business exemption within their provisions.

Senator BARNETT—My view—and I think the view of many others—is that we want to move to this concept of one industrial relations system notwithstanding that most of the states that you have just referred to support a small business exemption. We have this AIRC decision which wants to remove it, and the government wants to put it back. Can you see the merit of a move to one industrial relations system that would make it consistent throughout the country? I think in your evidence you said that if you are a member of your industrial association you come under the federal award, and if you are not then you come under the state system. Even for your farmer members, it would seem problematic that I have a farm here and five kilometres down the track my neighbour farmer is operating under a different system. It seems fraught with danger, it is problematic and red tape infested and needs to be fixed. How do you respond to the idea of moving to one industrial relations system?

Ms Wawn—We certainly support a single system—there is no question about that. Our preference would be that it is undertaken in the likes of Victoria, where there is a referral of powers as opposed to using the corporations power. We say that simply because a number of our members are not incorporated entities; they are things such as trusts and partnerships, so the utilisation of corporations' power will exclude some of those farming businesses. Our preference, obviously, is a referral of state powers. If there is a strong move, at least in the initial stages of utilising corporations power, we are also supportive of that move simply to remove the differences, as you say, between one farm and the next and to have some consistency in the law across the board.

Senator BARNETT—You have touched on the constitutional powers of the government under the Corporations Law, which I think most people say will cover 85 per cent plus—maybe 90 per cent, 95 per cent—so the issue is out there and the government has indicated its position. I am going to ask you a tough question about this number 15: what about businesses with 20 or 25? How do you differentiate—

Ms Wawn—The big number.

Senator BARNETT—in terms of the small business exemption?

Ms Wawn—We have not specifically debated this within our association. Some are 15; some are 20. The vast bulk of our membership has up to 10 full-timers or part-timers and there is a lot of utilisation of casuals, so we have not made a distinction between 15 or 20. Our submission would be that it needs to be consistent across the board. At the moment there are a lot of rules dependent upon small business exemptions, and we think there should be consistency in the act. If you are going to put in exemptions for small business, whether it is for redundancy or unfair dismissals, then obviously it should be consistent. Our preference would be 20 in all cases, but it should be consistent.

Senator CROSSIN—You make a claim in your executive summary that the NFF strongly disagrees with the reliance by the AIRC on the ability of small business to pursue an incapacity to pay claim. They cannot afford to pay redundancy—I think that is point 4 of your summary. In other words, you are putting to us that you do not believe that the Industrial Relations Commission has a role to assess this. Further to that, isn't this in conflict with the

role when they actually assess a capacity to pay—that is, a wage increase claim? Isn't it a bit inconsistent here?

Mrs Wawn—The fundamental difficulty we have with the commission is that there is a high reliance on the arbitration system that obviously makes it difficult for any small business to pursue their case. Hence, they put up barriers to make things extraordinarily difficult for small business to pursue things that are in the interests of their individual businesses because of the centralisation of the system.

Senator CROSSIN—Can you give me an example of the barriers you believe are there? You say it is difficult for small business to pursue their case; is it not as difficult for workers to pursue theirs, as well?

Mrs Wawn—Could you repeat your first question.

Senator CROSSIN—Can you give me an example of the barriers you are talking about?

Mrs Wawn—Certainly, a good example—I know this is slightly off the track—is the roping in of awards, where small businesses can be automatically roped into awards without a realisation of the consequences to their business of being roped in. If they do not have representation from an employer organisation, they are automatically roped into awards. On the other hand, employees can be represented by a union, even though the union does not have any employees who are members. So their businesses can be roped into awards. There is a range of examples in the commission—

Senator CROSSIN—Give me an example that specifically refers to this legislation.

Mrs Wawn—This legislation firstly ensures that small businesses do not have to pay redundancy and, secondly, it ensures that we do not have to rely on incapacity to pay claims, which create so many burdens in terms of paperwork and time for small business. One of the individuals we used in our test case on incapacity was in Moree and the other was in Armidale. They would have been required by the commission to fly down to Melbourne to provide evidence. They had to provide private financial records. It is an never ending paper trail and it is time consuming. They did not have time in the middle of the drought to go to a hearing in Melbourne to give evidence because they have to feed their cattle every day.

Senator CROSSIN—But prior to the test case, there were automatic exemptions for that. Why are you not putting a case to us that perhaps there should be some provisions for exemption rather than for a totally arbitrary cut-off of 15 or fewer employees?

Mrs Wawn—Our preference is to provide exemptions because it is simply easier for small business. They do not have to go through this process of providing documentation. If, however, that primary position is not accepted, then, yes, we would consider looking at automatic exemptions. But the issue is, as Senator Murray has raised, that we have to identify those. When we raised a really good example of where there should be an automatic right for incapacity, it was ignored by the commission. Hence, the question Senator Murray has put to us: 'Can we consider your arguments in the incapacity case in a legislative sense?' and certainly that is the case, but we should not need to go through this process in the first instance. There should be an exemption to ensure that small businesses do not have to establish their position through this minefield of paperwork in the first instance.

Senator CROSSIN—So you would be putting to us that the exemptions that applied prior to this test case should be made easier rather than there being legislation that arbitrarily exempts businesses of 15 or fewer?

Mrs Wawn—Certainly for farmers the legislation that is being proposed by the government is exactly identical to that which we had in the federal agricultural awards, and that is that a small business exemption applied. We did not need to go to the commission for approval for that exemption to apply; it was automatic. So we are simply asking the government to reinstate what has been in farming industry awards for a considerable amount of time.

CHAIR—Thank you very much for appearing for the National Farmers Federation.

[11.20 a.m.]

BARKLAMB, Mr Scott Cameron, Manager, Workplace Relations, Australian Chamber of Commerce and Industry

CHAIR—Welcome. Is there anything else you would like to tell us about the capacity in which you appear today?

Mr Barklamb—I represent the ACCI in a wide range of workplace relations policy and arbitral matters, including before the AIRC. For the benefit of the committee, I was the lead employer advocate opposing the deletion of the exemption we are debating today and the other ACTU claims in the redundancy case.

CHAIR—The committee prefers all evidence to be given in public. It will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 9. Are there any changes or additions you wish to make?

Mr Barklamb—No.

CHAIR—But you have circulated an extra document.

Mr Barklamb—I do apologise, yes. I have circulated this morning an additional document entitled ‘Example of additional severance pay obligation’. This is a replication for the committee of one of the tables we prepared frequently in the arbitration of this matter and that were well known to the commission and parties. I provided it to provide an illustration of the indicative additional costs to be assumed by small business should the redundancy pay obligation cease.

CHAIR—Is it the wish of the committee that the document be tabled? There being no objection, it is so ordered. You may continue with your evidence, Mr Barklamb.

Mr Barklamb—Thank you for the opportunity to appear today and contribute to your consideration of the bill. The ACCI represents 35 major business organisations in Australia, thereby over 350,000 businesses employing four million employees. Importantly, we are Australia’s largest organisation representing small businesses. Based on our analysis, the feedback from our small business members and our understanding of this case and the proposition at hand, we support passage of the bill. We support urgent action to ensure smaller businesses do not assume additional redundancy pay obligations or a redundancy payment obligation that they are substantially, and we say inherently, unable to viably assume. We also support resetting the boundary for future award regulation to recognise the fundamental incapacity of small business to assume additional redundancy pay obligations.

I want to start by boiling this down to what we see as a fairly simple question—and this is my purpose in handing the additional document to you this morning. The question is: do we accept that small businesspeople, the mum and dad businesspeople in our communities, can access between \$2,000 and \$4,000 extra precisely when their businesses are facing adversity—or going broke, in vernacular terms? The ACCI accepts that you do not lightly disturb decisions of the commission. We agree with the ACTU that this should not be a habitual activity or practice. Parliament should only act to do so on the rare occasions in which two tests are met: the decision is based on error and the decision will result in public

policy outcomes inconsistent with good governance and inconsistent with the principal object of the Workplace Relations Act—that is, being the promotion of the economic prosperity and welfare of the people of Australia. Both of these tests are met on this occasion.

I will not go into further detail on why we say the decision was in error; that is contained in our written submissions. I will, however, indicate that the obligation on redundancy pay for the reasons we set out cannot viably be assumed by the substantial bulk of small businesses due to inherent financial incapacities. It fails, we say, the commonsense test. I comprehend that there was discussion on employee losses this morning. We are not saying there will not be losses to small business employees on being made redundant; we say, however, that this is about a suitable balance being reached. Employee losses, we say, are outweighed by the interests of continued business viability and the consequences both on families running small businesses and on other employees and their scope to be retained. We say that an appropriate balance of those interests was reached in 1984, not in 2004.

