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No. 2 2001–02

Workplace Relations Amendment (Prohibition of
Compulsory Union Fees) Bill 2001

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Workplace Relations Amendment (Prohibition of
Compulsory Union Fees) Bill 2001

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Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001

Date Introduced: 23 May 2001

House: House of Representatives

Portfolio: Employment, Workplace Relations and Small Business

Commencement: Twenty eight days after the Bill receives the Royal Assent

Purpose

To prohibit the inclusion in enterprise agreements of a clause allowing industrial organisations to charge a fee for service in respect of enterprise bargaining negotiations.

Background

The *Workplace Relations Act 1996* (WRA) regulates the employment of those covered by Federal jurisdiction and provides for three principal methods of determining conditions of employment:

- Australian Workplace Agreements (AWA) – basically individual agreements between the employer and employee. AWAs are subject to minimum entitlements but have mostly been restricted to higher paid employees.
- Certified Agreements (CAs) – there are two principal forms of CAs, with employers being able to enter agreements with unions which have at least one member in the business (section 170LJ agreements) or with the employees of the business (section 170LK agreements). (There are also section 170LL agreements for Greenfield sites but these are relatively rare.)¹
- Awards – where neither of the above two apply (these are usually lower paid employees, such as those covered by recent ‘Living Wage’ cases).

This Bill is concerned with section 170LJ agreements (LJ agreements), which cover a substantial majority of employees covered by the WRA.

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In June 2000 the ACTU Congress endorsed a policy that member unions may seek to insert a 'fee for service' clause in new certified agreements, under which a negotiating fee would be levied on those for whom the union had negotiated a LJ agreement. The argument behind such a fee was that it would prevent people 'free riding' on what others had paid to achieve. The free rider argument is an economic concept which applies to those who receive a benefit as part of a group while they had not contributed to achieving the benefit while others had. In the case of an LJ agreement (or award increases) this applies to situations where union members contribute towards the cost of negotiating improved pay and conditions but all employees, including those who have not contributed to the cost of the negotiations (the 'free riders'), benefit from the outcome. Under the ACTU Congress decision individual unions were to determine if a fee for service condition in an LJ agreement was to be sought.

The fee for service concept has been opposed both by the Government and employer organisations as being effectively a 'back door' method of attracting new members and implementing compulsory unionism which is prohibited by the freedom of association rules contained in WRA. This argument is strengthened when the fee for service to be levied is greater than the union dues payable, providing a financial incentive for employees to seek the lower cost union membership. (There are doubts about the ability of the relevant union to actually enforce payment, see below).

Legal Position

The fee for service issue came to prominence following the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (ETU) reaching agreement with a large number of principally small employers to have such a clause inserted in new LJ agreements. The relevant clauses generally provided that an annual fee of 1% of annual income, or \$500, was payable to the ETU by new employees. The inclusion of such a provision in the CAs means that the employer and majority of the employees covered by the CA have agreed to its inclusion. The Employment Advocate took action in the Australian Industrial Relations Commission (AIRC) to have the clauses removed from the agreements on the grounds that they breached section 298Z of WRA as they contained 'objectionable material'. The case was heard in December 2000 and January 2001, with the decision handed down in February 2001.

In this case the fee for service clause was alleged to be objectionable as it breached section 298K of WRA by requiring or permitting injury or prejudice to an employee on the grounds that they are not a member of a union or propose to become a member. To breach section 298K there is also a requirement that injury or prejudice be for a 'prohibited reason'.

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The Vice-President of the AIRC hearing the case found that there was objectionable material as the relevant clause promoted union membership and so breached the freedom of association rules. The Vice –President stated:

I agree, as submitted by the applicant, that [the relevant clause of the CA] should be looked at in a realistic and practical way. In my opinion, it is there to persuade new employees into joining the ETU. The minimum fee of \$500 per annum is substantially more than the ETU membership fee. Further there is little doubt, I think, that the ETU would waive the fee in respect of persons who are or become members.²

The Vice-President then considered whether the relevant fee for service clause existed for a prohibited reason. Prohibited reasons are listed in section 298L of WRA with the Employee Advocate relying on the reason being that the fee for service clause would prejudice an employee as they are not, or do not propose to become, a member of a registered association (ie a union). In determining this matter the Vice-President had regard to the consequences of a failure to pay the fee for service, and concluded that this would result in a breach of their conditions of service with the employer, which the employer may then act upon or not. Any action by the employer against the employee would therefore be for a breach of the employment agreement rather than for failure to be a member of, or join, a union.³

This decision is the subject of an appeal.

The decision of the AIRC also raises the issue of whether a union could legally enforce a fee for service provision. As the agreement, while collective, is between the employer and employee and not between the union and the employee it is very unlikely it could be enforced without the employer initiating enforcement action.

