APPENDIX 3

ANSWERS TO QUESTIONS ON NOTICE

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

Department of Employment, Workplace Relations and Small Business

Question:

Senator Collins asked at *Hansard* 31 August 2001, p 19 and 20:

Whether a statement of the International Labour Organisation (ILO) quoted in the Australian Council of Trade Union's submission is consistent with the Department's response regarding the implications of the Bill for Australia's obligations under ILO conventions on Freedom of Association. If the two statements are inconsistent which has the greater authority.

Answer:

There is no inconsistency between the extract from the ILO's tripartite Committee on Freedom of Association quoted by the ACTU at paragraph 23 of its submission and the approach of the ILO outlined by the Department at the Senate Committee's hearing.

The extract from the ILO's Digest of decisions quoted in the ACTU's submission is from a decision of the ILO's tripartite Committee on Freedom of Association (see 289th Report, Case No. 1594, paragraph 24). This decision concerned a complaint against the Government of Cote d'Ivoire by the World Confederation of Labour over the arrest, detention, withholding of salary, and dismissal of members of the Federation of Free Trade Unions of Cote d'Ivoire ('Dignite'), an association of trade unions established in competition with the country's only other association, the General Union of Workers of Cote d'Ivoire (UGTCI). In full, paragraph 24 of that decision states:

> *As regards recovery of the union dues which, according to the complainants, several employers were deducting at the source and paying to the UGTCI, despite letters from workers informing management and heads of personnel that they had left that trade union, the Committee notes that no new reply* [from the Government] *has been supplied. The Committee cannot but recall that, in keeping with the principles of freedom of association, it should be possible for collective agreements to provide for a system for the collection of union dues, without the interference of authorities. It requests the Government to supply information on the measures taken to ensure that union dues are repaid to the trade union organizations actually chosen by workers.*

This is not inconsistent with the position put by the Department that legislative schemes that permit or prohibit union security arrangements (such as universal service fees) are both compatible with ILO standards.

This is illustrated by the extracts from the Committee on Freedom of Association's 1996 Digest of Decisions and the Committee of Experts' General Survey on Freedom of Association and Collective Bargaining 1994, which were supplied to the Senate Committee.

Question:

Senator Collins and Senator Carr asked at *Hansard* 31 August 2001, p 20:

Regarding written complaints from employees about service fees, can the Department give us some indication of the incidence and nature of these complaints, including the nature of the industry and the size of the firms in which these employees work.

Answer:

The Department is aware of six written complaints regarding service fees. Two of the complainants specifically identified themselves as public sector employees. One complainant referred to past employment in the manufacturing industry, one referred to past membership of a union management committee and the remaining two complainants did not specify their occupation.

One of the public sector complainants provided details of a recent certified agreement negotiated by a union which caused significant salary downgrading for certain employees within the complainant's workplace, and expressed concern as to the requirement to pay for such union services (the salary downgrade was alleged to be $5,000pa in some cases). Another complainant who had been on a union management committee felt that charging service fees above membership rates was an attempt to make people join the union.

Several of these written complaints requested the Government to change the laws to prevent payment for unsolicited services.

The Department is also aware of a number of verbal representations to the Office of the Employment Advocate.

Question:

Senator Collins asked the Department, at *Hansard* 31 August 2001 page 21, to address the points raised in the submission of Professor Keith Hancock.

Answer:

In his submission Professor Hancock argues that balancing collective bargaining and freedom of association issues is a difficult policy area, and that all available alternatives raise problematic issues. He canvasses several approaches.

However, the Government's chosen response to this issue reflects its view about the importance of individuals rights to freedom of association. In his second reading speech introducing the *Workplace Relations and Other Legislation Amendment Bill 1996*, the then Minister for Industrial Relations, the Hon. Peter Reith MP, identified the principle of freedom of association as being '…[a]mong the fundamental principles underpinning the

government's industrial relations policy'.[1] He also highlighted the protection for *individual* freedom of association and freedom of choice provided under the WR Act when he stated that the WR Act was intended to deliver '…genuine freedom of association founded on effective protection against coercion and discrimination based on an individual's membership or non-membership of a union.'[2]

The Government considers that registered organisations should seek to attract membership based on the competitiveness and value of the services they offer to attract members.

Question:

Senator Collins asked the Department, at *Hansard* EWRSBE page 21, to address the points raised in the submission of Mr Graeme Orr.

Answer:

The points raised by Mr Orr and the response to each point are set out below:

Point 1

Mr Orr argues that the Bill infringes freedom of collective contract.

