# WORKPLACE RELATIONS AMENDMENT BILLS

A submission by the Australian Industry Group and
Engineering Employers' Association, South Australia
to the Senate Employment, Workplace Relations, and Education
Legislation Committee

# 18 APRIL 2002

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## 1.0 Introduction

The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia, representing approximately 10,000 employers, large and small, in every State and Territory. Members provide more than $100 billion in output, employ more than 1 million people and produce exports worth some $25 billion.

Ai Group represents employers in manufacturing, construction, information technology, telecommunications, and other industries.

Ai Group has had a strong and continuous involvement in the industrial relations system at the national, industry and enterprise level for over 130 years. Ai Group is well qualified to comment on the:

- Workplace Relations Amendment (Fair Termination) Bill 2002;
- Workplace Relations Amendment (Fair Dismissal) Bill 2002;
- Workplace Relations Amendment (Genuine Bargaining) Bill 2002;
- Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002; and
- Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002.

This submission is made by Ai Group and on behalf of its affiliated organisation, the Engineering Employers' Association, South Australia (EEASA).

This submission draws on materials submitted to the Committee since 1999 in respect of previous Inquiries into workplace relations amendment bills[1]. It also draws on a recent submission and statement made by Ai Group to the Royal Commission into the Building and Construction Industry.[2]

It is not our intention to comment on all aspects of the Bills but rather to outline Ai Group's position on the significant legislative amendments proposed.

**R N Herbert**
**CHIEF EXECUTIVE**

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[1] Specifically, it draws on Ai Group's submissions in respect of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*; the *Workplace Relations Amendment Bill 2000* (which focussed on pattern bargaining); the *Workplace Relations Amendment (Australian Workplace Agreement Procedures) Bill 2000*; the *Workplace Relations Amendment (Termination of Employment) Bill 2000*; the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000*; and the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001*.

[2] The submission was lodged with the Royal Commission in March 2002 and the Statement was lodged in November 2001.

## 2.0 Workplace Relations Amendment (Fair Termination) Bill 2002

Under the existing s.170CC of the *Workplace Relations Act* ("the Act"), power is provided for a regulation to be made exempting *"employees engaged on a casual basis for a short period"* from the operation of the termination of employment provisions of the Act.

Until recently, Regulation 30B(3) defined a casual employee as being engaged for a *"short period"* unless:

X the employee was engaged by a particular employer on a regular and systematic basis for at least 12 months; and

X the employee had a reasonable expectation of continuing employment.

In a decision of 16 November 2001, the Full Court of the Federal Court ruled that Regulation 30B(3) was invalid because it extended beyond the powers prescribed in the Act for the making of regulations (*Hamzy v Tricon International Restaurants trading as KFC & Ors*, [2001] FCA 1589). It appears that, given the Court's decision, it is now impossible to draft a regulation which fully preserves the intent of the previous arrangements without amending the Act.

On 7 December 2001, a new regulation came into operation which defined "short period" in the following manner: *"a casual employee is engaged by a particular employer for a short period if the occasions on which the employee works for that employer under that engagement occur within a period of less than 12 months".*

While the new regulation has addressed some of the problems caused by the *Hamzy* decision, the concepts of "regular and systematic" employment and "reasonable expectation of continuing employment" are no longer contained within the exemption. These concepts are essential inclusions and are fair to both employers and employees. It is not uncommon for a company to have a list of persons who may be available to carry out casual work and for the company to use that list from time to time when it needs casual labour. If a casual on the list works for a company irregularly and there is no reasonable expectation of continuing employment then it is unfair for an employer to be exposed to an unfair dismissal claim from such a casual - regardless of whether or not the casual has been on the list and worked for the company on several occasions over a period of more than 12 months.

The concepts of "regular and systematic" employment and "reasonable expectation of continuing employment" have been the subject of a significant amount of case law within the AIRC unfair dismissal jurisdiction. The meaning of such terms is now relatively settled. They were adopted by a Full Bench of the AIRC in the recent *Parental Leave for Casuals Test Case* (PR 904631).

The *Hamzy* decision has caused uncertainty and concern amongst employers about the nature and scope of the casual employment exemption under the unfair dismissal laws. This uncertainty is not in the interests of employers or employees. Employers have lost some of the flexibility which they had available with regard to the use of different forms of employment. Further, employees who work on an irregular basis (often voluntarily due to their lifestyle choices or family responsibilities) may find that they have fewer employment opportunities because of an increased use of contractors at the expense of casual labour as a result of the *Hamzy* decision. There is an urgent need for the Act to be amended to restore the intent of the original regulation.

**Table 2.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Fair Termination) Bill 2002***

| Proposed Amendment | Ai Group's Position | Basis of Ai Group's Position |
|---|---|---|
| To relocate the provisions which exempt certain classes of employees from the termination of employment provisions of the Act (including both the unfair dismissal provisions and the unlawful termination provisions), from the Regulations to the Act. The provisions to be relocated are those which existed prior to the *Hamzy* decision. **(170CBA)** | Supported | Incorporating the exemptions within the Act, rather than the Regulations, would address the uncertainty caused by the *Hamzy* decision and reinstate the arrangements that had operated effectively for several years.<br><br>This approach would also result in provisions which are easier for employers and employees to understand and comply with because the key provisions would be located in one place. |
| To remove the words *"or a qualifying period of employment"* which appear in Regulation 30B(1)(c) **(170CBA(1)(c))** | Supported | In August 2001, the Act was amended to provide that an employee is unable to pursue an unfair dismissal claim if he or she is given notice of termination or is terminated prior to the completion of a *"qualifying period of employment"* which is defined as: |

