SENATE EMPLOYMENT WORKPLACE RELATIONS SMALL BUSINESS & EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO

THE WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2002

SUBMISSION BY

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The SDA is totally opposed to the proposed Bill.

It is our very strong submission that the rationale provided by the Government for the introduction of the Bill is misconceived and inconsistent with the thrust of the Government's own legislation, namely the provisions of the Workplace Relations Act.

The practice of having bargaining agent fees paid by non members to a union, for the purposes of reimbursing the union for the cost of bargaining an enterprise agreement, has been found by Vice-President McIntyre of the Australian Industrial Relations Commission not to offend the provisions of Part XA of the Workplace Relations Act.

The decision of Vice-President McIntyre makes clear that bargaining agent fees are not objectionable provisions under Section 298Z of the Workplace Relations Act; therefore they are not, and cannot be seen to be, compulsory union fees. Rather as the nature of the clauses already incorporated in the Certified Agreements considered by VP McIntyre makes clear, the fee that is sought to be paid by a non member to a union is a fee to reimburse the union for the costs of bargaining for and on behalf of all employees.

The structure of the Workplace Relations Act makes very clear that a Certified Agreement made under either Division 2 or Division 3 of Part VIB of the Workplace Relations Act, can be made between an employer and a registered organisation of employees. These agreements, once certified, apply to and bind all persons whose employment is covered by the agreement.

Effectively, agreements made with organisations have application to all employees of the employer who are to be covered by the terms of the agreement.

This means therefore, that members and non members alike gain the benefits of an agreement.

In the case of a Division 2 agreement every employee, whether they are a member of the union or not, is bound by the Division 2 agreement, pursuant to the provisions of Section 170 M(1)(b) of the Workplace Relations Act. In a Division 2 agreement therefore, every person whose employment is to be covered by the agreement, is clearly and unambiguously bound to that agreement. Thus not only do they have the benefits of the agreement, but any obligations that flow from the agreement also apply to them.

Where an agreement is made under Division 3 between an employer and an organisation of employees in settlement of an industrial dispute, that agreement binds the employer and the organisation and the members of the organisation in accordance with Section 170MA of the Workplace Relations Act. Because the agreement binds the employer it means therefore that employees whose employment will be subject to the agreement will have the benefit of the agreement.

Employees of employers who are bound to either a Division 2 or a Division 3 agreement will receive the benefits of the agreement whether or not they are members of the union.

The key difference between a Division 2 and Division 3 agreement is that because a Division 3 agreement is only binding on individual employees who are members of the organisation of employees, then non-members who get the benefit of the agreement do not have any of the responsibilities of the agreement. (See *NTEU v Quickenden, High Court, Toohey. J. 22/11/1996*.)

Thus it follows that workers who make no contribution to the union will gain the benefit of the work undertaken by the union in negotiating and bargaining and concluding an agreement with an employer and having such an agreement certified under the Workplace Relations Act.

Not only do the provisions of Section 170M and 170MA ensure that certified agreements made with registered organisations have application to non members but the Workplace Relations Act goes significantly further in Part XA by making it clear that it is an offence for an employer to treat a union member and a non union member differently.

What this requires is that, even where an employer negotiates an agreement with a union, it is not possible for the union and the employer to agree that only union members will obtain the benefit of the agreement. For an employer to do so would place the employer in breach of provisions of Part XA because it would be an offence to treat the non union employee less favourably than the union employee by virtue of reason of non membership of the union.

Part XA therefore, under the guise of freedom of association, makes clear that an employee who is not a member of a union is entitled to demand from their employer the benefits that a union has negotiated for union members.

It is clear therefore that the structure and purpose of provisions of the Workplace Relations Act is to ensure that a person who is not a member of a union is entitled to receive the same benefits that a member of the union is entitled to.

Equally where a union has negotiated through an enterprise agreement, which becomes a certified agreement under Division 2 or Division 3 of part VIA of the Workplace Relations Act, a set of terms and conditions of employment for union members then every employee is entitled to receive those conditions.