I appreciate that my time to make an introductory statement is limited so I want to say a couple of brief things before taking questions. Overturning decisions in legislation is not new or unknown to this parliament. It reacts to decisions of courts and tribunals quite regularly by modifying legislation. This has been one of the key drivers of the development of the Workplace Relations Act. For example, our statutory enterprise bargaining system rests on the rejection of a commission approach in the early nineties that indicated that parties were not yet capable of bargaining. It is quite open to this parliament to disagree with the commission and to deliver differing outcomes; it should do so on this occasion. There is no appeal from a decision of the commission; legislation is effectively the only avenue.

I also note that it is quite open to this parliament to remove the capacity of the commission to arbitrate and award particular issues. In a sense that was done in the award simplification process in the mid-nineties to today and it was done, for example, in the removal of preference clauses. A number of matters in awards were determined previously by the commission and thought appropriate, and this parliament has ultimately considered otherwise.

I say two things in conclusion. The first is to point to and to emphasise our submissions on the urgency of action on this issue. The relief secured by the supplementary decision of June 2004 begins to expire in June 2005. A substantial set of major federal awards will impose obligations on small business between June and October in the absence of the passage of this bill. Were this bill to be passed at some later juncture, we will face the prospect of having small businesses assume a redundancy pay obligation of four weeks and then having it removed again. That would cause substantial confusion and it is a public policy outcome again to be avoided.

Secondly, there is one slight area on which we would differ from the bill as introduced, and that is in regard to section 170FA. A more fundamental re-examination of subdivision D of part VIA of the act is required in toto. We question whether redundancy orders based on ILO conventions should form part of our system. With that, Senators, I am happy to take questions.

CHAIR—Thank you very much for your submission. You claim in your submission that there was manifest error in the commission's redundancy case decision. Could you define for the *Hansard* record what you mean by 'manifest error'?

Mr Barklamb—We make these submissions with due respect to the commission and its deliberations and assessments; we merely differ on the outcome and the decision reached. We want that to be clear. However, we consider that the overwhelming bulk of the evidence in this matter should have led to a different outcome. In particular, the three factors that the commission cited to remove the exemption—the previous non-exemption of some states such as South Australia, a mixed position in Tasmania and some particular industry awards such as the clothing trade—did not support a viable extrapolation to industry generally. We disagree in particular with the exemplar witnesses that the commission based their decision on.

There were a very small number of employee witnesses who were employed by small businesses and in receipt of redundancy pay. We say that that should have been determined to be a highly atypical circumstance and not capable of being extrapolated to small businesses generally. We seriously question the profitability data relied upon by the commission to reach its decision. We think that a different conclusion could certainly have been reached on that. My colleagues from AiG had a survey upon which they certainly strongly put it to the commission that a different conclusion could be reached. On our analysis of the nominal basis of the decision, each of the elements can be strongly questioned.

CHAIR—You said in your oral evidence that it fails to meet the commonsense test as well. When I was questioning the ACTU witnesses I made a similar point. I did not quite put it that way; I said that it defies logic, particularly in relation to the likely impact of that decision on business costs, cash flow, profitability and the viability of small business. Is that what you are referring to when you say that it fails a commonsense test, or are there other elements?

Mr Barklamb—It certainly is. It seems to us a relatively simple proposition that Australia's smallest businesses, at the community and local level—run, to be slightly trite, by the mums and dads in the local strip shopping centres—simply do not have these amounts of money to access to pay additional benefits precisely when they are facing adversity. On that, it is a myth that there is strategic redundancy in small business. Some of our larger businesses may well restructure and make decisions on business units in good times to restructure themselves with a view to the future. Small businesses are far more reactive; they primarily make redundancies when they are in genuine financial adversity. I reiterate the elements of our submission that cite this Senate's analysis of small business capacities to pay and the nature of small business in Australia in the small business employment inquiry, the report of which is appended to our submission. That is precisely the basis upon which we say the proposition in the 2004 redundancy decision fails to meet a test against commonsense.

CHAIR—In the comments from the ACTU they were claiming that these sorts of redundancies are, as you put it, strategic. I was making the point that maybe some are but certainly the vast bulk probably are not. Could you elaborate on what perhaps happens with the vast bulk of small business when they are in a redundancy-type situation where the introduction of this approach in which they would have to suddenly make payments for that could put small business viability at risk?

Mr Barklamb—It is the firm feedback to us from our small business members through our representative organisations that small businesses attempt to trade out. They try and juggle very tight payment terms, higher levels of interest than their small business colleagues and difficult operating environments. There is a very different level of experience amongst those who run some small businesses as compared to those who run larger businesses. There is different expertise that can be brought to bear, and significantly lower expertise can be brought to bear in terms of technical financial expertise and the like. It is our understanding that small businesses really will attempt to keep employing the people they employ in their local communities and attempt to keep trading for as long as possible. It is to be remembered that that attempt to keep trading—to trade out—occurs when the investment in that small business often involves, for example, the family home. So they are in significant personal indebtedness and personal risk at a time when they are attempting to trade out of their difficulties.

CHAIR—I think we are establishing very clearly that this decision by the commission is not in the interests of small business. But you also state in your submission that it is not in the national interest. Could you elaborate on what you meant by it not being in the national interest?

Mr Barklamb—Indeed. We say that there is a broad consensus on the importance of the small business sector in creating further employment opportunities. It is in the interests of the small business sector and therefore communities and therefore states and regions and therefore the national economy and our interests as a whole that small businesses be able to trade as viably as possible and be able to make appropriate staffing decisions when required with minimum or appropriate balance of pay obligations that do not otherwise threaten their broader viability and do not threaten the viability of other staff. So it is about flow-on effects and the capacity of the small businesses themselves to trade through, grow, weather storms and create additional employment.

Senator MARSHALL—Was ACCI satisfied that they were able to put all the evidence that they wanted to before the commission in this matter?

Mr Barklamb—We certainly had an opportunity to make substantial written and oral submissions and at no point were our submissions truncated or brought to a premature end.

Senator MARSHALL—On the ‘manifest error’ that you talk about in your submission, didn’t you actually have an opportunity after the decision to go back to supplementary hearings and challenge that manifest error, as you say, before the commission?

Mr Barklamb—We did indeed. The ability to challenge that was primarily drawn from invitations the commission itself provided to us. We thought the supplementary decision was primarily driven by a very different signal on long service leave counting for the overall redundancy standard—for larger businesses, in fact. We thought there was an invitation there for a differential set of standards, which was not ultimately yielded in the supplementary decision.

We also took the opportunity to put an alternative approach to small businesses, but that was an approach within the findings of the commission about their ultimate capacity to make these payments. I want to be very clear on that: we did not and do not agree that small

businesses ever have the capacity to make these payments. However, when we pursued the applications that led to the supplementary decision, we did so within the boundaries of what the commission determined in March 2004.

Senator MARSHALL—From what you have just said—and you say it in paragraph 67 of your submission, too—you do not oppose small businesses making redundancy payments where this does not affect their viability. Is that right?

Mr Barklamb—We certainly do, consistent with the concept of awards as a safety net. We certainly do not oppose small businesses making redundancies where they are able to.

Senator MARSHALL—Does that mean you would support a return to the provision that existed prior to the 2004 decision—that is, subject to an order of the commission the provision may not apply?

Mr Barklamb—The experience prior to 2004 was of very isolated and atypical circumstances, with small businesses having applications brought against them on a case-by-case basis for additional payments. Those decisions appear to have been made very much in the context of the economic and industry restructuring that occurred through the late 1980s and early 1990s. They are also creatures of a different statute and of a time when awards did not perform a safety net role. It is to be recalled that the avenue to argue additional payments against a small business and, indeed—at the fear of opening this—the avenue of incapacity to pay both predate the safety net concept. In a safety net era, it is far more relevant to make a standard that can apply in all cases. And in the overwhelming majority of cases there is an inability to make these payments.

Senator MARSHALL—That is not really the question I asked. You are saying on the one hand that if businesses have the ability to pay you would support that. In paragraph 65, you say that the incapacity to pay reverses the proper onus. Yet this bill if passed removes any obligation on small business to make redundancy payments, so even if a small business has the capacity to pay employees those employees cannot take the small business to the commission to have it determined there. So what does it do?

Mr Barklamb—A small business can make an AWA, a certified agreement with a union or—as Senator Murray elucidated in a question earlier—they can make an unregistered arrangement to provide a severance payment by agreement consistent with the design of our system.

