



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS
AND EDUCATION LEGISLATION COMMITTEE

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

FRIDAY, 31 AUGUST 2001

CANBERRA

BY AUTHORITY OF THE SENATE

WITNESSES

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

Friday, 31 August 2001

Members: Senator Tierney (*Chair*), Senator Carr (*Deputy Chair*), Senators Collins, Ferris, Stott Despoja and Tchen

Substitute members: Senator Murray for Senator Stott Despoja

Participating members: Senators Abetz, Allison, Boswell, Brown, Calvert, George Campbell, Chapman, Coonan, Cooney, Crane, Crossin, Crowley, Eggleston, Faulkner, Ferguson, Gibbs, Gibson, Harradine, Hogg, Hutchins, Knowles, Lightfoot, Ludwig, Lundy, Mackay, Mason, McGauran, O'Brien, Payne, Schacht and Watson

Senators in attendance: Senators Carr, Jacinta Collins, and Tierney

Terms of reference for the inquiry:

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

Committee met at 9.03 a.m.

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

CHAIR—Welcome. I declare open this hearing of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. On 20 June 2001, the committee was asked by the Senate to inquire into the provisions of the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2000](#). The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill is intended to prohibit the inclusion in enterprise agreements of a clause allowing industrial organisations to charge a fee for service in respect of enterprise bargaining negotiations. The bill is concerned with section 170LJ agreements, which cover a substantial majority of employees covered by the Workplace Relations Act 1996. Before we commence taking evidence today, I wish to state for the record that all witnesses who appear before the committee are protected by parliamentary privilege with respect to evidence provided. I welcome observers to this public hearing. The committee has before it submission No. 20. Mr Ryan, are there any changes you wish to make?

Mr Ryan—No.

CHAIR—I now invite you to make a brief opening statement and then we will go to questions.

Mr Ryan—The Australian Catholic Commission for Employment Relations is grateful for this opportunity to appear before the Senate inquiry. In summary, we do not support the charging of a bargaining fee without the direct consent and authorisation of an employee prior to the negotiation of a certified agreement. In examining the specific provisions of the bill, we make the following points. The charging of a fee for the provision of bargaining services by a union or an employer association does not necessarily contravene the principles of freedom of association; rather, it may be a matter of whether a compulsory bargaining fee pertains to the

relationship between the employer and employees. In this context, we note that the full bench of the Australian Industrial Relations Commission is currently hearing an appeal related to the insertion of fees for the provision of bargaining services in a certified agreement. Thank you again for inviting us to appear. I would be pleased to take any questions about our submission.

Senator JACINTA COLLINS—Thank you, Mr Ryan, for your submission. One of the questions that I intend to explore with a number of witnesses today—and you have covered this issue in part in your submission—is about consent to paying a fee and when that consent may or may not be relevant. You would be aware that in relation to enterprise bargaining agreements new employees are frequently simply absorbed into an agreement that is already in place.

Mr Ryan—True.

Senator JACINTA COLLINS—The wording in this bill about consent needing to have been given prior to negotiation is limited, because it does not actually fit with what we know happens in relation to enterprise bargaining agreements. Do you have any thoughts on that issue?

Mr Ryan—Yes. We are not sure about the practicalities where an employee may give prior consent or is not able to give prior consent. How do you give prior consent if you are not there at the time the agreement is made? But we have also tried to examine the question: if you are in the work force at the time and you give prior consent, where does that place you in terms of the union's commitment to its members, its rules and the actual mechanics of the bargaining process? From our various experiences we know that, quite often when a union comes into a workplace with a log of claims that it puts to its members first, non-union members become aware of it too. So there are practical issues there.

Senator JACINTA COLLINS—The government have flagged an intention to try and do something about the nature of our industrial system and small business logs of claims in a bill that they are proposing to introduce in this session to the House of Representatives. But, if we go back to the current system and the nature of a log of claims, most union logs of claims actually relate to persons who are eligible to be members of the organisation, not necessarily members.

Mr Ryan—That is true.

Senator JACINTA COLLINS—The scope enables bargaining in many cases for both types of workers. A very interesting component of a number of the employer submissions to this inquiry is the view that unions, simply for their own interest, seek common outcomes between members and nonmembers. That is an interesting thread, but I do not think it is actually valid. I would be interested in your view on this area, but my understanding is that there are a number of components of the system that still exist—the government has sought to remove some of them, but they do still exist in the system—which require certain types of behaviour from bargainers. There are components of the provisions about enterprise bargaining, for instance, which mean that, if you bargain a certain outcome, that outcome is supposed to be on offer for all workers, whether they are union members or not.

Mr Ryan—I think we touch upon that in our submission. You also enter into that area of discriminatory action if those conditions are withheld from the other employees, who may or may not be union members.

Senator JACINTA COLLINS—That is right. The government has sought in the past to remove what I class as protections within our bargaining system. They are unique and intrinsic to the Australian system, but provide a component of protection and a reflection of

our more egalitarian approach to workplace relations. The government has not succeeded in removing those protections, so in part we have a bargaining system but also we have certain constraints on what is allowable bargaining. On the other hand, we also have the government seeking not to acknowledge those restrictions placed on bargainers within the system with a bill such as this.

Mr Ryan—We spent quite an amount of time looking at it—it comes back to that question of free riding—and examining it from a moral and a technical and industrial perspective. We came back to that point of the structure of the system that you are touching on and which, from your perspective, engenders what appears to be a free riding situation—but in effect, at the end of the day, we do not think that it is. There is not an ability for people to opt out—and I am not suggesting that people should be able to opt out, because that would lead to a different type of system altogether that possibly is not in the best interests of all. That is the conundrum in front of the union movement, in that what it does will have benefits for others.

In thinking about this issue, I also see that it is not just in enterprise bargaining that unions win improvements for a work force. It also happens with the award system, as we know from national wage cases. The living wage case is a pertinent example, where awards are varied and that flows across not only to those who are union members but also to those who may not be. That is the difficulty for unions in both improving the lot of their members and where they see themselves in society.

Senator JACINTA COLLINS—Yes. From your point of view and from your submission, you accept that provisions providing for service fees are not necessarily in conflict with freedom of association.

Mr Ryan—No, they are not. I will try to work through an example. I am aware of the ETU—the CEPU matter—but say that a union sought to compulsorily charge the same service fee as its union membership, or chose to charge a fee that was less than the union membership—some people argue that the lesser fee would be more appropriate because union membership fees go not only towards that bargain service but to other union activities: to us, that does not say that the non-union member is coerced or forced into joining the union. If the fee is the same as the union membership, I cannot see any practical impact on the non-union member that causes them to join a union or feel as if they should. However, if the fee is greater than the annual union membership, indirectly that may cause a non-union member to make an economic calculation, to say, ‘It is cheaper to pay the union membership than to pay this bargaining fee.’ That is where it gets into possibly contravening freedom of association. My point is that, on the face of it, it is not necessarily a breach of freedom of association.

Our reading of the proposed bill—and we have talked with legal advisers about this in doing our diligencies—is that the freedom of association part of the act would not necessarily be breached by that compulsory charging of the fee because, without having it in front of me, the various provisions do not necessarily injure the employee in any way. There may be a financial cost but it does not seem, on the face of it, to injure or act to the detriment of the employee in their employment. That is why we question whether or not the basis of the bill is properly constructed. We agree with the overall principle that you should not have to pay a fee that you have not requested in advance.

Senator JACINTA COLLINS—But, as we were discussing earlier, that is different to the situation where you have to do it in advance of a negotiation which might have been conducted 12 months prior to you starting employment. Given that example, where do you think is the best place to determine this issue—the commission’s appeal or here?

Mr Ryan—As you can tell, we have noted that the commission is hearing an appeal on that very matter that was before Vice-President McIntyre that appears to be the genesis of this bill. It would be very useful if the appeal were heard and the benefit of how the full bench—especially when the president of the commission is sitting on that bench—determines the matter. Going back a step in terms of our discussion about freedom of association, I think it is instructive that, in our reading of the transcripts so far in that full bench appeal, the bench itself has not been persuaded by the freedom of association arguments. It has touched on that very matter of whether this is a matter pertaining to the relationship between employers and employees. That is what it sought more recently for the parties to make representations to it about.

Senator JACINTA COLLINS—In one sense, given issues such as that and the one that you have just covered from the consideration, this bill could be characterised as a knee-jerk and a fairly immature reaction to the issue. We should be waiting for the specialist process to exhaust itself before we roll it up here. Would you agree with that?

Mr Ryan—I will not worry about the politics. It is useful to have the guidance of the statutory body that is meant to carry out the functioning of the act. It may be a case that the full bench says that this is not a matter pertaining to the relationship between employers and employees and the matter is clarified in that respect. The freedom of association issue is not therefore the real issue at the heart of this.

Senator JACINTA COLLINS—At the heart of this issue—no. And that is potentially in part one of the lessons that has come to us from the way some other bargaining systems have dealt with issues such as this—the American and Canadian, just to indicate a few. I am not aware—and you might be from your looking into the issue—apart from the right to work legislation in the US, of a response such as this to classify all of these things as compulsory union fees and rule them out in a bargaining system.

Mr Ryan—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.

Senator JACINTA COLLINS—No. Bear with me for a moment while I refresh my memory. Have you given any thought as to how, if this legislation were to proceed, it should be amended?

