



Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005

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Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005

Date Introduced: 9 February 2005

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The formal provisions commence on Royal Assent. The substantive provisions commence the day after Royal Assent.

Purpose

The Bill seeks to amend the [Workplace Relations Act 1996](#) to extend the Act's (WR Act) prohibition on federal certified agreements containing bargaining fees or bargaining service fees (as used in the current Bill), to State employment agreements containing such fees where the employer is a constitutional corporation.

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

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 Government thus sought to prohibit certified agreements from containing bargaining fee clauses (measures discussed below).

Bargaining fees in certified agreements

The background to the adoption of bargaining fees by unions in certified agreements has been canvassed previously in Bills Digests, but might be again reviewed and updated.

- 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

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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).

- The purpose of bargaining fees was to 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 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 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 an employee's salary or \$500 pa whichever was 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, that is allowing them freedom to join or associate (see discussion below), and the WR Act's freedom of association provisions are based, inter alia, on the Constitution's corporations power.
- The EA's objections in the CEPU agreements matter were brought before the Australian Industrial Relations Commission (AIRC) over 2000-01. Under [section 298Z](#) (removal of objectionable provisions) of the WR Act, the EA sought to have the clauses removed. The AIRC 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. (In January 2003 however a Full Bench of the AIRC

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held in a challenge to the certification of a number of agreements, that such fees did **not** pertain to the employment relationship, offending [section 170LI](#).²⁾

- 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 in 2000 (referred to here as Electrolux No.1).³ In 2001 Justice Merkel found against the industrial action taken in support of including bargaining fees in a certified agreement, that is, 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.
- In the appeal decision, a Full Bench of the Federal Court held on 21 June 2002 that industrial action taken to pursue a union log of claims was legitimate, including over all of the claims (referred to as Electrolux No.2).⁴
- 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. In 2004, the High Court found that bargaining fees did **not** pertain to the employment relationship, that is, of the employer and employees in their capacity as such. Further, the High Court found that CAs containing non-pertaining matters were void (referred to as Electrolux No.3).⁵
- The Government consequently amended the WR Act to ensure that CAs (and AWAs) were valid to the extent they contained 'pertaining' provisions. The amendments were inserted by the [Workplace Relations Amendment \(Agreement Validation\) Act 2004](#) which commenced on 15 December 2004 (see [Bills Digest No. 56 2004-05](#)⁶). CA provisions found to be non-pertaining are not to be enforced.

Bills and Acts prohibiting bargaining fees

The inclusion of bargaining services fees in (federal) union-negotiated certified agreements was addressed in 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.

Following the November 2001 federal election, the Government introduced the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (see Bills Digest No.108 2001-2002). That Bill was laid aside on 18 September 2002, following the Government's rejection of Senate amendments. However its successor Bill was passed by the Parliament on 26 March 2003 taking the form of the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Act 2003](#), which prevents the inclusion of bargaining fees in certified agreements amongst other changes (see also the [Senate Report](#) on the Bill).

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Bargaining fees and State jurisdictions

In [Bills Digest 101, 2002-03](#) it was noted that the New South Wales and South Australian jurisdictions had addressed bargaining fees in the context of collective bargaining negotiations in the respective States.

The following extracts from the *Australian Labour Law Reporter* updates these and other developments.

New South Wales

In its 2002 review of the principles for approving enterprise bargaining agreements the full bench of the NSW Industrial Relations Commission inserted a new clause relating to union bargaining fees (see cl 2.9).

The Commission rejected arguments from employer bodies that the Act or any principle of law prohibited the inclusion of a provision in an enterprise agreement permitting the payment of a fee by employees to a third party involved in the negotiating or maintenance of an enterprise agreement. While the inclusion of such a provision might be appropriate in some circumstances and unacceptable in others, there was no jurisdictional impediment to approval.

