LABOR SENATORS' REPORT

Introduction

1.1 This is the sixth report made by this Committee in the current parliament on proposed amendments to the *Workplace Relations Act 1996*. 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 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.

1.2 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.[1]

1.3 Labor senators also view the scope of the bill as much broader than the Government's intent in that it effectively prohibits legitimate voluntary actions without due cause. Labor senators note that some observers consider the bill to be illiberal in that it infringes freedom of collective action. [2] Additionally, Labor senators support the view of trade unions who view the passage of the bill as:

> both a failure to abide by the decision of the umpire in relation to the subject matter of the Bill and an attempt to intimidate the Australian Industrial Relations Commission ("the AIRC") in relation to the appeal which is presently before a Full Bench of the AIRC.[3]

'Knee-jerk' legislation

1.4 It is the view of Labor senators that as the case before the AIRC has not been resolved, any legislation such as the proposed bill is premature. The representative from the Australian Catholic Commission for Employment Relations (ACCER) noted that the appeal

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1 Hansard, 31 August 2001, p. 2

2 Submission No 2, Mr Graeme Orr, p. 1

3 Submission No 10, Transport Workers' Union of Australia, p. 1

before the full bench of the AIRC was concerned with the issue of freedom of association which is central to this bill. He also pointed out that it was instructive that so far the bench itself has not been persuaded by the freedom of association arguments.[4]

1.5 On this issue the ACTU representative remarked of the legislation that the bill was premature in the sense that, until the decision of the full bench of the AIRC is handed down the state of the current law in relation to bargaining fees is not clear. The ACTU considers it prudent to await that decision before amending the WRA.[5] The ACTU also has concerns about the timing and political nature of the bill. It takes the view that it is an attempt by the Government to score points against the trade unions in a pre-election period.[6]

1.6 Labor senators believe that the emotive nature of this bill also has the undesirable effect of creating a potential for conflict between the legislative and judicial machinery. Labor senators see the introduction of this bill as an attempt to thwart unfavourable judgements within the recognised judicial system. Such an attempt not only lessens the authority of the courts but also degrades the value of the industrial relations framework as a whole. It is inconsistent with the Government's stated aims in addressing industrial negotiations.

1.7 It is also not clear whether employer organisations have fully considered the implications of the introduction of this bill. The Committee asked employer organisations whether they had understood that they were supporting a Government bill which would prevent Australian citizens using the courts to appeal or seek relief from decisions of tribunals. The answers provided were vague and indicate that this aspect of the bill has not been fully considered.[7]

1.8 In relation to the pending AIRC decision Labor senators consider it is premature for legislation to be dealt with prior to the full bench hearing and any other legal proceedings which may follow.[8]

Compulsory bargaining fees or compulsory union fees?

1.9 Another concern of Labor senators with the proposed legislation is the misleading title of the bill. The fees that the Government is purporting to legislate against are not union dues but negotiation charges. It is not the first time that policy rhetoric of a highly misleading nature has been used in the short title of workplace relations legislation. The provocation that has been characteristic of all the Governments workplace relations legislation has begun with the short title. The longest ever report of this Committee was devoted to the flagrantly and erroneously titled 'More Jobs, Better Pay Bill'.

1.10 This point is not lost on organisations like the ACCER, which noted in its evidence:

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4 Hansard, op cit, p. 3

5 ibid, p. 12

6 ibid, p. 10

7 Hansard, op cit, p. 5

8 Submission No 5, Australian Council of Trade Unions, p. 2

> In terms of the title, you may have noticed that the title is misleading. It is not about compulsory union fees in any event. It is perhaps about compulsory bargaining fees or a title to that effect, but it is not about a compulsory union fee.[9]

Foreign precedents and the ILO conventions

1.11 In its submission, the ACTU notes that agency or bargaining fees are permitted in collective agreements by the International Labour Organisation (ILO) conventions and in other developed and democratic countries,[10] and cited the difference between other countries and Australia on this issue.