The Government's policy on compulsory union fees is founded on a strong policy emphasis on the individual right to freedom of association. This has been highlighted above.

The WR Act already protects certain individual freedoms ahead of freedom of collective contract. For example, a collective contract cannot impinge upon the protection afforded individuals against discrimination. The Bill further protects individual freedom.

Points 2 and 3

Mr Orr argues that 'agency bargaining fees' represent a way in which the 'free-rider' problem can be addressed and that agency fees should be a permissible matter for enterprise level bargaining.

The Government's view is that every individual has a right to choose whether she wishes to join a union, and whether she wishes to associate with a union in some other way, for example by consenting to pay some form of fee for bargaining services. The Government believes that it is an infringement of the individual right to freedom of association for compulsory union fee arrangements to be imposed upon individuals by majority approval of a certified agreement.

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[1] The Hon. Peter Reith MP, Minister for Industrial Relations, Second Reading Speech Workplace Relations and Other Legislation Amendment Bill 1996, *Hansard*, 23 May 1996, p1302.

[2] The Hon. Peter Reith MP, Minister for Industrial Relations, Consideration of Senate Message Workplace Relations and Other Legislation Amendment Bill 1996, *Hansard*, 21 November 1996, p7218.

The Bill is intended to ensure that individuals can only be required to pay a fee to a union where they have given their individual consent to do so.

Point 4

Mr Orr argues that requiring the payment of a 'fair share fee' without mandating membership of a union does not infringe associational freedom. As discussed above, it is the Government's view that such arrangements do infringe upon the right of individuals to freedom of association. In addition, the 'fairness' of imposing such fees on non union members, particularly in situations (as discussed in the Department's submission at paragraph 44) where unions actively attempt to prevent non members from participating in certified agreement negotiations.

Point 5

Mr Orr suggests that the ETU 'bargaining agents fee' clauses which impose upon non union members a fee greater than normal union dues are intended to create a disincentive to non-membership. The Government is in accord with this view, as was Vice President McIntyre when he found that the clauses were intended '…to persuade new employees to join, or to coerce new employees into joining the ETU.'[3]

Points 6 and 7

Following from his argument that 'agency bargaining fees' imposed through certified agreements should be permitted, Mr Orr argues that regulation of bargaining agents fees (for example in relation to the amount of the fee) is required. As stated above, the Government's view is that compulsory union fees imposed through certified agreements represent an infringement of the individual right to freedom of association. The Bill would permit bargaining fee arrangements only where the union and individual employee or employees concerned reach agreement before any services are delivered. In such circumstances, where there is agreement by both parties, no further regulation of such arrangements is necessary.

Question:

Senator Carr asked at *Hansard* 31 August 2001, p 21:

How many occasions have there been of political intervention to prevent or effectively pre-empt an appeal from a legal tribunal in this country.

Answer:

The Government does not consider that the Bill constitutes political intervention to prevent or pre-empt an appeal. Legislation to give effect to the principle of freedom of association is required irrespective of the outcome of current Commission proceedings.

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[3] *Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and other Agreements*, PR900919, 9 February 2001, per McIntyre VP at paragraph 15.

The Government considers that demands by unions for bargaining agents fee are contrary to the principles of freedom of association, particularly the right of individuals to choose whether or not to join an industrial association.

Government policy is that the only means by which bargaining fees can be charged consistently with freedom of association principles is for the fee to be agreed to in writing by an individual worker and in advance of bargaining services being provided to that individual.

Australian Industry Group

Question:

Senator Collins asked at *Hansard* 31 August 2001, p 6:

In the case of a new employee, how do you deal with the situation where obviously the bargaining has already occurred before you are dealing with their employment and their potential union membership, or even their potential payment of a fee? That is my question.

Answer:

Australian Industry Group (Ai Group) does not believe that the terms of the bill would prevent a new employee from making a voluntary financial contribution to a trade union.

The effect of the bill would be to prohibit an industrial association (eg. a union) from demanding or receiving a fee or levy for the provision of bargaining services (s.298QA(1)).

"Bargaining services" are defined in proposed sub-section 298B(1) as services provided *"in relation to the negotiation, making, certification, extension, variation or termination of an agreement under Part VIB"*.

In our view, a new employee engaged during the term of a certified agreement would remain free to make a voluntary contribution to a trade union. The exclusion in sub-section 298QA(1) would not apply because "bargaining services" have not been provided. Such services, by definition, only apply to the processes of negotiating, making or certifying an agreement or when an agreement is to be varied or terminated. Such processes are not occurring in circumstances where a new employee is engaged during the life of an existing certified agreement.