Mr Ryan—Not in the technical sense. Our advice is that it would be flawed if it were based on the freedom of association provision. In effect it may not be of practical effect if it is placed in that area.

Senator JACINTA COLLINS—So, in that sense, in that it is flawed, we should wait for the commission to address its appeal and—

Mr Ryan—The commission may address that. There are different views around that. But if the bill were to proceed, it would need examination in terms of its practical effect under that part. When someone seeks to enforce it, they may find that they are not able to do so because of those issues around whether it acts to the detriment or injury to an employee.

Senator JACINTA COLLINS—But were the bill to proceed to the Senate in its current form—correct me if I misunderstand you—is the bill flawed and do you think it should be rejected?

Mr Ryan—In our view the bill is flawed and it would need to be amended if it is to achieve its objectives.

Senator JACINTA COLLINS—I think I have covered all of the areas. Thank you for your appearance today.

ACTING CHAIR (Senator Carr)—Thank you for coming along today.

[9.27 a.m.]

MOIR, Mr Matthew, Principal Advocate, Australian Industry Group

ACTING CHAIR—Welcome, Mr Moir. Do you have any comments to make on the capacity in which you appear?

Mr Moir—I am appearing on behalf of the Australian Industry Group as well as the Engineering Employers Association of South Australia.

ACTING CHAIR—The committee has before it submission No. 25. Are there any changes that you wish to make to it?

Mr Moir—No.

ACTING CHAIR—The committee prefers all evidence to be given in public, although the committee would also consider any request for all or part of the evidence to be given in camera. I point out that such evidence may subsequently be made public by order of the Senate. I now invite you to make a brief opening statement.

Mr Moir—Thank you. The Australian Industry Group and the Engineering Employers Association of South Australia strongly support the passage of the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#). It is well known that Australia has a unique industrial relations system. Ask any visitor to these shores and they will tell you that our traditional award based system of tribunal regulation, married with enterprise bargaining and certain legislative standards, is virtually unheard of anywhere else.

An integral part of the operation of that system is the existence of registered industrial bodies—namely, trade unions and employer associations. Rules have always been in place governing the membership of those registered industrial associations. Underpinning those rules has been the concept of freedom of choice, which finds its legal expression in the contemporary notion of freedom of association. This freedom of choice—choice about whether to join or refuse to join a trade union or, for that matter, an employer association—is a fundamental tenet of our industrial relations system. Indeed, it breathes life into our very democracy.

The organisations which I represent submit that compulsory bargaining fees—or union service fees, as they are sometimes described—are an anathema to the notion of freedom of association enshrined within the law of this country. I shall elaborate upon this point shortly. However, it is worthwhile to look briefly at the current legislative framework and recent industrial relations developments.

One of the central pillars of the current statutory regime is, of course, the notion of freedom of association. The objects of the act make this clear. Part XA of the act exists to protect the integrity of an individual's choice to join, or refuse to join, a trade union. As Justice Wilcox of the Federal Court said in the recent case of *Construction, Forestry, Mining and Energy Union v. BHP Steel (AIS) Pty Ltd*:

It is fundamental to the notion of freedom of association that employees should be free to join, or refuse to join, industrial organisations and not be subject to discriminatory action or victimisation on account of their choice.

We would submit that this statement and the current provisions of the act reflect general community acceptance in Australia of the position that union membership should remain a matter of individual choice.

The issue of compulsory bargaining fees has recently come into the spotlight as a result of several high profile union campaigns. Unions are now commonly pursuing a standard clause

to be inserted into collective agreements. The elements of the standard clause have been well publicised. They are: all new employees within an enterprise are required as a condition of employment to pay a bargaining fee to the relevant union; the bargaining fee is usually set at a significantly higher level than the standard union fee; the employees must pay the fee or else be subject to disciplinary action by the employer; and unions would waive the bargaining fee in respect of those people who join their ranks. Our members report that unions are increasingly pursuing these types of clauses in enterprise bargaining negotiations. We expect that such union demands will only intensify in the face of ongoing membership decline and shrinking financial bases.

This raises an important public policy issue: what should the attitude of our law and law-makers be towards agency shop arrangements in Australia? We submit that there are a number of cogent reasons for the bill to be passed. Firstly, there is a need for legal certainty. Members of the committee would be aware that this issue is currently the subject of full bench proceedings before the Australian Industrial Relations Commission. We submit that it is appropriate for the parliament, as the supreme policy making body in Australia, to deal with this issue rather than simply await the outcome of the commission proceedings.

Secondly, I made mention earlier of how freedom of choice is a fundamental tenet of our industrial relations system. Bargaining fees remove a non-unionist's freedom of choice and undermine the concept of voluntary unionism. One cannot ignore the financial reality of agency fees. Under pain of either a hefty service fee or the penalty of disciplinary action the individual non-unionist is drawn towards taking out union membership. This is an unfair and draconian situation. Bargaining fees represent a mere financial variation of the closed shop and thereby destroy freedom of choice.

It is also worth noting that effective unions lose little in an environment of voluntary unionism. Voluntary unionism creates a climate whereby unions must serve their members well if they wish to be effective. It has always been the lot of industrial organisations—and this includes employer associations as much as trade unions—to persuade, rather than coerce, nonmembers to join and contribute to the collective effort. Compulsory bargaining fee clauses in collective agreements are also unfair towards the employer because they compel employers to enforce what is in essence a coercive working arrangement.

It is also impossible to draw a line between bargaining and non-bargaining services and activities undertaken by trade unions. It is unfair for union political activities and campaigns, which are not germane to collective bargaining, to be financed—against the will of employees—from levies paid by them. The notion of majority rules is also no defence, otherwise this cherished principle is simply being used to sanction what are, in essence, highly coercive arrangements which impinge upon an individual's freedom of choice. Finally, comparisons with other countries such as the United States and Canada, which allow for agency shops, are flawed because those countries have imposed restrictions. Moreover, Australian trade unions enjoy significantly greater representational and collective bargaining rights than their counterparts in, say, North America. The AI Group and EEASA urge the committee to make recommendations in line with our submission.

Senator CARR—As I understand your submission, you are saying that you want the parliament to intervene in a matter that is, essentially, currently before the courts. You want the parliament to make illegal what you fear a court will find legal. Is that the case?

Mr Moir—It is true that the matter is currently before the full bench of the Australian Industrial Relations Commission. It is important to bear in mind, though, the context of those proceedings. Those proceedings deal with a highly technical issue about whether bargaining

agency fee clauses, like the type that unions are now commonly pursuing, breach the freedom of association provisions under part XA of the act. In a sense, it is a narrow technical issue. The commission is not examining, in any sense, the merits of such clauses. Indeed, they cannot, because these clauses are, of course, a product of enterprise bargaining negotiations. What the bench has to determine is whether those clauses constitute objectionable provisions under the Workplace Relations Act. That inquiry, which is being undertaken by the commission, is therefore quite distinct from what is now before this committee. I would respectfully submit that this committee is examining, fairly and squarely, the merits of such bargaining fee arrangements.

Senator CARR—Whether it be technical or otherwise, in essence you are asking us to rule illegal what is currently a matter subject to appeal before a court. That is the case, is it not?

Mr Moir—What we are asking this Senate committee to recommend is that a bill be passed which would have the effect of outlawing such arrangements, based upon a full consideration of the merits surrounding such clauses.

Senator CARR—Would that principle apply in other activities that companies are involved in? For instance, if a company was appealing on taxation matters, would you expect the parliament to intervene and to make illegal company actions in regard to taxation or matters to do with corporation governance if they were seeking appeals from the courts, or relief from a court?

Mr Moir—It is commonly the situation that proceedings being dealt with by a court or tribunal are also being dealt with simultaneously by parliament. That may be in the area of taxation, Corporations Law or these matters.

Senator CARR—Yes, I understand that. The principle I am coming to is whether or not you, as a representative of companies, ought to be concerned about the legal precedent you are setting. Essentially, you are asking us to prevent citizens of this country using the courts to appeal or, as is the situation in this case, or seeking relief from decisions of tribunals?

Mr Moir—We do not see that it would set any such precedent, Senator. This Senate committee is about determining the merits of such provisions; it is not about examining whether they square with the existing statutory framework.

Senator CARR—That is fine. We can put that in our report. The employers that you represent are not concerned about the prospect of political intervention to prevent citizens appealing to courts or seeking relief through courts for decisions taken by other courts. That is your submission; that is fair enough.

Mr Moir—Could I clarify that? I guess the way we see it is that the parliament is the supreme policy making body, as we have said in our submission. It is for parliament to take the lead rather than to simply—

Senator CARR—That is fine. Essentially, you are asking for political intervention to save you from the decisions that you fear courts might take.

Mr Moir—Hopefully we have put up some cogent arguments as to why—

Senator CARR—I am just trying to get to the guts of what you have put to us and I think I have.

Senator JACINTA COLLINS—I would like to follow on from that line of questioning. We have just heard from one employer group that they think that this legislation is flawed and also, contrary to your submission, that the payment of fees for bargaining services does not

contravene principles of freedom of association. Were you—that is AIG, not you personally—involved in the development of this bill in terms of the way it is currently couched?

Mr Moir—No, we were not.

Senator JACINTA COLLINS—Do you accept that there are some flaws in how this bill seeks to address its stated intention?

