PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2001

Committee's consideration of the bill

1.1 The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 bill was introduced into the House of Representatives on 23 May 2001. On 19 June 2001 the Senate referred the bill to its Employment, Workplace Relations, Small Business and Education Legislation Committee.

1.2 The Committee received 25 submissions in relation to this bill and held a public hearing in Canberra on 31 August 2001. A list of submissions and witnesses at the hearing are to be found in the appendices to this report.

Background to the bill

1.3 The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 would amend the *Workplace Relations Act 1996* (WRA) to prevent employer organisations and unions from demanding fees from non-members (without the individual members consent) for bargaining services and would proscribe certain discriminatory conduct in relation to decisions by employees about payment of such fees. An exemption to the prohibition of fees would be provided where the industrial association obtains an individual's written agreement to pay a fee in advance of the bargaining services being provided.[1] In particular, the bill will prohibit the inclusion in enterprise agreements of a clause allowing industrial organisations to charge a fee for service in respect of enterprise bargaining negotiations.

1.4 The WRA provides for three main methods of regulating conditions of employment:

- Australian Workplace Agreements (AWA) - basically individual agreements between the employer and employee. AWAs are subject to minimum entitlements but have mostly been restricted to higher paid employees.

- Certified Agreements (CAs) - there are two principal forms of CAs, with employers able to enter agreements with unions which have at least one member in the business (section 170LJ agreements) or with the employees of the business (section 170LK agreements).

- Awards - where neither of the above two apply, these are usually lower paid employees, such as those covered by recent 'Safety Net' cases.

This bill is concerned with section 170LJ agreements (LJ agreements), which cover a substantial majority of employees covered by the WRA.[2]

1.5 The bill is not simply a reaction to recent developments in the Australian Industrial Relations Committee (AIRC) nor recently made 170LJ agreements. The policy intention of this bill was adopted by the Government as far back as the WRA Amendment (More Jobs,

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1 Submission No. 19, Department of Employment, Workplace Relations and Small Business, p. 1.

2 Department of the Parliamentary Library, Bills Digests No.2 2001-02, 17 July 2001, p. 2.

Better Pay) Bill 1999, albeit in a slightly different statutory form. It is also the normal (and frequent) practice of governments to amend legislation in accordance with judicial interpretations which may render it inoperative. A judgement of the AIRC handed down by Vice President McIntyre on 9 February 2001 has cast some doubts on whether current legislation is fulfilling its intention. The 'fee for service' issue arose from an agreement between the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (ETU) and a number of employers to have such a clause inserted in new LJ agreements providing a 'fee for service'. The Employment Advocate took action in the AIRC to have the clauses removed from the agreements on the grounds that they breached the freedom of association provisions in Part XA of the WRA. The AIRC found that the clauses did not breach Part XA because they would not lead to conduct by the employer which would discriminate against employees because they are not, or do not propose to become, a member of an industrial association, the relevant 'prohibited reason' in section 298L. This decision is the subject of an appeal by the Employment Advocate.

1.6 In June 2000 the ACTU Congress endorsed a policy by which member unions may seek to insert a 'fee for service' clause in new certified agreements. This would allow a negotiating fee to be levied on those for whom the union had negotiated a LJ agreement.

1.7 Given that the Government's 1999 legislation remains blocked by the Senate and given the issues arising in the case pending before the AIRC, the Government has introduced the bill to counter a trend whereby some trade unions are attempting to use the workplace relations system to place an obligation on non-member employees to pay a fee, without the employees consent, for services in relation to negotiations of certified agreements. It is the Governments position that such arrangements, in the absence of employee consent, amount to compulsory union fees. The Government considers that the inclusion of bargaining agents fee clauses typically place an obligation upon the employer to inform employees that a fee for bargaining services is payable to the relevant union. The Government also considers that the clauses purport to place an obligation on the employees to pay the fee to the union.[3] This service fee effectively means that:

> Employees who have chosen not to be members of a trade union are faced with the payment of a bargaining fee to that union, or payment of annual trade union membership fee. Employees who are members of trade unions but who wish to resign their membership are placed in an equally invidious position. [4]

1.8 The amount of the fee varies between being equivalent to and in excess of annual union fees. The Hon Tony Abbott MP, Minister for Employment, Workplace Relations and Small Business noted in his second reading speech that in many cases the fee demanded had been set at about $500 per year, well above the level of annual union dues. [5]

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3 *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 Explanatory Memorandum,* p. i

4 Hon Tony Abbott MP, *Hansard*, House of Representatives, 23 May 2001, p. 25834

5 ibid

General Policy Intentions

1.9 The bill is consistent with workplace relations policy that has been implemented since 1996. This legislation, as may be taken from its title, emphasises the primacy of the workplace as the determining body wherein wages ad conditions are negotiated. The role of unions is recognised to the extent that they represent only their members and only in a given workplace. The WRA emphasises the rights of the individual employees to negotiate freely with employers regardless of union attitudes. It is therefore inconsistent with the intention of the Act to allow practices to remain which impose a continuing relationship between non-union employees and a union.

