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Workplace Relations Amendment (Prohibition of  
Compulsory Union Fees) Bill 2002

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Compulsory Union Fees) Bill 2002

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13 March 2002

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# Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

**Date Introduced:** 20 February 2002

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** Substantive amendments of Schedule 1 commence 28 days after the Act receives Royal Assent. However certain provisions may apply before this date; refer to the commencement section of the Bill.

## Purpose

The purpose of the Bill is to prevent collective agreements certified under the [Workplace Relations Act 1996](#) (the WR Act) containing provisions which require the payment of bargaining services fees by non union members to the relevant trade union which is party to the agreement. The Bill also prohibits conduct designed to force the payment of such fees. On the other hand, the Bill does not prevent the voluntary contribution of such 'fees' by non members to unions.

## Background

The background to the inclusion of bargaining services fees in union-negotiated certified agreements was covered in [Bills Digest No.2 2001-2002](#). That Digest addressed the previous Bill dealing with bargaining services fees, the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#). The previous Bill on compulsory union fees failed to pass the Senate, with debate on the Bill adjourned on 6 August 2001. In the Bills Digest, the following context to the introduction of these fees was canvassed:

- 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 (CAs), under which a negotiating fee would be levied on those for whom the union had negotiated a section [170LJ](#) agreement. (Section 170LJ agreements are one form of CA permitted under the WR Act). Bargaining fees would prevent non-unionists 'free riding' on members.

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- A number of unions sought to recover the expenses involved with enterprise bargaining by charging a fee to non-members. In some cases a provision of the agreement itself provided for the payment of the fee, usually via deduction from pay. This policy could be justified on the basis that under section [170LT](#) of the WR Act, all employees bound by the agreement are required to approve it, usually by a ballot, and section [170MDA](#) prevents the CA discriminating between unionists and non-unionists.
- However, the use of bargaining fees in CAs was opposed by the Federal Government which sees the use of these fees as a de facto compulsory union membership fee, with recourse to these being prompted primarily by the fall in union membership.
- In 2000, the Employment Advocate intervened in the certification process of a number of agreements negotiated by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU and sometimes referred to as the ETU) which contained provisions for the levying of these fees (set at 1 per cent of employee's salary or \$500 pa whichever the greater).
- The Employment Advocate argued that these agreements contained an objectionable provision in contravention of section [170LU\(2A\)](#), because the provision required conduct allegedly violating the 'freedom of association' provisions of the WR Act ([Part XA](#)). (It is helpful to understand these provisions are supposed to prevent coercion to associate, meaning not to join a union, as well as preventing conduct preventing employees from joining unions, ie allowing them freedom to join or associate).
- The EA's objections in the CEPU matter were brought before the Australian Industrial Relations Commission, heard by Vice President McIntyre.<sup>1</sup> Under section [298Z](#) of the WR Act, the EA sought to have the clauses removed. His Honour concluded that although the action (charging a fee) may be for a prohibited reason, **the intention or motive of the conduct was an essential component of a breach** of section [298K](#), but the provision did not disclose a prohibited reason as the intention or motive.<sup>2</sup> The previous Bills Digest noted that VP McIntyre's decision was subject to appeal.

### Appeal to the AIRC Full Bench

A Full Bench of the Australian Industrial Relations Commission upheld the Vice President's finding that the union fee clause was not objectionable.<sup>3</sup> The decision noted:

*The agreement provides that the employer must advise all new employees of the requirement that they are to pay a bargaining agent's fee to the CEPU. Once the employer has done that its obligation has been discharged.*

*The clause does not overtly or otherwise require the employer to differentiate as between unionists and non-unionists in the terms upon which employment will be offered. On its face the agreement does not require or permit, etc. an employer to discriminate in any way between union members and non-union members.*<sup>4</sup>

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However, the Full Bench did raise a question about whether matters not pertaining to the relationship of an employer and employee could validly be included in an CA.

