SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

Inquiry into the

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

3rd August 2001

Introduction

1. On the 23rd May 2001, the Federal Minister for Employment, Workplace Relations and Small Business, Mr Tony Abbott MP, introduced the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001* (the Bill) into Federal Parliament.

2. The Bill seeks to amend the current provisions of the *Workplace Relations Act 1996 (Cth)* (the Act) relating to *freedom of association*. In particular, the Bill seeks to prohibit the inclusion of clauses in certified agreements, which require the payment of fees for the provision of bargaining services, and to prohibit actions by unions to collect fees, which have not been agreed to - in writing - in advance of the certified agreement being negotiated.[1]

3. In commenting on the provisions of the Bill the Australian Catholic Commission for Employment Relations (ACCER) draws upon principles espoused by Catholic Social Teaching.

4. Catholic Social Teaching is a set of principles and teachings based on Christian values, which aim to bring about a good and fair society for the benefit of all.

5. The ACCER contends that the charging of a fee for the provision of bargaining services by a union or employer association does not necessarily contravene the principles of freedom of association.

6. It is the wording and practical effect of such particular clauses in a certified agreement that may or may not contravene the principles of freedom of association.

7. Therefore, the ACCER does not oppose a trade union or employer association from charging a fee for services relating to bargaining of a certified agreement as long as that fee is agreed to in advance. Individuals and organisations choose to join or not to join an industrial association for a variety of reasons. Therefore, while an individual or organisation may be willing to pay a fee for the provision of bargaining services, they may not be willing to support, through formal membership, the other activities of the industrial association.

8. The ACCER notes that the Full Bench of the AIRC is currently hearing an appeal[2] related to the insertion of fees for the provision of bargaining services into a certified agreement.

[1] *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001, Explanatory Memorandum, page i.*

[2] *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and other agreements*, Giudice J, Kaufman SDP, Whelan C, 15th June 2001, PR905312

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

9. The Bill seeks to amend Part XA (containing the Freedom of Association provisions of the Act) 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; and

   - Certain discriminatory or injurious conduct towards a person, because they have 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 associations 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 the employee has paid, or proposes to pay a non-compulsory fee.[3]

10. The title of the Bill appears to be imprecise in that it identifies "union fees" as being the type of fees to be prohibited by the Bill. This appears to be inconsistent with the content of the Bill as:

   - it addresses fees or levies "*for the provision of bargaining services*"[4]; and

   - the Explanatory Memorandum states "the amendments proposed by this Bill would apply equally to non-member service fees imposed by trade unions or by industrial associations of employers."[5]

11. It is suggested that the title reflect the fact that the Bill is about the payment of <u>bargaining service fees</u> to industrial associations.

12. The Bill proposes to insert a new section 298QA into the Act. This section would prohibit an industrial association from <u>demanding</u> or receiving a payment for a fee for the provision of bargaining services where such a fee is <u>not</u> agreed to in advance.

13. The ACCER supports the intent of this provision. The provision of bargaining services by an industrial association to a non-member may be likened to the establishment of a contract for services. That is, the non-member would be required to consent to the services before they are delivered. Where a fee for the provision of bargaining services is imposed, by way of a certified agreement or other statutory workplace agreement, the employee has not consented to the provision of the service prior to the service being delivered.

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[3] *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001, Explanatory Memorandum*, page i.
[4] *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001*, Schedule 1.
[5] *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001*, Explanatory Memorandum, page ii.

14. However, the ACCER would question the placement within the current Act of the proposed s.298QA. The Bill proposes to insert s.298QA into Part XA, which deals with the Freedom of Association provisions of the Act.

15. However, the ACCER asserts that demanding or charging a fee for the provision of bargaining services does not necessarily contravene the principles of freedom of association.[6] Rather, it may be the structure and practical effect of the bargaining services fee that affects the rights of an individual or organisation under freedom of association.

16. Moreover, the industrial instrument used by an industrial association to impose a fee for the provision of bargaining services is also at issue.

17. The current structure of the Act is such that an Australian Workplace Agreement (AWA) is made directly between the employer and the employee.[7] An employer or employee may appoint, in writing, a person to be their bargaining agent.[8] That is, it is a consent arrangement for bargaining services.

18. Additionally, the imposition of a fee for the provision of bargaining services is not an allowable award matter under section 89A(2). Furthermore, a fee may not necessarily be considered to be "incidental" to the matters listed in section 89A(2) or "exceptional" as defined in section 89A(7). Therefore, it is questionable as to whether a fee for the provision of bargaining services may be included into an award.