Mr Moir—Certainly we have scrutinised the terms of the bill. We do not see any problem with the provisions of the bill in terms of meeting its stated objectives. I am not aware of the precise concerns which have been raised by the other employer association, but our reading of the bill is that it would have the effect of outlawing compulsory bargaining fee arrangements, while at the same time preserving the ability of industrial parties to allow for non-compulsory fees. That is fine with us. If people are to be requested to make contributions but there is no element of coercion, then that is fair enough in our view. As we see it, the bill meets those objectives.

We have not had any involvement in putting together the precise terms of the bill. I might just add by way of conclusion that obviously the provisions of part XA of the act are very complicated in themselves. There has been extensive litigation over those provisions since they were enacted, and sometimes those provisions have been criticised as being unduly complex and difficult to interpret. You can compare those provisions with, say, relevant or corresponding provisions under state industrial relations legislation. Take, for example, the New South Wales Industrial Relations Act. It has similar provisions governing freedom of association. They are much easier and simpler to understand and, in our view, they meet the same objectives as the federal act does. But coming back to your question—

Senator JACINTA COLLINS—I should be more specific so you can respond to the issue we were discussing before you arrived. The framing of the words about when an employee must consent refers to it needing to have occurred prior to the negotiation or the bargaining. How will that deal with the situation where new employees, under restrictions within the act, will come into agreements that have been bargained previously?

Mr Moir—I am sorry, Senator, but are you referring to a particular part of the bill?

Senator JACINTA COLLINS—I will have to go the bill—no, I am not actually referring to a particular clause, but anyone who has looked at the bill understands that the terminology that has been adopted is that consent needs to be given prior to the bargaining.

Mr Moir—Or the imposition of the bargaining fee, you mean?

Senator JACINTA COLLINS—‘Or’ the imposition of the bargaining fee?

Mr Moir—Yes.

Senator JACINTA COLLINS—Yes. But the element of consent needs to occur, according to the way the bill is framed, prior to the bargaining.

Mr Moir—Yes.

Senator JACINTA COLLINS—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. That is one of the significant flaws in how this bill is currently framed.

Mr Moir—I would agree that is a valid issue. I cannot reply at this point; I would need to take that on notice and perhaps provide a further response in writing to the Senate committee. I had not spotted that defect, if, indeed, it is there.

Senator JACINTA COLLINS—It is a question that I will ask the department later today, and if you refer to the *Hansard* you may see that they deal with this issue as well. Even observed from outside, there is an obvious industrial problem in how legislation drafted this way may operate in a real workplace sense.

That leads to another issue. I want to commend AIG for not running the same line of argument that a couple of the other employer organisations did, which is this very naive reflection on why they believe unions bargain the way they bargain and how they deliberately seek common outcomes between union members and non-members. I did not see that reflected in your submission. I will certainly take it up with the other two, because it is a bizarre rationalisation of why common outcomes might occur. I am sure you are aware that one of the reasons within our unique industrial relations system that outcomes are often more common than not is the restrictions that exist in the act in relation to discrimination, to employees, regardless of union membership, being offered equivalent terms and conditions in bargaining. But I was intrigued that, when you talked about the privileges that unions have in our unique system, you did not at the same time acknowledge those restrictions as well. It is those restrictions that—as even the previous witness acknowledged—contribute to that free-rider problem. Do you accept that they are restrictions in the system?

Mr Moir—I would not necessarily characterise them as restrictions per se. I am aware of the provisions which you are referring to—for example, the provision which provides that the terms of a certified agreement must apply to unionist and non-unionist alike, which has always been a principle that has applied under the award system, commonly known as the metal trades case doctrine. We would say that that is part of the totality of the system in which we operate. It is the quid pro quo, if you like, for trade unions and employer associations deriving significant corporate and representational rights under our system. Those rights include the ability of trade unions to represent both unionist and non-unionist alike.

I think everybody would agree that trade unions in Australia derive significant influence in society because of their ability to represent the workforce generally, not just members. Take, for example, test case proceedings before the Industrial Relations Commission: in those proceedings, the ACTU, on behalf of trade unions generally, will be representing the workforce as a whole, regardless of their union membership. Trade unions derive from that an enormous say over the industrial relations agenda in this country. Examples are the yearly living wage cases, which attract an enormous amount of attention in society and have enormous implications, and the current reasonable hours case, which is before a full bench of the Industrial Relations Commission as a test case.

Sure, unions have to put in efforts on behalf of people who are not making a contribution, just as employer associations do; but the flip side of that coin is that we all derive significant benefits, rights and privileges from that system, especially when you compare it with overseas countries. In the United States, where bargaining fee arrangements are allowed, for a union to even have the right to sit down and negotiate with the employer at a particular enterprise they must have majority membership. That is an enormous hurdle which American trade unions have to overcome. There are no such restrictions here in Australia.

Senator JACINTA COLLINS—Mr Moir, I have read your submission and I am aware of the ground that you have covered there. One of the issues—which I accept, mind you—in this quid pro quo discussion is that there have been significant changes in recent years to the

organisational rights of parties within our industrial relations system. In part the union movement's response to that is to say, 'Okay, our organisational rights from the old system have been changed. We need to modernise to make ourselves more relevant to that current environment.' Part of that current environment is a much stronger emphasis—and this has been a bipartisan thrust—on bargaining, and a system based on bargaining, and the unions have sought to reorganise themselves to accommodate the bargaining environment. So, on the face of it there is nothing wrong per se—or nothing surprising—in their changing their strategy, because the system has changed. So, on the face of it, that is no rationale for why we should ban that change.

Mr Moir—You still need to keep in mind the details of what is being pursued.

Senator JACINTA COLLINS—Yes. I am particularly mindful because this government sought to remove some of those provisions within the act—the provisions about offering equivalent terms and conditions in enterprise agreements to union members and non-union members. Some employer groups—not all of them—supported it. I think, if I recall properly, at the time AIG did not support it—or components of it. I will not put words in your mouth there because I am relying on a distant memory. However, regardless of what the government's intention was at the time, those provisions still continue to exist in our system. In another sense, that has been the union movement's response to that: 'We have to bargain and achieve outcomes which are on offer equally to union members and non-union members. We see ourselves having a free rider problem as a consequence of that.' And they have sought to deal with it.

Mr Moir—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-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.

Senator JACINTA COLLINS—It is interesting that you raise coercion because coercion has been an issue this committee has concentrated on for a number of years, since the 1996 bill. In those cases it related more directly to what was coercion in respect to people's right to choose to sign, or not to sign, an AWA. There has been a lot of litigation in that area and it seems to have settled down to the extent that you can be required, as a condition of employment, to sign an AWA, under some circumstances. I accept that there are still some issues with components of that.

Mr Moir—It will depend very much on whether the employee is a new or existing employee.

Senator JACINTA COLLINS—I am talking about new employees. So for a new employee, as a condition of employment, your employer can require you to sign an AWA. If that is the interpretation we should put on coercion according to the courts with respect to freedom of association, why then can employers and unions by agreement not require as a condition of employment that their employees pay a bargaining fee? You might want to argue about how appropriately struck that fee is—and that is a different debate—but, if we are talking about coercion and freedom of association, what is the difference between the AWA issue and the bargaining fee issue?

Mr Moir—The courts have said, as I understand it, that there will be duress exerted in relation to offering an AWA and signing such a document if there is illegitimate pressure placed upon an individual. If you apply that test to these types of arrangements—bargaining fee arrangements—it is quite clear that there is pressure being exerted—

Senator JACINTA COLLINS—But it is no different from the pressure to sign an AWA if you are a new employee and you are being told that it is a condition of employment.

Mr Moir—But I suppose the question then is: 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.

Senator JACINTA COLLINS—At the moment I am speaking hypothetically: for the sake of it, let us say that the fee is 80 per cent of the union fee. In that sense, where is the coercion if an employer and a union by agreement in their agreement have a clause which requires as a condition of employment that a new employee agree to pay a bargaining fee?

Mr Moir—I suppose the coercion is evident on a number of levels. Firstly—

Senator JACINTA COLLINS—No, I am saying to you that, in terms of how courts have already determined coercion regarding AWAs, where is the difference, or is there a difference, or do you accept that there is not one under that hypothetical situation?

Mr Moir—There is a key difference. AWAs operate by way of individual agreement—that is, between an employer and an individual employee—

Senator JACINTA COLLINS—There are collective AWAs.

Mr Moir—Yes—AWAs which are proforma AWAs offered on a collective basis. But the way we would see it being different there is that the individual still has a choice.

Senator JACINTA COLLINS—To take the job or not.

Mr Moir—Their choice is still preserved. It is still within the realm of their decision making. When you talk about bargaining fee arrangements under collective agreements, the collective consent, if you like, completely overrides the individual's freedom of choice.

Senator JACINTA COLLINS—The individual's freedom of choice on commencement of employment is no different to their freedom of choice about signing an AWA. It is accepted as a condition of your employment that there is a bargaining fee.

Mr Moir—I guess we have to draw a distinction between an AWA and a bargaining fee arrangement. An AWA is merely a document—an instrument—like an award or a certified agreement. It is an instrument which is regulated and allowed to exist under the act. What actually applies to that individual is the terms and conditions set out under the AWA. In a sense, the fact that the terms and conditions are in an AWA does not make the existence of the AWA by itself significant. What is significant is the terms and conditions under that. So you really need to look at what is being offered under the AWA and compare that with the substance of a bargaining fee arrangement. I think they are two different kettles of fish: one is an instrument and one is a condition of employment.