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| | | • three (3) months; or<br>• a shorter period (which could include no period) determined by written agreement between the employee and employer before the commencement of the employment; or<br>• a longer period determined by written agreement between the employee and employer before the commencement of the employment, being a reasonable period having regard to the nature and circumstances of employment.<br><br>The August 2001 amendments to the Act were worthwhile. However, they have created some confusion about the interplay between the impact of these relatively new provisions in the Act and the longstanding exemption for employees serving a period of probation. Probationary employees are exempt from both the unfair dismissal and the unlawful termination provisions. In contrast, the new provisions of the Act relating to a *"qualifying period of employment"* apply only to the unfair dismissal laws. |

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| | | Ai Group's preferred approach would be for the confusion to be remedied by amending the Act to exempt those serving a *"qualifying period of employment"* from all of the termination of employment laws previously referred to in Regulation 30B(1) (ie. both the unfair dismissal laws and the unlawful termination laws). This would mean that the existing Regulation 30B(1)(c) (re. probationary employment) and the proposed new s.170CBA(1)(c) would no longer be required.<br><br>If such approach is not achievable then the removal of the words "or a qualifying period of employment", as proposed in the Bill, would reduce some of the confusion. |
| To preserve the rights, liabilities and obligations of employers and employees despite Regulations 30B(1)(d) and 30B(3) being declared invalid in the *Hamzy* decision. **(170CCA)** | Supported | The provisions preserve the status quo which existed prior to the *Hamzy* decision with the exception that the rights and liabilities of parties to proceedings which have been finally determined by a court or by the Commission before the commencement of the proposed new s.170CCA would not be affected. Such an approach is fair to both employers and employees. |

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| To relocate the provisions which require a fee to be paid when termination of employment applications are lodged, from the Regulations to the Act and to providing for this fee to be indexed annually in line with movements in the Consumer Price Index **(170CEAA)** | Supported | A fee of $50 already applies when unfair dismissal applications are filed with the Registry. Such fee can be waived by the Registrar where a person would suffer significant hardship.<br><br>It is essential that a fee continue to apply when unfair dismissal applications are lodged. The magnitude of the fee is not excessive but it acts as some deterrent to those who might otherwise lodge speculative claims which are without merit. Such claims are costly for the employer and waste the AIRC's resources.<br><br>Given the need for an ongoing filing fee, it is appropriate that the provisions relating to the fee apply permanently and be relocated from the Regulations to the Act. The approach of increasing the fee in line with CPI is a sensible and practical one. Such approach is consistent with the manner in which various other amounts referred to in the termination of employment laws are indexed (eg. The cut-off rate for award free employees in s.170CC(3) and Regulation 30BB; and the maximum amount of compensation which can be awarded to award free employees under s.170CH(9)). |

## 3.0 Workplace Relations Amendment (Fair Dismissal) Bill 2002

This bill incorporates a provision excluding employers with less than 20 employees from the operation of the unfair dismissal laws. There is strong support from small business for this approach. Small business members consistently express the view to Ai Group that the existing unfair dismissal laws operate as a disincentive for them to employ new staff.

If an exemption is not achievable then Ai Group proposes that the Act be amended in the manner set out below.

- **Employees of small businesses should be excluded from pursuing an unfair dismissal claim for the first 12 months of their employment.**

  A 12 month exemption period for small businesses would reduce the disincentive for them to employ new staff, while at the same time preserving the rights of longer serving employees.

  It is noteworthy that in the United Kingdom, employees of all businesses are excluded from pursuing an unfair dismissal case until they have 12 months of continuous employment (subject to certain exemptions, such as termination due to trade union membership).

- **Some of the major constraints of procedural fairness under the Act should be removed for small businesses.**

  At the present time, under the unfair dismissal laws, an employee of any business (large or small) needs to prove that his or her dismissal was *"harsh, unjust or unreasonable"*. That is, the same general standard applies to businesses of all sizes.

  The Act was amended in August 2001 to require the Australian Industrial Relations Commission (AIRC) to take into account the differing capacities of businesses of different sizes to comply with dismissal policies and procedures. However, such amendment, while worthwhile, still requires a small business employer to demonstrate that procedural fairness has been afforded to a dismissed employee, including proving that the employee was warned about unsatisfactory conduct or performance. Without written policies and procedures, proving that procedural fairness has been extended to a dismissed employee several months after a termination can be very difficult for small businesses.

  In addition, the cost of defending and/or settling an unfair dismissal case impacts more heavily on smaller businesses given their fewer financial resources and the fact that they typically do not employ specialist human resource staff.

  Under the Act, all employers must have a valid reason for terminating the employment of any employee but Ai Group proposes that where such valid reason exists, small businesses employers should only be required to demonstrate that they have:

  - Notified the employee of the reason for the dismissal; and

- Given the employee an opportunity to respond to any reason related to his or her capacity or conduct before terminating their employment.

Such an approach meets the standard of procedural fairness prescribed by Article 7 of the *ILO Convention Concerning Termination of Employment at the Initiative of the Employer* (Schedule 10 of the Act). The Act incorporates a higher standard, for example, by requiring in s.170CG(3) that warnings be given. The application of this higher standard to small businesses is not in the national interest.

Both the *Workplace Relations Amendment (Fair Dismissal) Bill 2002,* as drafted, and Ai Group's alternative approach propose special arrangements for small businesses only in respect of the unfair dismissal laws (Subdivision B of Division 3 of Part VIA) – not the unlawful termination laws (Subdivision C). Therefore, it would continue to be unlawful for a business of any size to terminate an employee for reasons such as their membership of a trade union or their temporary absence from work because of illness or injury.

