CHAPTER 12

SCHEDULE 14 – FREEDOM OF ASSOCIATION

12.1 This Chapter deals with amendments to the freedom of association provisions in Schedule XA of the WR Act. The amendments are set out in Schedule 14 of the Bill.

Outline of proposed amendments

12.2 The amendments are directed at closing gaps in the coverage of the existing provisions as well as additional measures in relation to closed shops. The major changes are:

- the prohibition of 'indirect or implied threats';
- re-enactment, in a single provision, of the list of 'prohibited reasons' for conduct by industrial associations, employers, employees, independent contractors and people who engage independent contractors, and extension of the list to cover additional matters such as conduct aimed at forcing people to pay fees to a union in lieu of union dues and other union membership related matters;
- express prohibition of discrimination by an employer against an employee or independent contractor for a 'prohibited reason';
- consolidation into a single provision of all conduct for a 'prohibited reason' by industrial associations against employers, independent contractors and employees;
- prohibition of the establishment or maintenance of a 'closed shop';
- prohibition of indirect conduct to bring about a contravention of the freedom of association provisions;
- vesting jurisdiction in State courts to deal with breaches of the freedom of association provisions, and allowing the courts to grant injunctions to prevent an apprehended breach of the Act; and
- expanding the definition of 'objectionable provision' to include union encouragement and discouragement clauses, and preventing these types of clauses being included in awards or certified agreements.

12.3 The provisions that attracted most attention in this Inquiry were the closed shop provisions, the amendments relating to 'objectionable provisions' and the amendments to prevent coercion into restrictive arrangements. The rest of the amendments were fairly uncontroversial, either because the amendments were generally agreed, or because the amendments simply re-enacted many of the existing freedom of association provisions in a simplified, consolidated form.

Closed shop provisions

Evidence

12.4 There are already provisions in the Workplace Relations Act which would prohibit employees from being coerced to join a union, for instance, section 298K prohibits employers from refusing to employ a person because they are not a union member. Other provisions relate to coercion by unions.

12.5 The new provisions introduce the concept of a 'closed shop' to the Act, and give more guidance as to when a closed shop is in existence. The Bill does not exhaustively define 'closed shop'. However, the Bill inserts a new section 298SB, which provides that a closed shop is presumed to be in existence where a number of conditions are fulfilled.

12.6 Unfortunately a number of witnesses misinterpreted how the provisions would operate:

> My workplace has 80 per cent union membership. This has nothing to do with anyone being forced to join; rather, young people cannot help but see how useful and helpful it is to have a union represent them. In a situation such as this with 80 per cent membership, under the proposed legislation, my workplace, and any workplace with over 60 union membership will be deemed a closed shop…Do the last 20 per cent who joined the union have to revoke their membership and therefore their rights?[1]

12.7 The Department provided supplementary submissions on notice emphasising that this is not the way that the proposed provisions would work:

> The circumstances described (workplaces with 60% union membership) would not on their own indicate a contravention of the proposed closed shop provisions…At least three things would need to be shown in order for there to be a contravention of the closed shop provisions…The first is that a closed shop is in existence or is intended to be brought into existence. The second is that a person has established or maintained the closed shop (alone or with others), or engaged in conduct with intent to establish of maintain a closed shop. The third is that that person has been found to have engaged in other contravening conduct as described in proposed section 298VA.

12.8 In other words, union membership at levels of 60% or more does not automatically mean that a closed shop exists. There would need to be additional evidence that it is a condition of employment that employees join a union or that employees would be disadvantaged if they did not join a union.

12.9 Employer groups generally supported the policy intention behind the provisions, but some were concerned by the reverse onus of proof created by proposed subsection 298VA(4) – this subsection provides that if a person (including an

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1 Evidence, Miss Claire Hamilton, Canberra, 1 October 1999, p. 20

employer) has been found to have breached the freedom of association provisions relating to coercion to join an industrial association, then it is presumed that the person was engaged in conduct with intent to establish or maintain a closed shop, or was knowingly concerned in the establishment or maintenance of a closed shop, unless the person can prove otherwise.