Senator JACINTA COLLINS—I accept that they are two different things but you still have not convinced me that there is anything different about the nature of what transpires for it to be coercion regarding a bargaining fee to be a condition of employment as opposed to the signing of an AWA to be a condition of employment. We could talk about that all day and I do not think that we would resolve it, so we will have to agree to differ on that one. The final

question that I have is in relation to employer organisation fee structures. Describe to us the way in which you charge fees.

Mr Moir—We seek to persuade companies to join our organisation.

Senator JACINTA COLLINS—So, membership.

Mr Moir—Yes.

Senator JACINTA COLLINS—Are there varying levels of membership?

Mr Moir—The level of membership fee will usually depend upon the number of employees engaged within the particular firm. The larger the company, the higher the fee.

Senator JACINTA COLLINS—Is that the only differential in terms of the membership component?

Mr Moir—Yes, that is the only differential. We do not impose additional levies or bargaining fees. From time to time we might ask for special contributions on particular issues but those requests—and they are requests and nothing more—are infrequent.

Senator JACINTA COLLINS—What is the nature of those sorts of requests?

Mr Moir—It might be that we are participating in a significant case and we are seeking voluntary contributions to assist our conduct of the case.

Senator JACINTA COLLINS—They are voluntary contributions?

Mr Moir—Absolutely.

Senator JACINTA COLLINS—When you seek voluntary contributions from your members what is your success rate usually?

Mr Moir—I would only be guessing but I would say that it would be fairly low.

Senator JACINTA COLLINS—Do you seek that across all of your membership or would you target a particular sector depending upon what the issue was?

Mr Moir—The latter.

Senator CARR—Within the sector that you are targeting, would the response rate be low?

Mr Moir—Yes, it usually would be. The problem we often find is that members believe that they are paying enough already through their membership dues and we have a hard time convincing them that additional contributions are necessary.

Senator JACINTA COLLINS—Do you charge any fees for particular types of advocacy services such as unfair dismissal cases?

Mr Moir—Yes, we do.

Senator JACINTA COLLINS—On what basis do you charge for those?

Mr Moir—We charge on the basis of fee-for-service arrangements for some kinds of work.

Senator JACINTA COLLINS—Are you aware of unions that charge fee for service in relation to those kinds of cases?

Mr Moir—I have heard that additional charges are levied upon members for those types of services. But I have also heard that they are not, or that arrangements are made for a law firm to undertake a case on behalf of a union member. Sometimes the union will pay exclusively for that; at other times the burden will rest on the individual member, or a combination of the two. That is what I have heard around the traps.

Senator JACINTA COLLINS—In your case, you charge fee-for-service arrangements for unfair dismissal type cases. What other cases do you charge fee for service for?

Mr Moir—Most forms of individual based litigation: for example, occupational health and safety prosecutions, unfair dismissal proceedings—as I mentioned—filing and approving of certified agreements—

Senator JACINTA COLLINS—I thought that you mentioned a moment ago that you do not have bargaining fees.

Mr Moir—That is not a bargaining fee.

Senator JACINTA COLLINS—What is it?

Mr Moir—It is a fee for preparing the paperwork and arranging for the certification of the agreement before the Industrial Relations Commission.

Senator JACINTA COLLINS—Thank you. That includes my questions.

CHAIR—I thank the witness for appearing today.

[10.05 a.m.]

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

CHAIR—Welcome. The committee has before it submission No. 5. Are there any changes that you wish to make?

Ms Rubinstein—No, there are not.

CHAIR—I now invite you to make a brief opening statement.

Ms Rubinstein—As is clear from the submission, the ACTU strongly opposes the passage of the bill. There are four key considerations which we believe should influence the committee to make a recommendation consistent with the ACTU's submission. The first of those is the timing and the political nature of the bill. Given that the issues involved with bargaining fees, including a fundamental jurisdictional issue, are currently before the Industrial Relations Commission, it seems to us that a bill such as this is, at best, somewhat premature and, at worst, amounts to little more than an attempt to beat up an issue to do with unions in what we all recognise is a pre-election period.

The second issue is that the bargaining fee issue has nothing whatsoever to do with the issue of freedom of association. That has been confirmed by the ILO, as is detailed in the submission. In its submission to the committee, the department makes much of the differences between the systems of industrial relations in the United States and in Canada which, as you know, along with other Western countries, do have laws which uphold the legality of bargaining fees. While those systems are different, the commitment of countries like the United States and Canada to freedom of association is not something that can be disputed and in that regard the fact that in those countries the courts and the legal system have consistently upheld that bargaining fees are not inconsistent with the concept of freedom of association is a factor which should be taken seriously by the committee in our submission.

It should also be recalled that in the early 1970s in the United Kingdom the concept of bargaining fees was introduced in legislation by a Conservative government as an alternative to the closed shop. The Conservative government took the view that, while the closed shop could be considered a breach of freedom of association—not necessarily a view that the ACTU holds—nevertheless, that Conservative British government did not see the concept of bargaining fees as inconsistent with the freedom of association principles. In all of these cases, the ILO, Britain, the United States, Canada and other European countries, it is seen as simply a means by which people who receive a service pay for that service. Listening to the evidence given by the witness before me in relation to choices with AWAs, I think that something was made of the fact that if, on engagement one does not like the terms of the AWA, one is, of course, free not to take the job. Similarly, if as an individual—having been outvoted by one's fellow employees—one wishes not to pay a bargaining fee, there is, of course, the same option that is available to somebody who does not like their AWA.

The third point, which is related to that, is that the bill represents unacceptable interference in the enterprise bargaining process that occurs between employers and employees and their unions. That is of course inconsistent with the concept of freedom of association. Freedom of association means free collective bargaining. Free collective bargaining means that the subjects of the bargaining should be determined by the parties. This government has made a great deal of the principle of allowing the parties directly concerned to settle matters between them through negotiation without—I think the phrase is—the involvement of unwanted third parties. If workers do not want bargaining fees then they will vote against an agreement which

contains such a provision. If employers do not want bargaining fees, they will not agree to the agreement; and if individuals do not like bargaining fees, they will not work at the place—so our submission is that they can sort it out between them.

The fourth point is that unions are required, by law, to represent non-members. The department's example of a union refusing to negotiate together with non-union representatives is simply not relevant. The question is, 'Can union representatives negotiate just for union members an agreement which will not have application to non-union members?' The simple answer to that is that they cannot. There is no way in which the benefits achieved by unions for their members can be denied to non-members. We have significant evidence from the Australian Bureau of Statistics that rates of pay, for example, in union negotiated agreements are considerably higher than in those agreements negotiated without union involvement.

If the government's concern—and that certainly comes through the submission from the department—is that some fees which have been proposed for bargaining are higher than union dues, that issue ought to be raised and discussed. Certainly, regulation of those fees does exist in some countries and the level of the fees is a relevant issue. That matter was in fact raised in discussions which the ACTU has had with various parties but we have found no interest in focusing on that issue as opposed to the issue as a whole. Our submission is that it is simply thrown in to muddy the waters.

Finally, a question has been raised about whether employees should be able to be prejudiced in their employment or discriminated against because they will not agree to pay a bargaining fee. The point there is that it 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. That completes my opening remarks.

CHAIR—Thank you very much.

Senator JACINTA COLLINS—Ms Rubinstein, I am glad you raised the issue of the differential wage outcomes between union and non-union bargained agreements because some employers' submissions to the committee have sought to address the free rider issue with a certain argument. On this occasion, I will refer to the ACCI submission because I do not have the retail traders one before me. The ACCI submission claims:

However, unions negotiate agreements on behalf of their members, and have a clear interest in applying the outcome to non-members to ensure that their members are not undercut by other employees.

Ms Rubinstein—There is some truth in that. There are arguments both ways in favour of union only agreements. If agreements applied only to union members, there would be a greater incentive for employers to de-unionise and to employ non-union labour. On the other hand, there would be a greater incentive for employees to join unions, if that was the case. So it goes both ways. But the fact of the matter is that in Australia, for reasons to do with fairness as much as anything else, it has been accepted that awards and agreements should apply to all employees who fall within their coverage. I add that the provisions ensuring that that is the case were in fact strengthened by this government. Once again, if that is something that is on the table, let us talk about it. But I have not seen any suggestion from this government or any

other government that that ought to be the case. Certainly, from the point of view of unions, there are arguments both ways.

Senator JACINTA COLLINS—But it is not a simple argument for which you can dismiss the free-rider issue?

Ms Rubinstein—No, absolutely not. The fact of the matter is that we have a system that encourages non-union membership, because you can have the benefits without joining a union. Employees say to unions, ‘Why should I join? I am covered by the agreement anyway.’ The union says, ‘This is what we have done for you.’ The employee says, ‘But I get it anyway.’

Senator JACINTA COLLINS—I know you have looked at the department’s submission, because you referred to it earlier. You cover in detail the ILO perspective regarding freedom of association and how it might fit with agency fees. The department, if I recall properly, did not refer to that at all.

Ms Rubinstein—I do not recall a reference to the ILO.

Senator JACINTA COLLINS—No, and there are some pretty clear guidance for us, from my reading of your submission. Is that not the case?