Note: Ai Group's proposals relating to the small business exemption under the *Workplace Relations Amendment (Fair Dismissals) Bill 2002* need to be considered in conjunction with our proposals relating to the *Workplace Relations Amendment (Fair Termination) Bill 2002.* When taken together, Ai Group proposes the following approach:

- all businesses to be exempt from the unfair dismissal laws and the unlawful termination laws for a "qualifying period of employment" of three months (or a longer reasonable period by agreement);
- small businesses to be exempt from the unfair dismissal laws (but not the unlawful termination laws) from the conclusion of the "qualifying period of employment" until 12 months.

Amending the Act in accordance with Ai Group's proposals would result in an appropriate balance being struck between maximising employment and protecting Australian workers.

**Table 3.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Fair Dismissal) Bill 2002***

| Proposed Amendment | Ai Group's Position | Basis of Ai Group's Position |
|---|---|---|
| To prevent unfair dismissal claims by employees if their employer has less than 20 employees **(170CE (5C),(5D) &(5E))** | Supported, but if a blanket exemption is not achievable then Ai Group proposes an alternative approach | There is strong support from small business for a blanket exemption from the unfair dismissal laws. Small business members consistently express the view to Ai Group that the existing unfair dismissal laws operate as a disincentive for them to employ new staff.<br><br>If an exemption is not achievable then Ai Group proposes that the Act be amended to:<br><br>• Prevent employees of small businesses pursuing an unfair dismissal claim during the first 12 months of their employment; and<br>• Remove some of the major constraints of procedural fairness for small businesses. (See details above). |

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| | | Note: Ai Group's proposals relating to the small business exemption under the *Workplace Relations Amendment (Fair Dismissals) Bill 2002* impact upon our proposals with regard to the *Workplace Relations Amendment (Fair Termination) Bill 2002*. When taken together, Ai Group proposes the following approach:<br><br>• all businesses to be exempt from the unfair dismissal laws and the unlawful termination laws for a "qualifying period of employment" of three months (or a longer reasonable period by agreement);<br>• small businesses to be exempt from the unfair dismissal laws (but not the unlawful termination laws) from the conclusion of the "qualifying period of employment" until 12 months |

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| To enable the Commission to dismiss unfair dismissal applications where they are invalid because of the small business exemption **(170CEB)**. In such circumstances, the Commission would not be required to conduct a hearing. | Supported | This measure complements the exemption for small business. It recognises that the cost of defending an unfair dismissal case impacts more heavily on smaller businesses given their fewer financial resources. It also recognises the fact that small businesses typically do not employ specialist human resource staff with knowledge of unfair dismissal proceedings. |

## 4.0 Workplace Relations Amendment (Genuine Bargaining) Bill 2002

### 4.1 Union pattern bargaining strategies

The pattern bargaining strategies being pursued by unions in the construction and manufacturing industries are highly inappropriate and damaging. Currently, 69 per cent of all "enterprise" agreements apply in these sectors.[3]

The union strategies involve the following steps, each of which are described below:

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| *Step One* | Companies across major sectors of the industry are forced to have a common expiry date for their enterprise agreements; |
| *Step Two* | Uniform bargaining periods are established across the sector; |
| *Step Three* | A template agreement is created; |
| *Step Four* | Employers are coerced to accept the pattern outcome. |

[3] 47% of all agreements apply in the construction sector and 22% of all agreements apply in the manufacturing sector. Source: Department of Workplace Relations and Small Business, Workplace Agreements Database.

### 4.1.1 Step One – Common expiry dates

Unfortunately, in the building and construction industry, the unions have already succeeded in lining up the expiry dates of "enterprise" agreements within most of the major sectors of the industry. This means that "enterprise" agreements within each of these sectors expire at a common time, which assists the unions in achieving a pattern outcome during the next bargaining round. The unions simply adopt the tactic of refusing to sign any enterprise agreement which does not have the required common expiry date.

In the manufacturing sector in 2000, the metal unions embarked upon a highly damaging and costly campaign to bring an end to enterprise bargaining in Victoria. **The campaign ultimately failed but the metal unions are currently planning a new national pattern bargaining push in early 2003. For the past two years they have been pursuing a common expiry date of 31 March 2003 and have succeeded in lining up the expiry dates of hundreds of agreements in various states on this date.**

### 4.1.2 Step Two - Establishing bargaining periods across the industry or sector

The Act permits industrial action to be taken in pursuit of an enterprise agreement, subject to the establishment of a bargaining period at the relevant enterprise and the party seeking to take industrial action giving a prescribed period of notice to the other negotiating party, of the specific industrial action to be taken.

Despite the fact that the Act emphasises that the above process relates to bargaining carried out at the enterprise level, the unions in the construction and manufacturing industries have devised a strategy which they argue gives them the ability to extend the right to take protected action to the industry level.

The unions have adopted the tactic of serving employers throughout the sector with bargaining notices in identical terms. Hundreds, or even thousands, of employers receive an identical notice at the same time, advising them that the relevant union is seeking to negotiate an "enterprise" agreement with each one of them.

### 4.1.3 Step Three – Creating a template agreement

The unions seek to create a template agreement in various ways. Their preferred approach is to seek agreement with a relevant employer association in the hope that members of that association will accept the agreement. If this is not possible, the unions typically look for a group of companies or a significant individual company that they can place under commercial pressure.

However, a "willing" employer negotiator is not a critical part of the unions' strategy. In the absence of a pattern agreement being reached with employers, the unions just draw up their own template "agreement" on the basis of what they believe they can force employers throughout the industry or sector to pay.