> …this reverse onus creates a situation where it is very difficult for persons to successfully defend applications for interim injunctions, where the test for such injunctions are that there is a serious issue to be tried and balance of convenience. Once an interim injunction is made it can remain in place for many months and detrimentally impact on the injuncted party to the extent there is little choice except to settle the matter.[2]

12.10 The Australian Industry Group stated:

> The word 'maintain' could refer to passive situation of allowing a situation to continue. This could mean that an offence may be committed where an employer allows 60% of employees in a particular group of employees to continue to belong to a union in circumstances where it may be argued that it is reasonably likely that the employer may prejudice an employee's employment for not being a member of the union…[3]

12.11 Some unions and employee associations, academics and the Queensland Government opposed the provisions. The following comment is representative of these submissions:

> A more fundamental concern is that these provisions make an assumption that a high level of union membership is prima facie evidence of a closed shop. They fail to acknowledge that in a number of workplaces both employers and employees recognise the benefits of a highly unionised workforce. Rather than promoting an artificial conception of unions as 'third parties', it should be recognised that unions can and do play an integral role at the workplace and industry level to promote improvements in productivity, innovation, employment and equity outcomes. To suggest otherwise is purely an ideological viewpoint.[4]

12.12 Some witnesses expressed concern about how the provisions would be enforced:

> …to police this, somebody, presumably government inspectors or perhaps employers, would have to compel workers to indicate whether or not they were members of a union. How else can you obtain the evidence that is needed to establish the so-called 60 per cent rule? We would have the

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2 Submission No. 375, Business Council of Australia, vol. 12, p. 2644

3 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3119-20

4 Submission No. 473, Queensland Government, vol. 23, p. 5981

> spectre of government inspectors…compelling workers to provide evidence of their union status.[5]

12.13 Some witnesses questioned why there would be no converse presumption that a non-union shop existed if union membership was below a certain rate.[6]

12.14 The Department provided supplementary information on notice addressing this point, explaining that:

> …closed union shops are more likely to exist and become entrenched through some form of explicit or implicit arrangement between unions and employers in certain industries. Additional measures are seen by the Government as being necessary to address this more systematic restraint of freedom of association.[7]

12.15 The need for further action to address 'systematic' restraint of freedom of association in some industries was put to the Committee in evidence about the continuing impact of a union 'closed shop' on non-union subcontractors in the construction industry. Employees of Western Ceilings, a small family company, generally do not join a union because of their religious beliefs. The company submitted:

> In the period from October 1996 to February 1997, our presence on commercial sites provoked industrial action on a number of occasions, following visits to these sites by an organiser from the CFMEU. We took these disputes to the Arbitration Commission and in each case we received a favourable decision which enabled us to complete our contracts…However, we have become painfully aware that these disputes have damaged our goodwill with a number of builders who once awarded us regular work…It is also significant that the contracts which have been won since the disputes are for work inside completed buildings, which are no longer regarded as construction sites. We know that each of these builders would be happy to use our services more frequently, but they are restricting the work awarded to us to those sites that are unlikely to attract attention from the unions.[8]

Conclusion

12.16 A majority of the Committee is satisfied that the legislative provisions as drafted will ensure that workplaces will not be investigated simply because of high union membership. The OEA would also require evidence that union membership is a condition of employment, or that people would be disadvantaged if they did not join the union.

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5 Evidence, Mr John Sutton, Sydney, 22 October 1999, p. 272

6 Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p. 73

7 Supplementary submission, Department of Employment, Workplace Relations and Small Business, Questions arising from hearing, Canberra, 1 October 1999

8 Submission No. 130, Western Ceilings, vol. 2, p. 488

Recommendation

12.17 That the proposed new provisions relating to closed shops be enacted.

Objectionable provisions

12.18 'Objectionable provisions' must be removed from awards and agreements under existing section 298Z of the Workplace Relations Act. Subsection 298Z(5) defines 'objectionable provisions' as 'provisions that require or permit…or have the effect…of requiring or permitting any conduct that would contravene (the freedom of association provisions).'

12.19 This encompasses clauses that express preference in employment for people who are or are not members of a union. The Bill proposes to expand the definition of 'objectionable provisions' so that awards and agreements cannot include any provisions that encourage or discourage union membership, or indicate general support for employees being a union member or non-member, even if these clauses fall short of a preference clause.