### Securing bargaining rights

Academics classify bargaining fee clauses under the rubric of measures to promote trade union security. Trade union security, ie the rights to organise, recruit members, develop collective bargaining policy and act as the sole bargainer on behalf of workers has often been regarded the key to trade union survival and the issue has been the centre of the most vicious industrial disputes. In many countries the principle has been more important than any results of bargaining such as high pay or good conditions, since trade union security is the precondition for such an outcome. In the Australian context of the development of arbitration systems at the end of the nineteenth century, Macintyre and Mitchell observe that

The series of great strikes, indeed the substance of the capital-labour debate in the 1890s, was not so much concerned with wages and conditions of employment, as with recognition and the role of the union and its rules in the system of industrial regulation ... if arbitration was to bring about industrial peace (it) was necessary to prevent precisely those types of disputes which had given rise to the idea of arbitration. This required recognition of unions, and of their legitimate interests ...

Seen in this light, registration of unions became a crucial object of the arbitration legislation ... This justifies the argument that the framework of union entitlement erected by arbitration, preference for union members, protection from discrimination, monopoly of organisation and so on, were intended as rights to be bestowed upon those unions party to the formal state processes of industrial regulation.<sup>5</sup>

The pre-entry closed shop is an arrangement between a union and employer which seeks to make employment in an enterprise conditional upon the new starter being a union member. The closed shop or compulsory unionism in this sense represents the pinnacle of trade union security. However the closed shop was not the pillar of union commitment to arbitration that union preference provided. In Australia, closed shop arrangements have not been commonplace, as Michael Wright has noted:

Following the introduction of conciliation and arbitration tribunals (from the 1900s), closed shop practices became illegal and could only operate on an informal, *de facto* level.<sup>6</sup>

Phillipa Weeks has noted in her study of trade union security arrangements in Australia, a few States later legalised the closed shop arrangement but retreated from it at other times.<sup>7</sup> The Employment Advocate's 1999 report into compulsory unionism estimated that the practices affected 346 000 employees, or 5 per cent of the then workforce, while in 1990 compulsory unionism was estimated to affect 17 per cent of the workforce.<sup>8</sup>

Thus, more common under the federal jurisdiction has been the ability of federal awards to provide for preference in employment for members of registered organisations. In legal

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terms, union preference did not require or enforce a closed shop. Union preference clauses did offer advantages to union members over non-members in respect of appointment, promotion and termination, usually in circumstances where both or more candidates were 'suitable' (hence the term *qualified preference*).

In any case, provisions under the WR Act have removed preference provisions from awards as such provisions have not been included under allowable matters (subsection [89A\)\(2\)](#) which awards may contain. Also, section [94](#) limits the discretion of the AIRC to include such provisions in awards. Other provisions under Part XA render such provisions (ie those found in CAs) void and facilitate their removal from CAs. The current Bill will reinforce these provisions.

Bargaining fees charged on non-unionists represent a middle approach to trade union security, for as Weeks notes, these fees do not enhance the union's ability to bargain and thus weaken solidarity.<sup>9</sup> On the other hand, it has only been since 1997 that non unionists have been afforded the privilege of voting on union-negotiated agreements (in the federal jurisdiction). So, union members tend to see these fees as the 'quid pro quo'.

Note also that similar arrangements exist in other industry sectors. *The Australian* reported in 1998 that the former Borbidge Government in Queensland had legislated in favour of several farmers' organisations affiliated to the National Farmers Federation to effectively rope farmers into being members in order to trade. Thus cane growers operated under legislation allowing a general levy on all growers for administration purposes, while Queensland farmers with more than 70 pigs had to be a member of the Queensland Pork Producers.<sup>10</sup>

#### Recent developments

The matter of bargaining fees has been addressed by Justice Merkel in a subsequent Federal Court decision which looked at what elements of a union-formed log of claims for bargaining purposes would attract the status of 'protected action' in the process of bargaining for a new CA. Under specified circumstances, where bargaining has reached an impasse, employees may undertake industrial action and employers may lock-out employees. Such action may be protected in the sense that actions (eg for damages) cannot be progressed.