The Commission will thus have to consider whether it is appropriate for a bargaining fee clause to be included in registered enterprise agreements on a case by case basis. Issues that the Commission will have to consider when determining whether or not to approve an enterprise agreement containing a bargaining fee clause are:

- whether the provision is a condition of employment;
- whether questions arise under sec [209](#) and sec [210](#) of the Act (*Industrial Relations Act 1996* NSW ie, concerning freedom of association and freedom from victimisation);
- for the purposes of sec [35\(1\)\(b\)](#) (allowing approval so long as there is no net detriment) and principle 4 (requiring consultation), the nature and extent of the involvement of non-member employees in the process of bargaining and ratification of the provision, and the information provided to those persons about the bargaining agent and the nature and extent of the fee charged; and
- for the purposes of sec [35\(1\)\(d\)](#) (prohibiting approval if there has been duress) and principle 4 (requiring consultation), the relationship between the bargaining agent and the persons affected by the fee and the nature of any consultative process with such persons.⁷

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Queensland

The effect of sec 141(1) (*Industrial Relations Act 1999*, Qld) is that an agreement cannot be certified if it contains a provision that is not about the relationship between the employer and employees, unless the provision is necessary for the effective operation of another provision of the agreement that is about the relationship: *AWU v Skills Training Mackay* (2002) 51 AILR ¶9-206. In that decision the Full Bench held that certified agreements may not contain bargaining fee clauses irrespective of whether the parties have agreed to such a provision ...

However, a different finding was reached with respect to provisions for the deduction of union fees. It was held that if parties to an agreement agreed to the provision, then it fell within the employment relationship, particularly as payments to a third party of this kind often provided a corresponding benefit to both the employer and employee.⁸

South Australia

The South Australian Industrial Relations Commission has approved the inclusion of bargaining fees in South Australian enterprise agreements but warned that the level of the fee may be discriminatory and all applications will be dealt with on a case-by-case basis.

In an agreement between the Liquor, Hospitality and Miscellaneous Workers Union (LHMU) and security company Ian Gregory Morrison Pty Ltd, the Full Bench allowed the inclusion of a bargaining fee clause which will see non-members of the union pay 80 per cent of union membership dues per year (non-members will pay \$232.96 per year while members of the union will pay \$291.20 per year): *Ian Gregory Morrison Pty Ltd (SA) Patrol and Security Officers Enterprise Agreement 2002-2004 (No 2) - Bargaining Agents Fee* [2004] SAIRComm 15 (14/4/04).

The decision follows on from an earlier case where the Full Bench found that it had jurisdiction to vary an enterprise agreement to include a bargaining fees clause: *Ian Gregory Morrison Pty Ltd (SA) Pty Ltd Security Officers Enterprise Agreement 2002-2004* [2003] SAIRComm 36 ; (2003) 53 AILR ¶1350-018 (17 June 2003).

The Full Bench found that the definition of an 'industrial matter' under State law is broad enough to include bargaining fees, in contrast to decisions in the federal jurisdiction.

However, the Full Bench warned that in some cases the fee level may be discriminatory, as was the case in the initial form of the agreement between the LHMU and Ian Gregory Morrison, where the clause submitted by the parties was equal to a full year's union payroll deductions. The Full Bench found that the fee set a disproportionate cost for the bargaining service, given the union dues paid by members cover more services than just the union's role as a bargaining agent. If the fee was designed to penalise non-members or those that use alternative bargaining services it was doubtful the clause could be sanctioned.⁹

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Federal response

The Minister for Employment and Workplace Relations, the Hon Kevin Andrews has argued in his [second reading speech](#) for this Bill that bargaining fees, including those sanctioned in state jurisdictions, impose obligations on non unionists for a service which they did not request, and that such fees may be negotiated in state industrial jurisdictions:

Bargaining agent fee clauses in agreements purport to impose an obligation to pay a fee on an employee who is not a member of a union for bargaining services that they did not request. This means non-union workers have to pay for union negotiations at their workplaces even though their concerns may not be represented at all. Effectively, bargaining agent fees act as backdoor compulsory unionism. They are contrary to the principles of freedom of association and should not be included in any form of industrial instrument.

The *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003* has been successful in addressing bargaining agents fee clauses in federal agreements with bargaining fee provisions removed from 10 certified agreements in January and February of 2004. A further 572 applications made by the Office of the Employment Advocate are currently being considered by the Commission. However, as progress is made in the federal jurisdiction, a number of unions have sought to include such clauses in agreements made under State legislation. Recent cases in State jurisdictions have confirmed that bargaining agent fees clauses can be included in State agreements ...

The Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005 will extend the prohibition on the inclusion of bargaining agents' fee clauses in agreements beyond agreements certified under the Workplace Relations Act 1996 to also cover any state employment agreement to which a constitutional corporation is a party.¹⁰

Two issues raised in the second reading speech to the Bill raise questions about the principles of freedom of association and in this context, freedom of association in the negative (that is e the Bill attempts to ensure that workers are not compulsorily forced to join unions), and, the use of the Constitution's corporations power (section 51(xx)) to extend the application of federal law.