19. Likewise, it is questionable as to whether an industrial association may insert into a certified agreement a provision imposing a fee for the provision of bargaining services. The current provisions of the Act require the nature of a certified agreement to be about "*matters pertaining to the relationship between an employer…. and all persons…. employed…..*"[9] It is noteworthy that the Full Bench of the AIRC has called for submissions by the parties on this issue in the current appeal before it.[10]

20. The ACCER supports those provisions of the Bill that would prohibit discriminatory or injurious conduct being taken against a person because they refuse to pay, or they propose to pay or have paid a fee for bargaining services which have not been agreed to in advance. Furthermore, the ACCER supports the provisions of the Bill that prohibit unions and employer associations from encouraging or inciting others to take discriminatory action against a person for the refusal to pay or proposal to pay or the actual payment of a bargaining fee.[11]

21. Non-members should not be coerced, harassed or intimidated to make a payment to an industrial association for the provision of services that they have not agreed to in advance of the service being rendered.

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[6] See generally, Freedom of Association section of this submission.
[7] *Workplace Relations Act 1996*, section 170VF
[8] *Workplace Relations Act 1996*, section 170VK
[9] *Workplace Relations Act 1996* section 170LI
[10] *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and other agreements*, Giudice J, Kaufman SDP, Whelan C, 15th June 2001, PR905312.
[11] See generally *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001* Schedule 1.

22. Further, they should not be subject to coercion, harassment or intimidation to give their consent to representation by an industrial association in the negotiation of a certified agreement.

23. Therefore, consideration needs to be given to the practical issues associated with ensuring that an non-member is able to genuinely consent or not consent to representation by an industrial association, in an environment free of coercion, harassment or intimidation.

24. In this sense the Bill appears to be deficient in that it does not prohibit action or threatened action which prejudices a person's employment where it is taken by independent contractors or non-member employees or organisations because of the payment or non-payment or proposed payment of a fee for the provision of bargaining services. Such action may occur because most but not all non-members have paid the fee and there still remains a perception of free-riding by those who have not paid.

25. The inclusion of a clause in a certified agreement about the charging of a fee for the provision of bargaining services raises issues of enforcement of the fee in the event of non-payment. In particular, section 178 of the Act currently allows for a party to the agreement or an organisation who is affected by the breach of the agreement, to sue for and recover a penalty for a breach of a certified agreement. This may create a more onerous enforcement provision than if the employee had entered into a contractual arrangement for the provision of bargaining services.

Negotiating at the workplace

26. The provisions of the Bill also raises issues relating to the current arrangements for the negotiation of enterprise agreements at the workplace level.

27. The structure of Part VIB Division 2 of the Act relating to the making of certified agreements distinguishes between certified agreements made between an employer and an organisation of employees[12] (usually a trade union) and agreements made between an employer and employees.[13]

28. In respect to the provisions of the Act for the making of an agreement between an employer and a trade union, a trade union may be involved in negotiations where there is "*at least one member employed…who will be subject to the agreement*" and where the trade union is "*entitled to represent the industrial interests of the member*."[14]

29. Historically, a trade union has had the ability to obtain an award against an employer concerning employees who are not their members but *who are eligible to join*. This has occurred on the basis that the trade union has a legitimate interest in ensuring that the conditions of employment of members are not undermined by employers being able to hire other non-union members on lesser conditions. Such a principle also

[12] *Workplace Relations Act 1996* s. 170LJ
[13] *Workplace Relations Act 1996* s. 170LK
[14] *Workplace Relations Act 1996* s.170LJ

pertains to the negotiation of a certified agreement. Indeed, anti-discrimination provisions of the Act and other relevant legislation require an employer to treat equally both union and non-union members in the determination of the terms and conditions of employment.

30. Therefore, the industrial reality is that where a union has obtained benefits for its members through the negotiation of a certified agreement, such benefits are passed on to non-members in the same workplace.

31. Thus on the face of it a "free-rider" situation appears to be created. That is, the union has provided bargaining services solely to members but non-member employees have benefited from those services. This leads then to a moral question as to whether non-member employees should be making a contribution to the industrial association who has represented the "workforce" in negotiations with the employer.

32. However, a non-member employee does not necessarily intentionally enter into the "free-rider" situation. The current structure of the Act does not appear to legally entitle a non-member employee to choose his or her own external representative in collective negotiations.[15] Only union members may request an industrial association to represent their interests in the negotiation of collective certified agreements.

33. Therefore, non-members may effectively be marginalised in negotiations for a collective agreement as they, or their representatives, may not be included in the negotiation process where a union is involved until the certified agreement is to be finalised by a vote of the majority.