Justice Merkel held that claims for the protection of accrued employee entitlements would be eligible to attract the status of protected action.<sup>11</sup> However he dismissed the notion that bargaining fees were legitimate matters of the employment relation which a CA could address. His Honour observed from the agreed facts and evidence that the bargaining agent's fee was being claimed by the unions to be payable only by employees who were not union members to reflect the service obtained by those non-members from the unions in negotiating agreements. He also noted that the relationship being created by the provision was one of agency:

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(41) The relationship between the employer and the employee that would be created were the claim acceded to is, essentially, one of agency; Electrolux is to contract with its employees on behalf of the relevant union, as its agent. The agency so created is for the benefit of the union, rather than for the benefit of the employee upon whom the contractual liability is to be involuntarily imposed. The resulting involuntary "bargaining" agency is, as a matter of substance, if not form, a "no free ride for non-unionists" claim, rather than one by which the union is undertaking its traditional role of representing the interests of union members in respect of the terms of employment of employees ...

(42) ... the bargaining fee debit facility is analogous to a demand by unions that an employer pay its employees' union dues by making deductions and payments from salary due and payable to employees in accordance with authorities provided by them. Such a claim has been held to not be within the requisite employment relationship.<sup>12</sup>

However in a more recent case, Justice Munro has decided not to follow *Electrolux*, observing that CA clauses authorising a payroll deduction system for union dues payment is an issue more to do with an arrangement for the electronic transfer of funds. Accordingly, provisions which may be properly included in the contract of employment through an industrial agreement should be found in the views of the parties themselves. The decision also canvasses the question of CAs containing bargaining fee clauses. The relevant CA clauses considered by Justice Munro read:

*Webforge NSW agrees to allow for subscription charges of AMWU membership to be deducted from wages subject to completion of a signed deduction authority by the employee concerned.*

And:

*The employer agrees to maintain the current payroll deductions of employees, such as Union Fees, Social Club, Medical & Health cover etc.*

Justice Munro made the following observations (in a lengthy decision) and decided that the inclusion of matters which strictly did not pertain the employer-employee relationship was not sufficient to prevent the agreements being certified. He reflected on the conflict between industrial relations practicalities and strict legal determinations:

[23] Writing in 1979, Sorrell repeated a point he first made in 1973 in a comment about the decision in *Re Portus*, but one still relevant to that contrast:

"To anyone concerned with the realities of labour relations the check-off is so clearly an industrial matter in any acceptable sense of the words as to seem to need no argument; and in USA it has been held to be a proper subject for collective bargaining under the National Labour Relations Act (US Gypsum Co (1951); and for Britain see Donovan, 1968, paras 718 ff). Whatever view may be taken of the Union Badge case, it would be impossible to argue from that decision that the check-off is not an industrial matter. But Menzies J in *Re Portus* said "It is the principle enunciated in *R v Kelly* that must be applied here, not the more general statements to be found in the

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Union Badge case and in Archer's case" (p 625); and since "the relationship that would be affected by such an obligation is a financial relationship of debtor and creditor ... not the industrial relationship ..." the check-off was not an industrial matter ... This could be construed as a piece of very narrow legalism - which says nothing of why the High Court should give this narrow, indeed regressive, interpretation to the industrial power given by the constitution to the Parliament."

[24] However, that criticism of the decision in *Re Portus* fell on barren ground. The reasoning in *Re Portus* was entrenched by the decision in *Alcan* and has apparently been carried through several rounds of statutory change. Although the body of precedent relates primarily to the use of award making powers, or to the identification of what matters may be subject of industrial disputes, it now steers also the decisions in *Electrolux* and Commission rulings. I note that the decision in *Electrolux* is subject to appeal.