Freedom of Association

[Convention 87](#) of the International Labour Organisation establishes freedom of association in an industrial context.¹¹ It provides that workers and employers shall have the right to establish, and subject to the rules of the organisation, join organisations of their own choosing without authorisation (for example, from an employer). The convention is silent on the negative freedom, that of workers not being compelled to join. Australia ratified this convention in 1973.

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A negative freedom of association however was found by the European Court of Human Rights (ECHR), in a now landmark case which involved the closed shop and the British rail industry in the 1970s.¹² Non union employees challenging the closed shop relied on the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms*, which as written did not confer or guarantee any right not to be compelled to join an association.

Council of Europe's freedom of association case - Majority decision

The majority decision noted that the relevant article of the convention did not stipulate a negative freedom of association:

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.¹³

The majority decision also quoted the view of the Conference drafting the convention that in light of the practice of closed shop arrangements, it was undesirable to introduce a 'non-one shall be compelled to join' provision in that convention:

On account of the difficulties raised by the 'closed-shop system' in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association' which features in [Article 20 par. 2 of] the United Nations Universal Declaration of Human Rights" (Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Préparatoires", vol. IV, p. 262).

The majority decision also argued that it did not follow that the negative aspect of a person's freedom of association fell completely outside the ambit of Article 11, or that each and every compulsion to join a particular trade union was compatible with the intention of that provision:

To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee ...¹⁴

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Council of Europe's freedom of association case - Dissenting judgment

A dissenting judgement by three judges sought to resolve the positive and negative aspects of the freedom of association by a) supporting the closed shop as a union security device and b) suggesting as a means to protect conscientious objectors, that national laws exclude non-membership of a trade union as a reason for dismissal, much as Australia's WR Act does: [subparagraph 170CK\(2\)\(c\)](#). The dissenting judgement argued:

The positive freedom of association safeguards the possibility of individuals, if they so wish, to associate with each other for the purpose of protecting common interests and pursuing common goals, whether of an economic, professional, political, cultural, recreational or other character, and the protection consists in preventing public authorities from intervening to frustrate such common action. It concerns the individual as an active participant in social activities, and it is in a sense a collective right in so far as it can only be exercised jointly by a plurality of individuals.

The negative freedom of association, by contrast, aims at protecting the individual against being grouped together with other individuals with whom he does not agree or for purposes which he does not approve. It tends to protect him from being identified with convictions, endeavours or attitudes which he does not share and thus to defend the intimate sphere of the personality. In addition, it may serve the purpose of protecting the individual against misuse of power by an association and against being manipulated by its leaders. However strongly such protection of the individual may sometimes be needed, it is neither in logic nor by necessary implication part of the positive freedom of association.

It follows that union security arrangements and the practice of the "closed shop" are neither prohibited, nor authorised by Article 11 of the Convention. Objectionable as the treatment suffered by the applicants may be on grounds of reason and equity, the adequate solution lies, not in any extensive interpretation of that Article but in safeguards against dismissal because of refusal to join a union, that is in safeguarding the right to security of employment in such circumstances... at present, it is therefore a matter for regulation by the national law of each State¹⁵.

Extending the federal jurisdiction

The Senate's Employment Workplace Relations and Education Committee reviewed the Workplace Relations Amendment (Termination of Employment) Bill 2002 which also proposed to extend the federal jurisdiction of the Commonwealth in respect of termination of employment. Professor George Williams of the University of New South Wales supported the proposed extension of Commonwealth power (although not necessarily the form of the national dismissal system proposed) in a submission on the Bill:

... It is clearly the responsibility of the federal Parliament to enact laws for national needs. Our economy does not consist of discreet and insular sectors of commerce within each State or even within Australia, but exists within a world of global markets that creates competition and interdependence with the economies of other nations. Section 51(xx) of the Constitution grants legislative power to the Commonwealth over 'foreign corporations,

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and trading or financial corporations formed within the limits of the Commonwealth' ... Most of the case law on section 51(xx) has concerned trading corporations. There is an unresolved division of opinion in the High Court on the scope of the power (although more judges have tended towards a broader view of the power in later cases). The focus of debate has been upon which activities of the listed corporations can be regulated under the power. Two possible views, a narrow and a broad view, border the possible scope of the power.¹⁶

A counter opinion to the desirability of extension of Commonwealth jurisdiction is evident in the views of Professor Ron McCallum (Dean Faculty of Law, University of Sydney). In a recent interview, he made the following points:

- The main problem with relying on the corporations power as the basis for a move towards a unitary IR system, is that it leaves out thousands of workers, meaning another tier of regulation is still required.
- 25 per cent of Australian workers were not employees of trading or financial corporations. This means that this group would not have the employment law governed by the proposed 'national' system. 'Even if you accepted former Workplace Relations Minister Peter Reith's figures that the Victorian referral of powers brought the number of those left out down to 15 per cent, it was still significant'.
- The question then became, "who was going to ensure my nanny was paid a minimum wage, who was going to worry about the little people, the personal services workers".
- Other problems were that labour law became "corporatised", because the focus of the legislation shifted to the corporation rather than to the rights of employees. Also, it was a grey area as to whether the corporations power extended to all the conditions of employment of employees of the foreign, trading or financial corporations it covered.¹⁷

In summary there conflicting views as to whether the Constitution's corporations power is a suitable constitutional base to extend the reach of the federal workplace jurisdiction.

Main Provisions

Schedule 1

Item 1 repeals and replaces subsection 298B(1) (definition of *bargaining services*). The expanded definition replicates the existing definition (which applies to federal certified agreements) but adds services provided by an industrial association in relation to the making of, variation of or termination of a State employment agreement, or a proposed State employment agreement to the definition.¹⁸

Item 2 inserts proposed subsection 298Y(3) providing that a term of a State employment agreement to which a constitutional corporation is a party, is void to the extent that it

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requires payment of a bargaining services fee. **Proposed subsection 298Y(4)** clarifies the scope of the terms ‘*permits*’ and ‘*requires*’ used in section 298Y, replicating the definition of these terms found currently under existing subsection 298Z(7).¹⁹

Item 3 (Application) provides that the prohibition of bargaining fees in state agreements applies to all State employment agreements entered into on or after the commencement of item 2 (the day after the Act receives Royal Assent).

Concluding Comments

The Bill when enacted may be used by certain State governments to challenge the extension of the federal workplace jurisdiction over the States, with the likely support of unions. In essence such a challenge may centre on the validity of use of the corporations power as a basis for a law, which prohibits the payment of a fee to the union by an employee under a state employment agreement. It may be found that the corporation’s relationship with an employee and a third party union is not directly related to the employment relationship, and may not be supported by the corporations power.

Endnotes

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- 1 Steve O’Neill and Bronwen Shepherd, [Bargaining fees and workplace agreements](#), E Brief, Department of Parliamentary Library, 2003.
 - 2 AIRC, PR26554, 10 January 2003.
 - 3 [Electrolux Home Products Pty Ltd v Australian Workers Union \(FCA, No. S157 of 2001, 14 November 2001\)](#).
 - 4 [Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited \[2002\] FCAFC 199 \(21 June 2002\)](#).
 - 5 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40 (2 September 2004). http://www.austlii.edu.au/au/cases/cth/high_ct/2004/40.html
 - 6 Jacob Varghese, Bills Digest No. 56, 2004-05, *The Workplace Relations Amendment (Agreement Validation) Bill 2004*, Parliamentary Library, Department of Parliamentary Services.
 - 7 CCH, *Australian Labour Law Reporter* at ¶60–850.
 - 8 *ibid.*, at: ¶61–560.
 - 9 *ibid.*, at: ¶61–770.

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- 10 The Hon Kevin Andrews, Second Reading Speech to the Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005, House of Representatives, *Hansard*, 9 February 2005, p. 1.
- 11 International Labour Organisation, *C87 Freedom of Association and Protection of the Right to Organise Convention*, 1948.
- 12 [*Young, James and Webster v. the United Kingdom* \(7601/76\) \[1981\] ECHR 4 \(13 August 1981\)](#).
- 13 *ibid.*, cited in the majority decision.
- 14 *ibid*
- 15 *ibid.*
- 16 Refer to Professor Williams' submission to the Senate Inquiry into Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002, http://www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/2002-04/teb02/submissions/sublist.htm
- 17 Interview with Professor Ron McCallum, Dean Faculty of Law, University of Sydney reported in 'Andrews outlines IR plans', www.workplaceexpress.com.au, 25 February 2005.
- 18 A definition of 'State Employment Agreement' is provided in subsection 4 (1) of the WR Act.
- 19 Section 298Z WR Act deals with the removal of objectionable provisions from awards and CAs.

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