



Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

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Contents

Purpose.	2
Background.	2
Table 1: Medium and Large Sized Business redundancy scale	3
Opposition to the Redundancy Test Case	4
Table 2: Small Business redundancy scale	5
Effect on GEERS	5
Other developments	6
Small Business Employment	7
Main Provisions	7
Schedule1.	7
Concluding Comments.	9
Endnotes.	9

Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

Date Introduced: 8 December 2004

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: On Royal Assent

Purpose

The Bill seeks to negate the *Redundancy Test Case* decisions¹ (of 26 March 2004 and 8 June 2004) of the Australian Industrial Relations Commission (the Commission) which, inter alia, will extend redundancy pay entitlements to federal award employees retrenched by small businesses.

The Bill achieves the small business exemption by making redundancy pay an allowable award matter *only* for businesses with 15 or more employees. The Bill goes beyond the federal award system relieving incorporated small businesses whose employees are regulated under State employment jurisdictions of redundancy liabilities payable after 26 March 2004.

Background

This Bill is similar in intent to the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004. The background to that Bill as well as detail of the Commission's *Redundancy Test Case* decision is provided in the Parliamentary Library's [Bills Digest 161 2003-04](#).²

For enterprises with more than 15 employees, the *Redundancy Test Case* decision granted an extension to the standard award redundancy table for the first time in 20 years, by essentially recognising service beyond an employee's first four years, extending the cap to 10 year's service.

The redundancy pay rate per year of service under the decision retained the established rate of 2 weeks pay per year of service excluding the first year's service. This rate reduces at 10 years service to allow for the financial burden to employers of meeting award long service leave accruals which would also become payable at 10 years' service. Thus, the maximum redundancy payment was increased from eight weeks pay to 16 weeks (stepped down to 12 weeks at 10 year's service, see Table 1).

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Table 1: Medium and Large Sized Business redundancy scale

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

The decision also extended the redundancy payment obligation to small business, albeit capped at eight weeks pay for four or more years' service, that is at the old cap which had applied to medium and larger sized businesses (see Table 2 on page 5).

Prior to the *Redundancy Test Case* decision, small businesses (those with fewer than 15 employees) had been excluded from the award obligation to pay redundancy under Termination, Change and Redundancy (TCR) award provisions. The exclusion had been made consequent to TCR test case decisions in 1984, the second of which provided a small business redundancy exemption.

Nevertheless, redundancy standards had been increased in some State jurisdictions. As the CCH's industrial consultant Peter Punch observed, the movements in redundancy or severance pay standards occurring in the States meant that the federal tribunal had little option other than to move its award provisions in line:

Bearing in mind the relatively recent decision of the Queensland Industrial Relations Commission (QIRC) enhancing severance pay standards for employees covered by

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that State's award system (2003³), the Full Bench really had little choice but to act to improve the TCR provisions. That is, the Queensland initiative, taken in conjunction with the decision by the New South Wales Industrial Relations Commission (NSWIRC) to enhance severance pay standards for employees under its awards as long ago as 1994 meant there was now a very considerable disparity between the federal TCR provisions and the standard severance pay provisions prescribed in the awards of the two largest state industrial jurisdictions.⁴

However, the state jurisdictions had not uniformly adopted a small business exemption (discussed in [Bills Digest 161 2003-04](#)), and the federal tribunal considered in 2004 that it was no longer appropriate to continue the blanket exemption for small business, as the exemption had its roots in the recession of the early 1980s.

