Bills Digest
No. 101 2002–03

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No. 2]

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Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No. 2]

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Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No. 2]

Date Introduced: 4 December 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: 28 Days after the Act receives Royal Assent

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 service fees to the 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. Also, the Bill allows employer associations and unions to charge bargaining fees where such fees have been arranged under a contract for services.

Background

In Parliamentary Library publication *Bargaining Fees and Workplace Agreements*, a bargaining fee was described as

> a charge made for the negotiation of a workplace agreement. They are not dissimilar to fees charged by professionals such as solicitors (or accountants). In the federal jurisdiction, a workplace agreement may take a variety of forms (certified agreements and Australian Workplace Agreements). In the course of negotiating such an agreement, an employer may be charged a fee by a bargaining agent, as may an employee or a group of employees.[1]

As is reported below, the current Bill differs from the predecessor Bill (as **initially** introduced to the House of Representatives) due to the inclusion of items which reflect the provision of bargaining services, specifically by ensuring that fees for bargaining services charged, for example, to employers by employer organisations, are not rendered invalid by provisions in this Bill.

Since the Bill sets out to prohibit 'compulsory union fees', it is helpful to commence discussion with reference to a more broad definition of a bargaining fee and one that comprehends the possible gamut of arrangements rather than the sole focus on a union charging a non-unionist a fee, which the title of this Bill implies.

Previous Bargaining Fee Bills

This is the third Bill seeking to prohibit the payment of bargaining fees to unions using the device of a provision of a certified agreement to implement the charge. The Government terms such fees levied by unions against non-unionists as 'compulsory union fees' as often it may be cheaper for the employee to join the union rather than pay the fee.

The inclusion of bargaining services fees in union-negotiated certified agreements was discussed in Bills Digest No.2 2001-2002. That Digest addressed the first Bill prohibiting bargaining services fees, the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001. That Bill failed to pass the Senate, with debate adjourned on 6 August 2001.

Following the November 2001 federal election, the Government introduced the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 to the House of Representatives on 20 February 2002 (the predecessor to the current Bill). The Bill was reviewed in Bills Digest No.108 2001-2002. As is discussed below in more detail, the predecessor Bill was laid aside on 18 September 2002, following the Government's rejection of Senate amendments. Since 1999, the question of whether certified agreements may contain a bargaining fee provision has been reviewed by the Australian Industrial Relations Commission (AIRC) and the Federal Court (to some extent). It is thus useful to canvass these recent developments.

Bargaining fees in certified agreements

From the previous Bills Digests, the following background to the adoption of bargaining fees by unions can be condensed in the following points:

- 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. A number of unions became acquainted with the inclusion of such fees in US and Canadian collective agreements to eliminate the free-rider problem, following overseas study tours in the 1990s.

- Certain unions then 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, on other occasions by direct invoice.

- Where a CA contained a bargaining fee provision, the 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 section170MDA prevents the CA discriminating between unionists and non-unionists.

- However, the use of bargaining fees in CAs was opposed by the Federal Government which viewed the use of these fees as a de facto compulsory union membership fee, with recourse to their imposition being prompted primarily by the fall in union membership.

- In 2000, the Employment Advocate (EA) 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, its electrical division sometimes referred to as the ETU). These contained provisions for the levying of these fees (set at 1 per cent of employee's salary or $500 pa whichever the greater).

- The EA argued that these agreements contained an 'objectionable provision' in contravention of subsection 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 (usually) 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 (AIRC) over 2000-01, heard by Vice President McIntyre.[2] 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, **and the provision did not disclose a prohibited reason as the intention or motive**.

- On appeal a full bench of the AIRC upheld the Vice President's finding that the union fee clause was not objectionable. 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.[3]

This remains an important decision on bargaining fees. The Hon Tony Abbott in his Second Reading Speech to the current Bill stated that the decision has

> … exhausted the legal avenues to have clauses removed from certified agreements.[4]

However, this is not the case. An AIRC decision in January 2003 has determined that bargaining fee provisions should not be included in CAs, and this development is reported below.