Tragically, in each round of bargaining in the construction sector, buoyed by the "success" of their strategy in previous rounds, the unions' claims are getting more and more excessive.

### 4.1.4 Step Four – Coercion of employers to accept the pattern outcome

Once the unions have developed their pattern agreement through the above three steps, they then typically seek to coerce employers to accept it. This coercion may take the form of:

- Organising industrial action against companies, which they argue is protected, because of the bargaining period established;
- Threatening industrial action against companies;
- In the construction and contract maintenance sectors, seeking to prevent companies from working on sites until they agree to the pattern outcome.

## 4.2 Victorian building industry dispute in 2000

The damaging nature of union pattern bargaining strategies is highlighted by the Victorian building industry dispute of early 2000. Construction unions pursued, through pattern bargaining, claims for excessive improvements to wages and conditions, the magnitude of which was impossible to justify at a time when building industry activity was declining. Key events relating to this dispute are summarised below.

***36 hour week agreed upon on the Docklands site***

On the strategically critical Colonial Stadium (Docklands) site, electrical contractors conceded a 36-hour week and a 10 hour-a-week limit on overtime. This flowed to all contractors on the site including several of the major building companies. The unions were able to apply enormous industrial pressure to the contractors on this site because:

- the agreements applying to the site had expired and the unions were free to pursue protected industrial action in support of their claims; and
- the contractors were under enormous commercial pressure to complete the project before the start of the 2000 AFL season.

***Industrial action in relation to the renegotiation of the Victorian Building and Construction Industry Pattern Agreement***

On 30 November 1999, the Victorian Building and Construction Industry Pattern Agreement expired. The Construction, Forestry, Mining and Energy Union's (CFMEU) claims included a 24 per cent wage increase over three years, a 36 hour week, full income protection, increased site allowances, increased superannuation contributions, increased redundancy benefits, protection against the impact of the GST and compensation for increased tolls.

During December 1999 and January 2000, the CFMEU served bargaining notices on approximately 3000 employers in the building and construction industry in Victoria.

In January and February 2000, approximately 3000 employers in the industry received notices of the unions' intention to take industrial action in pursuit of their claims. Industrial action was taken across the industry in early February 2000.

***Termination of bargaining periods by Commissioner Merriman***

On 18 February 2000, the MBAV made application to the Australian Industrial Relations Commission (AIRC), on behalf of approximately 200 employers, for the suspension or termination of bargaining periods. Following 11 days of hearings between 24 February and 17 March, on 22 March 2000 Commissioner Merriman decided to terminate 216 bargaining periods under s.170MW(3) of the Act and ordered that normal work resume on 24 March 2000[4]. The Commissioner directed the parties into conciliation without delay and advised the parties that if conciliation was unsuccessful then the matter would be arbitrated by a Full Bench of the Commission.

***Agreement reached between Grocon and the unions***

On 23 March 2000 (the day after C Merriman's decision), Grocon (the Grollo Group) reached agreement with the unions on the introduction of a 36 hour week.

***Agreement reached between 11 employers and the unions***

During late March 2000 and early April 2000, a group of 11 employers led by Multiplex were negotiating with the unions. On 4 April 2000, the group reached agreement with the unions on a package involving a 15 per cent wage rise over three years (plus a further 3 per cent in the fourth year or CPI whichever is greater) and the phasing in of a 36 hour week over four years. The 36 hour week is to be implemented through the granting to employees of an additional 13 days off per year (called Productivity Leisure Days or PLDs), phased-in as follows: Nil additional days in 2000; Nine additional days in 2001; Nine additional days in 2002; and 13 additional days in 2003.

***Agreement flowed throughout the building and construction industry in Victoria via the Victorian Building and Construction Industry Pattern Agreement***

On 11 April 2000, various other major construction companies which had been strongly opposing the 36 hour week, agreed to the arrangements negotiated with the group led by Multiplex, with little alteration. Shortly after this, the conciliation proceedings before Commissioner Merriman were wound up.

By mid-May 2000, the terms of a new Victorian Building and Construction Industry Pattern Agreement had been reached in negotiations between the CFMEU and the MBAV. The agreement expires on 30 November 2002 and it incorporates the PLDs and wage increases agreed upon by the group led by Multiplex.

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[4] Print S4379

***Flow on continued via the Victorian Building Industry Agreement***

The Victorian Building Industry Agreement (VBIA) applies throughout Victoria to on-site work on building and construction projects.

The VBIA expired on 30 March 2000 and, following the negotiation of the new Victorian Building and Construction Industry Pattern Agreement, a new VBIA was negotiated. The *Victorian Building Industry Agreement 2000-2005* incorporates the 36 hour week arrangements agreed upon by the group led by Multiplex.

***Flow on potential in other states and to other sectors***

In NSW, the construction unions have announced their intention to pursue a campaign in mid- to late-2002 to achieve a shorter working week. Similar attempts are being made by unions in other states to flow on the 36 hour week.

## 4.3 Campaign 2000 in the manufacturing industry in Victoria and the decision of Justice Munro of the AIRC

Given the unions' perception of the "success" of their pattern bargaining strategies in the building and construction industry, they endeavoured to apply the same strategies in the manufacturing industry in Victoria.

From 1998, the Australian Manufacturing Workers' Union (AMWU) and the Communications, Electrical and Plumbing Union (CEPU) began refusing to sign any agreement in the manufacturing industry in Victoria which did not expire on 30 June 2000. By early 2000, approximately 500 agreements in the manufacturing industry had this expiry date.