Opposition to the Redundancy Test Case

Nevertheless, employers and particularly the Australian Chamber of Commerce and Industry let vent their feelings against the *Redundancy Test Case* decision.⁵ The Coalition Government also disagreed with one element of the decision—the extension of the redundancy obligation to small business—and intended to reintroduce the small business redundancy exemption upon its re-election in October 2004:

A re-elected Coalition will continue to pursue changes to take the unfair dismissal laws burden off the back of small business and protect small business from redundancy payments.⁶

The commitment in effect meant overturning the *Redundancy Test Case* decision and the intention was reported thus:

The federal government will legislate to overturn the decision of the AIRC (Commission) to require small businesses to pay the full extent of redundancy entitlements.⁷

The Government has argued that the justification for this Bill is that the Commission's redundancy decision will increase the contingent liabilities of small business, potentially harming the ability of employers to employ. As the Bill's second reading speech said:

In the Government's view, the AIRC's (Commission) decision seriously underestimates the impact that redundancy pay would have on small businesses. For instance, a retail small business with seven employees, each with four years' continuous employment, would now face a contingent liability for redundancy pay of nearly \$30,000.⁸

However, the statement does not appear to allow for the effect of the Commission's supplementary redundancy decision in June 2004.⁹ This decision essentially agreed with submissions of the Commonwealth and employers, particularly the Australian Chamber of Commerce and Industry and the Australian Industry Group. It noted that small business may lack the financial reserves to meet redundancy payments arising out of the March

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decision, despite the Commission making the obligations less financially burdensome for small business, per the table below:

Table 2: Small Business redundancy scale

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and over	8 weeks' pay

Accordingly, the Commission varied its March decision and decided that for the purposes of calculating redundancy entitlements, small business employers should only be required to take into account employment service rendered after 8 June 2004. This means that the contingent liability for those small business employees cited in the second reading speech as being made redundant (see quotation above) is zero until June 2005, irrespective of the employees' years of service.

This stipulation concerning the calculation of service for small business employees has been reproduced in the award provisions complying with the supplementary decision. For example, in the Metal, Engineering and Associated Industries Award, the clause stipulated for the time counted for service reads:

4.4.2(d) Continuity of service shall be calculated in the manner prescribed by 7.1.5. Provided that service prior to 8 June 2004 shall not be taken into account in calculating an entitlement to severance pay for an employee of a small employer pursuant to 4.4.2(b).

Effect on GEERS

It is also important to note the effect of this Bill on the General Employee Entitlements Redundancy Scheme (GEERS) This scheme meets certain employee entitlements in the event that an employer is unable to pay these due to insolvency. It was noted in [Bills Digest 161 2003-04](#) that the Government accepted the prevailing 'community standard' of eight weeks pay for redundancy entitlements as one of five entitlements GEERS is prepared to meet.

However, entitlement to payment under the scheme is generated by evidence of a) the entitlement and its accrual and b) a legal obligation to meet the entitlement. It is suggested

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that this Bill potentially removes a presumption to a GEERS payment (the scheme is not legislated) for certain state and federal small business employees (that is, those not currently denied redundancy) in the event that an employer becomes insolvent.

For small business employees employed under State jurisdictions who may have award entitlement to redundancy (the issue of each of the State jurisdictions conceding a small business exemption or otherwise was also canvassed in [Bills Digest 161 2003-04](#)), and whose employers have not incorporated, an entitlement to a GEERS payment in the event of employer insolvency may still be established.

Other developments

It might also be noted that while the second reading speech to the Bill reports, *inter alia*, on the retention of the small business redundancy exemption in Queensland, there are other developments in the state jurisdictions worth reporting. In Western Australia the Industrial Relations Commission has reserved its decision to increase redundancy pay and spread redundancy provisions across the State's awards. Under the *UnionsWA* claim, the scale of redundancy payment would apply to all businesses regardless of size, meaning small businesses would not have an eight weeks cap as provided for federally.¹⁰ Also, South Australian unions have also launched a test case to increase redundancy payments with hearings scheduled for April this year.¹¹ The union application mirrors existing NSW redundancy standards which are superior to the federal provisions.