Evidence

12.20 The Department suggested that the proposed amendments were designed to ensure that awards and agreements do not indirectly express preference for union membership or non-membership 'through statements of encouragement or discouragement or service fee arrangements. Such statements can require the employer to pursue an active role in the encouragement or discouragement of union membership. Such action on the part of an employer will inevitably impact upon the freedom of choice of some employees.'[9]

12.21 The Business Council of Australia supported these amendments, considering that union encouragement clauses should be proscribed because:

> They…offend the principle of freedom of association…[and because] Enterprise bargaining and agreements should be about working arrangements between the employer and employees – not about the self-interests of the bargaining agent.[10]

12.22 The Business Council of Australia provided an example of a clause in the KFC National Enterprise Agreement:

> It is the policy of the employer that all its employees subject to this agreement shall join the union. Accordingly, the employer undertakes to positively promote union membership by strongly recommending that all employees join the Shop, Distributive and Allied Employees Association…All employees, including new employees at the point of

9 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2412

10 Submission No. 375, Business Council of Australia, vol. 12, p. 2643

> recruitment, shall be given an application form to join the union together with a statement of the employer's policy.[11]

12.23 It would appear from the evidence of the Business Council of Australia that in some cases employers agree to union encouragement clauses in their certified agreements at the insistence of a union, not because the employers believe that this will promote a harmonious and productive workplace.

12.24 The Australian Mines and Minerals Association expressed their concerns this way:

> It is naive in the extreme or misleading to suggest that the presence of so-called 'encouragement clauses' within agreements do not lead to the placement of unreasonable pressure on employees or prospective employees to join or remain a member of a particular industrial organisation. The current Act has been interpreted as permitting such clauses. Pressure through 'encouragement clauses', direct or implied, runs counter to the principles of freedom of association. AMMA therefore strongly supports the above provision as doubt will be removed as to what constitutes an unlawful provision.[12]

12.25 Other employer groups, such as the Australian Catholic Commission for Employment Relations also supported the amendment:

> …we say you have the right to join or not to join a union, free from coercion or duress or influence…when we looked at the encouragement clauses, we felt that was providing an influence in one direction that would be inconsistent with our principles.[13]

12.26 Witnesses representing unions and submissions from unions opposed the proposed prohibition of union encouragement clauses. The SDA submission stated:

> The union encouragement clauses do no more than create an environment in which organisers and delegates can actively recruit union members without the employees being fearful that they may be victimised or discriminated against by the employer if they choose to join the union.[14]

12.27 However, the Office of the Employment Advocate, which has responsibility for the freedom of association provisions of the Act, gave evidence that some employers do interpret award encouragement clauses as requiring them to coerce employees to join the union:

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11 *ibid*., p. 2642

12 Submission No. 381, Australian Mines and Metals Association Inc, vol. 13, p. 2855

13 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 141

14 Evidence, Mr Joseph De Bruyn, Brisbane, 27 October 1999, pp. 422-3

> Certainly we have had experience of employers telling us, when we say we are concerned about their conduct, 'Oh no, we have to make everyone join the union.' What they then do is point to an encouragement clause. I believe they are not understanding what the clause says. The clause does not require them to make people join; it only requires them to perhaps encourage people to join. As long as you do that properly you can do that without breaching the freedom of association laws.[15]

12.28 Aside from this issue of misinterpretation or misunderstanding, the Employment Advocate was not opposed to employers encouraging or discouraging union membership in a manner that did not infringe on an employee's right to choose.[16]

Conclusion

12.29 A majority of the Committee notes that union encouragement clauses, in their implementation, probably result in employees, particularly new starters, believing that they must join the union in order to keep their jobs. The Committee majority believes that union encouragement clauses do operate in some cases to restrict employees' freedom of association.

Recommendation

12.30 That the provisions to prohibit union encouragement clauses in awards and agreements be enacted.

Restrictive arrangements

12.31 The Bill prevents action being taken against a person because they have refused to enter into a 'restrictive agreement or arrangement' (see paragraph 298BA(m)). Subsection 298BA(4) would define 'restrictive agreement or arrangement' to mean:

> …a written or unwritten agreement…or arrangement that requires a person to provide the same, or substantially the same, terms or conditions of employment or engagement…to some or all of the person's employees or independent contractors that work at a workplace or in an industry as they are provided to another person's employees or independent contractors who also work at that workplace or in that industry.

Evidence

12.32 There were two main concerns about this proposal:

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15 Evidence, Mr Jonathan Hamberger, Canberra, 28 October 1999, p. 490

16 Evidence, Mr Jonathan Hamberger, Canberra, 28 October 1999, p. 489

- it could limit the ability of multi-employer projects (particularly in the construction industry) to be conducted with similar terms and conditions of employment applying to all contractors involved in the project; and
- it could outlaw the Homeworkers' Code of Practice.