Recent legal contests concerning bargaining fees

- The Electrolux company contested elements of a log of claims served upon it by unions including the Australian Workers Union (AWU) in the Federal Court. Justice Merkel found against the industrial action taken in support of including bargaining fees in a certified agreement, ie that the industrial action was unprotected as at least one component of the claim, the bargaining fee provision, could not be validly included in a certified agreement as it did not pertain the relationship of employer and employee.[5]

- In the appeal decision of 21 June 2002, a Full Bench of the Federal Court (Justices Murray Wilcox, Catherine Branson and Shane Marshall) held in Electrolux No.2 on 21 June 2002 that industrial action taken to pursue a union log of claims was legitimate, including over all of the claims.

- the decision distinguished 'industrial disputes' under the arbitration system and the more liberal scope of matters which may be included in certified agreements, the contents of which must pertain to employment: Section 170LI reads:

> Section 170LI Nature of agreement
> (1) For an application to be made to the Commission under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:
>
> (a) an employer who is a constitutional corporation or the Commonwealth; and
>
> (b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement.

The Electrolux No.2 decision made the comment, in *obiter dicta*,

> … the words of section 170LI(1) are significantly different from those contained in the definition of "industrial dispute" in previous enactments. Cases decided with reference to that definition may not apply.[6]

- The Electrolux company and the employers' association, Australian Industry Group (AiG) commenced a challenge to the Electrolux decision in the High Court in July 2002. Should hearings proceed, they are expected to commence on 9 May 2003.[7]

These cases notwithstanding, there remained a divided view within the AIRC as to whether bargaining fees can or cannot be legitimately included in certified agreements. That they cannot is essentially both derived from Justice Merkel's views in his November 2001 decision and an earlier (2001) AIRC Full Bench decision, that bargaining fees **may** not pertain to the relationship of an employer and employee.

The Hon.Tony Abbott also noted in his Second Reading Speech to this Bill that nine agreements containing bargaining fees were unable to be certified by the AIRC in August 2002, and the decision/s not to certify were under appeal.[8]

The result of this appeal was made on 10 January 2003 by a Full Bench of the AIRC. Its decision has, in a nutshell, indirectly supported the observations provided by Justice Merkel in the Federal Court, and a previous AIRC Full Bench decision[9] in which the possibility that that bargaining fees may not pertain to the employment relationship was canvassed. The most recent AIRC Full Bench decision holds that bargaining fee provisions proposed to be inserted into a certified agreement do not pertain to the relationship of employer and employee; as the decision says:

> … the proper construction of that section was that there must be "*an agreement*" about matters pertaining to the requisite relationship. We fail to see why an agreement which contains a term which is not about matters pertaining to the requisite relationship would be such an agreement.[10]

The decision appears to be belatedly sending reverberations through the media with both *The Australian* and *Australian Financial Review* reporting on the decision on 22 January 2003. The editorial on the issue by the AFR stated:

> Compulsory bargaining fees are really a backdoor way of bringing back the closed shop to bolster flagging union coffers … (they) offend against the law of contract, which requires offer and acceptance as well as consideration and certainty to be binding.[11]

It will be interesting to see if employers and unions seek another form of agreement, other than a federal certified agreement to continue the bargaining fee payments. It was reported in *The Australian* that a number of certified agreements may be deemed to have clauses in them dealing with bargaining fees and union payroll deduction schemes, and one union is considering pursuing the matter to the High Court, ie, to seek to have existing agreements with bargaining fee provisions remain in force, (despite the issue already being listed with the High Court).[12]

Amendment and rejection of the predecessor Bill

The predecessor Bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee on 20 March 2002, which reviewed the predecessor Bill (and four other workplace relations bills). The submission of Australia's peak employers' organisation, the Australian Chamber of Commerce and Industry (ACCI) to the Senate Committee expressed concerns with the format of the predecessor Bill. As originally

drafted, it may have impeded contractual arrangements for the demand for a payment of a service (bargaining fee). ACCI contended:

> … ACCI supports both the principle of the bill and its terms. However, we suggest … that there needs to be an amendment to the bill to ensure the enforcement of proper consensual demands by registered employer or employee organisations for the payment of a bargaining fee that has been agreed upon before the provision of services. The bill should specifically ensure that, where a registered organisation has an agreement for the provision of bargaining services and those services are provided but payment is not made in respect of a request for payment and so a demand for payment is then made for the provision of those services, that is not inadvertently caught by the prohibition on the demand for bargaining fees. There is a problem, in our view, with the wording of one of the clauses in the bill, which needs to be clarified to allow proper enforcement of agreed bargaining fee services.[13]

Subsequently, the Government made amendments to the Bill and it passed the House of Representatives at its third reading on 16 May 2002 with the following caveats:

> Nothing in this section prevents an industrial association from demanding payment of a bargaining services fee that is payable to the association under a contract for the provision of bargaining services…
>
> To avoid doubt, nothing in this Division prevents an industrial association from entering into a contract for the provision of bargaining services with person who is not a member of the association.[14]

Mr Abbott made the following comment on these amendments

> These are very technical amendments. They are designed to address issues that were raised in the Senate committee process and to ensure that arrangements which are indeed voluntarily entered into are not struck out by the legislation. I commend the amendments to the House.[15]

Democrat and ALP amendments

The predecessor Bill was introduced into the Senate on 19 June 2002 and passed on 21 August 2002. In addition to those amendments cited above, the predecessor Bill now included certain Australian Democrat amendments, supported by the ALP, the bulk of which the Government rejected on 18 September 2002, when the Bill was laid aside. In essence the Democrats sought to model a 'permissible' bargaining fee arrangement in the amendments. These amendments which the House of Representatives considered and rejected (having considered similar amendments also on 28 August) included the following detailed requirements:

> **Section 298SA Permissible bargaining fees**
>
> (1) An organisation may charge a permissible bargaining fee:

(a) in connection with an agreement certified under section 170LJ or Division 3 where:

(i) the agreement's beneficiaries include those who have not made a contribution to the costs of reaching the agreement by means of paying a union membership fee; and

(ii) this permissible bargaining fee is explained in clear language, and in writing, to all employees in advance of the vote on the agreement; and

(iii) details of the permissible bargaining fee, and the services for which it is payable, are set out in the agreement; and

(iv) all employees affected by the agreement are advised, prior to bargaining commencing, whether it is proposed to include a permissible bargaining services fee in the agreement, and that they may make submissions to the AIRC under subparagraph (vii) in relation to this fee; and

(v) in addition to the requirement in subsection 170LT(5), a valid majority of persons employed at the time, whose employment would be subject to the agreement, have genuinely agreed to the provision; and

(vi) the agreement provides for the method and timing of the fee to be paid; and

(vii) the AIRC is satisfied that the fee is fair and reasonable; and

(viii) the agreement provides that new employees pay the fee only for the pro rata period of the agreement from the time that their employment commences; or

(b) in connection with an agreement certified under section 170LK where:

(i) the employee has agreed to pay for the provision of bargaining services in respect of the certified agreement; and

(ii) the employee has agreed to the total amount to be paid and this total amount covers all the bargaining services that may be provided in relation to the employee in respect of the certified agreement; and

(iii) the agreement was entered into before the bargaining services were provided.[16]

Basis of policy commitment

The Government's opposition to the inclusion of bargaining fees in certified agreements was reflected in its workplace relations policy taken to the 2001 federal election. Part 9 of the Liberal Party's 2001 election policy *Choice and Reward in a Changing Workplace* stated:

> 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.