If employees have a right to receive any benefit negotiated by a union with an employer then there should be a corresponding obligation on the employee to assist in funding the cost of the bargaining negotiation and representation process necessary to obtain and maintain those benefits.

At the present time the structure of the Workplace Relations Act appears to codify the rights of employees, especially non union members, to access the same entitlements and benefits that union members have by virtue of their membership of the union without at the same time requiring or providing codification of the responsibilities or obligations that would go with those rights.

The response by unions to negotiate with employers' bargaining agent fees and to have these endorsed by employees in Certified Agreements is a reflection of the real responsibilities which should be borne and met by non union member employees who have access to the benefits negotiated by a union.

It should be noted that all employees to be covered by an agreement negotiated by a union actually get to vote on the acceptance or rejection of the proposed agreement and the agreement only proceeds where there isa majority vote in favour.

Bargaining agent fees cannot be seen to be defacto compulsory union membership.

In the Association's very strong submissions, the underlying rationale of the Bill is fundamentally flawed as, it is in our view, based upon nothing other than a determination to prevent unions from effectively implementing a fee for service model in relation to services provided by unions.

Overseas Approach

It is important that the Senate have regard to the approach adopted in the United States and Canada in relation to bargaining agent fees. In those two jurisdictions the concept of bargaining agent fees are well entrenched within the legislative framework of bargaining.

Both the United States and Canadian industrial relations system recognise the absolute right of unions to recover a bargaining agent fee, where the union has bargained an agreement, which provides benefits to all employees in a workplace. Employees who are not members of a union are able to be forced to pay a proper bargaining agent fee and the unions have a right to sue to recover such fees.

Both the Canadian and United States systems are based upon the concept of recognition of mutual obligations. If a worker is to have access to the benefits negotiated by a union, then the worker has an obligation to pay a

portion of the cost incurred by the union in negotiating an enterprise agreement.

The key decision in relation to this issue in the Supreme Court of Canada is *Lavigne v Ontario Public Service Employees Union (1991) 2.S.C.R. p211-352.*

Madam Justice McLachlin, part of the majority in this case, said most succinctly:

> *"The whole purpose of the (Rand) formula is to permit a person who does not wish to associate himself or herself with the union to desist from doing so. The individual does this by declining to become a member of the union. The individual thereby dissociates himself or herself from the activities of the union. Fairness dictates that those who benefit from the union's endeavours must provide funds for the maintenance of the union. But the payment is by the very nature of the formula bereft of any connotation that the payor supports the particular purposes to which the money is put. By the analogy with government, the payor is paying by reason of an assumed or imposed obligation arising from this employment, just as a taxpayer pays taxes by reason of an assumed or imposed obligation arising from living in this country." pp 345.346*

The exact same logic compels the total rejection of the current Bill.

Contradictions

There are further deficiencies in the approach adopted by the Government in the structure of the Bill. The Bill does not prevent industrial relations consultants from collecting a fee for bargaining services. The limitation in the Bill relates only to industrial associations collecting bargaining service fees. The utilisation in non union agreements of professional industrial relations consultants, who purportedly represent the interest of employees in a non union agreement, will allow those industrial relations consultants to collect a bargaining agent fee and to do so in a manner identical to the approach adopted by unions. The Bill however, will prevent unions, as

industrial associations, from collecting the fee but still protect the right of industrial relations consultants from collecting a bargaining agents fee.

Furthermore, and in a similar vein, the Bill does not prevent what has occurred in practice, and that is a franchisor can validly collect a bargaining services fee from franchisees in relation to enterprise bargaining. This has happened recently, to the Association's knowledge, in the case of a fast food franchisor which demanded an $1100 fee from each franchisee for the benefit of accessing a non union agreement prepared by the franchisor. A bargaining service fee of this type is clearly permitted under the Bill.

It is clear that the Bill intends to protect such conduct when undertaken by employers, even though it purports to outlaw such conduct when undertaken by unions. The Bill is clearly biased.

Given its overall objectionable purpose, the Bill should be quickly and soundly rejected by the Senate.