12.33 The Department submitted that the purpose of the amendments was to prevent independent contractors from being coerced to enter into multi-employer 'site arrangements' requiring them to provide similar terms and conditions of employment as their head contractors and other contractors.[17]

12.34 Some employer groups suggested that the proposed amendment did not take into account the practical reality of conducting large multi-employer projects in Australia. The Australian Industry Group submitted:

> A specific site or project agreement is designed to create necessary common conditions on a specific site where numerous sub-contractors are employed. An example would be a site agreement for construction of a city building which specifies common safety practices applicable at the site, or common rostered days off which will avoid delays in work due to staggered absences of sub-contractor staff…***It is submitted that major sites or projects will be unworkable without there being the right to make site specific requirements of sub-contractors***.[18]

12.35 The Australian Chamber of Commerce and Industry agreed, citing the findings of a recent Productivity Commission report, *Work Arrangements on Large Capital Building Projects*:

> While a greater enterprise focus in negotiations is desirable, it needs to be recognised that if all work arrangements were negotiated at an enterprise level, head contractors could lose important elements of control over building sites. Coordinating and planning work could be problematic if work arrangements negotiated individually by subcontractors differed significantly.[19]

12.36 Master Builders Australia also opposed the proposed changes which it saw as putting in jeopardy the use of site based agreements which have been generally accepted by those in the industry as contributing to improved industrial relations on major projects.[20]

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17 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2408

18 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3118-9

19 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3366-7

20 Evidence. Mr Alan Grinsell-Jones, Canberra, 28 October 1999, p. 502

12.37 The Australian Mines and Metals Association expressed similar concerns regarding resource sector projects:

> Certainty and security of an investment on a project is a key consideration. To that end, the capacity to ensure stability in employee relations is fundamental. AMMA expresses reservations regarding the above provision if a consequence of its passage is to further limit the capacity to use project agreements on major projects. This area is particularly vexing given the need to ensure certainty and security in employee relations when considering large financial investment.[21]

12.38 Several witnesses questioned the impact of the proposal on the Homeworkers Code of Practice . For example:

> We are…concerned at the possible implications of the Freedom of Association provisions in the proposed Bill for operation of voluntary codes and arrangements such as that for the Homeworkers' Code of Practice developed through the Fair Wear Campaign which is crucial for (Non-English Speaking Background) women. While this campaign operates only in the area of textiles, clothing and footwear work, it is a model of community, union and private sector cooperation to ensure that manufacturing and subcontracting arrangements do not act to exploit vulnerable workers…Many of our members come from countries where Governments have colluded to act against their constituents for narrow ends. We entreat you to demonstrate that this does not occur here.[22]

12.39 Another submission stated:

> Any changes that affect the code will directly affect one of the main tools by which industry exploitation is challenged. Good Shepherd notes Minister Reith's assurances that making the Code illegal was 'certainly not intended', and further that should his advice confirm that the code would indeed become illegal, he would intend to make an appropriate amendment. We would applaud such an amendment, but note however that it is yet to become a reality.[23]

Conclusion

12.40 A majority of the Committee notes that the Government did not intend that the new provisions to prohibit restrictive agreements and arrangements would affect the Homeworkers' Code of Practice, and has undertaken to make an appropriate amendment to exclude the Code from the operation of the proposed provisions if necessary.

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21 Submission No. 381, Australian Mines and Metals Association Inc, vol. 13, p. 2855

22 Submission No. 411, Association of Non-English Speaking Background Women of Australia, vol. 16, p. 3497

23 Submission No. 311, Good Shepherd Social Justice Network, vol. 8, p. 1523

12.41 Regarding the impact of the proposed provisions on multi-employer site agreements, the Department's evidence demonstrates that it is these particular types of arrangements that the provisions seek to outlaw (along with pattern bargaining outcomes). A majority of the Committee notes concerns amongst employers that these provisions would have an adverse impact on the ability of contractors to efficiently conduct large scale construction projects, and the potential negative impacts on securing investment in Australia's resource sector.

12.42 However, a majority of the Committee considers that the potential impact of these amendments on the viability of important sectors of the Australian economy, and has reached the conclusion that these concerns are outweighed by the importance of ensuring that independent contractors are not coerced into providing the same conditions of employment as their head contractors.

Recommendation

12.43 That the amendments to prohibit employers, contractors and industrial associations from exerting pressure on other persons to enter into restrictive site agreements or arrangements be enacted.