The Bill's second reading speech notes that the Government has called on state governments to legislate to maintain the exemption of small businesses from redundancy pay. Yet, a discussion paper on Tasmanian industrial relations laws proposes a legislated redundancy standard (which appears not to provide any exemption for small business):

The Tasmanian Government is considering the introduction of a new redundancy standard of two weeks' ordinary pay for each completed year of service. The proposed change is outlined in the State Government's discussion paper detailing possible amendments to the *Industrial Relations Act 1984* (Tas). No fixed maximum payment is mentioned. Currently, Tasmania's laws do not provide a fixed entitlement for severance pay.¹²

Should an amendment as envisaged actually be passed by the Tasmanian Parliament, it may, *inter alia*, redress a particular problem generated under the Tasmanian industrial system. In the case of a business in insolvency, the Tasmanian Industrial Relations Commission conducts hearings for the making of employee redundancy pay after the insolvency is determined, and there is no prescribed redundancy standard — each case is determined on merit. A consequence under the GEERS scheme is that after a business is placed in the hands of an insolvency practitioner, no entitlement to redundancy pay can be established, as no legal obligation to the employees for redundancy is in effect at the time of insolvency. This anomaly has been raised in Senate Estimate Committee hearings.¹³

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Small Business Employment

In June 2003 the number of small businesses had increased to 1,179,300 (from 1 122 000 in 2001).¹⁴ Of these:

- 666 200 (56 per cent) were non-employing businesses, up by 5 per cent since 2001
- 389 100 (33 per cent) employed 1–4 people, down by 2 per cent since 2001, and
- 124 000 (11 per cent) employed 5–19 people, down 2.5 per cent since 2001.¹⁵

In 2001, small business employed 2.26 million employees (apart from the owner/s). The estimate of these employing and non-employing small businesses which were incorporated, provided by the ABS in 1999, was 43 per cent.¹⁶ All small businesses in Victoria, the Northern Territory and the Australian Capital Territory are already under the federal jurisdiction.

Making allowance for the difference in the small business definition (the Bill's 'fewer than 15 employees' and the ABS small business definition of 'less than 20 employees'), there are reasonable grounds to assume that the Bill will have potential influence over the redundancy entitlements of more than 1 million small business employees, on the assumption that the Commission's redundancy decisions potentially broadened access to the entitlement and that about 770 000 employees of incorporated small businesses already fell under the scope of the federal jurisdiction.¹⁷

Main Provisions

Schedule 1

Item 1 – Sub Paragraph 89A(2)(m) replaces existing paragraph 89A(2)(m) making redundancy pay by an employer of 15 or more employees an allowable award matter. The obligation to pay redundancy by employers of fewer than 15 employees therefore would *not* be an allowable award matter.

Item 3 inserts **proposed subsection 89A(7A)** which would prevent an 'exceptional matters order' being made about redundancy pay by an employer of fewer than 15 employees.

Item 4 inserts **Sub paragraph 89A(8A)(a)** which sets out the 'relevant time' at which the number of employees is to be calculated for the purposes of paragraph 89A(2)(m) and subsection 89A(7A). **Paragraph 89A(8A)(b)** provides that a reference to employees in either paragraph 89A(2)(m) or subsection 89A(7A) includes a reference to the employee who becomes redundant and any other employee who becomes redundant at the relevant time. A reference to employees also includes any casual employee who, at the relevant

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time, has been engaged by the employer on a regular and systematic basis for at least 12 months, but does not include any other casual employee.

Item 5 inserts **Part VIAA. Proposed section 167** provides that a constitutional corporation which employs fewer than 15 employees is not required to make redundancy payments to its employees where a State/Territory law or state award requires it to do so.

Item 6 inserts **proposed subsections 170FA(3) and (4). Subsection 170FA(3)** provides that the Commission must not make an order to give effect to Article 12 of the ILO's Termination of Employment Convention in relation to the matter of redundancy pay by an employer of fewer than 15 employees. The intention behind sections 170FA, FB, FC and FD was to provide employees with access to severance payments where these were not available as an award entitlement.¹⁸ The WR Act's termination of employment provisions give effect to Articles 12 and 13 (only) of the Convention, and there exists in these WR Act provisions currently a small business exemption. **Subsection 170FA(4)** sets out the relevant time and the definition of employees including long term casual employees for the purpose of calculating a small business (see **item 4**).