In November 1999, the unions scheduled state-wide stoppages to seek endorsement for their Campaign 2000 log of claims. In response, Ai Group obtained orders from the AIRC and the Federal Court requiring the unions to call off the stoppages. When the orders were ignored Ai Group pursued contempt of court actions against the AMWU, the CEPU, the AWU and three officials. Arising from those proceedings, three officials were found guilty of contempt and Craig Johnston, the Victorian State Secretary of the AMWU and Dean Mighell, the State Secretary of the CEPU were each fined $20,000.

Some of the unions' own literature about Campaign 2000 clearly stated that they intended to ignore Court and Commission orders if necessary to achieve their objectives.

On this point, in handing down his decision in the contempt proceedings, Justice Merkel of the Federal Court said:

> *The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their*

*disputes.....it also requires that parties comply with the orders made by the courts in determining those disputes.*

Following Ai Group's refusal to force a common outcome on its member companies, the unions embarked upon a campaign to force individual companies across the industry to capitulate.

From early 2000 the unions refused to meet with companies at the enterprise level and organised collective meetings of employers across various sectors. Despite threats of, and in some cases actual, industrial action, all but a very small number of employers refused to attend. After the sector meetings failed due to lack of attendance the unions tried to organise meetings across the whole industry. Despite their efforts and threats they could only convince a handful of companies, mainly in the contract maintenance and metals construction sector, to attend.

Identical bargaining notices were served on approximately 1500 employers and in late-August 2000, all of these employers received identical notices of a state-wide stoppage (which supposedly related to the negotiation of their enterprise agreements).

As soon as Ai Group became aware of the state-wide stoppage we made application to the Commission to suspend or terminate bargaining periods on behalf of a large number of employers. Despite this, the stoppage went ahead.

The proceedings before the Commission continued for several weeks. Twice the unions withdrew all of the relevant bargaining periods in an unsuccessful attempt to stop the case proceeding.

In a significant decision, on 16 October Justice Munro terminated bargaining periods for all of the applicant companies on the basis that the unions had *"not genuinely tried to reach agreement"* with the companies. This removed the unions' right to take protected industrial action.

In his decision, Justice Munro dealt at some length with the rights of parties in respect of pattern bargaining. Some key questions were dealt with:

- ***Is a union entitled to make common claims across an industry?***

  On this issue, Justice Munro held that:

  > *"A common set of demands for conditions of employment, or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a negotiating party is not genuinely trying to reach agreement with the counterpart party".*
  >
  > and
  >
  > *"Industry-wide demands are often made by unions and sometimes pursued at national level. It is not the characteristic of the demand that may cause offence..... But advancement of such claims in a way that denies individual negotiating parties opportunity to concede, or to modify by agreement, cannot satisfy the test established by the Act".*

- ***Is a union entitled to refuse to accept any outcome other than the one that it is pursuing across an industry and take industrial action in pursuit of that outcome?***

  On this point, Justice Munro held that a negotiating party's conduct must evidence *"a genuine try to reach an agreement with the opposing negotiating party to whom the industrial action or bargaining period is specific"*.

  If a negotiating party is *"trying to reach agreement with all, or an entire class of negotiating parties in an industry - all or none"* then the negotiating party is *"not genuinely trying to reach agreement with <u>any</u> negotiating party in the industry or class"*. However, in a particular case the issue is dependent upon matters of fact and degree.

- ***Is a union able to reach an agreement with an industry association and then take industrial action against companies in the industry to force them to incorporate the outcome in their enterprise agreements?***

  On this issue, Justice Munro said that *"the advancement of claims in a way that effectively seeks agreement from or through entities that are not the negotiating party to whom industrial action or the relevant bargaining period is directed"* cannot satisfy the requirements of the Act.

- ***Is industrial action which is taken at a common time throughout an industry (eg. a State-wide stoppage) and organised by unions as part of a campaign in support of common claims, grounds for suspending or terminating bargaining periods?***

  With reference to s.170MW(3) of the Act which enables the AIRC to suspend or terminate bargaining periods if industrial action is threatening to cause significant damage to an industry or an important part of it, Justice Munro said:

  > *"It seems an inescapable conclusion that co-joint industrial action on one day against many negotiating parties in an industry sector magnifies the social and economic impact of the industrial action"*

  Justice Munro appropriately concluded that protected action can only be taken if the parties have *"genuinely tried to reach agreement"* at the enterprise level. If a union is pursuing a pattern outcome and is refusing to accept any other outcome at enterprises throughout an industry or sector then the union is not genuinely trying to reach agreement at the enterprise level and therefore any action taken is not protected. Further, this constitutes a ground to have the bargaining period suspended or terminated.

## 4.4 Legislative amendments to give employers greater protection against damaging pattern bargaining campaigns

While the decision of Justice Munro provides greater clarity about the rights of parties to engage in protected action in pursuit of pattern bargaining, Ai Group believes that the Act needs to be amended to make it clear that protected industrial action only applies to the negotiation of enterprise agreements and not to pattern agreements pursued by unions across an industry or sector. Such approach would not prevent agreements which are consistent with an industry or sector pattern being certified by the Commission where such agreements are freely entered into by the parties to those agreements. However, it would prevent protected industrial action (which was introduced into the Act exclusively for enterprise bargaining), being used by unions to pursue industry and sector wide claims.

The approach taken in the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* is consistent with the decision of Justice Munro in the *Campaign 2000* case. It preserves the right of unions to make common claims across an industry but requires that such claims be genuinely negotiable at the enterprise level. It prevents unions taking protected industrial action in pursuit of non-negotiable pattern outcomes.