Senator MARSHALL—So what you are saying is that it has nothing to do with reversing the onus. You are saying that it is clearly a decision of the employer as to whether they want to make a redundancy payment or not, regardless of whether they have a capacity to pay or not.

Mr Barklamb—We think it is an appropriate matter for negotiation.

Senator MARSHALL—There is nothing in the act that allows negotiations about it. We have heard evidence to say that in effect this bill will make redundancy provisions a non-allowable matter.

Mr Barklamb—It will indeed.

Senator MARSHALL—It will indeed. Talking about reversing the onus—there is no obligation to negotiate that at all. The onus is simply on the employer as to whether they want to or not.

Mr Barklamb—The protected action provisions of the act and the bargaining schema of the act can yield this outcome above the award safety net, the same as any other. It can yield a redundancy pay obligation if that is prioritised by employees.

Senator MARSHALL—You say that incapacity is not used because of the cost and complexity et cetera. During the hearings, did you actually address those matters of complexity and cost beyond the minor amendment you pursued in 66A of your submission?

Mr Barklamb—Thank you for that question. We only pursued a very minor amendment to the incapacity provisions of the act, which was essentially of a technical or procedural nature. As to more fundamental changes to the incapacity provisions, we did not pursue them. We were aware of the experience of our colleagues from the farming sector and also aware of the lack of success of previous incapacity avenues in the hospitality sector. It was our firm experiential understanding from a range of industries, states and circumstances that incapacity provisions are simply incapable, despite revisions, of offering a suitable avenue for an opt-out. A universal standard using incapacity as an avenue for opting out simply could not operate.

I want to quickly go slightly further on the issue of incapacity. Practically, what we are talking about, as I said earlier, is a small business going to the wall, rushed by creditors. I think I handed you the example of a shop. They would have to staff the shop themselves, juggle difficulties in accessing suitable stock and suitable staffing as time gets tight and perhaps would be fighting the bank about credit. These are the people who we are suggesting have the time to prepare sophisticated documentation and participate in an arbitral case, which is precisely what an incapacity provision or an incapacity avenue would dictate. We say it is just a fallacy to say that these people are capable of participating in incapacity proceedings generally.

Senator MARSHALL—But every instance is not that situation. In fact, from my understanding, based on the evidence we have received in the submissions, that is not even a majority. It is a small number of situations that you are describing.

Mr Barklamb—Again, we should be clear on the feedback we get from our members. It is the tip of the iceberg argument. There are a small number of arbitrated incapacity cases that can be pointed to. I think my colleague referred to a half-dozen across a certain period of years.

Senator MARSHALL—Two.

Mr Barklamb—Two, across a certain period of years.

Senator MARSHALL—Twenty years.

Mr Barklamb—Two in 20 years? That does not to us show that only two businesses had incapacity. It shows a strong level of businesses being discouraged and representative organisations and advisers being discouraged by the nature of the process and the hostility of the process to applicants.

Senator MARSHALL—Clearly, it is easier for employers if there is just the blanket extension; that is true. But it is certainly not easier for the employees who are being made redundant.

Mr Barklamb—The additional document I handed out this morning indicates the flow of moneys to employees who are being made redundant. It is not a case of nothing.

Senator MARSHALL—I do not see anyone retiring on that.

Mr Barklamb—In the arbitration of this matter, incomes through to retirement and those sorts of notions were not seriously advanced at any point for severance pay and a lot of those notions were rejected by the commission.

Senator MARSHALL—The commission made a decision based on all the evidence; that is true. That is part of the problem I have with this bill simply seeking to overturn a decision made by the commission when it had a year and 16 days of hearings and then another couple of days of supplementary hearings and it had an opportunity to consider all the evidence put before it. The government participated in that process and simply does not like the outcomes. It seeks to legislate to overturn the decision. Quite frankly, I find that rather hypocritical of the government to begin with. We have heard a bit about a unitary system. On one hand we hear that a number of the states support an exemption and therefore we should listen to the states; then the argument flows that we should have a unitary system, so we should ignore the states' views in that respect. We seem to be doing a bit of cherry-picking around the place. But no two state jurisdictions have the same provisions, do they?

Mr Barklamb—I think that is a fair observation, although I would probably express that another way. There was only one state that expressly stated the exemption in the eye and refused it, and that was South Australia. There was a far more mixed position in WA and Tasmania. The Queensland and New South Wales jurisdictions firmly enshrined the exemption. Of course, in Victoria, with the common rule transfer, the exemption was in play through federal award coverage.

Senator MARSHALL—But you say it as if the decisions of those state tribunals absolutely reinforce what this legislation is proposing. Why are we not picking up the whole of the Queensland decision? Sure, it has an exemption, but it has a whole gamut of additions and conditions on the exemption as well. Why are we not picking up that?

Mr Barklamb—In practice we are not looking at a statutory codification of the full redundancy clause. The decision of the commission was a reaction to the applications of the ACTU and counter-applications from our organisation—nothing more and nothing less. There simply was not the arbitral basis to consider the full range of matters put in Queensland.

Senator MARSHALL—I am just making the point about people actually using other state jurisdictions as if, in some way, they absolutely support what is being proposed here—and they do not, though, do they?

Mr Barklamb—In answer to what I think you are asking me, we say one of the fundamental tenets—and we say this as a conclusion that is quite open to the Senate and any observer—

Senator MARSHALL—And was open to the commission.

Mr Barklamb—And was open to the commission. We say that a fundamental understanding of all of the systems is that small businesses simply cannot assume the severance payments. That was the supplementary decision in December 1984. We say that remains a sound position and understanding through to today.

Senator MARSHALL—There have been some concerns raised—and I have personally experienced this in a life before parliament—that employers will structure their businesses in such a way as to ensure that they are able to access the exemption provisions of a small business. I have been involved in instances where the maintenance department of an employer, which might have hundreds of employees, becomes in itself a small business arm of the bigger business. There have been attempts to try to avoid redundancy provisions that way. We know of many instances, through subcontracting and contracting out, where businesses restructure themselves in such a way as to avoid real and proper redundancy obligations. Does ACCI or any of your employer organisations that are members of yours give employers advice on how to restructure their businesses to avoid redundancy payments?

Mr Barklamb—I will answer that question, if I may, by going back to the more fundamental issues you are raising.

Senator MARSHALL—As long as you do answer the last one.

Mr Barklamb—As long as I do answer that question. Our members give advice to employers on a very wide range of issues in restructuring. Redundancy would certainly be prudently included within that as professional, expert advice. As to whether our members are complicit or proposing of contrivances, I certainly do not have that feedback or understanding. In fact, to go back to what I wanted to say about that question, there can be a myriad of reasons that organisations choose to restructure elements of formerly core business into, for example, satellite businesses, into different arrangements or into labour hire that I would suggest go well beyond structures of redundancy. I am not denying, Senator Marshall, that you may have experienced that but I do not think that is necessarily a widespread, single causation of that happening.

I will say one more thing, however. We are not supportive of businesses contriving circumstances to reduce head count under 15. That is not an outcome we see as a live one. It was certainly a very real concern after 1984 and we would suggest it did not happen in a widespread sense. It is one of the stated reasons the clothing trades award was varied in particular terms in the 1980s. We do not understand that that approach has been picked up more widely, because we do not think it was a live issue. We certainly do not support businesses restructuring strategically purely to avoid these obligations.

Senator MARSHALL—But it is an incentive to do so.

Mr Barklamb—I would suggest that that incentive has been there since 1984. Our understanding is that there is not a widespread set of organisations stopping dead at a 14 head count and not increasing above that.

Senator MARSHALL—But it goes further than that, doesn't it? There are companies set up—purely employment only companies—within their businesses that have no assets whatsoever, and they do that also to avoid ultimately paying out redundancy payments. You must know about that. You must know that that happens.

Mr Barklamb—There are a range of circumstances and structures that companies have set up. Some of them may have been subject to litigation, if that is something you are referring to. I do not personally get feedback through our representative organisations that that is occurring as a widespread phenomena. I do not believe that companies restructure purely with a reference to the company having to downsize. That would be a fairly short-sighted approach if that is the entire reasoning behind corporate restructuring.

Senator MARSHALL—I will finish with this question: are you aware when the parliament before has altered a decision of the commission within six months of that decision being made?