[25] For the reasons I have given, I consider that each of the PRD (payroll deduction) provisions in these agreements is distinguishable as an agreed term from the matters at issue in those decisions. Moreover, in the context in which each appears in the agreements, I doubt that either provision could properly be said to be a substantive and significant matter. Each is undoubtedly discrete in the sense that it stands by itself and may be readily severable. It may be necessary to decide the point solely upon application of what I understand to be the principles applied by Merkel J in *Electrolux*. For the reasons I have given, I would not consider that the inclusion of either provision would prevent the respective agreement from being an agreement about matters that pertain to the relationship between an employer and all persons whose employment is subject to the agreement.<sup>13</sup>

It might be noted that the NSW Labour Council has commenced proceedings in the NSW Industrial Relations Commission (March 2002) to have payroll deduction provisions enshrined as award rights. According to Assistant Secretary, Mark Lennon, the case was aimed at stopping employers withholding payroll deductions during enterprise negotiations, as many employers opted for terminating deductions as a bargaining chip. He said: "We see this as enshrining a fundamental right of employees to have their wages paid into a nominated account".<sup>14</sup> As we have seen, the same ground for opposing union fee clauses in awards has been used to prevent having bargaining fees included in CAs. This initiative from NSW is thus significant.

#### Senate Committee Reports

The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which reported on the Bill in September 2001 in the report [Provisions of the Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#). This inquiry provided a forum for many organisations to submit their views on the subject, and these views in abbreviated form are reported later.

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The issue of bargaining fees was considered by a Senate Committee in the early 1980s. The Harradine Committee did recommend an agency fee approach be adopted for those who did not have strong (religious) conscientious objection to union membership but nevertheless did not want to be a union member.<sup>15</sup> The fee proposed in the Harradine report was the usual membership fee discounted for non-industrial activity and determined by the Industrial Registrar. The legislative provisions to be relied on in this proposed exercise were the conscientious objection provisions administered by the Australian Industrial Registrar and found in the *Conciliation and Arbitration Act 1904*. These provisions remain under section [267](#) of the WR Act. Upon proof of the grounds for the objection the registrar may issue a certificate to the person concerned, and the usual or 'prescribed' fee paid to the registrar. However the provisions are rarely used, as Part XA provisions are available. Note that the Harradine report was concerned about the award and union preference systems. The problems thrown up by enterprise bargaining are discussed in the conclusion to this digest. However, many would see the Harradine proposal as being quite a reasonable middle way.

## Policy commitment

### Coalition Parties

Part 9 of the Liberal Party's 2001 election policy *Choice and Reward in a Changing Workplace* stated:

#### *Keeping union membership voluntary*

Employees in Australia now have the basic right to choose whether to join or not to join a trade union, and to exercise that choice free of coercion or duress. Indirect interference or discrimination with these rights, such as requiring non unionists to pay compulsory bargaining fees to trade unions should be outlawed.

### The Coalition will:

Legislate to prohibit trade unions involved in workplace bargaining from imposing a compulsory \$500 per year fee on non union employees.<sup>16</sup>

The Coalition's previous workplace relations policy known as 'More Jobs Better Pay' (1998) also made reference to curb practices which might encourage the 'closed shop'.<sup>17</sup> Coalition senators delivered the majority report of [Provisions of the Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#)

### Australian Labor Party

The ALP's position can be summarised in an extract from its dissenting report in [Provisions of the Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#)

The view of Labor senators in regard to this bill is consistent with earlier dissenting reports. The legislation currently before the Parliament is yet another attempt to

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marginalise union involvement in workplace relations and in negotiations on wages and conditions to the point of irrelevancy. In this sense the Government is intent on destroying a century of Australian industrial relations traditions. The realisation of this policy has been slow in coming to some sections of the workforce but there are distinct signs of a sharpening of consciousness of the importance of maintaining processes that the Government has been anxious to dismantle.