1.10 The Government therefore considers the bill to be necessary to prevent union attempts to require non-union members to bear a cost for union activities through the imposition of 'bargaining agents fees'. Such fees are typically stated to relate to costs incurred in negotiating certified agreements with employers. The Government considers that what the unions are seeking are not 'bargaining agents fees', but rather compulsory union fees, because the unstated (and in some cases the stated) intention of the union is that they are intended to compel employees to join the union.[6]

1.11 Government and employer organisations oppose compulsory unionism which is, in any case, prohibited by the freedom of association rules contained in the WRA.[7] As outlined by the Minister in his second reading speech:

> An important characteristic of Australia's reformed workplace relations system is the opportunity it has given for workers, union and non-union alike, to fully participate in the formal processes of the system, particularly in making collective or individual workplace agreements. A significant contributing factor in this transformation has been the Coalition's commitment to freedom of association in the workplace. This fundamental principle is reflected in both the objects and provisions of the Workplace Relations Act 1996, such as those which prohibit compulsory unionism, preference to unionists or coercion in agreement making; and in the promotional and enforcement functions of the Office of the Employment Advocate. [8]

1.12 It has been noted that this argument is strengthened when the fee for service to be levied is greater than the union dues payable, providing a financial incentive for employees to seek the lower cost union membership. [9]

1.13 The Explanatory Memorandum for the bill noted that following the AIRC decision, union moves to have such clauses included in certified agreements have recently increased. The Government's position is that such clauses are contrary to the freedom of association principles that underpin the current workplace relations framework. Accordingly, such

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6 DEWRSB, op cit, p. 1

7 DPL, op cit, p.2

8 Hon Tony Abbott, *Hansard*, op cit, p. 25834

9 DPL, op cit, p. 2

clauses should not be able to be included in certified agreements and should not be able to be sought from non-union members in the absence of prior individual agreement. [10]

1.14 The Minister further stated that:

> Certain trade union leaders have attempted to coerce non-union employees into joining a union by making a demand that all non-unionists pay a 'service fee' on account of union participation in agreement negotiations in their workplace. The coercive nature of the compulsory fee demand is highlighted by the fact that it is typically made without consent of the relevant employee, and may not even be made until after the so-called services are rendered. [11]

1.15 In addition to the issue of compulsory unionism the Minister has further identified that the 'fee for service' issue attempts to subvert, in part, the WRA mechanism. Trade unions are attempting to use an industrial instrument recognised by the WRA to give demands for bargaining fees a legitimacy that they would not otherwise have. The Minister stated that it was in the public interest that the Act not only prohibit such non consensual demands but also prevent the misuse of certified agreements to advance these coercive purposes. [12]

1.16 In response to the AIRC decision that such fees are designed for coercive purposes but under the current terms of the WRA are not prohibited from inclusion in certified agreements, the Government considers that it is necessary to amend the WRA to preclude such action because:

> The fact that there is no specific statutory prohibition on such provisions means that their coercive impact may remain until such time as the loophole allowing their inclusion in certified agreements is closed by legislative amendment. [13]

Outline of Changes

1.17 It should be noted that the Government's bill does not create an absolute bar to a genuine 'bargaining fee' being negotiated by a non-union employee and the relevant trade union. The Government's bill would allow genuine bargaining fees where the prior written consent of the individual employee has been given and the bargaining services have been delivered. In this way the bill addresses union concerns about so-called' free riders' without impeding freedom of association. The bill will amend the freedom of association provisions in part XA of the WRA to prevent the inclusion of clauses in certified agreements which purport to require payment of fees for the provision of bargaining services, and prohibit action by unions to collect fees which have not been agreed in writing in advance. [14]

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10 *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 Explanatory Memorandum*, op cit, p. ii

11 Hon Tony Abbott, *Hansard*, op cit, p. 25833

12 ibid, p. 25384

13 ibid

14 *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 Explanatory Memorandum*, op cit, p. i