Mr Barklamb—I am not aware of something occurring necessarily within six months although, as I did sit and think about this at my desk yesterday, I thought about our whole statutory enterprise bargaining system. My recollection of the 1990 wage case was that the commission said to the parties, ‘You lack the maturity to bargain. We are not ready for the enterprise bargaining principles you are putting to us.’ The then government’s reaction to that was to create a statutory enterprise bargaining system. As I indicated in opening, I am aware that in a sense the evolution of the Workplace Relations Act has been driven over a century by reactions to court and tribunal decisions to either confirm them, modify them or overcome them. Much of the act is actually shaped in those sorts of directions. As I said earlier, certainly the parliament was involved in award simplification and even freedom of association, which is quite a good example. In the 1970s we had the heyday of preference clauses: major arbitration and creativity by the commission. Full benches, in making awards, as they did at that stage, said preference clauses were part of the system and were valid. This parliament has reversed that by creating the freedom of association provisions and specifically deleting scope for preference clauses.

CHAIR—Senator Marshall, we are starting to run out of time.

Senator MARSHALL—In that case I should finish.

CHAIR—That is very obliging of you.

Senator MURRAY—Mr Barklamb, you are quite correct, of course. Jurisprudence produces common law principles which are then enshrined in statute. That is the origin of codified statute. I am indebted personally in my job to many of the decisions of industrial relations tribunals because they have helped us arrive at some principles which assist. And that is what is confusing in this matter, because we have differing views of expert bodies. You have stated that the New South Wales parliament has legislated a small business exemption from redundancy pay obligations. I do not know much about that. As I understand it, the Employment Protection Act 1982 would be the act you are referring to. As I understand it, that act only gives a small business exemption insofar as the compulsory notification requirements are affected; in other words, it is a threshold issue, an access issue, and not really an exemption for small business per se. Is that the correct interpretation of New South Wales?

Mr Barklamb—I would need to go back and look at that. I notice that you have before you a submission from the New South Wales government and we would consider that they would present their system accurately. I do know that in New South Wales there is an

interaction between the legislation and the standards handed down by the commission that evolved over a set of years. I was indicating more that the outcome in New South Wales was an exemption. I apologise if I have erroneously put an emphasis on that being delivered by parliament when it may have been delivered through the interaction of statute and the commission.

Senator MURRAY—It does raise an important point. Effectively what the federal government is doing is setting a threshold. It is saying, ‘If you have 15 persons or more employed you are required to observe redundancy pay obligations, and below that you don’t.’ No-one argues for the prohibition of redundancy pay. If people want to make agreements to pay redundancy, everyone accepts that. So if the parliament were to disagree with the federal government’s threshold but agree with the principle that there should be thresholds, where do you think a threshold should apply if it was not an arbitrary one of, say, 15 employees, or even the higher ABS version of 20 employees?

Mr Barklamb—Our primary position would be that if the parliament were to agree to the concept of a threshold the concept should be somewhere in the region of 15 to 20. We say that the parliament could have confidence in that figure because of the experience since 1984. That is what the December 1984 supplementary decision delivered. In those industries where the threshold exemption has operated it has operated well, evidenced by a paucity of applications to implement redundancy pay against small businesses. That said, were this committee mindful to recommend some reduced threshold, we could not really assist as to whether it is any particular number between one and 14.

Senator MURRAY—Let me put to you something that might assist you. You have focused—rightly, I think—as have other employer organisations, on the ‘capacity to pay’ arguments. The fact is that, if somebody is under stress because of their business circumstances, dealing with issues like the commission—which may be far from their place of business and may require them to produce information which is difficult for them to put together even when they are in good circumstances, never mind bad circumstances—make for a problem. There are other thresholds that could be considered, such as an automatic exemption on the production of verifiable, independent pieces of paper. The previous witness and I discussed a tax return which shows no taxable income—no profit, in other words—or that the proprietors were the recipients of social security payments or special relief from governments, such as in the instance of farmers. They are the ones I can think of, but you may be able to think of others.

We are searching here for what would be the appropriate threshold if we were to retain the principle that those who are able to pay redundancy should pay it. In broad, the ACCI accept that principle. You do not say that people should not pay redundancy; you say, ‘If you can pay, and you have agreed to pay, you should pay.’ That is my understanding.

Mr Barklamb—As I indicated earlier, we certainly have no opposition to or difficulty with bargaining on this issue where the capability exists. As to whether a numerical threshold can be replaced with other evidence, we would suggest that that would be fraught with quite a degree of difficulty. I can certainly see there is difficulty as to what evidence you use and how you weigh competing indicators. What if, of the five pieces of paper, four go one way and one goes another?

Senator MURRAY—Do not misunderstand me: I am not suggesting a discretion of the AIRC. I am suggesting that if a piece of paper is presented which shows that there was no taxable profit, such as a tax return, they would have no discretion; there is an automatic exemption.

Mr Barklamb—We would suggest that, even if a threshold were identified—it may be a threshold of no taxable income or a far more balanced one of maybe a taxable income below minimum wages, because it is important to remember that that income is what a lot of small business proprietors are taking from their businesses—it would not necessarily be indicative of your instant capacity to come up with the types of amounts I have put on the piece of paper for you this morning in the additional threshold spreadsheet. Even some nominal return or other indication on another financial document does not illustrate an instant capacity in trade to have this type of money to hand. That is where our suggestion stems from: when you are running a business of a certain limited size, you are inherently unable to have that type of money and fluidity to hand to meet these additional obligations.

I would add that if, for example, you are unable to produce a tax return that shows you to have a zero taxable income or a very low taxable income in one year, that year may have been preceded by a number of years when that was not the case, or you may still be attempting to leverage your finances so your family home is not so indebted to the running of your business. We suggest that there is a wide range of circumstances which could lead to an inherent inability to supply any paper test and where the proxy is a business of a certain size and is unable, through its throughput, in the absolutely overwhelming main, to meet those types of obligations.

Senator MURRAY—You have said that no government, coalition or Labor, appearing before the Industrial Relations Commission supported the removal of the small business exemption. A few just did not say anything, as I understand it. That does not invalidate your statement. The governments of New South Wales, Queensland and Western Australia at the time of their submissions were all Labor governments?

Mr Barklamb—They were.

Senator MURRAY—And they all supported a small business exemption?

Mr Barklamb—The Western Australian and, from memory, Queensland governments supported the exemption. I understand Victoria to have made no submission—they expressly said, ‘We do not make a submission on the small business exemption.’ Beyond that, I would have to check.

Senator MURRAY—You say here ‘New South Wales’. What did New South Wales do?

Mr Barklamb—I would have to check expressly for you exactly what New South Wales said. I can do that through extracts from their submissions.

Senator MURRAY—I wonder if you could, because it is one thing for tribunals to make a decision; it is quite another for governments, particularly Labor governments, on an issue like this. I want the evidence to the committee to be specific about this. Could you also in your response pick up for us what thresholds those governments were talking about—whether it

was the threshold of 15 or 20, which is the ABS small business threshold, or whether they were talking about any other thresholds such as those other measures we have discussed?

Mr Barklamb—I certainly can. For the benefit of the committee, my recollection is that we debated the threshold as an either/or proposition. There was never a discussion about putting it up or expressly about putting it down, but I will certainly check that.

Senator MURRAY—I want to be sure about your remarks here, because you are very specific. For the benefit of the committee, I will just read it. You say:

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.

Mr Barklamb—I will go back and check that.

Senator MURRAY—My last question refers to the ACCI position on unfair dismissals. It seems to me that this matter is complicated by your position because, if the unfair dismissals exemption and this redundancy exemption go through for small business, you will have a case where it will be much easier for people to be fired and they will not be able to get redundancy either. In other words, it is a double whammy. The danger there of course is that unscrupulous employers—in these matters we are never talking about scrupulous employers—will in fact operate to the detriment of the Australian principle of a fair go and of decent human rights and decent employment practices. It is a pretty harsh regime that you are advocating, isn't it? I am not averse, as you know, to tightening up the system, but I am concerned if all safeguards go.

Mr Barklamb—The first point to make is that at no point is there a discussion of removing the capacity to argue an unlawful dismissal, regardless of the size of the business. So, if the redundancies are faux redundancies and there is discriminatory or unlawful conduct at hand, that capacity would certainly exist. What is very difficult for a small business in making a case for redundancy and dismissal at the same time—the interaction of the unfair dismissal and redundancy provisions—is negotiating the fairness provisions in regard to things like selection process, notification and implementation of the termination of the redundancies.