- As part of the Government's attempt to reorganise the Australian workplace, Labor senators note that it has flagged an intention to address the nature of the industrial system in this bill. The government has sought in the past to remove what Labor senators consider to be protections within the industrial bargaining system. These are unique and intrinsic to the Australian system and provide a component of protection and a reflection of a more egalitarian approach to workplace relations compared to the industrial relations scene in other countries. As yet, the Government has not succeeded in removing those protections, so that there exists a bargaining system with certain constraints on what is allowable bargaining. The Government also refuses to acknowledge those restrictions placed on bargainers within the system with a bill such as this.<sup>18</sup>

#### Australian Democrats

The following extract is from the Australian Democrats Minority Report in [Provisions of the Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#)

- The Australian Democrats support the rights of employees and employers to join or not to join registered organisations. We support the prohibition on duress. This bill addresses the possibility of non-members of unions being forced to pay bargaining fees (fee-for-service as it is also known), which then converts into a kind of compulsory unionism. The Democrats believe that fee-for-service issues must be separated out from issues of freedom of association and a prohibition on duress. Both fee-for-service and freedom of association are principles we support. The question then revolves around enabling legislation and whether this bill is the appropriate vehicle for the resolution of these issues ...
- We see a clear distinction between the notion of compulsory unionism (which we oppose) and a contribution to the costs of bargaining, where the person paying is a direct beneficiary of that bargaining. Such payees are not joining a union, but clearly the fee should not be a substitute for a normal union fee. They are paying for a service. They are not contributing to other activities of the union, or electing to play any role in the activities, policies or other conduct of the organisation, or getting any of the other benefits of a union. They are not union members.

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## Position of key organisations

The following summaries of the positions of key organisations are taken from their respective submissions to the 2001 Senate Employment Committee inquiry into the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#).<sup>19</sup>

Australian Council of Trade Unions (ACTU)

Points made by the ACTU in its submission to the Senate Employment Committee's inquiry into the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 include the following:

- Bargaining fees paid by employees covered by collective agreements who are not union members are provided for in the law of a number of countries, including the United States, Canada, Switzerland, Israel and South Africa.
- The principle in these countries is that where a union is recognised by the employer for the purposes of collective bargaining and negotiates an agreement covering all employees, fairness demands that non-members, or “free riders”, be required to pay a fee to the union, either at the same level as union dues or at a lower rate set to approximate the real costs to the union for representing the employees as part of the collective.

Quoting from Graeme Orr's<sup>20</sup> research into bargaining fees, the ACTU observes that in the United States, the standard clause adopted by the Federal Court of Appeals states:

*No employee shall be required to become or remain a member of the union as a condition of employment.*

*Each employee shall have the right to freely join or decline to join the union.*

*Each union member shall have the right to freely retain or discontinue his membership.*

*Employees who decline to join the union may be required to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues.*

- In Canada, the “Rand formula” (named after Justice Rand who developed it in a 1946 decision for the Canadian public service) provides that the compulsory bargaining fee is presumptively that of the usual union dues.
- The ILO views bargaining fees as a valid issue for collective bargaining, with its Freedom of Association Committee holding:

*“When legislation admits trade union security clauses such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements.”*

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- The ILO's *General Survey* explicitly states that bargaining fee provisions, when negotiated between unions and employers, are consistent with freedom of association principles:

*(Clauses in collective agreements) may also require all workers, whether or not they are members of trade unions, to pay union dues, or contributions, without making union membership a condition of employment (agency shop) or oblige the employer, in accordance with the principle of preferential treatment, to give preference to unionized workers in respect of recruitment and other matters. These clauses are compatible with the Convention provided, however, that they are the result of free negotiation between workers' organizations and employers.*

- The current requirement in the Act that certified agreements include only matters "pertaining to the relationship between employers and employees" is inconsistent with the principle of free collective bargaining. It should be noted that the High Court has held that deduction of union dues is not a matter pertaining to the employment relationship, and so cannot be validly included in an award or an agreement. The Court also expressed the view that such deductions could be considered "industrial" for the purposes of the Constitutional conciliation and arbitration power; the jurisdictional restriction results from the limitation imposed by the Act, not the Constitution.
- Apart from the specific prohibitions in section 298K, and the penalties attached to a breach, the effect of section 170MDA is that it is not possible in practice for a union to make an agreement with an employer only on behalf of its own members, as non-members would be able to obtain an extension of the agreement to cover their employment.
- The Minister has made it clear that he expects unions to represent non-members, as in his criticism of unions for failing to insert a redundancy pay provision into the award covering One.Tel employees.<sup>21</sup>