1.18 Part XA of the WRA will be amended to prohibit;

- Unions and employer organisations from requiring non-members to pay fees for 'bargaining services', except where an employee has agreed in writing to pay a fee in advance of the bargaining services being provided (such a fee is defined in the Bill as a 'non-compulsory fee'): and
- Certain discriminatory or injurious conduct towards a person, because he or she has refused to pay a fee claimed by a union for bargaining services, or because he or she has paid, or proposes to pay a non-compulsory fee: and
- Unions and employer organisations from encouraging or inciting others to take discriminatory action against a person because he or she has refused to pay a fee claimed by a union for bargaining services, or because he or she has paid, or proposes to pay a non-compulsory fee. [15]

1.19 An additional effect of the amendments would be that fees for bargaining services cannot be included in certified agreements and any such clause in existing certified agreements can be removed by the AIRC under section 298Z. Under the proposed amendments, the AIRC would be required to refuse to certify an agreement if satisfied it contained a provision requiring or purporting to require people who were not members of an industrial association to pay a fee to an industrial association for bargaining services.[16] In his second reading speech the Minister noted:

> Given that agreement to any payment of such fees should be a private matter for the individual choice of each employee unfettered by others, the Bill will prohibit a certified agreement from including any provision relating to payment of fees for bargaining services.[17]

Main Provisions

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

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

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15 *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 Explanatory Memorandum*, ibid,

16 ibid

17 Hon Tony Abbott, *Hansard*, op cit, p. 25834

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

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

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

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

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

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

Item 10 provides that the amendments do not apply to any payments received before commencement.[18]

Considering the evidence

Consensus of employers

The favourable reaction of employers is easy to understand in the light of the onerous responsibilities that are placed on them by the AIRCs interpretation of subclause 14.3. As Vice President McIntyre stated in his judgement:

> In my view, subclause 14.3 requires or permits (etc) conduct by the employer of at least one of the types described in s.298K(1). Subclause 14.3 has to be read in context, not in isolation. Subclause 1.3, as earlier noted, provides that the terms and conditions of the agreements shall be a condition of employment. This, in my view, means, among other things, that, if an employee failed to pay the fee to the ETU, he or she would be in breach of his or her obligation to the employer and, accordingly, the employer would be entitled to take such disciplinary action against

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[18] DPL, op cit, p. 4

> the employee as was legally available to it. In these circumstances, it is my view that subclause 14.3 requires or permits (etc) the employer to take action against an employee who fails to pay the fee to the ETU; for instance, by dismissing the employee or altering the position of the employee to the employee's prejudice. Such actions are conduct of the type described in at least one of the paragraphs of s.298K(1).[19]

1.20 This clearly puts employers in a most difficult position. As the Australian Industry Group (AIG) argued, it may be claimed that employers would be entitled to take action against employees who failed to pay bargaining fees because such employees would be in violation of their employment obligations. Yet such employer actions would violate the protective provisions of the statute and would be carried out for a prohibited reason, in this situation, because of a failure to join the union.

1.21 Where clauses exist in enterprise agreements which provide for collection of bargaining fees, employers may be harassed by unions to enforce the clause, and employees may find themselves harassed both by the union and employer even though, as will be noted further on, it is almost certain that such clauses are legally unenforceable.

1.22 The AIG, referring to a statement from the Full Bench inviting submissions for an appeal, stated:

> The upshot of the Full Bench statement is that the question of whether or not agency shop clauses in certified agreements offend freedom of association law hinges upon another technical issue: whether such clauses are enforceable and/or within the jurisdiction of the AIRC to certify, in particular whether they sufficiently pertain to the employer-employee relationship?
>
> Given this high degree of legal uncertainty surrounding agency shop clauses in certified agreements, it is imperative for Australia's elected representatives to deal with this central public policy issue. Notwithstanding the legal niceties, union demands for agency shop clauses continue unabated and are likely to feature increasingly in enterprise bargaining. We submit that Parliament - as the supreme policy-making body in Australia – should deal with the issue of compulsory bargaining levies, rather than simply await the outcome of the AIRC proceedings or any other possible legal proceedings.[20]

1.23 The Australian Chamber of Commerce and Industry (ACCI) is unequivocal in its position and considers that compulsory union fee clauses in certified agreements are contrary to the freedom of association principles. ACCI sees the bill as a measure designed to clarify the WRA in respect of the increasing trend by trade unions to include such clauses as part of the bargaining process.