We have already indicated that small businesses have a difficulty in taking strategic advice and making strategic accounting and financial judgments about their futures. Equally, where they are facing adversity and making redundancies, it is very difficult for them to be able to negotiate the labyrinthine fairness decisions—based on a fair go all round, admittedly—on selection of redundancy et cetera. So the consideration at hand is a financial transfer of moneys. Unfair dismissal claims about redundancies really rest on a level of HR advice that is very difficult for these employers to access.

Senator MURRAY—If I may interrupt and get your response, we have paid a great deal of attention to process issues with federal unfair dismissal, to the extent that unfair dismissals have reduced applications by 62 per cent in the last 10 years. In other words, only the meritorious cases are getting through. The problem has been at the state levels where the process has been dreadful. Nearly all the complaints, when you dig under them, seem to refer

to state jurisdictions. Yet both from the ACTU and the employer groups, I have not heard in this inquiry—it might have occurred elsewhere—much attention being paid to sorting out the process, just stopping abuse and complexity with respect to much of the way in which these things are handled.

Mr Barklamb—Obviously the fair termination and the small business—I have forgotten the exact nomenclature of the bill—dismissal bill are not the matters we are going to today. You could say that the small business exemption from unfair dismissal is in itself a procedural reform, because unfair dismissal is about fair procedure, and a fair procedure based on the decisions of the commission rests on being able to negotiate some fairly sophisticated concepts. So in a sense, you could say that paring the termination redress for a small business back to only the most objectionable and clear-cut dismissals where the reason itself is not a valid one is essentially in the nature of a procedural reform.

Senator MURRAY—Are you aware that there are only a little over 2,000 unfair dismissal applications for small business under federal law and that the vast bulk is under state law? The fairness issue is not a major thing.

Mr Barklamb—Again, however, we certainly are aware that substantial improvements have been made to the unfair dismissal from its initial introduction in the early nineties by the preceding government and by this government. Those have in the main, in an almost unblemished part, contributed to the usability in the system and to applications only being made where merited. However, we are again approaching a tip of the iceberg type argument. For the tip that is over the water, these are still very costly and difficult matters to deal with where settlements are reached at odds with the financial capacities of the organisations and they are made to make financial judgments regarding settlements, rather than merit judgments. But there is also a whole level of the iceberg under the water where people in small business are reporting to us levels of paralysis and lack of confidence in their ability to make necessary managerial, termination, disciplinary et cetera judgments with their staff with the rapidity they would like.

Senator MURRAY—I should perhaps put this on notice so you could give it some thought. I fear that if you get rid of the ability of small business employees to access redundancy provisions and you get rid of unfair dismissal, which is the intention of government, they really are not in a position to get redress—easy redress—without going to the courts, which is very difficult for small business employees, as it is for a small businessman or woman. You are introducing a very harsh environment for these people.

Mr Barklamb—This may be a matter that we will take up in inquiries into other matters, but I would say that we are talking about an environment that persisted consistently before 1984 and the 1990s. It is a situation not unknown to the Australian workplace.

Senator MURRAY—I would appreciate it if you could give some thought to the link between your two policies and about what protection will remain for workers in those circumstances. I know the ACTU are listening, so perhaps they could do the same.

CHAIR—Senator Crossin, do you have any questions?

Senator CROSSIN—No. I think pretty much what I wanted to ask has been covered.

Senator BARNETT—Mr Barklamb, I want to draw out some analysis on the severance pay obligation additional document that you tabled. If I am in a small business with seven employees who have been working for four years or more, you are telling me that, based on this document, the redundancy obligations are estimated to be \$30,000 in addition to what I am required to pay today.

Mr Barklamb—Yes. In the example of a shop worker in Victoria on \$526.40 a week, it would be just over \$4,000 each and, as you say, if all seven were to be made redundant, it would be in the obligation of \$30,000.

Senator BARNETT—With respect to a small business that is an enormous amount of money.

Mr Barklamb—It is indeed. This is but an indicative example at the minimum wage. When we get to tradespeople and people with overaward payments and the like, we are talking about very considerable amounts of money. That has really been at the core of our evidence to say that there is inherent inability to assume these payments. The amounts of money at hand are not suitable to transfer out of mum and dad businesses to redundant employees. The legitimate balance of interest simply does not lie there. As the table clearly shows, it is not a situation of employees having no transfer of moneys to them. The notice payments are still there.

Senator BARNETT—We have 1.2 million-odd small businesses in Australia that are employing about 3.3 million people, which is nearly 50 per cent of the private sector work force, and providing over 30 per cent of our GDP. To what extent does your analysis apply to existing small business employees? Does it apply to all of them or just to some of them?

Mr Barklamb—To assist you, we will provide the material we presented publicly to make a macro assessment of this. We did that associated with, in particular, a supplementary decision exercise which we believe of itself redressed \$190 million of immediate impact of this decision and effectively did no more than delay the \$190 million impact.

Senator BARNETT—What is the \$190 million amount?

Mr Barklamb—The \$190 million was what was being faced in the imminent term by employers in the wake of the March 2004 decision by the commission.

Senator BARNETT—Is this the contingent liability for employers?

Mr Barklamb—It was not so much a contingent liability as much as it was based on the actual throughput of redundancies in any calendar year. I certainly will assist and provide further information on that.

Senator BARNETT—You said in your submission that from July to, I think, October we are going to have a position where the opposition parties know the government's intent and might decide to block this legislation, but this will kick in on 1 July because of the AIRC decision. We are going to have small businesses all around this country with that liability growing on a day-to-day basis and we are going to have a problematic position for small business that will potentially be a nightmare.

Mr Barklamb—I absolutely agree with that assessment. From early July, we will gradually see major federal awards reach their anniversary date of which a four-week

obligation is going to come to pass. Were this piece of legislation to pass during the latter part of the year, you would see some major federal awards that have the obligation have it taken away and you would see other major federal awards never quite get it. It might be a matter of a day here or a day there. You will see a great raft of inconsistency and uncertainty yielded through the rest of this year for small businesses and, as I have been at pains to say, the small businesses doing it worst and facing going to the wall.

Senator BARNETT—Mr Barklamb, I do not think this has been adequately acknowledged as what potentially could happen in the second half of this year as a result of this AIRC decision. Knowing that this is the government's intent, it could be blocked. We will not get it through prior to 30 June if the opposition parties oppose it, and that is a real possibility. It is going to be a serious issue for small business employers and small business employees.

Mr Barklamb—Indeed. The uncertainty will be in no-one's interest.

Senator BARNETT—My understanding of the research is that in that AIRC decision there were four state governments that participated. Queensland and WA opposed the removal and New South Wales and Victoria neither supported nor opposed it. That was my advice, but I might be wrong. Notwithstanding that, we had evidence earlier from the NFF that some of their members operate under a state award and some operate under a federal award and they are metres or a kilometre apart. This is nonsensical. If you were trying to design a system for industrial relations arrangements in Australia, why would you do it that way? Is this further evidence in support of one industrial relations system that can apply across the country?

Mr Barklamb—This is precisely the type of issue and precisely the type of circumstance that should lead us to engage genuinely in an analysis of and debate on moving to a unitary system, a single system, and have greater harmonisation between our systems. My friend from the NFF discussed with you the case of someone down the road having a different circumstance. We do have circumstances like those that I think you questioned my friend on. In a printing company, for example, there will be printers under a federal award and the person doing the payroll will be under a state award. We have that sort of thing in restaurants. There are lots of examples within the one workplace where you are mixing federal and state awards. You can have a situation, for example, where the primary activity, such as rubber, plastic and cable making is under a federal award but the person in the warehouse is not, the person who does the pays is not and the person who drives the trucks is not. You are shifting instruments all the time.

Senator BARNETT—So that is not unusual. You have case after case of those types of examples.

Mr Barklamb—Indeed; mixed federal and state award coverage.

Senator BARNETT—How common is it?

Mr Barklamb—It would depend on the industry, but there would be a substantial bulk of areas where it could happen. I cannot put an exact percentage on it, but it is certainly not a marginal concern.

Senator BARNETT—Finally, I am interested in the view that I think you expressed to Senator Murray to some extent on this number of 15 as opposed to 20. I am thinking of those two numbers in particular, but whatever it is, with the greatest respect to whoever, we should try to make it consistent. We have the unfair dismissal laws that use the 20 figure, we have the ABS statistics that use a figure less than 20 and we know that a microbusiness is less than five, but there are some other pieces of legislation that use 15. As somebody who has a background in small business, you are trying to cut the red tape and keep it simple. The worst thing in the world for small business is to try to work out the different arrangements that apply, so we have to try to make it a simple system. Do you have a view on the number or just a view on the need to make it simple?