Ai Group strongly supports the Bill but proposes a minor amendment to avoid any doubt about the meaning of the term "industry" in s.170MW(2A)(a) and (b)(i). In many cases pattern bargaining campaigns are pursued against companies in

sectors of an industry. Therefore, Ai Group proposes that the term "industry" be replaced with the term "industry or sector of an industry" in s.170MW(2A)(a) and (b)(i).

## 4.5 Cooling-off periods

Ai Group strongly submits that the Act should enable the Commission to call for a cooling-off period.

Ai Group's September 1999 submission to the Senate Committee inquiring into the provisions of the *Workplace Relations Legislation (More Jobs, Better Pay) Bill 1999* was supported by statutory declarations from some 20 member companies. Many of these statutory declarations outlined serious dispute situations which had arisen and which would have been assisted by a cooling-off period.

In the *Campaign 2000* proceedings, Justice Munro said:

> *"it appears to me in most disputes to be a matter for welcome that the parties resort to what are termed cooling-off periods.....the term cooling-off period I don't think is known to the Act at this stage, although some have sought to have it introduced.....The course of Campaign 2000 litigation before the Commission in all its aspects indicates that the cooling-off periods have in particular instances served some useful purpose in reaching agreement in some instances or at least in allowing the parties to back off from what would otherwise have emerged as dug in positions..".*

In deciding to terminate the bargaining periods and order that no further bargaining periods be established for a six week period, Justice Munro said:

> *"The effect of that order and declaration is to attempt to force an end to the current phase of Campaign 2000 activity against the 33 employer applicants. Thereby, the order will allow an effective and unequivocal cooling-off period, free of bargaining periods until the end of November".*

The *Campaign 2000* proceedings before Justice Munro demonstrate that the Commission has the power to order a cooling-off period in limited circumstances. However, in that case, Ai Group made application to suspend or terminate bargaining periods on 23 August 2000. The bargaining periods were eventually terminated by Justice Munro on 16 October 2000 after lengthy hearings over the several weeks. This highlights the need for a fast and effective mechanism to be introduced into the Act to give the AIRC the power to order a cooling off period in appropriate circumstances.

The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* provides such a mechanism. The Bill appropriately leaves it to the Commission to determine whether or not a cooling-off period should be established to assist the resolution of a particular dispute.

## 4.6 Amendments to prevent unions delaying proceedings and frustrating the intentions of the Act

During the two significant disputes in 2000 referred to above – the Victorian building industry dispute and the *Campaign 2000*

proceedings – deficiencies in the Act became apparent.

Both of these industry-wide disputes involved a large number of workplaces, all of which had been served with identical notices initiating bargaining periods. In the *Campaign 2000* proceedings, one of the manufacturing unions involved (the AMWU) served 1200-1500 bargaining notices on employers. Other manufacturing unions served hundreds of additional bargaining notices.

The process of identifying the specific bargaining case numbers relating to each of the bargaining notices served by each of the individual unions was exhaustive in both proceedings and contributed to the delays associated with having the bargaining periods terminated by the Commission.

Further, in the Campaign 2000 proceedings, twice the unions withdrew bargaining notices and then re-served them in an attempt to frustrate the proceedings. With regard to such tactics Justice Munro stated[5]:

> *"The timing of the beginning, ending and renewal of bargaining periods with employer negotiating parties is eloquent. It is a basis for an inference that the AMWU's ostensible cessation of bargaining periods has been facile……Within two working days of the report to the Commission about the cooling-off period, a majority of those employers were faced with new notices initiating bargaining periods".*

Despite the Commission's strong criticisms of union tactics designed to frustrate the processes of the Commission, the current provisions of the Act dealing with suspension and termination of bargaining periods encourage such tactics.

To address this issue, Ai Group proposes that the Act be amended to enable applicants seeking suspension or termination of bargaining periods to simply identify the enterprises involved – not the specific bargaining periods established. It is proposed that the Commission have the power to suspend or terminate all bargaining periods relating to negotiations over certified agreements applicable to particular single businesses or parts (without the need to identify the specific bargaining case numbers relating to each relevant bargaining period). Ai Group also proposes that the Commission have the power to make an order that prevents negotiating parties initiating further bargaining periods in pursuit of such certified agreements for the period specified in the order. This approach would:

- Avoid the need for specific bargaining case numbers to be identified;
- Prevent unions simply serving other bargaining notices to establish new bargaining periods to replace suspended or terminated bargaining periods.

Under s.170MW(10) of the Act, the Commission currently has the power to order that a further bargaining period not be established for a specified period upon the termination of a specific bargaining period. However, in the abovementioned *Campaign 2000* proceedings before Justice Munro, the unions argued that the power in s.170MW(10) only relates to the termination of bargaining periods and that the Commission does not have the power to order that further bargaining periods not

[5] Print T1982, page 12.

be established when bargaining periods are suspended. (NB. S.170MW(10) does not refer to suspension).

Ai Group does not agree with this view but if it is correct, then the Commission's power to suspend bargaining periods would be of little practical effect because a union could simply initiate other bargaining periods to overcome the suspension of the earlier ones. Ai Group's proposed amendments would clarify that unions are not able to frustrate the Commission's processes in the way that they argue they can.

The proposed s.170MWA in the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* addresses one of the problems which arose in the *Campaign 2000* proceedings before Justice Munro. That is, where a union withdraws a bargaining period to deprive the Commission of jurisdiction and then immediately establishes another bargaining period. Ai Group strongly supports the Bill but the other problems outlined above need to be addressed through appropriate legislative amendments.