ALP/Australian Democrat/Greens policy position/commitments

ALP

As previously reported the ALP views such fees as being capable of being included in certified agreements. ALP Senators reviewing the predecessor Bill regarded the objects of the WR Act as affording the right of the parties to an agreement to determine its contents

> Labor senators oppose this Bill which is misleadingly titled and simply designed to prevent unions from charging fees to cover the costs they incur in undertaking enterprise bargaining services. Such a restriction is inconsistent with the objectives of the Act in promoting agreement making between parties and allowing parties to determine the most appropriate form of agreement. Labor senators can only speculate that the underlying intention is to reduce the capacity for unions to bargain effectively on behalf of their own members and Australian employees more generally.[17]

Australian Democrats

Senator Murray representing the Australian Democrats in the Senate Committee inquiry into the predecessor Bill contended

> It is hard to see how provisions for bargaining fees should be against the spirit of the WR Act and its object of facilitating agreement making. Agreement making is desirable, and if fee-for-service contributes to that, it is to the good. There is also the issue of 'free-riders' by employers on the backs of employer organisations, and employees on the backs of unions …We consider it fair that those who benefit from agreement making should make a contribution towards its costs, whether employers or employees. This strikes us as a fair principle.[18]

Position of significant interest groups/press commentary

The position of the peak employers' organisation, the ACCI has been referred to earlier, and the view is generally reflective of employer bodies.

Unions

On the other hand, the union movement is taking what appears to be an industry by industry approach to the inclusion of bargaining fees in certified agreements. In evidence

to the Senate Committee, the ACTU reflected upon the deliberations leading to the adoption of bargaining fees, and the method in which they might be pursued. As the President of the ACTU stated:

> When we established the principles behind the bargaining fee, it was very much about not imposing it on every workplace, not having a union executive take a decision that imposed it before they went into negotiate, but about a democratic discussion, decision, at the workplace so that, if you like, the onus is on us to promote the value of our services in each environment.

Yet the Australian Education Union preferred not to set about seeking the inclusion of bargaining fees in its certified agreements, even though it understood that free-riders would benefit from negotiations, as the AEU's national secretary reflected

> Members take the view that those who benefit from an outcome should pay and should not get the outcome unless they do. However, I think that the wise old conciliation and arbitration system, going back to the bus ticket case or one of those cases where everybody should get the outcome, really is the wisest position for all concerned. We do not have a view on charging bargaining fees. Our non-union rate is fairly low and we would prefer them to join the union.[19]

State jurisdictions

It might be useful to note that the question of including bargaining fees in enterprise agreements is building momentum in the State industrial systems. For example, the South Australian Government has recently conducted a review of the State's industrial relations jurisdiction, in which the **option** for bargaining fees was discussed within the following parameters:

- the fee could be paid on a voluntary basis
- the clause would not apply where an employee has been represented by another party, for example the Employee Ombudsman or an agent of their choice
- the potential to impose a bargaining fee for unrepresented employees is made known to all employees in the notification of intention to bargain
- any bargaining fee set must be reasonable having regard to the cost of union membership
- in relation to an agreement that includes one or more unions in the negotiation process, only one bargaining fee can be charged.[20]

In New South Wales, the NSW Industrial Relations Commission is also inquiring into the inclusion of bargaining fees in enterprise agreements, and has proposed the following (new) principle for the parties to the proceedings to comment on:

> Where the proposed enterprise agreement includes a provision as to payment of an agency or union bargaining fee, the commission shall consider whether the proposed provision is consistent with the provisions of the *Industrial Relations Act 1996* and, where applicable, the rules of any relevant registered organisation.[21]

The NSW Government submitted to the Commission that bargaining fees are an 'industrial matter' that should be decided by the parties at the workplace level.[22]

Any consequences of failure to pass (e.g. potential double dissolution trigger)

Essentially, this Bill becomes available as a trigger for a double dissolution of both Houses of Parliament if after 28 November 2002 the current Bill passes the House of Representatives and subsequently the Senate rejects the Bill.

For there to be a double dissolution of both Houses of the Parliament, an interval of 3 months is required between the rejection of the proposed law by the Senate (in the of the case of the predecessor Bill, 28 August 2002), and the House of Representatives passing the proposed law a second time. A second failure by the Senate to then pass the Bill has the potential to trigger a simultaneous dissolution of both Houses under section 57 of the Australian Constitution.