#### Australian Industry Group

Points made by the AIG in its submission to the Senate Employment Committee's inquiry into the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 include:

- Agency or bargaining fees are only permitted in collective agreements in a limited number of overseas jurisdictions. Typically, these countries (like the United States and Canada) have industrial relations systems which are quite different from that in Australia. These jurisdictions often operate under a system of collective bargaining, whereby unions must overcome substantial hurdles before gaining the right to represent employees in collective bargaining negotiations.
- By contrast, unions are afforded greater representation and organisational rights under the Australian workplace relations system. Unions in Australia do not require majority

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membership in order to gain employer recognition for the purposes of collective bargaining. Instead, under the current statutory framework, unions are entitled to (amongst other things):

- meet and confer with the employer in respect of any proposed agreement where at least one employee requests it;
  - negotiate on behalf of members employed at a particular workplace;
  - take protected industrial action in support of claims for a new collective agreement;
  - become parties to collective agreements where at least one member requests it.
- While countries like the United States and Canada operate under collective bargaining systems, Australia’s workplace relations framework is a “hybrid” system - enterprise bargaining underpinned by an industry-wide award “safety net” system. Under the award system, unions derive significant representational and corporate rights to act on behalf of both members and non-members. For example, arbitral awards are usually the product of union action and (under the *Metal Trades case* doctrine) apply equally to unionist and non-unionist alike.
  - Almost as a trade-off for obtaining benefits on behalf of all employees (including those employees who choose not to make any financial contribution to the collective effort), trade unions have always been granted important representational and organisational rights under Australian industrial law. If Australian trade unions now seek agency shop arrangements in line with places like the United States or Canada, then it can be argued they should also be prepared to accept weaker union recognition and representational rights under collective bargaining law.
  - In those foreign jurisdictions where agency shop arrangements are permitted, the law usually introduces strict controls to limit the inevitable inroad into freedom of association which agency shops represent. Monies collected by a union in this way are typically ring-fenced to prevent them from being used to support political parties or activities.
  - There is a need for legislation to be passed to ban the compulsory imposition of bargaining levies upon Australian workers. Alternatively, strict controls need to be implemented before irreparable harm is done to the principles of freedom of association which are so highly esteemed by employers and employees in present-day Australia.

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Department of Employment, Workplace Relations and Small Business

Points made by DEWRSB (now DEWR) in its submission to the Senate Employment Committee's inquiry into the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 include:

- Compulsory union fees are often claimed to be justified on the grounds that they represent a 'user pays' or 'mutual obligation' approach to service delivery consistent with other areas of public policy, in fact compulsory union fees represent an indirect means of promoting union membership.
- Given that the fees are typically imposed via the operation of a concluded and certified agreement, payment of the fee after the event would not result in the provision of services to the individual. In many cases compulsory union fees are set in excess of union membership fees. The VPA's (Victorian Police Association) proposal to impose a \$750 'bargaining agents fee' when annual dues for membership of the Association are set at approximately \$420 is a good example of this tendency and highlights the coercive impact that fees may have.
- The compulsory union fees in the ETU (CEPU referred to above) agreements are a further example. Vice President McIntyre recognised the intent of such clauses was to '...persuade new employees to join, or to coerce new employees into joining, the ETU' when he found that (for technical reasons) he was unable to remove the 'bargaining agents fee' clause as an objectionable provision under section 298Z.
- The 'mutual obligation' analogy for compulsory union fees is not appropriate because a key element of the Government's approach to implementing the principle of mutual obligation through the delivery of programs, such as 'Work for the Dole', is that individuals only incur obligations where they consent to receiving the services delivered. The imposition of compulsory union fees through a clause in a certified agreement is not consistent with this requirement of individual consent.
- The 'user pays' analogy meets similar objections - users can only be required to pay for services they have requested or consented to receive. The Government believes that industrial associations should be subject to the same standards as ordinary businesses, which are prevented by fair trading legislation from providing unrequested services and then demanding payment for those services.
- Although federal legislation in the United States makes provision for agency shops, it also permits such arrangements to be made unlawful by State law. 'Right to Work' legislation that over-rides the federal legislation and makes the enforcement of agency shops illegal has been enacted in 21 State jurisdictions. Right to work legislation takes precedence over union security legislation and prevents employees from being dismissed because they refuse to join, or pay fees to a union