**Table 4.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002***

| Proposed Amendment | Ai Group's Position | Basis of Ai Group's Position |
|---|---|---|
| To assist the Commission to consider whether a negotiating party is or is not genuinely trying to reach an agreement with other negotiating parties at the enterprise level. **(170MW(2A))** | Supported | Union pattern bargaining campaigns are causing significant loss and damage to Australian employers and are undermining the objectives of the Act. Several significant pattern bargaining campaigns are currently being planned by unions in the construction and manufacturing sectors. The Bill provides enhanced protection for employers targeted during such campaigns.<br><br>Genuine enterprise bargaining occurs only when parties show their willingness to reach agreement at the enterprise level. The Bill would require the Commission to consider the intentions and conduct of parties during negotiations when considering applications made under s170MW for suspension or termination of a bargaining period. The Commission would be encouraged to consider whether the action of negotiating parties was focussed on reaching agreement at a particular enterprise, or on reaching an agreement across an industry or sector. |

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| | | The approach in the Bill draws heavily on the decision of the Justice Munro in the *Campaign 2000* case (Print T1982). This approach preserves the right of unions to make common claims across an industry but requires that such claims be genuinely negotiable at the enterprise level. It prevents unions taking protected industrial action in pursuit of a non-negotiable pattern outcome.<br><br>Ai Group strongly supports the Bill but proposes a minor amendment to avoid any doubt about the meaning of the term "industry" in s.170MW(2A)(a) and (b)(i). In many cases pattern bargaining campaigns are pursued against companies in sectors of an industry. Therefore, Ai Group proposes that the term "industry" be replaced with the term "industry or sector of an industry" in s.170MW(2A)(a) and (b)(i). |

| | | |
|---|---|---|
| To enable the Commission, in appropriate circumstances, to suspend a bargaining period to allow for a 'cooling-off' period **(170MWB)** | Supported | The *Campaign 2000* proceedings before Justice Munro highlighted the need for a fast and effective mechanism to be introduced into the Act to give the AIRC the power to order a cooling off period in appropriate circumstances.<br><br>The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* provides such a mechanism. The Bill appropriately leaves it to the Commission to determine whether or not a cooling-off period should be established to assist the resolution of a particular dispute. |
| To allow the Commission to make orders to prevent the initiation of a new bargaining period, in appropriate circumstances, where a party has withdrawn a bargaining period. **(170MWA)** | Supported | The proposed s.170MWA in the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* addresses one of the problems which arose in the *Campaign 2000* proceedings before Justice Munro. That is, where a union withdraws a bargaining period to deprive the Commission of jurisdiction and then immediately establishes another bargaining period. Ai Group strongly supports the Bill. |

| | | |
|---|---|---|
| | | However, various other related problems have arisen which need to be addressed.<br><br>The Act should be amended to enable applicants seeking suspension or termination of bargaining periods to simply identify the enterprises involved – not the specific bargaining periods established. During an industry-wide pattern bargaining campaign, the process of identifying the case numbers assigned to all of the thousands of individual bargaining notices served by unions is exhaustive and frustrates employer attempts to pursue suspension or termination of bargaining period.<br><br>It is proposed that the Commission have the power to suspend or terminate <u>all bargaining periods</u> relating to negotiations over certified agreements <u>applicable to particular single businesses or parts</u> (without the need to identify the specific bargaining case numbers relating to each relevant bargaining period). The Commission should also have the power to make an order that prevents negotiating parties initiating further bargaining periods in pursuit of |

| | | |
|---|---|---|
| | | certified agreements for the period specified in the order. This approach would:<br><br>• Avoid the need for specific bargaining case numbers to be identified;<br>• Prevent unions simply serving other bargaining notices to establish new bargaining periods to replace suspended or terminated bargaining periods.<br><br>S.170MW(10) of the Act should be amended to clarify that the Commission has the power to order that a further bargaining period not be established for a specified period upon the suspension of a bargaining period. (Note. S.170MW(10) does not refer to suspension and the unions have argued that the power in s.170MW(10) only relates to the termination of bargaining periods).<br><br>Ai Group does not agree with the unions' interpretation of the Act but if it is correct, then the Commission's power to suspend bargaining periods would be of little practical effect because a union could simply initiate another bargaining period to overcome the suspension of an earlier one. Further, if this view is correct then s.170MWB of the Bill may prove to be ineffective |

| | | |
|---|---|---|
| | | because unions could simply initiate a new bargaining period and take protected action during the cooling-off period, despite the suspension of the bargaining period to which the cooling-off period relates.<br><br>Ai Group's proposed amendments would clarify that unions are not able to frustrate the Commission's processes in the way that they argue they can. |

# 5.0 Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

## 5.1 Union claims

Over the past two years, several unions have sought to convince employers to include non-union bargaining fee clauses in enterprise agreements.

At its 2000 national congress, the Australian Council of Trade Unions (ACTU) unanimously endorsed a policy promoting compulsory bargaining fees through enterprise bargaining.[6] The relevant policy reads:

> *"3.18 Provision should be made for certified agreements to include a term providing that a specified negotiating fee be deducted from the wages of all employees covered by the agreement to be forwarded to the relevant union, with such fee to be offset against union dues if paid by the employee."*

The ACTU left it up to individual unions to implement the policy as they saw fit.

[6] ACTU, *Minutes of the Australian Council of Trade Unions Congress 2000: Wollongong Entertainment Centre*, 26 June – 29 June 2000, ACTU, Melbourne, 2000, p 165.