1.12 It should be clearly noted that in countries such as the United States of America and Canada the legal systems have consistently upheld that bargaining fees are not inconsistent with the concept of freedom of association. Additionally, it should be remembered that in the early 1970s a Conservative Government in the United Kingdom introduced the concept of bargaining fees into legislation as an alternative to the closed shop.[11]

1.13 Drawing attention to developments overseas, the ACTU notes that the ILO has ruled that bargaining fee issues do not impinge upon the principle of freedom of association. The ILO considers that it is not mandatory to have bargaining fees, but says that it is an acceptable provision in collective agreements that are negotiated between employers and unions.[12]

Interference in collective bargaining

1.14 Labor senators note that while the Government is committed to the principle that employment bargaining issues should be negotiated between employers, employees and their representatives at the enterprise level, the bill proposes to interfere in this process. This is inconsistent with the concept of freedom of association. Freedom of association means free collective bargaining. Free collective bargaining means that the parties should determine the subjects of the bargaining process. This government has made a great deal of the principle of allowing the parties directly concerned to settle matters between them through negotiation without the involvement of unwanted third parties.[13]

1.15 The Government should not be allowed to alter in part the basis upon which much of the industrial workplace framework is constructed. As the Australian Manufacturing Workers Union noted in its submission:

> This is the nature of the Government's enterprise bargaining regime - it gives the power to the majority to dictate conditions unpalatable to the minority, provided those conditions are not discriminatory under the Act. The government cannot now in an ad hoc partisan manner seek to interfere with the decisions of workers and

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9 ibid, p. 3

10 Submission No 5, op cit, p. 3

11 Hansard, op cit, p. 10

12 ibid,

13 ibid

> their employer. The government must either be faithful to its rhetoric of worker democracy or else fundamentally alter the 'valid majority' provisions of the Act.[14]

1.16 Labor senators note that the Department has received six written complaints concerning the operation of service fee clauses. Of these complaints, "several" called for legislative action to preclude them being included in enterprise agreements.[15]

1.17 Labor senators concur with the view that there is no justification for the Government to interfere in the content of certified agreements which are negotiated between employers and a majority of the employees concerned.[16] Thus the Senate should not pass this bill.

Discrimination issues

1.18 The Government and employer organisations have mentioned possible discrimination against employees who do not pay fees for bargaining services. Labor senators deny that this is a valid basis for introducing this legislation. The ACTU has stated:

> The point is not an issue of discrimination or prejudice; it is an issue of enforcement of an agreement. Just as with employees who do not want to work on weekends for ordinary rates, where that is in their agreement; or who do not want to work on Saturdays or on Sundays—or on Fridays for that matter—for religious reasons; or who do not want to work 12-hour shifts for reasons personal to themselves; if that is in the agreement, that is what they have to do or they have the choice of not continuing in that employment. Once an agreement has been freely negotiated and freely voted on by the people who are going to be affected by it, it ought to be enforceable like any other provision.[17]

1.19 In the case of new employees, the government argues that it is unjust to allow a situation where they are obliged to pay a bargaining fee included in an agreement to which they have not given prior consent because it was finalised before they commence with an employer. In contrast, the government finds it acceptable that a new employee be required to accept an AWA as a condition of employment.

Coercion

1.20 During the 1999 inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Labor senators were particularly concerned with evidence that demonstrated new employees were being placed under a form of 'economic' duress or coercion. The options open to new employees were to sign an AWA or not have a job. Potential employees are treated as supplicants and are not consulted about or have no input into that negotiation – this is particularly so given the well-documented 'pattern' nature of AWAs. It has been established by the Courts that this government's legislation allows for such compulsion.

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14 Submission No 18, Australian Manufacturing Workers' Union, p. 2

15 Answers to Questions on Notice, DEWRSB, p2

16 Submission No 5, op cit, p. 8

17 Hansard, op cit, p. 11

1.21 While not directly the same it appears to be an exercise of sophistry by the Department on behalf of the Government to argue that a new employee having no input into the original bargaining of a current certified agreement should be absolved of one of its conditions, namely the payment of a bargaining fee, but should be bound by all others.

1.22 On this basis it is ironic that the Department has advanced this argument on behalf of the Government – the same Government that sees no problem in allowing new employees to be required to accept AWAs.