Freedom of Association

34. The focus of statements about the Bill have been on the principles of *freedom of association.* Indeed, the Explanatory Memorandum of the Bill states:

> "*the Government considers that, in absence of individual agreement, such clauses* [clauses relating to the payment of a bargaining fee by non-union members] *are contrary to the freedom of association principles that underpin the current workplace relations framework. Accordingly, such 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"*[16]

35. Catholic Social Teaching supports the right of employers and employees to form trade unions and employer associations as a proper and legitimate exercise of the right to freedom of association. It also recognises a wider representation responsibility of

[15] Both s. 170LJ and s.170LK of the Act allow for the involvement of a "organisation of employees" who may represent a "member" of the organisation. Organisation within the Act is defined as "an organisation registered under this Act" (s. 4). Thus where it is an organisation of employees who is representing a member, it is normally a trade union.

[16] *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001, Explanatory Memorandum*, page ii.

such associations. *Laborem Exercens* states that the purpose of trade unions is to defend the vital interests of employees:[17]

> "*They* [unions and employer associations] …*are* *a mouthpiece for the struggle for social justice, for the just rights of working people in accordance with their individual professions.*"[18]

36. Catholic Social Teaching also affirms the right of an individual or organisations to freedom of association. This is considered to be an individuals or organisations right to join or not to join a trade union or employer association, free from coercion, harassment or intimidation by others.[19]

37. The common meaning of freedom of association is that individuals are free to associate with others for any lawful purpose.[20] In the context of workplace relations, freedom of association is considered to be the right of an individual employee or organisation to join, or not to join an industrial organisation. Indeed, this is reflected in the objects of Part XA of the Act,

> "*(a) to ensure that employers, employees and independent contractors are free to join industrial organisations of their choice, or not to join industrial associations of their choice; and*
>
> *(b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations.*"[21]

38. Fees charged by industrial associations for the provision of bargaining services during workplace negotiations do not necessarily contravene the objects of the Freedom of Association provisions of the Act. The demand for a fee for bargaining services provided - in itself - does not automatically remove the right of the individual or organisation to join or not to join the industrial association.

39. However, the amount or structure of the fee charged for the provision of bargaining services may persuade or influence an individual or organisation to join or not to join the relevant industrial association. For example, this might occur where the fee charged for bargaining services is greater than the membership fee for that organisation.

40. The ACCER accepts that it is the responsibility of the individual industrial association to establish the amount and structure of fees for the provision of its services. In this sense, an industrial organisation should not be considered to be different to any other provider of services within the marketplace and thereby is entitled to seek payment for the services requested of it.

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[17] Pope John Paul II, *Laborem Exercens; On Human Work*, (St Paul Publications; Homebush, 1981) page 81.
[18] Pope John Paul II, *Laborem Exercens; On Human Work*, (St Paul Publications; Homebush, 1981) page 83.
[19] Pope John Paul II, *Laborem Exercens; On Human Work*, (St Paul Publications; 1981) page 81.
[20] O'Neil N, Handley R, *Retreat from Injustice; Human Rights in Australian Law*, (Federation Press: Leichhardt) 1994, page 217.
[21] *Workplace Relations Act 1996* section 298A.

41. However, the individual or organisation should be able to object to the *imposition* of a bargaining fee; that is, where the individual or organisation has not authorised the union to bargain on its behalf yet a fee is charged.

42. The current provisions of the Act do allow for "objectionable provisions" to be removed from certified agreements that would infringe freedom of association. The individual merits and circumstances of each case need to be put before the relevant tribunal or court for decision. This is evidenced by cases such as *PR Dawson and Sons*[22] and *CEPU and Das Services Agreement*,[23] where exclusive representation clauses were removed from these certified agreement on the grounds that they were "objectionable." However it is arguable as to whether a clause relating to the payment of a fee for the provision of bargaining services would fall within the scope of an "objectionable provision."

Conclusion

43. The ACCER does not consider the charging of a fee for the provision of bargaining services by an industrial association to be, in itself, a contravention of the principle of freedom of association.

44. The structure and amount of a fee charged for the provision of bargaining services may contravene the right of an individual or organisation to freedom of association where it indirectly coerces or unduly influences the individual or organisation to join that industrial association.

45. In this sense, the Bill in focusing on the freedom of association provisions of the Act may not necessarily be correct. Rather the issue may be whether a fee for the provision of bargaining services is a *matter pertaining to the relationship between the employer and all persons employed* at the workplace.

46. The ACCER does not support the charging of a bargaining fee without the direct consent and authorisation of the non-union member, prior to the negotiation of a certified agreement.

47. The ACCER notes the appeal process currently being heard before a Full Bench of the AIRC in respect of *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and others*.[24]

[22] 1998, PrintQ6068
[23] 1999, PrintR2646
[24] Giudice J, Kaufman SDP, Whelan C, 15th June 2001, PR905312