Ms Rubinstein—Yes, the ILO has looked at this issue specifically. First of all, it is not mandatory to have bargaining fees, but the ILO says that it is an acceptable provision in collective agreements that are negotiated between employers and unions.

Senator JACINTA COLLINS—It does not make an exception for Australia’s unique system, that it should not be appropriate in our context?

Ms Rubinstein—No, not that I am aware of.

Senator JACINTA COLLINS—On a more technical problem to do with how this bill is drafted, a discussion earlier today, before you arrived, was about what I read to be a problem—even if this bill were in place to meet its intent—with the definition regarding when a person might consent to pay the fee. The question I have put to previous witnesses is: how does the current wording of this bill deal with the situation of new employees, because how can they agree, prior to the bargaining services having been provided, to pay a fee with respect to the certified agreement they would be covered under?

Ms Rubinstein—I imagine that the intention is that they would do that in relation to the next round of bargaining.

Senator JACINTA COLLINS—Does that then mean they cannot pay a fee with respect to the agreement that they are covered under when they commence employment?

Ms Rubinstein—It would seem to mean that. I suppose it depends on when the provision of the service is taken to have taken place.

Senator JACINTA COLLINS—You understand what I see is the problem?

Ms Rubinstein—Yes. Is the provision of the service when the actual bargaining takes place—that is, prior to the thing—or is the provision of the service the access to the conditions of the agreement that the employee takes when they become employed? It would probably mean the former, which means that a fee could not be applicable to somebody who is employed, enjoys all the advantages of the agreement, until the next agreement. That is clearly a problem with the bill.

Senator JACINTA COLLINS—Yes. The difficulty with it being the second option is that the union has no power at all, because the requirement exists at law in terms of whether that employee can get access to the agreement or not.

Ms Rubinstein—Yes.

Senator JACINTA COLLINS—So there is no service provided at that point.

Ms Rubinstein—Yes, it is not within the gift of the union—that is quite right.

Senator JACINTA COLLINS—So there is no service to which the reading of this could apply?

Ms Rubinstein—That is right. Arguably, there is also the problem that the union cannot deny the service to a non-member anyway.

Senator CARR—You referred to this bill as being premature. Could you explain to the committee what you mean?

Ms Rubinstein—It is premature in the sense that, until we have the decision of the full bench of the Industrial Relations Commission, we do not even know the state of the current law in relation to bargaining fees. It would seem to me that, if there were a concern and if that concern were legitimate—which I do not accept—then it would seem sensible to await that decision, to analyse that and to look at legislation in that context. When I say that it is premature, I do not mean that it is a good idea that ought to be done some time in the future but rather that, in any event, it is jumping the gun.

Senator CARR—In your experience, have there been other occasions in which governments have sought to pass legislation to prevent an appeal from a tribunal proceeding or to pre-empt an appeal proceeding on a decision of a tribunal or court in industrial relations?

Ms Rubinstein—There is no doubt that this government—or at least the past and the current ministers for industrial relations—have been responsive, shall we say, to decisions of the court. Transmission of business might be one of those, in the sense that proposals were made, although they have not passed, to alter transmission of business provisions prior to the decision of the High Court in the PP Consultants case, which dealt with those issues. There may well be other examples, but it is not a good idea.

Senator CARR—It is relatively unusual.

Ms Rubinstein—I would imagine it is relatively unusual, yes.

Senator CARR—Do you think it sets precedents? I cannot think of too many examples where this sort of political intervention has taken place—or that has been successful in the sense of getting parliament to agree to a political intervention to prevent or to pre-empt a decision of a court.

Ms Rubinstein—If this sort of thing goes on then, essentially what you are having is a battle between the courts and the legislature, so that when the courts are interpreting legislation in ways which the government does not like then the law is changed and you are going backwards and forwards. That is not very good, I would have thought, for the credibility of either, frankly. That would be damaging to public opinion on both the courts and politicians.

Senator CARR—Thank you.

CHAIR—There being no further questions, thank you for appearing today.

[10.26 a.m.]

HAMILTON, Mr Reginald Sydney, Manager, Labour Relations, Australian Chamber of Commerce and Industry

CHAIR—Welcome, Mr Hamilton. The committee has before it submission No. 3. Are there any changes that you wish to make?

Mr Hamilton—On page 51 of this document there is a typographical error. At the bottom of the page—this is on page 7 of our submission—in the last sentence before the heading ‘The free rider argument’ the statement is made that ‘this sort of incentive to join unions is unlawful’. Of course, the sentence should read: ‘This sort of incentive to join unions is lawful.’

CHAIR—Thank you. We will note that change. I now invite you to make a brief opening statement.

Mr Hamilton—I will be very brief. For quite a number of years, these sorts of committee hearings have been the subject of enormous disagreement and polarisation, and it is a matter of great regret to us. For that reason, I would like to say this: we strongly welcome the responsible behaviour of the Australian Labor Party in looking at the registered organisations bill on its merits and moving appropriate amendments to it. I am sure that that approach will continue when that bill is considered by this committee and the Senate. It has not necessarily been an easy thing to do, given this election environment.

Senator JACINTA COLLINS—It has been considered by this committee.

Mr Hamilton—I am sorry; there have been so many of these committee hearings, Senator. I would like to make the point that it is not necessarily an easy thing to do in the current election environment, and we are certainly very grateful for it. We are also grateful for the conduct of the Australian Democrats in passing, with amendments, the federal government’s recent unfair dismissal bill. Finally, of course, we are grateful to the federal government for developing that bill and to Minister Abbott for successfully steering it through the parliament. That is not necessarily an easy thing to do, given recent history.

However, turning to this bill, I think we are back in more familiar territory—disagreement and polarisation. We support this bill. We see it essentially as a clarification and reinforcement of the existing statutory scheme. It deals with a situation which, in substance, was intended to be covered but which, perhaps in terms of the legal wording, was not covered. I refer to the comments of Vice-President McIntyre in the recent ETU bargaining fee decision, which I quote at the bottom of page 5 of the ACCI submission, where he said:

In my opinion it is there—

namely, the fee—

to persuade new employees to join or to coerce new employees into joining the ETU.

Senator JACINTA COLLINS—Sorry, Mr Hamilton, did you say it was at the bottom of page 5? I think we have a problem with page numbering.

Mr Hamilton—I see, yes. It is under the heading, ‘Compulsory Union Fees or Bargaining Agents Fees’. You are right.

Senator JACINTA COLLINS—I was also having trouble finding your typographical error too.

Mr Hamilton—I will work off the committee's copy then. That will make page numbering easy. First of all, at the bottom of page 51 of this document there is the heading, 'The Free Rider Argument'. The word before that is 'unlawful' and it should be 'lawful'.

CHAIR—A slight variation.

Senator JACINTA COLLINS—Just a small typographical error.

Mr Hamilton—It is always pleasing when you pick up these direct contradictions of your views in your own submission. Page 6 is where the vice-president is quoted. At the bottom of the page are the words in italic:

In my opinion, it is there to persuade new employees to join, or to coerce new employees into joining the ETU.

That was the quote. We agree with that. I think that is the substance of it, which is just to finish the act. It has a set of intentions and underlying policy considerations. While it may have been worded in such a way that it may or may not cover these sorts of union fee arrangements, in substance we feel that, if the parliament had turned its mind to this present claim when it was enacting the act, it would not have allowed that sort of fee to remain outside the prohibitions. That is the opening statement we wish to make, Mr Chairman.

CHAIR—We will have questions.

Senator JACINTA COLLINS—Mr Hamilton, I do not think you were present for all of the AIG submission, so stop me if I am covering ground that you are familiar with. We had a discussion about coercion, and the question I put to the witness was: what is the difference between an employer being allowed to require, as a condition of employment, the acceptance of an AWA and an employer and a union agreeing that, as a condition of employment, new employees accept a bargaining fee?

Mr Hamilton—In brief, from our point of view—and I speak for ACCI and obviously not for others in the community—we have always distinguished that sort of thing on this basis: that a union fee of that kind with the intention described by the Industrial Relations Commission in the sentence—

Senator JACINTA COLLINS—I am sorry, I should take that back a step. We got to a hypothetical example that the fee was 80 per cent of the union fee.

Mr Hamilton—I see.

Senator JACINTA COLLINS—So it is more of a discussion of what does and does not constitute coercion.

Mr Hamilton—I see. We think even an 80 per cent fee would be a partial inducement to join the trade union. An AWA is a type of industrial instrument with a particular purpose. For example, an employer might introduce it as a system of building commitment and trust and joint interest between the employer and employee where a workplace had been particularly polarised and had a very bad industrial relations system. AWAs have usefully been used in the past to deal with such situations. In our view, there is therefore a clear workplace relevance to requiring an AWA to be a condition of employment. In relation to union fees, that is a different matter. In our view, trade unions should essentially be service providers. They should be able to offer their services without undue restrictions. On the other hand, employees should not be forced to use their services or be induced to in some way. For that reason we would not support a union fee arrangement of this kind. That is the distinction we draw.

Senator JACINTA COLLINS—But if you go down the path of unions as service providers there is the difference that, unlike pretty much any another service provider, unions

operate within a system which requires that the service that they achieve be offered to those who are not clients.

Mr Hamilton—It is not always the case that both awards and agreement extend in that way. Usually they do. I think I can recall some cases where they may not. Unions choose, for their own policy reasons, to extend the award or the agreement in question to non-union members. That is their choice.