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## Main Provisions

- The Bill bolsters the direction to the Australian Industrial Relations Commission to refuse to certify a CA where it contains 'objectionable provisions'. Unions will not be able to take industrial action against employers for the purpose of seeking consent to bargaining services fees. The payment or non-payment of bargaining services fees has been added to the list of prohibited reasons which may trigger a freedom of association violation. New provisions prevent an industrial association from demanding payment of bargaining services fees and provisions for bargaining services fees are specifically rendered void.

### Schedule 1

#### Part 1

**Item 1** amends **subsection 170LU(2A)** directing the Commission to refuse to certify agreements which contain 'objectionable provisions'. Other provisions of the subsection are deleted. Objectionable provisions are later defined under amendments to subsection 298Z(5).

**Items 3 and 4** provide definitions for bargaining services and bargaining services fees respectively under amendments to section 298B(1) contained under Part XA which deals with freedom of association and non association.

***bargaining services*** means services provided by (or on behalf of) an industrial association in relation to an agreement, or a proposed agreement, under Part VIB (including the negotiation, making, certification, operation, extension, variation or termination of the agreement).

***bargaining services fee*** means a fee (however described) payable:

(a) to an industrial association; or

(b) to someone else in lieu of an industrial association;

wholly or partly for the provision of bargaining services, but does not include membership dues.

**Item 6** adds the payment or non-payment of bargaining services fees to the list of prohibited reasons in section 298L(1) under **new paragraph 298L(1)(o)**. Prohibited reasons relate to reasons for which an employee cannot be dismissed, injured in employment or alter the employment of the employee to his/her prejudice.

**Items 7 and 8** modify existing provisions concerning employees and contractors (sections 298Q and 298S respectively), preventing these industrial associations from inciting these persons to take industrial action or coercing these persons to join the association where the conduct involves the non-payment of bargaining service fees.

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New provisions are added to Division 5 of Part XA. Proposed **subsection 298SA** prevents industrial associations from demanding bargaining service fees while proposed **subsection 298SB** prevents an industrial association from taking action with the intent of coercing the payment of bargaining service fees.

**Item 10** inserts a new **Division 5A** into Part XA. New **section 298SC** prevents persons from making misleading statements about a person's liability to pay bargaining service fees.

**Item 11** insets new **subsection 298Y(2)** which holds that a provision of a certified agreement is void to the extent that it requires payment of a bargaining services fee.

**Item 12** repeals and replaces **subsection 298Z(5)** providing a new definition of 'objectionable provision' to include a provision of a certified agreement which requires the payment of a bargaining services fee.

## Part 2

### Application

**Items 13** allows the amendments to the certified agreement provisions to have application (after the provisions commenced) even if a matter had commenced hearing in the Commission prior to the amendments coming into effect.

**Item 15** applies the proposed definition of objectionable provisions under Item 12 to apply to old agreements

**Item 16** confirms that payments made and received prior to these amendments coming to effect stand.

## Concluding Comments

The evidence which has been presented appears to show that there is somewhat of a division in the legal authorities as to whether what are essentially payroll deduction arrangements are outside the concept of matters pertaining to the employment relationship, or, could be construed as objectionable provisions. The current Bill will make amendments to the WR Act in the attempt to put this issue beyond doubt in respect of bargaining fees.