Mr Barklamb—We would certainly support simplicity and predictability of outcomes. The point at which the margin between a small business and a medium business occurs is a difficult one. Whether there is an exactitude to it or a science so that you can say that it is precisely at one point or another, I am not sure. We certainly know that when you get under the 25 to 30 employee level you are less likely to have on-site HR advice and financial and operational capacities to access the types of resources you need to negotiate a lot of the more difficult regulatory areas.

We also know that the 15-employee exemption that has been there since 1984 has worked well, with only marginal action either from unions to seek additional payments against employers—which was a highly marginal concern—or from issues of incapacity on the other side, as we have been through. Certainly, some degree of consistency would be supported. We certainly do not believe that businesses with employee numbers between 16 and 20 magically have capacities that those with under 15 do not.

Senator BARNETT—I can see a strong argument in favour of 20. Thank you for your evidence.

CHAIR—I thank the witness from ACCI.

[12.21 p.m.]

RYAN, Mr John Francis, National Industrial Officer, Shop Distributive and Allied Employees Association

CHAIR—Welcome. The committee prefers all evidence to be given in public. It will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 7. Are there any changes or additions?

Mr Ryan—Do you also have submission No. 7A?

CHAIR—We do have that. It was distributed this morning. Do you have it, Senator Crossin?

Senator CROSSIN—I do; it was emailed to me.

CHAIR—I now invite you to make a brief opening statement and then we will go to questions.

Mr Ryan—The opening statement will deal with submission No. 7A, which introduces some additional material. I apologise for the lateness of tendering the supplementary statement, but it is important because it addresses a number of the issues which have been completely lacking from the discussion—certainly from the department's submissions to the committee and from any of the employer organisations. It picks up on some issues which have not been addressed in either the second reading speech or the explanatory memorandum and that go to, in particular, the structure of the bill. I make several points in the supplementary submission, mainly that the structure of the bill—especially the definitional approach to relevant time—has a consequential effect of challenging the jurisdiction of the commission to have redundancy provisions in any award. This would, in my view, lead to a position where redundancy provisions in any award for any sized employer will be outside the jurisdiction of the commission, except in extremely rare circumstances.

I also make the point in submission No. 7A that the notion of what constitutes an employer of 15 employees is not an easy question to answer. I give a practical example of a particular employer, whom I name as Jasbe Petroleum. This example comes out of recent proceedings in the Australian Industrial Relations Commission where the one employer operates through 16 separate companies, each running a petrol retail site, but it is all one group and it is effectively owned by one person. The result is that under the bill, as currently structured, each of those 16 companies will be a small business, whereas the reality is that that employer could have many hundreds of employees in total.

I make the point on page 9 of submission No. 7A, in the third full paragraph, that it would be possible for the 16 Jasbe corporations to have up to 224 employees and still all be considered small businesses. I note there that, whilst I use the general number of 224, the reality is that under this bill Jasbe Petroleum could have 224 full-time and part-time employees with several hundred casual employees and each of them would still be small businesses. That is because the definitional structure of this bill is such that it isolates the majority of all casual employees from the operation of the definition of small business.

I also make the point in our supplementary submission that, to a large extent, it would appear that the bill represents a con job on small business. The government has certainly

portrayed this as being an issue of benefit to small business, whereas the structure of the bill is such that it will remove redundancy provisions from businesses other than small businesses because of the effect it has on the jurisdiction of the commission. And because of the notion of defining an employer as a constitutional corporation in the simplest terms it allows employers the capacity to have as many constitutional corporations as they like, as long as each employs less than 15 employees, and then the sum total of the business is able to gain the benefits of this bill. In other words, a benefit which is proposed to be for the protection of small business can be accessed by any business with sufficient capacity to organise their affairs properly. I note that I have had to do company searches on medium and large businesses a number of times and I have as my starting point annual returns, the annual reports, of corporations. You only have to pick up the annual reports of any of the medium sized or major corporations in Australia and they list, generally, anything from 50 to 100 associated entities and subsidiaries. When you look at the structure that companies have, then it is quite clear that the submissions I make are founded in reality.

As part of this opening submission I will make a couple of other general comments. Senator Barnett has asked a number of the witnesses: does the bill maintain the current situation? It clearly cannot be maintaining the current situation where the definitional approach of this bill is significantly different from the definitional approach adopted by the Australian Industrial Relations Commission in relation to redundancy payments. The exclusion in the 1984 decision in relation to 15 employees was 15 employees *simpliciter*, so you could count any employee. I ran cases before the commission in the late 1980s, when I was an official for the Federated Ironworkers Association, where we specifically led evidence to the commission that the employer had more than 15 employees on the basis that we were able to count all of the people in the operating factory environment plus the employees in the head office environment and we included all employees—casual, part time and full time. So there was always the capacity in the commission to have regard to a wider number of employees than this bill provides for.

Equally, in relation to the commission, you could always have the capacity to run the argument as to who was or what constituted the effective employer. It did not define employer in the concept of a constitutional corporation. It treated the concept as: who is the employer? On that basis it was always possible before the commission to run the argument that a particular employer was constituted of a number of entities but that that constituted the employer for the purposes of whether or not the employer had less or more than 50 employees under the commission's test case decision. This bill significantly reduces the notion of what is the employer and significantly reduces the number of employees. In that sense, it cannot be seen to be maintaining the current situation. It is a fundamental change.

I also make one other comment. To the extent that there is a focus on the cost implications of small businesses paying redundancy payments, it must be borne in mind—and I think this is forgotten—that most small businesses have a large number of casual employees. Therefore they already pay redundancy pay to those employees, and that is because the concept of what constitutes a casual loading builds into it elements of lost benefits—the loss of security of employment, the loss of annual leave, the loss of sick leave. In that circumstance, where small businesses are quite prepared to pay 25 per cent above the award cost of an employee by

virtue of employing casual labour, they are accepting and paying a component which takes into account redundancy type provisions, which is payment for service forgone. In that sense, therefore, this bill treats only one class of employee as the exception—that is, the full-time and part-time employees of small businesses. It draws the distinction not between small business and large business but between two classes of employees of small business. Those are my opening submissions.

Senator BARNETT—Mr Ryan, can I just go to the submission from the ACCI, which you might have heard earlier, with regard to the additional information they tabled about the cost for a person who has been working for four years or more. They say that under these arrangements, if they come in from 1 July, the redundancy payment would be about \$4,200. So for the average small business that is employing seven people, with a redundancy liability of \$4,200 each, it would be about \$30,000 for a small business, a retail business or any business that is employing those people. What do you say? Do you accept that proposition from the Chamber of Commerce and Industry?

Mr Ryan—I accept it in terms of the mathematics. If you multiply eight weeks pay by \$526.40 or thereabouts, you will come up with a figure over \$4,000, so I accept the mathematics. I do not accept it as being a realistic proposition at all, certainly in the retail industry. If I found a retail employer who had seven full-time employees—they would have to be full-time employees to obtain that sort of money—who had four years service and who then went out the door, the one thing I would be sure of is that no-one would get a cent, because by the time they go out the door—and we have had this happen on many, many occasions—there is not a cent left for the employees. The employer never pays redundancy payments that are owed. In fact, we do not even see the annual leave entitlements that are owed. And, invariably, our members lose anything up to a week or two weeks pay. So these theoretical assumptions about costs are simply that—they are theoretical. They have no basis in reality.

Senator BARNETT—You are saying that is if the business goes down the gurgler.

Mr Ryan—That is the scenario that was painted: an employer who has seven full-time employees, each of them earning \$4,000, who retrenches all seven of them. That happens when the business closes. When that happens, and we have seen it happen too often, no-one gets anything.

Senator BARNETT—But your preference is that they do get something, that they do get their \$4,211, obviously.

Mr Ryan—I would start off by first of all hoping that I could get them their wages, then their annual leave entitlements and then hopefully, in that sort of circumstance, try and get some redundancy payment. Yes, I would hope to get it, but these theoretical constructs that appear in the department's submissions, where they posit a situation of a retailer with seven employees in the same circumstance, are nonsense scenarios. Where it actually happens, where large-scale redundancies occur like this in the retail industry in small business areas, no-one gets a cent. We have prosecuted some people up hill and down dale and, whilst they are still riding around in their Mercedes and have their house and their swimming pool, our members have got nothing. The unscrupulous employers—

Senator BARNETT—The ideal world that you are painting is that you want this bill rejected. That is what your submission says.

Mr Ryan—Yes.