Senator JACINTA COLLINS—No, it is not only their choice. There is the requirement that the terms and conditions within an enterprise agreement be made available to union and non-union members.

Mr Hamilton—Yes, I do recall that provision. There are cases of awards where that is neither the case nor a requirement. In the case of agreements there is that provision that you mention. I concede that, and I think that provision applies in both the AWA and certified agreement streams in slightly different forms.

Senator JACINTA COLLINS—Let me go to a discussion we were also having earlier about the bill itself. I am interested in a technical sense about how it would apply. If you look at item 2(b) as being how you ensure consent occurs—

Mr Hamilton—Which clause are you referring to?

Senator JACINTA COLLINS—Part 1, item 2 at line 11.

Mr Hamilton—Subsection 298B(1). That is a definition.

Senator JACINTA COLLINS—Yes. Was ACCI involved in discussions with the government over the framing of this bill?

Mr Hamilton—Yes. As I recall it—and, again, I do think my memory is correct on this—the bill was discussed in the relevant NLCC committee with us and the ACTU and we both put a point of view, which I think is supposed to be confidential under the NLCC Act; nevertheless, the submission I put today is essentially the sort of view that we put there.

Senator JACINTA COLLINS—Did any of the discussion go to the detail about precisely how the bill is framed?

Mr Hamilton—As I recall it, we did discuss the definition as well as the other aspects, yes.

Senator JACINTA COLLINS—My concern with the definition is: how does a new employee ever indicate consent?

Mr Hamilton—So the argument that you are putting is that—

Senator JACINTA COLLINS—They cannot indicate consent prior to the bargaining service having been provided, because they were not around at the time. I think you were here when we had this discussion with Ms Rubinstein.

Mr Hamilton—Yes, I was, but I was otherwise engaged temporarily.

Senator JACINTA COLLINS—The concern is that on engagement of an employee there is no service provided for which consent can be indicated.

Mr Hamilton—That is correct.

Senator JACINTA COLLINS—You would essentially have to wait until the next bargaining round occurred before any consent could be indicated.

Mr Hamilton—I think that is correct. The relevant service would already have been provided; therefore, paragraph (b), which refers to agreement in writing before the bargaining services are provided, would not apply.

Senator JACINTA COLLINS—What should we do about that problem?

Mr Hamilton—Two things. Firstly, if it is a problem it could be amended in some way, fixed up. I am sure the government would address it if asked by a unanimous committee report. Secondly, the question is: is it actually a problem? The numbers of new employees are not necessarily great. It may not be such that it is a problem requiring rectification.

Senator JACINTA COLLINS—Given that we now have enterprise bargaining agreements which apply—and I will have to ask the department this—across many hundreds of thousands of employees—

Mr Hamilton—Yes, many hundreds of thousands. It is a substantial system these days.

Senator JACINTA COLLINS—In the retail sector, for instance, I know about the level of turnover, and I would have thought there could be quite a significant problem with the life of agreements—unless one was interested in denying unions access to bargaining fees.

Mr Hamilton—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. I do not pretend to have the answer off the top of my head. Perhaps there is a way to amend it which would meet that issue. Perhaps turnover in the national economy is something like 10 per cent or less a year. I suppose that is an issue—it is a substantial number of employees. I really do not have a concluded view on that. I would have to think about it.

Senator JACINTA COLLINS—The ACTU submission included some guidance from the ILO on agency fees. Do you have any comments?

Mr Hamilton—I have just seen their views. At this stage the only comment I would make is that we are talking about a different system in Australia, where trade unions really do have a compulsory role and collective arrangements are known as awards. They have that role in virtually every workplace. That may be a different circumstance from a set of arrangements where the collective agreements referred to in the ILO quotation in paragraph 23 of the ACTU submission are not underpinned by a set of collective arrangements negotiated by trade unions. That is perhaps a point of distinction. Obviously we have always sought to support appropriate bargaining arrangements consistent with international norms. We have never walked away from those. I do not pretend at this stage to have a final response to the material that the ACTU has produced, which I have only just seen.

Senator JACINTA COLLINS—We might get something from the department on that issue. Unfortunately their submission to this inquiry made absolutely no reference to our international obligations.

Mr Hamilton—I am not sure what their submission is or what they will be saying on this issue. I have not discussed it with them.

Senator JACINTA COLLINS—In terms of your consideration of this issue, you might like to review the *Hansard* and, if there is anything you want to add to what the department says later today, to forward that to us, given that you saw the ACTU's comments only today.

Mr Hamilton—Thank you. I will do that.

Senator JACINTA COLLINS—That concludes the questions that I have, but I will say that your earlier comments in your opening statement did not reflect the debate we had in the

Senate on the **Workplace Relations Amendment (Termination of Employment) Bill 2001**, where we were characterising the bill as a gutted dead fish.

Mr Hamilton—I did notice that comment. The ways of the Senate are beyond an industry representative like me. The language used is unique, and I certainly do not pretend to follow all of it.

Senator JACINTA COLLINS—It grew during the committee stage debate. I think it started with the Democrats' reference to it being a dead fish and grew from there. Thank you for your appearance.

Mr Hamilton—Thank you.

Proceedings suspended from 10.45 a.m. to 11.19 a.m.

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

SMYTHE, Mr James Edward, Chief Counsel, Workplace Relations Legal Group, Department of Employment, Workplace Relations and Small Business

CHAIR—I welcome officers from the Department of Employment, Workplace Relations and Small Business. The committee has before it submission No. 19. Are there any changes that you wish to make?

Mr Smythe—No.

CHAIR—I now invite you to make a brief opening statement.

Mr Smythe—The committee will be aware that there is presently a case before the full bench of the Australian Industrial Relations Commission which is dealing with the issue of bargaining agents' fees in certified agreements. The committee will be aware that one issue that the full bench is considering is whether or not these clauses offend freedom of association provisions presently in the act and, if they do, whether they should be removed from certified agreements. The commission is also considering the issue of whether, in any event, such clauses are legally enforceable. The government believes that the remedial provisions in the bill presently before the committee are necessary, irrespective of the outcome of the deliberations of the full bench of the commission.

Senator JACINTA COLLINS—Mr Smythe, do you think the determination of the commission might actually guide an appropriate response to this matter?

Mr Smythe—There may be some matters that the commission may pronounce upon which might clarify the existing law, but there would be a number of issues relating to the general problem of compulsory union fees which may not. The difficulty is, we have no idea what the commission will determine and, irrespective of what it determines, there will be numerous unresolved issues which the government believes this bill will address.

Senator JACINTA COLLINS—It does not explain the urgency of doing it ahead of time.

Mr Smythe—The government perceives that there is a growing problem which needs to be addressed in legislation. The legislation has now been in the parliament for some time.

Senator JACINTA COLLINS—Yes, but we may be led to the position where we end up duplicating a process unnecessarily because we have not waited for the commission's appeal.

Mr Smythe—The government believes that, irrespective of the outcome, there will still be issues that need to be resolved by legislation. 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 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.

Senator JACINTA COLLINS—Doesn't the current act prohibit compulsory unionism?

Mr Smythe—The current act prohibits a range of stated conduct and activity which offends freedom of association principles. There is not a blanket, catch-all freedom of

association provision; there is a range of provisions in part XA which attempt to cover the range of freedom of association principles.

Senator JACINTA COLLINS—How do you respond to the proposition that an agency fee in a certified agreement is not necessarily in conflict with freedom of association, as put to us this morning by ACCER—the Australian Catholic Commission for Employment Relations?

Mr Smythe—The government believes that the imposition of an agency fee on someone who has not agreed to it offends freedom of association principles. An individual should not have any fee imposed upon them without their prior agreement. That association should be treated the same way as any other commercial entity—that is, they should not be able to charge for unsolicited services.

Senator JACINTA COLLINS—But any other commercial entity does not have the same obligations as a union.

Mr Smythe—The union, in the government's view, does not have any obligations in respect of non-members.

Senator JACINTA COLLINS—Tell me what the analogy is with any other service provider, in that the act requires that the outcome achieved by a union in bargaining be equally available to non-union members covered by a certified agreement.

Mr Smythe—As I understand it, the fee that is purported to be imposed is a fee in respect of bargaining. There is no obligation in the act for the union to bargain on behalf of nonmembers. Indeed, the act provides choice at the point before an agreement is struck. Where there is a possibility of bargaining occurring, there are numerous choices: there is a choice for the union to attempt to reach agreement with the employer, there is a choice for collectives of non-union members to reach agreement with the employer, and there is a choice for individuals to strike AWAs with the employer. In that context the government does not believe it can be said that the union has bargaining obligations in respect of non-union members.

Senator JACINTA COLLINS—That was not the issue I was raising. The issue I was raising is the differential between what is required of a union under the act and the analogy with other service providers or other commercial entities where the act requires that the outcome be available to those other than clients of the service provider.

Mr Smythe—The outcome is an incident of the agreement.

Senator JACINTA COLLINS—No, the outcome is the terms and conditions included in the agreement. That is what is bargained.

Mr Smythe—But the union, in bargaining, does not necessarily bargain on behalf of the nonmembers. The fact that it applies to them does not mean that a service is being provided to them. It would apply to them irrespective of their interests. In fact, precedent suggests that it does apply to them irrespective of their interests. For instance, there is no guarantee that the nonmembers want what is in the agreement or that they are even consulted. In fact, practice would suggest that nonmembers not only are not consulted when unions bargain agreements but are excluded from consultation. So the service has not been provided to them. If the fee is for the service then they have not received the service.