Item 7 provides that the amendments contained in **items 1 to 4** of this Schedule apply where the Commission is dealing with industrial disputes by arbitration after the Schedule commences whether the industrial dispute arose before or arises after the Schedule has commenced. This item also provides that the amendment made by **item 5** applies to a state law or state award made, amended or varied, imposing redundancy pay obligations on constitutional corporations employing fewer than 15 employees.

Item 8 provides that if, during the period from 26 March 2004 until Schedule 1 commences, the Commission made an award or order that had the effect of requiring an employer of fewer than 15 employees to make a redundancy payment, or if the Commission varied an award or order that was made before or during that period to that effect, then from the commencement of this Schedule such an award or order ceases to have that effect.

Item 9 prevents a state law or award that is made, amended or varied during the period from 26 March 2004 until the schedule commences and which has the effect of requiring a constitutional corporation employing 15 or fewer employees to pay redundancy pay, from having effect.

Item 10 protects small business redundancy employee entitlements paid prior to the commencement of this Act.

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Concluding Comments

As noted in the conclusion to [Bills Digest 161 2003-04](#), the Bill highlights the difficulty of altering what appear to be established standards—in this case the removal of the small business exemption in federal award redundancy provisions. Although the main purpose of the Bill is to counter the AIRC redundancy decisions, the Bill also indicates the Government's more pronounced intention to exclude inconsistent state award provisions, even though the Commission's decision does not alter or extend redundancy provisions in the State jurisdictions.

The calculation of a small business's employment numbers carries more bearing for the entitlements of all employees in a small business than is the case, for example, with the proposed unfair dismissal exemption, when the redundancy numbers are calculated at less than 15 employees. In other words if the calculation of the numbers justifies a payment to one redundant worker, then his/her departure may remove the redundancy entitlement for those remaining. Note that the Senate Employment Workplace Relations and Education Legislation Committee will report on this Bill by 14 March 2005.

Endnotes

- 1 Australian Industrial Relations Commission, *Redundancy Case* [PR032004](#), 26 March 2004 and *Supplementary Decision*, [PR062004](#), 8 June 2004.
- 2 Steve O'Neill, Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004, *Bills Digest No 161 2003-04*, Parliamentary Library, Department of Parliamentary Services.
- 3 *QCU v QCC [2003] QIRComm 383; (2003) 53*, CCH Australian Industrial Law Reports at ¶300-025.
- 4 Peter Punch, 'Redundancy Test Case', *Australian Industrial Law News*, 30 March 2004.
- 5 ACCI 'Massive kick in the guts for small business and the economy' [Media Release](#), 26 March 2004
- 6 The Coalition's 2004 workplace relations policy can be found at: <http://www.liberal.org.au/documents/ACF748F.pdf>
- 7 'Federal Government to press for early workplace win', *CCH Australian Industrial Law News* 23 November 2004.
- 8 The Hon Kevin Andrews, Second Reading Speech: Workplace Relations Amendment (Small Business Employment Protection) Bill 2004, House of Representatives, *Debates*, 8 December 2004, p.123.
- 9 AIRC, Redundancy case, Supplementary Decision, [PR062004](#), 8 June 2004.

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- 10 'WA redundancy test case', at www.workplaceexpress.com.au, 22 December 2004
- 11 Ibid, under 'SA redundancy test case, new IR Act'
- 12 CCH, *Australian Industrial Law News*, 'Tasmania: Government proposes new redundancy standard', 31 August 2004.
- 13 This issue was raised by Senator Sherry in Senate Estimates hearings of the Employment, Workplace Relations and Education Committee on 21 November 2002.
- 14 ABS, *Small Business in Australia*, (Cat. No. 1321), 23 October 2002.
- 15 ABS, *Characteristics of Small Business*, (Cat. No. 8127), 28 April 2004.
- 16 ABS, *Small Business in Australia*, (Cat. No. 1321), 23 May 2000 at Table 5.1
- 17 Refer to the [Explanatory Memorandum](#) of the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, p. 5.
- 18 See for example AIRC decision, *S9143*, 4 October 2000.

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