Definition of Bargaining Services

1.23 Labor senators also note the problems with the definition of bargaining services in the Bill which on our reading would preclude new employees from voluntarily contributing to the cost of a union negotiated agreement by requiring consent prior to the negotiation occurring.

1.24 The Department rejected this suggestion. Officers provided the following explanation to the Committee during the inquiry:

> Mr Smythe – … this provision does not preclude a new employee from consensually contributing to the union if they wish to, it simply precludes that contribution from being characterised as a service fee, because the government believes that, in those circumstances, it is not a service fee.[18]
>
> Mr Smythe – And the government's position is that because at the time the negotiation occurred the new employee was not there and therefore could not be consulted about or have any input into that negotiation, no services could be provided to them. The difference between us, Senator, is that you equate the services with the outcome whereas what I am doing is equating the services with the process.[19]

1.25 We reject this argument entirely. It is simply specious to try and create a distinction between the *process* of negotiating an agreement and the *outcome* of that process, limit the definition of the service provided to the *process* and argue that the service cannot therefore attract compensation.

1.26 An extension of this argument, if applied to other areas of economic activity, would preclude the likes of road tolls, building levies or other usage charges associated with the creation of infrastructure. One possible perverse outcome of this logic, if followed to its natural conclusion, would be that by simply renaming the bargaining fee an 'outcome' fee, union parties to an agreement would still be able to recover compensation from non-union members for negotiating an agreement. Regardless, the scope for legal wrangling to resolve these issues is great.

1.27 In the Ministers Second Reading Speech, it was stated 'the government is making it abundantly clear that the specific terms of the workplace relations act should prohibit non-consensual fee demands.' The government has not limited its legislation to its stated intent, that is, non-consensual fees.

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18 Ibid, p. 19

19 Ibid, p. 22

Quantum

1.28 Finally, Labor senators note that the Government has stated that proposed bargaining fees are in excess of current union dues and portray this as an attempt by trade unions to force non-union employees into joining unions to avoid the higher costs. Labor senators concur with the opinion of the ACTU that if some fees that have been proposed for bargaining are higher than union dues, that issue ought to be raised and discussed.

1.29 ACCI in their submission have used that the following quote from Vice President McIntyre of the AIRC to partially justify opposition to bargaining agents fees:

> 'In my opinion, it is there to persuade new employees to join, or to coerce new employees into joining, the ETU. The minimum fee of $500 is substantially more than the ETU membership fee. Further there is little doubt, I think, that the ETU would waive the fee in respect of persons who are or become members. The obligation to pay the fee is therefore unlikely to be required by the ETU of anyone who is a member of the ETU.' [20]

1.30 Unfortunately ACCI has not expanded on this issue and in fact at page 7 of the submission refers to the $500 fee as an 'incentive' to join. If this is the case such a fee may be likened to a 'sign on bonus' that has become common practice to encourage employees to accept and vote in favour of certified agreements and AWAs.

1.31 While Labor senators accept that the level of the fees is a relevant issue, it is considered that it is an issue for the AIRC to consider but not a basis for legislation. Labor senators consider that this issue is not a crucial reason to introduce the bill and agree with the ACTU that it was simply thrown in to muddy the waters.[21]

Conclusion

1.32 It is the opinion of Labor senators that the proposed bill is inconsistent with the spirit of the WRA. It seeks to close loopholes which may not exist and is biased on the very shaky grounds of violation of the principle of freedom of association. As knee-jerk legislation, it is highly vulnerable to being struck down by the courts and as such represents not only a waste of taxpayers money, but also brings regulation of workplace relations further into disrepute.

1.33 This is summed up in the Victorian Trades Hall Council's submission:

> There is no justification for the Government to pass this Bill. There is no issue with compulsory union membership fees. There is no reason for the Government to interfere with its own principles concerning enterprise agreement making; and there are no inconsistencies to the principles of freedom of association and the charging of a service fee to meet the cost of making an agreement. [22]

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20 Vice President McIntyre, Australian Industrial Relations Commission, Print PR90010 paragraph 15

21 ibid, p. 10

22 Submission No 17, Victorian Trades Hall Council, p. 4

1.34 Labor senators urge the Senate to reject this bill.

Senator Kim Carr

Deputy Chair

Senator Jacinta Collins