Senator JACINTA COLLINS—It depends on how you characterise the service.

Mr Smythe—More importantly, the government believes that irrespective of all those sorts of arguments you cannot impose fees for unsolicited services. So, unless the individual asks

for the service or agrees to the service in writing beforehand, it is an unsolicited fee and they should not have to pay for it.

Senator JACINTA COLLINS—Let us go to the detail of where you have problems. One of the biggest problems with this bill is that it goes much broader than what the government claims to be intending to do. It is impossible, given the way this bill has been framed, for a new employee commencing employment and covered under a certified agreement to give their consent to pay a fee.

Mr Smythe—It is also impossible for the union to have provided a service to someone who was not employed at the time of the bargaining.

Senator JACINTA COLLINS—That is the point. That is the problem with how you characterise service.

Mr Smythe—If you cannot provide the service then you cannot impose the fee.

Senator JACINTA COLLINS—That is the problem—you are contorting what a service is. The service is the negotiated conditions of employment. That is what the employee cares about: what their terms and conditions of employment are. That is what is bargained, that is the outcome and that is the service. A new employee commences with an employer and, even if they wanted to indicate consent to pay a fee in recognition of the bargaining that achieved their terms and conditions of employment, under your bill that is not possible.

Mr Smythe—That is correct. When a new employee comes to an employer it makes no difference what circumstances gave rise to the terms and conditions; they are presented with a set of conditions which they agree to or do not agree to. So there is no way any service as been provided to them.

Senator JACINTA COLLINS—The service, in a fair characterisation of this situation, is the conditions of employment that apply to an employee's employment. That is the contortion that the government is making in this area. That is why you have tied yourselves up in knots. In any fair characterisation of the situation involving new employees who might even want to consent to pay a fee, that is not possible under this bill. Employer organisations today have had difficulties with this issue as well.

CHAIR—Senator, do you have a question?

Senator JACINTA COLLINS—Yes, I am getting to it.

CHAIR—It is a bit of a statement that you are making.

Senator JACINTA COLLINS—Any fair-minded person would accept that when a new employee commences employment, if they freely choose to contribute to how their terms and conditions of employment are determined, they should be able to. But your bill precludes that.

Mr Smythe—I think the government would disagree with the way you are characterising what service fees are for. But, in the example you gave, if a new employee felt the need to contribute to the union but not join—which is the position you are putting to me—then there would not be anything prohibiting that employee from simply saying, 'I would like to contribute,' and providing the union with some money. What it would prohibit is the union demanding or receiving fees for bargaining services.

Senator JACINTA COLLINS—Yes.

Mr Smythe—If the proposed new employee, as a matter of his or her morality, found the need to contribute to the union, this bill would not prevent them from doing so.

Senator JACINTA COLLINS—Let us go to the detail of that. Where is the definition of bargaining services that allows that interpretation? I am talking about circumstances in which someone is making a contribution with respect to services provided in a sense retrospectively, I suppose.

Mr Smythe—Bargaining services are defined in clause 1 of schedule 1 of the bill.

Senator JACINTA COLLINS—Yes. Explain to me how that definition resolves this problem.

Mr Smythe—I do not think the government sees it as a problem. What this bill is aimed at doing is ensuring that where a registered organisation purports to demand fees for bargaining services it cannot do so unless there has been agreement beforehand.

Senator JACINTA COLLINS—I understand that is the intention.

Mr Smythe—What the government would say is that, where a new employee comes after the agreement has been struck, the union provides no service. The service involved the negotiation of the agreement, and that was something that occurred in the past. The new employee is faced with a set of terms and conditions which they can accept or reject—it does not matter how those terms and conditions were arrived at. There are a number of complications with what you propose. Let us say, for example, a certified agreement was negotiated with an employer by two or three or half a dozen unions, under your analogy each one of those unions would be able to demand a fee from a new employee.

Senator JACINTA COLLINS—No, we are not talking about a demand situation at all. The problem that I find with the way the bill is framed is it precludes the voluntary situation.

Mr Smythe—In the hypothetical I propose, who should the new employee pay the service fee to?

Senator JACINTA COLLINS—The employee could choose. We are talking about a voluntary scenario here.

Mr Smythe—If they can choose, then doesn't that give the lie to the service notion, because which one of the unions provided the service? The service is in the bargaining.

Senator JACINTA COLLINS—Come on, Mr Smythe, that is a nonsense. You are really clutching at straws on that example. For goodness sake, any time there is more than one union involved in a bargaining situation it makes a nonsense that a service has been provided.

Mr Smythe—No, it makes a nonsense that you can say in respect of a new employee that the new employee can choose who provided the service. Who did provide the service? What the government will say is that the service was not provided. The service was issued to people who voluntarily chose to be represented as part of the bargaining process, not ex post facto when a set of terms and conditions has been arrived at by a negotiation process.

Senator JACINTA COLLINS—I am sorry, but that whole contribution is utter nonsense. You have a serious problem with this bill. It is a definitional problem. You have incorporated a scope much broader than the government's intent; you are ruling out quite legitimate voluntary behaviour, and you cannot rationalise it.

Mr Smythe—You say we have included something beyond the government's scope. This is the government's bill. The government's scope is reflected in this bill.

Senator JACINTA COLLINS—What I am saying to you is that the scope of the bill is broader than its intent. Its intent, supposedly, is to deal with compulsory service fees. Is that not the case?

Mr Smythe—Its intent is to ensure that nobody is required to pay a fee unsolicited that they have not agreed to in writing beforehand. A new employee cannot—

Senator JACINTA COLLINS—And I have pointed out to you that a new employee—

CHAIR—Order! Senator, the witness is giving an answer.

Mr Smythe—A new employee cannot agree in writing beforehand and therefore they cannot be subject to the fee.

Senator JACINTA COLLINS—That is the point. This bill is precluding a new employee from consensually contributing to the terms and conditions of their employment if they were negotiated before they commenced that employment.

Mr Smythe—As I said before, this bill does not prohibit a new employee from making a contribution 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.

Senator JACINTA COLLINS—But I have asked you, in terms of the definitions in this bill, how you can justify that distinction, and you have not given us an answer.

Mr Smythe—Because ‘bargaining services’ is defined in the first clause.

Senator JACINTA COLLINS—Sorry?

Mr Smythe—I believe we have gone through this issue a couple of times—

Senator JACINTA COLLINS—I am still asking you how the definition in the bill—and we are still waiting for a copy of the bill to arrive at this end of the discussion—allows you to make that distinction.

Mr Smythe—I think I have already answered that question.

Senator JACINTA COLLINS—No, you have not.

Mr Smythe—I do not propose—

CHAIR—Senator, I do not think the witness has anything to add. Shall we move on?

Senator JACINTA COLLINS—The witness is clutching at straws. I am absolutely astounded. I did not believe that this submission was up to the department’s normal quality, but this dialogue is astounding. Anyway, I will move on to the next point. What is the difference in terms of freedom of association between an employer requiring, as a term and condition of employment, that a new employee sign an AWA and an employer requiring, as a condition of employment, that an employee agree to a service fee in relation to the bargaining of their terms and conditions of employment? What is the distinction?

Mr Smythe—I do not see how signing an AWA has any effect on freedom of association.

Senator JACINTA COLLINS—The point is that you and a number of employers—and this is a question that we have discussed with a number of employers today as well—have a concern about coercion. I have adopted a test on coercion in one area of recent law and contest, which is that pertaining to freedom of choice and an AWA. It has been determined quite clearly—and in fact the department has argued this on several occasions—that a new employee can be required as a condition of employment to accept an AWA. I am asking you what the difference is between that situation and a new employee being required to accept a service fee in relation to concerns with respect to coercion or duress.

Mr Smythe—With respect, Senator, I cannot see the analogy. When a new employee signs an AWA, no-one is asking them to pay a fee. This is about the involuntary imposition of fees.

Senator JACINTA COLLINS—I got a better result out of the employers on that one, too. We will go to the next issue that was raised. What is the government's position with respect to—and I hope you have at least looked at the ACTU's submission on this—our commitments and obligations to, and guidance from, the ILO in relation to service fees?

Mr Smythe—I will get my colleague Mr Bohn to answer this question in some detail, but my understanding is that the ILO, having considered this issue, have indicated that regimes which permit or prohibit bargaining agents' fees are not incompatible with ILO conventions. In other words, either regime is compatible with ILO conventions. But perhaps Mr Bohn can expand on that answer.

Mr Bohn—The easiest thing might be if I hand up a document that has a summary of the relevant ILO jurisprudence and, in fact, quotations from the relevant ILO jurisprudence.

Senator JACINTA COLLINS—And then I would appreciate it if you would take me to where you believe the ACTU's submission on this is in error.

Mr Bohn—We are not saying that the ACTU was wrong in saying that bargaining agents' fees are consistent with the convention; we are saying that prohibitions on such fees are also consistent with the convention.

Senator JACINTA COLLINS—Now that we have that, please go to paragraph 23 in the ACTU submission and tell me how the statement there is consistent with what you just said.

Mr Bohn—Could you give me the number of the ACTU's submission?

Senator JACINTA COLLINS—It is No. 5. This is on page 62 at paragraph 23 in the book.