Main Provisions

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 (the FOA provisions).

> *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 me mbership 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 are reasons for which an employee cannot be dismissed, injured in employment or have altered the employment of the employee to his/her prejudice.

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

Item 9 adds new provisions to Division 5 of Part XA. **Proposed subsection 298SA** prevents industrial associations from demanding bargaining service fees. However **proposed subsection 298SA(1A)** makes clear that the section does not void contract arrangements for the payment of bargaining service fees. **Proposed subsection 298SB** prevents an industrial association from taking action with the intent of coercing the payment of bargaining service fees. **Proposed subsection 298SBA** clarifies that the FOA provisions do not prevent contracts being entered into by an industrial association with a person (including a non-member) for the provision of bargaining services.

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 inserts **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 14** ensures that this provision will apply to existing certified agreements.

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.

Schedule 1

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.

Conclusion

The decision by the AIRC on bargaining fees on 10 January 2003 in effect supports the Government's position on this matter. Therefore the question may be asked as to whether the provisions of this Bill are required to prohibit bargaining fees, now that the AIRC has determined that the fees are non-allowable. It might also be assumed that, as a first step, the Office of the Employment Advocate might seek to re-list applications with the AIRC to have such clauses removed from agreements.

Endnotes

1 Steve O'Neill and Bronwen Shepherd, *Bargaining Fees and Workplace Agreements E brief*, Department of the Parliamentary Library, August 2002.

2 AIRC, PR900919, 9 February 2001.

3 AIRC, PR 910205, 12 October 2001.

4 The Hon. Tony Abbott MP, *Parliamentary Debates*, House of Representatives, 4 December 2002, p. 9537.

5 Electrolux Home Products Pty Ltd v Australian Workers Union (FCA, No. S157 of 2001, 14 November 2001.

6 Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited [2002] FCAFC 199 (21 June 2002).

7 'What's ahead for IR in 2003', *WorkplaceInfo* 7 January 2003.

8 The Hon. Tony Abbott MP, *Parliamentary Debates*, House of Representatives, 4 December 2002, p. 9536.

9 AIRC, PR 910205, 12 October 2001.

10 AIRC, PR926554, 10 January 2003.

11 'The perils of wage setting', *The Australian Financial Review* 22 January 2003.

12 'High Court may rule on union fees', *The Australian*, 22 January 2003.

13 Evidence by Mr P. Anderson for ACCI to the Senate Employment, Workplace Relations and Education Legislation Committee on 3 May 2002, p. 80.

14 The Hon. Tony Abbott MP, *Parliamentary Debates*, House of Representatives, 16 May 2002, p. 2340.

15 ibid.

16 The Hon. Tony Abbott MP, *Parliamentary Debates*, House of Representatives, 4 December 2002, p. 9537.

17 Refer to ALP Senators minority report in the Senate Employment, Workplace Relations and Education Legislation Committee, *Report on the provisions of bills to amend the Workplace Relations Act 1996*, May 2002, pp. 39–40.

18 Refer to comments of Senator Murray in Senate Employment, Workplace Relations and Education Legislation Committee, *Report on the provisions of bills to amend the Workplace Relations Act 1996*, May 2002, p. 65.

19 Robert Durbridge on behalf of the Australian Education Union giving evidence to the Senate Employment, Workplace Relations and Education Legislation Committee on the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002* (and other Bills) 3 May 2002, p. 122.

20 'Review of the South Australian Industrial Relations System' *Report,* October 2002, p.93. Note however that the SA Opposition has proposed a Bill to outlaw bargaining fees, see 'Union bargaining fees under attack', *The Advertiser*, 4 December 2002.

21 'NSW may adopt bargaining fees', *WorkplaceInfo,* 22 November 2002.

22 Reported in *Industrial Relations and Management Newsletter,* v.19, n.11, December 2002, p. 5.