Senator BARNETT—You want the bill rejected. You want that system injected into the law and that AIRC decision to remain.

Mr Ryan—Yes.

Senator BARNETT—I want to take you forward to July, August, September and October—the period of time when you will know the government’s intention. If this bill is blocked some small businesses will have those obligations and, you would assume, some will not. What sort of environment are we going to be living in the second half of this year if that happens?

Mr Ryan—I do not know what is going to happen in the second half of this year because the government have not told us what they are going to do with the workplace relations legislation.

Senator BARNETT—You know what the government’s intention is. You have read the bill. You are opposing it.

Mr Ryan—Yes. The reality would be that even if this comes in—on the basis that the current bill is rejected and the commission decision applies—these would be, at worst, notional obligations on employers because they could only arise, first of all, if the employer did have employees who were full-time or part-time. In our industry the vast majority of employees are casual. Where they are part time and full time, these obligations would only arise if there was a redundancy situation that required an employee to have their services terminated. They would not apply if there was a redundancy situation but there was a relocation or reassignment of an employee, or where an employer—and this happens with the good employers—tried to find someone a job in order to avoid the loss of employment. So they are notional; they are not real.

Senator BARNETT—You are using the word notional. With respect, it is not a notional liability. This is the law. This is creating a liability. It is not notional, is it?

Mr Ryan—If it is not notional, it is nothing more than contingent. It is contingent upon certain things happening. It is the same as the current law providing contingent liabilities for long service leave which are much more onerous than this in terms of the costs. But contingent liabilities only come into existence as vested liabilities if the contingency occurs.

Senator BARNETT—So you agree it is not a notional liability.

Mr Ryan—I will agree it is not notional. But if I am expected to believe the government then—

Senator BARNETT—I am just clarifying the definitions.

Mr Ryan—I would believe the Treasurer, who says that we have such a booming economy that there will be no redundancies.

Senator BARNETT—I think we can avoid that esoteric discussion.

Mr Ryan—The Treasurer does not think it is esoteric.

Senator BARNETT—You opened your remarks by talking about definitions so I thought I would clarify your definition of notional liability. Can you respond to the Queensland state termination and redundancy test case decision? I understand they wanted to retain the small business exemption. Are you aware of that?

Mr Ryan—Yes. In submission No. 7 we draw attention to that. I know that the government has had regard to that in one of the earlier manifestations of this bill. One of the things I draw attention to there is that, whilst we are fundamentally opposed to the concept of the exemption, at least the approach adopted by the Queensland commission was that they recognised that first and foremost you have to be very careful about defining what is and what is not a small business. They made it very clear that they wished to ensure that there would be no contrived exercises to avoid payment of redundancy payments by artificially creating the concept of a small business. Given that the government obviously knew about that long before it drafted this bill, that seems to imply that this bill has been drafted so as to deliberately avoid the very specific aspect of clarifying what is a small business. That makes me more worried that the bill is designed to actually encourage, rather than avoid, the rorting of the system.

Senator BARNETT—We have had a lot of evidence today about the inconsistency in the different states and indeed in the federal jurisdiction of the different awards, the different terms and conditions that apply under different arrangements. Do you think that if we could come up with fair, reasonable, sensible, commonsense arrangements, one industrial relations system would be preferred?

Mr Ryan—It is one of those questions where you place so many qualifiers on it—whether it could be a fair and effective system. If it could be genuinely fair according to my approach of fairness, I would be happy with a unitary system. The trouble is that I do not accept that the way the government use the term ‘fair’ is fair. They have a completely different approach. The other matter that I would—

Senator BARNETT—Okay.

ACTING CHAIR (Senator Marshall)—Let the witness answer fully. You have tried this with everybody, and it is proper that they qualify their answer if they want to.

Senator BARNETT—I am listening.

Mr Ryan—The other matter I raise is that the approaches in the state systems have reflected different rationales on occasions. There is a very clear difference in the philosophical rationale underpinning the New South Wales redundancy approach and the federal commission’s redundancy approach. There is equally a totally different rationale underpinning the Tasmanian industrial relations commission’s approach to redundancy. On that basis, it is very difficult to ever have a unitary system where there cannot be agreement on the rationale for it. This bill has never looked at what the underpinning philosophical rationale for redundancy is. Therefore to impose a single system over all of the states—this bill simply overrides the states—is to do it on the basis of ignoring the debate about what the rationale for redundancy is as it has been determined by the New South Wales, Tasmanian and federal systems, which probably have the three most diverse philosophical approaches.

Senator CROSSIN—You make a point in your submission that the government justifies this legislation by picking up on the decision in Queensland but you point out that it is a fairly disingenuous position that the government has because there are some aspects of the commission that are not picked up. Can you clarify those for us?

Mr Ryan—The government has used Queensland to support its argument because of the very clear provision of an exemption for small business and, to that extent, the simplicity of saying there is a state which clearly supports an exemption has been picked up by the government. Where the government then ignores what it does not like about the Queensland approach is that the Queensland commission was very clear in going to the extent of ensuring that there had to be some balance introduced into the system to ensure that an exemption for small business only related to genuine small businesses.

The difference between the approach of this government and that of the commissions is that legislation is a very blunt instrument and, once legislation defines terms and defines the jurisdiction of the commission, it operates very bluntly. The commissions—and certainly the Queensland commission—had a very flexible approach to constituting what was or was not a small business. They do not and did not have to define those terms in any great detail. They were simply able to make it very clear that they would not accept rorting of the system. Commissions can do that. Commissions have the ability to change their decisions in order to take into account particular circumstances, and they have the flexibility to move. The legislation as proposed is so blunt that you cannot get around it once it is in place. That is an example of where the federal government has picked up one part of the Queensland approach but simply ignored the second part, which is giving greater certainty to what constitutes small business and ensuring that there are no rorts in the system.

Senator CROSSIN—You make a point in your submission that the minister uses an example of what would be a typical employer, which you say is not the case. What is a typical employer in the industry that you cover?

Mr Ryan—Typical small businesses would operate with larger numbers of casuals. If there was ever an employer who had only seven employees there would probably be one full-timer, maybe one part-timer and five casuals, in which case a redundancy bill would only ever apply to the two senior employees, the full-timer and the part-timer. Business changes are accommodated by simply shedding casual labour as economic circumstances change, so that if there is a downturn in retail sales then the casuals are put off. We have experienced this constantly, that the casuals make up the bulk of employment in the retail industry because it simply provides flexibility to employers to meet any of the ups and downs of a changing economic market. That is despite the fact that casuals are up to a third dearer on wages alone. Depending on which state you are in, it can cost from 20-odd per cent up to around 30 per cent extra to employ casuals. Employers are prepared to pay the extra costs on a continuing basis because of that flexibility and it avoids the need to ever retrench or make redundant the key full-time employee or the key part-time employee.

Senator CROSSIN—The ACTU put to us this morning that the test case was a year long and there were 16 days of evidence. To your knowledge, was there any evidence ever put about the incapacity to pay by employers in your area of coverage?

Mr Ryan—No, I am not aware of any issue on that. I am running a current case before the commission where a decision has been reserved. We are trying to rope in a large number of employers into a particular federal award. Their capacity to pay the award rates has been raised. The only thing I would say about that is that in that case, because the employer wanted to lead the evidence, they led highly confidential, highly personal financial information about the state of play of each of these businesses. The bulk of these businesses would have had between 20 to 30 employees. In all cases, the information will never see the light of day in terms of the public. Even as the union official, I could not get access to some of the information—our barrister could—because the commission was able to use its provisions under section 355 of the act to simply declare that all of the information that was commercial-in-confidence and private financial information was sealed. That is my experience wherever capacity to pay arguments have been raised. It is possible to do so in an environment where even the unions who run the cases do not actually get to see the information. The advocate is the only person who gets to see it and the advocate can be placed under very strict constraints by the commission. They have got formal powers to do this to prevent any discussion or disclosure of confidential information, which allows employers to put up quite personal information. It cannot be sighted or seen by anyone other than the advocates and the commission. That is my experience in relation to capacity to pay arguments.

Senator MURRAY—Mr Ryan, please confirm for the committee: any employee under contract, unless that contract specifies redundancy, is not entitled to redundancy—that is correct, isn't it? If you are a contractor with a limited period for which you do the work, you are not entitled to redundancy unless it is in your agreement?

Mr Ryan—No—unless the contract specifies it or unless there is a law or award that overrides the provisions of the contract.

Senator MURRAY—I have asked the secretariat to get the figures for our report, but you will not have the figures in your head. There are large numbers of contractual employees in small business, aren't there?