Reaction to the Decision

The response from the various industrial relations groups and the government have been very much as could be expected. A number of unions have adopted the policy of the ETU and sought to have fee for service terms included in certified agreements or have requested non-union members in the industry to voluntarily pay the fee. Again, it is very doubtful that such requests could be enforced by the union. The Minister for Employment, Workplace Relations and Small Business stated:

Bargaining agent's fees are 'back door' compulsory unionism and contrary to the principles of freedom of association and workers' right to choose whether or not to belong to a union.⁴

In a newspaper article the Chief Executive of the Australian Chamber of Commerce and Industry stated:

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The ruling may yet be appealed [as has occurred] and it is possible such an appeal may come to a different view on the law. Alternatively, it is possible that the legislation requires an overhaul to clear up any confusion.

Either way something must be done to end unfair pressure on ordinary working men and women.⁵

In a Media Release dated 13 February 2001 the Australian Democrats spokesperson for Workplace Relations, Senator Andrew Murray, ‘welcomed’ the AIRC decision, stating:

Unlike Minister Abbott, I don’t regard it as blackmail or a breach of freedom of association laws. I would regard it as a fee rendered for a service that increases the take home pay of both union and non-union workers alike.

....

The fee can only be charged if the majority of employees in the workplace vote it into the enterprise agreement itself.

That is appropriate as the workers in a workplace who are paying union fees should not be carrying those who do not.⁶

Main Provisions

Items 1 and 2 of Schedule 1 of the Bill will insert two new definitions into section 298B of WRA:

- ‘Bargaining services’: services provided by, or on behalf of, an industrial organisation in relation to a certified agreement.
- ‘Non-compulsory fee’: a fee or levy that is wholly or partly for the provision of bargaining services if it is payable to an industrial organisation or someone else on behalf of the organisation and the person who is liable to pay the fee or levy agrees in writing before the services are provided, to pay the fee or levy.

Item 3 will insert additional ‘prohibited reasons’ in section 298L of WRA. The additional prohibited reasons provide that an employer must not discriminate against an employee or independent contractor if:

- the employee or independent contractor has agreed to pay a non-compulsory fee, or
- has not paid or agreed to pay any fee or levy wholly or partly for the provision of bargaining services (this includes fees or levies extending beyond the definition of a non-compulsory fee).

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Section 298Q of WRA prohibits industrial organisations from under-taking certain action. **Item 4** will add to this that an officer of an industrial organisation must not take, threaten to take, or encourage a third party to, prejudice a person as the person has undertaken the actions described in item 3.

Proposed section 298QA will prohibit an industrial organisation, or an officer or member of such an organisation, from demanding that a person pay a fee or levy, other than a non-compulsory fee, for the provision of bargaining services. This provision may prevent a union from even requesting or suggesting that a non-member pay such a fee or levy. The term demand is defined as purporting to demand, having the effect of demanding or purporting to have the effect of demanding. The distinction between demanding (which suggests an obligation) and requesting is not dealt with (**item 5**).

Section 298S of WRA, which prohibits certain conduct by industrial organisations against independent contractors, will also be amended to prohibit action being taken against an independent contractor on the basis that they undertaken either of the actions for a prohibited reason as described in **item 3 (item 6)**.

Item 8 provides that the AIRC may have consideration of the above matters when determining whether to certify an agreement after the commencement of the Bill.

Item 10 provides that the amendments do not apply to any payments received before commencement.

Concluding Comments

The free rider argument regarding non-union members benefiting from union negotiated gains in employment conditions has been around for a considerable period. However, unions have recognised that if improvements in employment conditions, eg wages, do not also apply to non-union members then there will be two classes of employees, with employers able to select the lower paid non-union workers. As a result, there has always been an incentive for unions to seek to have equivalent conditions for members and non-members. While the fee for service is a way of addressing the free rider problem, there are also alternatives, which could address some of the compulsory unionism arguments.

For example, a non-union employee could elect to pay the fee to a registered charity rather than the union (this would address the issue of conscientious, or other, objection to joining a union and also boost contributions to charity, although there may need to some adjustment to the rate of payment or the taxation laws to reflect the deduction which would be allowed for such a donation). The appropriate charities could be agreed at an individual or workplace level.

The decision in this case to legislate before the appeal is determined may be contrasted with the decision in regard to certain tax minimisation schemes (such as controlling

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interest superannuation) where the government has determined that court cases should be completed before a legislative response is considered.

Endnotes

- 1 The Department of Employment, Workplace Relations and Small Business publication *Trends in Enterprise Bargaining*, September quarter 2000 found that of 21 818 agreements certified between 1.1.97 and 30.9.2000 2 276 were 170LK agreements covering 8% of employees covered by certified agreements.
- 2 Australian Industrial Relations Commission, PR900919, p. 5.
- 3 *Ibid.*, p. 13.
- 4 *Media Release*, 27 February 2001.
- 5 *The Age*, 15 February 2001.
- 6 Australian Democrats, *Media Release*, 13 February 2001.

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