Mr Smythe—I will allow Mr Bohn to enlarge on this. I do not know what inference you draw from that. I think we have handed up a document to you which indicates that the ILO has pronounced as we have said. Perhaps the ACTU has not fully canvassed all the pronouncements of the ILO.

Senator JACINTA COLLINS—You are going around in circles again. I asked you a moment ago to take me to where you believed what the ACTU had provided to us was not consistent with what you had said to me a moment ago.

Mr Smythe—All I can say to you is that it would appear that the quote in the ACTU document from the ILO is inconsistent with the ILO quote that we have provided to you.

Senator JACINTA COLLINS—Then inform the committee on which has the greatest status.

Mr Bohn—We would have to take that on notice. I am not sure where—

Senator JACINTA COLLINS—This quote in the ACTU submission is quite clear. It says:

In keeping with the principles of freedom of association, it should be possible for effective agreements to provide for a system for the collection of union dues, without interference by authorities.

Mr Bohn—We are not saying that it would not be possible. What we are saying is that not having them is equally consistent with the convention.

Senator JACINTA COLLINS—We just went through the example where you are even precluding by consent the collection of a type of due.

Mr Smythe—We have provided the committee with a quote from an ILO document which indicates that that is the case. I do not think we can take it any further than that.

Senator JACINTA COLLINS—You are taking it further—you were going to come back to the committee in relation to the status.

Mr Smythe—We can take it further in indicating the status of the two pronouncements.

Senator JACINTA COLLINS—You indicate in paragraph 34 of your submission that employees have written to you complaining about service fees. Can you give us some indication of the incidence and nature of these complaints?

Mr Bohn—I would have to take that on notice. I could not give you precise numbers.

Senator JACINTA COLLINS—It could be two?

Mr Bohn—I would have to take that on notice.

Senator CARR—Could you also tell us what the nature of the industry they work in is and the size of the firms in which they work?

Mr Bohn—Not without further investigation.

Senator CARR—As part of your response to Senator Collins.

Mr Bohn—Certainly.

Senator CARR—I take it they have written to you in confidence.

Mr Smythe—We have to take on notice whether it would be appropriate to provide the correspondence.

Senator CARR—Thank you. You may want to remove the name of the person. I do not mind if that is the case. If they were not written to you in confidence, can we have copies of them?

Mr Bohn—It is the nature of the complaint, though, that you are actually interested in.

Senator CARR—Yes.

Senator JACINTA COLLINS—I mentioned the ACTU submission. We have got into a stalemate there until you take on notice the questions. I think I will add some further questions once I look at this also. The ILO situation was one of my disappointments with the department's submission. I was somewhat surprised that you did not deal with that issue in the submission proper. Obviously, I will need time to consider that and come back to you with any further questions. Do you have a response to any of the other submissions that have been made to this inquiry?

Mr Bohn—Not that I can think of. I note that a reasonable amount of emphasis has been placed on international models, and the government would say that those models are not relevant in considering what is appropriate in the Australian context. However, beyond that, I cannot think of any particular submissions that we could specifically address.

Senator JACINTA COLLINS—I think it is one thing to say that that is not relevant, but the onus is really on you to demonstrate where you think those distinctions are that make them meaningless in relation to the Australian scene. I think we had this discussion earlier today with AIG. They had focused their submission on pointing out the various privileges that apply to unions in the Australian context, but they completely ignored the responsibilities—I suppose that is the way you could characterise it—of unions within the Australian system as well. It is one thing to say that we have a different system, but you have to explain the nature of our system.

Mr Bohn—I think we addressed that in our submission.

Senator JACINTA COLLINS—We will probably have a difference of opinion on how adequately that was dealt with. That is why I will also ask you on notice to go to the submissions of Professor Hancock and Mr Graeme Orr and respond to their criticisms. For instance, Mr Orr had a fairly tidy summary of about eight points. I would be interested in the government's response to those points. You have covered some of them in your submission but some you have not really covered. Is there anything you want to say at the moment on that, or would you prefer to deal with that fully on notice?

Mr Smythe—I want to clarify what it is that you are asking us. Are you asking: in respect of submissions by other parties, can we please respond to any criticism that they have made of the bill?

Senator JACINTA COLLINS—Not any or all of the parties. I have referred you to two. I have given you an opportunity to respond to any significant general issues you think have been raised by submittees, and I am saying to you that, on my reflection of the contributions of both Keith Hancock and Graeme Orr, there are issues that your submission has not dealt with that they raised that are serious concerns. I would like you to take that on notice or address them now if they come to mind.

Mr Smythe—I seek a little more clarity on that. The government does not believe that there are any significant issues raised by parties and therefore there is nothing to answer. If you could identify and—

Senator JACINTA COLLINS—If you want that to be your answer, that is fine!

Mr Smythe—If you could identify the issues that you wish us to further investigate—

Senator JACINTA COLLINS—I want you to address the eight points raised in the submission of Graeme Orr. But rather than listing them in detail now, I think I will deal with that on notice as well. Chair, my view is that we are going around in circles on these issues and getting nowhere, so I will provide the department with a list of questions on notice.

CHAIR—Are there any further questions?

Senator CARR—I have one. Questions have been raised here by witnesses concerning the intervention that this bill proposes into the legal process in terms of an appeal before the full bench, and concerns have been expressed that this bill would be premature insofar as those matters are not resolved. I have asked the question: is it appropriate for there to be a political intervention to prevent or effectively pre-empt an appeal from a legal tribunal in this country? What is your response to that?

Mr Smythe—Senator Collins has already raised that issue and I have answered that question.

Senator CARR—Has she asked you how many other occasions there have been where these parallel circumstances had occurred?

Mr Smythe—She has not.

Senator CARR—Could I ask you?

Mr Smythe—I have no idea. I will take that on notice.

Senator CARR—Thank you very much.

CHAIR—Are there any further questions?

Senator JACINTA COLLINS—I now have the bill and so I would like Mr Smythe to take me to the definition of 'bargaining services'. Where is that provided?

Mr Smythe—That is in clause 1 of schedule 1 of the bill.

Senator JACINTA COLLINS—It says:

bargaining services means services provided by (or on behalf of) an industrial association in relation to the negotiating, making, certification, extension, variation or termination of an agreement under part VIB.

There is nothing to say that that characterisation of the services stops at the time when it is processed in the commission or its commencement date, is there?

Mr Smythe—It refers to ‘in relation to negotiating, making, certification, extension, variation or termination’. That is reasonably precise as to what it relates to.

Senator JACINTA COLLINS—If I am a new employee, it would be fair to say that I commence on terms and conditions of employment that have been negotiated, wouldn’t it?

Mr Smythe—I could not answer that in the hypothetical. It may well be there was no negotiation at all.

Senator JACINTA COLLINS—But it could be possible and it could be a fair characterisation of a potential scenario that, as a new employee, I have started employment on terms and conditions of employment that have been negotiated.

Mr Smythe—It could be.

Senator JACINTA COLLINS—Were I to voluntarily think it was fair for me to make a contribution towards that negotiation, explain to me how that definition allows me to do so. From my reading of it, it prevents me from doing that because there is no way in which I could have given my consent to that negotiation prior to it having occurred. Perhaps you should take that on notice.

Mr Smythe—No, I will not take it on notice because I do not think there is anything to take on notice. In respect of the new—

Senator JACINTA COLLINS—That is strange, because the two employer organisations did. They asked to.

CHAIR—Order! Senator Collins, the witness is answering the question. Would you let him answer the question before you ask the next one.

Mr Smythe—In respect of the new employee, no services were provided.

Senator JACINTA COLLINS—We go back to what it says in the bill:

bargaining services means services provided by (or on behalf of)—

and it does not say with respect to an individual employee in this definition—

an industrial association in relation to negotiation, making, certification, extension, variation or termination of an agreement ...

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.

Senator JACINTA COLLINS—It does not matter how you equate the services. I am saying to you that—

Mr Smythe—With respect, that is the absolute difference.

CHAIR—Order! Senator, the witness is answering.

Mr Smythe—With respect, that is the difference in this argument.

Senator JACINTA COLLINS—But the problem still has no remedy. The scope of this bill is broader than the government's intent. The problem has no remedy in terms of how this bill is framed.

Mr Smythe—The government does not believe the scope of this bill is broader than its intent.

Senator JACINTA COLLINS—I would like to see how the government demonstrates that a new employee who voluntarily wishes to make a voluntary contribution in recognition of the negotiation of their terms and conditions of employment is allowed to do so—

Mr Smythe—We have already had that discussion.

Senator JACINTA COLLINS—because the bargaining services definition here does not make that distinction.

Mr Smythe—We have already had that discussion and I believe I have answered that question.

Senator JACINTA COLLINS—You cannot explain to me how that definition makes that distinction?

Mr Smythe—I believe I already have.

Senator JACINTA COLLINS—Well, try again.

CHAIR—Senator, the witness has now said several times that he has answered the questions. Please move on.

Senator JACINTA COLLINS—The witness has dug his head in the sand.

CHAIR—Move on, Senator.

Senator JACINTA COLLINS—That is it.

CHAIR—Are there any further questions?

Senator JACINTA COLLINS—I look forward to the employers' response to this issue since we cannot get sense from the department.

CHAIR—We thank the witnesses for attending. That concludes the inquiry into the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Bill 2001](#).

Committee adjourned at 11.55 a.m.