The evidence shows that such arrangements are arguably within the scope of industrial matters under the Constitution's Conciliation and Arbitration power. However, most CAs in the federal jurisdiction are based on alternative constitutional powers, notably the Corporations power.<sup>22</sup> The use of these non-traditional constitutional powers (ie those other than the conciliation and arbitration power) is usually associated with the notion that

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the parties are to be allowed greater discretion in framing the terms of their agreements. Thus the Bill will limit this discretion.

A related issue concerns the drafting of clauses under enterprise bargaining which allows participants, particularly those operating under 'joint working parties' to create provisions in their own hand thus moving away from the control of the Commission. The Commission has formerly helped to provide a modicum of consistency for example in the drafting of certain award clauses. The new freedom possibly makes it difficult for the Commission to locate just one objectionable provision of an agreement when certifying the agreement where gifted amateurs have made the attempt to draft clauses. (In this sense, a 'union agreement' may be one that is union-vetted rather than union-drafted.) Where the agreement is proposed for certification and has been approved by the majority in the enterprise to be covered by it, it represents the will of the parties, as Justice Munro observed (above).

Finally, the current Bill appears to be offering consent to the payment of a 'fee' or contribution which is voluntary as opposed to one which is obligatory under a CA, perhaps in recognition that the practice of charging bargaining services fees is likely to continue. Listing the non-payment of a bargaining services fee as a prohibited reason under Part XA is likely broaden the reach of the proposed provisions, ie into areas of State industrial jurisdictions.

## Endnotes

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- 1 AIRC, [Print 900919](#), 9 February 2001.
- 2 *Bills Digest* No.2 2001-2002 Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001, p. 1
- 3 AIRC [Print PR 910205](#), 12 October 2001.
- 4 *Ibid*, paragraphs 19–20.
- 5 Macintyre, S. and Mitchell, R. (eds) *Foundations of arbitration: the origins and effects of state compulsory arbitration 1890-1914* (Oxford University Press, Melbourne, 1989) p. 16.
- 6 M.Wright 'Union preference and the closed shop in Australia' in *Australian Unions*, G.W. Ford and D. Plowman (eds.) (Melbourne, MacMillan, 1983) p. 241.
- 7 P. Weeks, *Trade union security law, a study of preference and compulsory unionism* (Federation Press, 1995).
- 8 'Closed shops dying out', *The Australian Financial Review* 11 June 1999.
- 9 Weeks, *op cit*, p. 260.
- 10 'Closed shops still open', *The Australian*, 17 June 1998.

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- 11 *Electrolux Home Products Pty Ltd v Australian Workers Union* [\[2001\] FCA 1600](#) (14 November 2001).
- 12 Ibid.
- 13 AIRC [Print PR914378](#) 18 February 2002.
- 14 'Unions launch test case on payroll deductions' *AAP News Service*, 5 March 2002.
- 15 Senate Select Committee on Industrial Relations Legislation, 1982, par 4.51.
- 16 The Liberal Party of Australia, Election 2001, *Choice and Reward in a Changing Workplace*, Part 9, 'Keeping union membership voluntary'.
- 17 Liberal Party of Australia and National Party of Australia, *Policies for a Coalition Government* (September 1998) 'More Jobs Better Pay'. The policy determined to make unlawful for persons to plan to establish or maintain, directly or indirectly, a closed union shop (p.28).
- 18 Labor Senators Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee [Provisions of the Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#)
- 19 All electronic submissions can be located here:  
[http://wopared.parl.net/senate/committee/EET\\_CTTE/WR\\_compunifees01/sublist.htm](http://wopared.parl.net/senate/committee/EET_CTTE/WR_compunifees01/sublist.htm)
- 20 Graeme Orr, 'Agency shops in Australia? Compulsory bargaining fess, union (in)security and the rights of free-riders' *Australian Journal of Labour Law*, v.14, n.1 at p. 15.
- 21 Note transcript of interview with the Hon Tony Abbott on *7.30 Report* 4 June 2001.
- 22 The forms of certified agreements and numbers covered are discussed in [Bills Digest No.2 2001- 2002](#).

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