Attitudes to bargaining fees

1.24 Whilst ACCI saw trade unions as service providers who should be able to offer their services without undue restrictions, they also consider that employees should not be forced to use their services. Accordingly, they support the proposed bill. When questioned about the fee for service issue, the ACCI representative replied;

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19 Australian Industrial Relations Commission, PR 900919, 9 February 2001, p. 9

20 Submission No 25, p. 12

> The way to approach this would be to say that we are not trying to treat trade unions and their services unfairly, nor are we trying to allow compulsion or coercion in favour of the payment of such fees.[21]

Compulsory unionism by the back door

1.25 It should be noted that in his decision of 9 February 2001 Vice President McIntyre of the AIRC concluded that the 'bargaining fee' in question was being pursued for a coercive purpose, that is to compel non-union employees to join the union.

1.26 Opposition senators and others have complained about the long title of the bill, calling it misleading on the grounds that it is 'negotiating fees' rather than 'compulsory unionism' which is the point at issue. The Government and its members on the Committee disagree with this position, and in any event prefer to deal with political realities and see union stratagems for what they are. What the ACTU proposes to encourage is nothing more than a re-institution of compulsory unionism under the guise of demanding a fee from an employee who has not negotiated the delivery of the service and who may not agree to so-called bargaining services the union pursues.

1.27 The Australian Mines and Metals Association (AMMA) considers that the impact of allowing a fee for bargaining services for certified agreements is disproportionate to the low number of union members within the resources sector. Introduction of clauses allowing bargaining fees in certified agreements which cover the resources sector will lead to a possible increase in union membership as employees seek to avoid the cost of such fees. Accordingly the AMMA supports the bill because it will block the backdoor attempt to introduce compulsory unionism through the imposition of bargaining fees.[22]

1.28 The Australian Retailers Association (ARA) concurs with the views of ACCI and considers that bargaining fees levied by trade unions should not be used as an alternate method to provide de facto union fees.[23]

1.29 The AIG notes that an integral part of the industrial relations system has been the framework of rules which govern the membership of registered industrial associations. Central to these rules is the principle of freedom of association. The AIG submit that compulsory bargaining fees are anathema to the principle of freedom of association and that the proposed bill would ensure that this principle was upheld.[24] The AIG considers that the bill will meet its stated objectives by outlawing compulsory bargaining fee arrangements while at the same time preserving the ability of industrial relations groups to allow for non-compulsory fees. The AIG raised the issue of coercive pressure being placed on non-union employees through such clauses. The AIG representative noted :

> I suppose the question raised by that is: if there is to be allowance for fees or levies to be imposed under collective agreements, should they be coercive or voluntary? That is the key issue here. The organisations I represent have no problem at all with provisions in certified agreements which call for voluntary contributions by non-

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21 Mr Reg Hamilton, *Hansard*, p. 19

22 Submission No 7, Australian Mines and Metals Association, p. 6

23 Submission No 12, Australian Retailers Association, p. 5

24 Mr Matt Moir, *Hansard*, 31 August 2001, p.8

> union members to unions. That is a matter for the industrial parties to agree upon. But where we take exception to what is currently going on out there is this element of coercion directed at individual non-unionists and the unfairness which is then placed upon the employer to undertake enforcement of those arrangements.[25]

1.30 It is the view of the AIG that the current system places pressure upon employees and stated:

> …is that pressure illegitimate? The pressure operates by way of the double bind which the non-unionist is placed in. Either they pay this hefty fee or they face disciplinary action, with the net result that they are driven towards taking out membership even against their will.[26]

1.31 In its submission the AIG recommends that the bill should be passed by the Senate because:

> It is clear that the trade unions view agency shop arrangements as a means to boost declining membership levels and/or penalise non-unionism. Such arrangements are impossible to square with the explicit freedoms of association and non-association found in s.3(f) of the Act. [27]

1.32 The AIG also raised other reasons for the bill to be passed. Firstly, they saw the need for legal certainty on this issue submitting that it is appropriate for the Parliament, as the supreme policy making body in Australia, to determine this issue rather than await the decision of the AIRC. Secondly, the AIG also saw bargaining fees as encouraging a closed shop situation and thereby destroying freedom of choice and freedom of association. Thirdly, the AIG considers that payment of bargaining fees to trade unions will provide funding to these organisations for union activities not strictly related to certified agreements.[28]

Allegations of 'premature legislation'

1.33 As mentioned earlier, the Government's desire to legislate on this matter dates back to 1999 well before the current AIRC proceeding. In any event, what the AIRC is dealing with is the interpretation of the existing statute and not formulating industrial policy. It is for the Government and the legislature to develop policy and make legislation clearly expressed beyond doubt. It has been claimed that the introduction of the bill is premature because of the case before the AIRC. The Government does not agree with this view. While the AIRC decision may clarify the existing law, there still remains the outstanding issue relating to compulsory union fees in general which would not be clarified regardless of the outcome. As the submission from the Department of Employment, Workplace Relations and Small business has stated:

> For instance, even if the commission were to determine that bargaining agents fees were unenforceable, their very existence in certified agreements gives rise to a perception of legitimacy which the government believes is wrong and contrary to freedom of association principles, and for that reason this legislation will still be

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25 ibid, p. 11

26 ibid p. 12

27 Submission No 25, op cit, p. 20

28 Mr Matt Moir, *Hansard*, op cit, p. 8

> necessary. In addition, even if the commission were to determine that such clauses were invalid and should be excised from certified agreements, there is still the issue of associations purporting to impose bargaining agents' fees outside the certified agreement system. This bill also addresses that issue.[29]

The Committee recognises that the importance of the legislation lies in putting to rest the perceptions that exist among some employers and employees that provisions in enterprise agreements containing offending clauses are legally enforceable. Such misconceptions need to be put to rest.

1.34 Further on the imposition of compulsory agency fees, the Department noted that the imposition of such a fee upon someone who has not agreed to it contravenes the principle of freedom of association. Accordingly, trade unions seeking to include bargaining fee clauses in certified agreements should be treated like any other commercial entity and not be able to charge for unsolicited services.[30]

1.35 Critics of the bill have claimed that it contravenes the position of the International Labour Organisation (ILO) on service fees. It is the Governments view that the ILO has indicated that regimes which permit or prohibit bargaining agents fees are not incompatible with ILO conventions. Thus, the bill will enhance the WRA while still abiding by Australia's commitment to ILO principles.[31]

1.36 The ACTU claimed before the Committee that the bill constituted unacceptable interference in the collective bargaining process.[32] The Government disagrees with this position noting that it has committed itself to the principle that employment bargaining issues should be negotiated between employers, employees and their representatives at the enterprise level. The bill further clarifies the mechanism of this process. The ACTUs submission in this regard conveniently overlooks the broader principles of Government policy which are under threat unless remedied by this legislation; the right of individuals to negotiate unencumbered by union membership or at least independent of it. The Government has consistently argued that freedom of association is non- negotiable. In fact the statute currently proclaims freedom of association as one of its principal objects (section 3(f)).

1.37 Finally, the Government and employer organisations are also concerned about possible discrimination against employees who do not pay fees for bargaining services. Opponents of the proposed legislation consider that this is not a valid reason for introducing the bill, however, the Government considers that the bill will ensure that as such fees will not be payable there will be no avenue for discrimination.

Conclusion

1.38 The proposed bill is part of the continuing commitment by the Government to workplace reform within Australia. In particular this Bill seeks to protect the principle of freedom of association within the workplace. It is the Government's position that demands by unions for fees for bargaining services are contrary to this principle and that amendment to

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29 Mr James Smythe, *Hansard,* op cit, p. 20

30 ibid, p. 20

31 ibid, p. 23

32 Ms Linda Rubinstein, *Hansard,* op cit, p. 14

the legislation is necessary to achieve this protection. The Department of Employment, Workplace Relations and Small Business notes in its submission to the Committee that:

> The Bill is the Government's response to what it considers to be union attempts to undermine this principle of freedom of association and to circumvent the protections afforded by the provisions of the WR Act.[33]

1.39 The Minister emphasised the Governments position in this regard when he said:

> The principles of freedom of association and freedom in agreement making mean that an employee should be entitled to exercise their own choice about how and if they wish to participate in negotiating workplace agreements in their workplace. Indeed under the Workplace Relations Act 1996 employees are not only entitled to the protection of the law if they choose to join or not join a trade union, but they are also entitled to nominate themselves or any other person as their bargaining agent in workplace negotiations. Unless such fees are the product of informed prior written consent by individual employee subject to the demand, they are coercive and should be unlawful.[34]

1.40 In introducing this bill, the Government does not intend to restrict lawful negotiating activities of registered organisations but rather to ensure that all employees have the freedom of choice in making certified agreements. The bill will enhance the service delivery by requiring organisations wishing to act on behalf of non-union members in bargaining matters to negotiate that service before bargaining takes place. The Minister has stated that:

> In introducing this Bill I emphasise that the government does not seek to impede the proper activities of trade unions and employer organisations.[35]

1.41 Government senators commend this bill to the Senate.

Senator John Tierney

Chair

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33 DEWRSB, op cit, p.1

34 Hon Tony Abbott, *Hansard*, op cit, p. 25834

35 ibid