**SENATE EMPLOYMENT, WORKPLACE RELATIONS,
SMALL BUSINESS AND EDUCATION
LEGISLATION COMMITTEE**

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001

September 2001

ISSN 1441-9890

This document was produced from camera-ready copy prepared by the secretariat of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. The report was printed by the Senate Printing Unit, Parliament House, Canberra.

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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

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

AUSTRALIAN DEMOCRATS' MINORITY REPORT

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001

1.1 The Australian Democrats support the rights of employees and employers to join or not to join registered organisations. We support the prohibition on duress. This bill addresses the possibility of non-members of unions being forced to pay bargaining fees (fee-for-service as it is also known), which then converts into a kind of compulsory unionism. The Democrats believe that fee-for-service issues must be separated out from issues of freedom of association and a prohibition on duress. Both fee-for-service and freedom of association are principles we support. The question then revolves around enabling legislation and whether this bill is the appropriate vehicle for the resolution of these issues.

1.2 We note the 25 submissions received on this bill and the discussion this matter has received (and continues to receive) in the Australian Industrial Relations Commission (AIRC) and in public discussion more broadly. This bill was introduced into the House of Representatives on 23 May 2001 and has been the subject of some consultation to date. In essence, the bill would amend the Workplace Relations Act 1996 (WRA) to prevent unions and employers from demanding fees from non-members for bargaining services.

1.3 The Government has characterised such fees as a form of compulsory unionism and this comprises their main argument for these amendments.

1.4 It is hard to see how provisions for bargaining fees should be against the spirit of the WRA 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.

1.5 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.

1.6 The bargaining fee may represent only a small portion of the real cost of completing an agreement, for instance where that agreement involves union members' foregone earnings through taking protected action.

1.7 We see a clear distinction between the notion of compulsory unionism (which we oppose) and a contribution to the costs of bargaining, where the person paying is a direct beneficiary of that bargaining. Such payees are not joining a union, but clearly the fee should not be a substitute for a normal union fee. They are paying for a service. They are not contributing to other activities of the union, or electing to play any role in the activities, policies or other conduct of the organisation, or getting any of the other benefits of a union. They are not union members.

1.8 Coercive attempts to force union membership are clearly illegal under the WRA and should remain so.

1.9 To allow a fee-for-service is not at all unusual under industrial relations and bargaining regimes in other countries. In some countries it is imposed. In the United States of America, those who are part of workplaces where a majority vote to join a union, and who

then benefit from rounds of bargaining to reach workplace agreements, must generally pay a fee to the union that wins the certification ballot and negotiates the agreement. Allowing workplaces to take a vote on agreements which include provision to charge such a fee, and then where the majority vote in its support, permit its collection, is not out of step with practice in other places. To repeat, it seems fair and reasonable that those who benefit also pay.

1.10 Of course some unions will not go down this path. They will reject a source of funds to unions that are based on agreement-based rights to charge and collect a bargaining fee. Such a practice does not sit easily with unions with a monopolist compulsory culture, or with those who support the 'organising approach' that has attracted much discussion in Australian unions since the mid-1990s. This approach places priority upon building unions through active membership, not providing services to non-members. There is lively debate within the union movement on these questions.

1.11 Requiring fees to be agreed to in advance by non-members who are advantaged by bargaining (a practice which the Government does not oppose) will not necessarily overcome the free-rider problem, as many free-riders will still see it in their clear self interest to refuse to give their consent in advance. This problem needs to be further explored.

1.12 The Democrats will consider the bill further, if it is resurrected following the forthcoming Federal election. We remain open to the possibility that bargaining fees or fee-for-service provisions become part of workplace law, within the principles of freedom of association.

Senator Andrew Murray

APPENDIX 1

LIST OF SUBMISSIONS

List of submissions received from organisations and individuals

Submission No.	Submission From
1	Mr Graeme Orr, Lecturer in Law, Griffith University
2	Ms Anne Morrison
3	ACCI
4	Mr Alan B McLean
5	ACTU
6	NTEU
7	Australian Mines and Metals Association (Inc)
8	Shop, Distributive & Allied Employees' Association
9	Professor Keith Hancock, National Institute of Labour Studies, Flinders University of South Australia, SA
10	Transport Workers' Union of Australia
11	Independent Education Union of Australia
12	Australian Retailers Association
13	CEPU
14	The Employment Advocate
15	Mr Adam Johnston
16	The Australian Workers' Union
17	Victorian Trades Hall Council
18	Australian Metal Workers Union
19	Department of Employment, Workplace Relations and Small BusinessT
20	Australian Catholic Commission for Employment Relations

21	Agribusiness Employers' Federation
22	Mr Simon Gullifer
23	Geelong and Region Trades and Labour Council
24	Australian Business Limited
25	Australian Industry Group and the Engineering Employers' Association

APPENDIX 2

WITNESSES AT PUBLIC HEARING

Friday, 31 August 2001 - CANBERRA

Bohn, Mr David Anthony, Acting Assistant Secretary , Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

Hamilton, Mr Reg, Manager, Labour Relations, Australian Chamber of Commerce & Industry

Moir, Mr Matt, Principal Advocate, Australian Industry Group

Rubinstein, Ms Linda, Senior Industrial Officer, Australian Council of Trade Unions

Ryan, Mr John, Executive Officer, Australian Catholic Commission for Employment Relations

Smythe, Mr James, Chief Counsel, Department of Employment, Workplace Relations and Small Business

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.