Mr Ryan—Yes.

Senator MURRAY—Moving to the next category of casuals, can you tell me whether any of the state or federal jurisdictions—there are six of them—allow casuals redundancy?

Mr Ryan—As far as I am aware, no.

Senator MURRAY—That is as far as I am aware too. Again, I have asked the secretariat to get the actual numbers of casuals in employment in Australia, but you would confirm that there are large numbers of casuals employed in small business, wouldn't you?

Mr Ryan—Very large numbers.

Senator MURRAY—The third category is part-timers. Can you confirm whether in all cases, both under state and federal jurisdictions, part-timers are entitled to redundancy?

Mr Ryan—Yes, because the distinction is generally not between part time and full time but between non-casual and casual, so it is the concept of permanent employment which encompasses part-time and full-time employment.

Senator MURRAY—Nevertheless, for the purposes of a common understanding, small business understands a part-timer to be a regular employee who does not work a full working week—you would agree with that, wouldn't you?

Mr Ryan—A lot of small businesses have total confusion about what is part time and casual. They employ people as casuals on a legal casual contract who work, effectively, what I would say are part-time hours. It is a part of the system permits.

Senator MURRAY—Given my definition of part-timers as I have outlined to you, there are very substantial numbers of those in small business, aren't there?

Mr Ryan—No, not substantial numbers. They still form a minority of employees, because part-time employees carry with them other obligations in relation to the termination provisions, whereas a person who is properly identified as on a casual contract of employment is able to be terminated at the end of each shift. On that basis, whilst they have all the appearances of being part time, and can often be euphemistically referred to as part time, the majority of the employees are actually on casual contracts of employment.

Senator MURRAY—Then we are left with full-timers, and nobody disagrees about what that means, I hope. There are some full-timers who in some circumstances are presently exempted from redundancy provisions as a result of state tribunal decisions—Queensland, for instance. That is correct, isn't it?

Mr Ryan—Yes, if they are within the particular categories of those exemptions.

Senator MURRAY—So, when we are discussing these redundancy provisions for small business, we have established with this question and answer session plus others today that there are already substantial numbers of employees in small business who do not get access to redundancy provisions—that is correct, isn't it?

Mr Ryan—Yes.

Senator MURRAY—And what the federal government is seeking to do is to make that universal.

Mr Ryan—Yes.

Senator MURRAY—As an association you do not object to exemptions based on various thresholds, such as 'casual'—you object to a universal prohibition. That is correct, isn't it?

Mr Ryan—No. We object to even the exemption on the basis of 'casual' but it is an exemption that we have had to simply live with. If you ask whether we have an objection, our answer is that we have it but recognise it is one of those very long-term provisions that is in place. Quite clearly it is at least remunerated for by the effect of the casual loading, taking into account the insecurity of the employment to casuals. Going one step further, the general concept of exemptions is something we would oppose. We would then debate the necessity for exemptions where they were going to be introduced regardless.

Senator MURRAY—Do you accept the proposition that if a small business genuinely cannot pay—if there is genuinely an incapacity to pay—the process for determining that should be as cheap and administratively easy as possible?

Mr Ryan—Yes, but with a qualifier: ‘cheap’ and ‘easy’ cannot be the only determinants of an effective system. It certainly should be cheap and easy but it has to be scrupulously honest and open and it has to be absolutely fair. If it is cheap and easy but it is not open, honest and fair then it is highly objectionable.

Senator MURRAY—Are you familiar with the concept of a public good?

Mr Ryan—Definitely.

Senator MURRAY—Then you would know that the case being put is that the harm felt by businesses as a result of having to prove financial incapacity through, for instance, producing three years of financial records, getting the accountant to produce them, driving all the way in and out for commission hearings and so on may be regarded as greater than the public good of a fair adversarial process, and the parliament therefore needs to consider some better shorthand method of dealing with that.

Mr Ryan—Yes—that sounds very good. However, I will just relate a personal experience. My son left home and wanted to apply for an allowance from Centrelink. The public good requirement of that required that my wife and I sit down to be means-tested. I have never been through such a horrendous process, spending days and days trying to justify every piece of money that came into the house, which is easy because it is wages, but also every cent that went out of the house for a full year. The public good was served on the basis of a proper analysis of the financial situation of the parents vis-a-vis the child. In that circumstance, the public good determined that it was going to be an absolutely open, honest and totally scrupulous analysis. If it applies to individual parents, I do not see why the public good is then changed because it happens to be an employer rather than a parent. Public good has to be for the good of the public and the public is all-encompassing, so it should not be just ‘good’ for a small section of the public.

Senator MURRAY—You are faced with the prospect of a government saying to you, ‘We’re going to get rid of this altogether.’ Is it the case that you would not accept any compromise provision at all and that you would hold out for the existing system? Would you go down valiantly fighting in flames?

Mr Ryan—No. The first thing would be to ensure, if the government was going to do it, that the drafting was right so that you would target only the people the government says it wants to target: genuinely small businesses. You need to have a system of defining ‘small business’ and defining ‘employees’ that is clear and not able to be rorted. If there is going to be a system of exemptions then they should be looked at very carefully.

I noted that you asked the question of the NFF about the pieces of paper that, because of the issues of such things as the farmers in receipt of special circumstances relief, they would produce as the mere triggers for an exemption. The great problem with that is that, if I am not mistaken, some of the largest national or international agricultural corporations were in receipt of some of those special relief payments because they happened to have properties that were in the areas that were most affected by drought. I am not certain whether the mere production of a piece of paper is sufficient if the production of the piece of paper does not come attached to a very detailed scrutiny of all of the circumstances relating to the capacity to pay. If you could do that then you would quite clearly be going down the path of being able to

identify a group of exemptions. While I philosophically oppose the concept of exemptions, I would at least have confidence that the exemptions were well thought out and were designed to meet a very specific issue.

At the moment, there has been no debate about the concept of exemptions and there would need to be a very solid debate about what constitutes fair and effective exemptions. I would have to be pragmatic about this. A bill that gave exemptions to targeted employers on the basis of clear, unambiguous and well understood criteria is certainly acceptable in preference to a bill that gives blanket exemptions to classes of employers who can totally rort the system just to get themselves within an exemption category. This bill clearly anticipates that and will clearly encourage a total rort of the system.

Senator MARSHALL—I wanted to pick up on the point you made earlier to Senator Crossin about the capacity to pay process. Earlier this morning we heard from the NFF that the reason their members will not pursue incapacity to pay arguments in the commission is purely because they do not want unions having access to their financial records. Your experience seems to be quite different to that. I want you to clarify for me whether as a union official you actually get to see those records.

Mr Ryan—I was involved back in the 1980s in a capacity to pay argument when broad information was made available to the union directly by the employer. We were satisfied with their incapacity to pay so we simply did not oppose an application by the employer and allowed the employer to do what it wanted to do. I have been involved in other cases in which at the mere mention of incapacity to pay arguments leading to us examining employer records the employer has bolted. I suspect it had nothing to do with the fact that I was with the Federated Ironworkers Association. We were considered to be a reasonably weak and moderate union at the time.

Senator MARSHALL—‘Tame cat’ I think it was referred to as.

Mr Ryan—Yes. I think it had everything to do with the fact that the employer would never have been able to satisfy anyone that he did not have a capacity to pay. Most recently, when the employer in a matter before the commission specifically raised the financial issues in order to argue against having employees covered by a federal award, it was the association’s advocate who suggested to the commission that this should be dealt with as confidential information. I cannot even access the transcript of that. The transcript is blocked. The submission and the material that was handed to the commission is sealed. That is the proper way to do it.

There are circumstances where unions have misused financial information. There was a case involving I think the pilots federation where the commission gave very strict orders preventing the union from misusing information that was given in a commission hearing. That case was about 20 years ago, but it shows that the commission will do the right thing and it certainly shows that most unions will do the right thing. If you do not want the elected union officials or hacks like me to get access to the information, it is very easy to control it so that only the advocates on both sides and the commission can deal with it. Ultimately, they are the ones who present and decide the case.

Senator MARSHALL—So the assertion by the NFF that members will not proceed because unions would have access to the information would be clearly refuted by you—someone who has had practical experience?

Mr Ryan—It is an ideological position; it is not a position based upon an understanding of how the provisions of sections 355 and 111 of the act can and do operate to protect information which is financially sensitive.

CHAIR—Thank you for appearing, Mr Ryan. That concludes the committee's hearing on the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004.

Committee adjourned at 1.06 p.m.