The CEPU embarked upon a campaign to secure the payment of compulsory bargaining fees in the electrical contracting industry. After the CEPU applied significant industrial pressure to its members, the National Electrical Contractors Association (NECA) reached a pattern agreement with the CEPU which incorporated a clause prescribing a compulsory bargaining fee. The relevant clause stated:

> ***"Clause 14.3 Bargaining Agents Fee***
>
> *The Company shall advise all employees prior to commencing work for the Company that a 'Bargaining Agents' fee of 1% of the employees gross annual income or $500 which ever is the greater is payable to the [CEPU annually] . . . "*

Under the standard clause, employees could choose to join the CEPU as a member at the cost of around $300 per annum, or choose not to and be required as a condition of employment to pay the $500 bargaining fee. If they did not pay the $500 fee, then they were subject to disciplinary action from their employer. The fee was only to be levied on new, not existing employees. It was clear that the CEPU would waive the bargaining fee in respect of those who joined its ranks. This standard pattern clause has now been incorporated within hundreds of certified agreements applying to electrical contractors.[7] Similar clauses are being pursued by other unions in the building and construction industry.

Another sector in which unions are endeavouring to force employers to include compulsory bargaining fee clauses in agreements is the metal manufacturing industry. The standard log of claims promulgated by the Australian Manufacturing Workers' Union (AMWU) includes the following clause:

***"46.0 Bargaining Agents Fee***

*46.1 The Company shall advise all employees prior to commencing work for the company that a 'Bargaining Agents' fee of $500.00 per annum is payable to the union.*

*46.2 The relevant employee to which this clause shall apply shall pay the 'Bargaining Agents' fee to the union in advance on a pro-rata basis for any time which the employee is employed by the company. By arrangement with the union, this can be done in quarterly instalments throughout the year.*

*46.3 The employer will, at the request of the employee to whom this clause applies, provide a direct debit facility to pay the bargaining agents fee to the union".*

Union claims for the payment of bargaining fees by non-union members raise an important public policy issue: what should be the attitude of the law and law-makers in Australia toward agency shop arrangements?

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[7] For example, see, eg, *A & L Priddle Electrical Contractors Enterprise Bargaining Agreement 2000-2003* (AIRC A4209 Cas M Doc S7202).

## 5.2 Legislative framework

One of the central pillars of the *Workplace Relations Act* is the notion of freedom of association.

The objects of the Act in s.3 include:

> *"The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> . . . . . .
>
> *(f) ensuring freedom of association including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association . . . "*

Part XA of the Act exists to protect a person's choice to join or refuse to join a trade union.[8] In *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd*, Wilcox J stated:[9]

> *"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."*

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8 See *Employment Advocate v National Union of Workers* (2000) 98 IR 302 at [102]

9 [2000] FCA 1008 at [48]. This statement was also cited with approval by Ryan J in *Maritime Union of Aust v Burnie Port Corp Pty Ltd* (2000) 101 IR 435 at [51-52]. On appeal, the Full Court did not disagree: see *Burnie Port Corp Pty Ltd v Maritime Union of Aust* [2000] FCA 1768.

Part XA represents a contemporary legal expression of the concept of voluntary unionism which has always been well-entrenched in Australian domestic law.

Although closed shop arrangements have historically been common in Australia, the concept of voluntary unionism has always been enshrined within the law of this country. It was estimated that as much as 25% of the Australian workforce and about 50% of union members were covered by "closed shop agreements" at the beginning of the 1980s.[10] However, with the significant decline in union membership over the past two decades, it is apparent that closed shop arrangements have diminished.

Moreover, the law in Australia has never sanctioned closed shop arrangements. For example, it has been held by the High Court of Australia that it is beyond the capacity of the AIRC (and its predecessors) to include compulsory membership provisions in awards.[11]

The position today is that in all jurisdictions closed shop arrangements are effectively unenforceable as a matter of law, since it is unlawful to discriminate against employees (including in relation to hiring) on the ground that they do not belong to a union.[12] In other words, legislators around Australia (whether at State or federal level) now recognise that union membership must be a matter of individual choice.

Furthermore, it is also common now for industrial legislation to invalidate provisions in an award or agreement which might have the effect of discriminating in that way. Section 298Y of the Act stipulates that "*a provision of an industrial instrument, or an agreement*

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10 M Wright, "Unionisation in Australia and Coverage of the Closed Shop" (1981) 7 *Aust Bulletin of Labour* 122.

11 *R v Wallis and Federated Clerks' Union of Aust; Ex parte Employers' Association of Woolselling Brokers* (1949) 78 CLR 529; *R v Findlay ; Ex parte Vic Chamber of Manufactures* (1950) 81 CLR 537

*or arrangement (whether written or unwritten), is void to the extent that it requires or permits, or has the effect of requiring or permitting, any conduct that would contravene*" the prohibitions in Part XA concerning freedom of association.

To reinforce the point, the Act provides that the AIRC "does not have power" to include such terms in an award (s.94) and must refuse to certify any agreement containing such terms (s.170LU(2A)). Section 298Z goes on to require the AIRC to remove similar "objectionable provisions" from existing awards or certified agreements on application.[13]

The Act evinces a clear policy intention: that employees should be free to choose whether or not to belong to a union. This policy reflects contemporary community values and attitudes in Australia.

About the closest which the law has come toward any notion of compulsory unionism is preferential treatment toward union members being contained within awards of the AIRC. From the early stages of the conciliation and arbitration system until the passage of the current Act, an express power existed to include provisions in awards directing that preferential treatment be given to union members in relation to a range of matters, including engagement in employment, promotion and retention in employment (for example, in relation to selection for redundancy). However, with the repeal of s.122 of the *Industrial Relations Act 1988 (Cth)*, that power has been removed. Any provision in an award or agreement purporting to require such preference would now be void as it would contravene the prohibitions on discrimination against non-unionists in Part XA. The position is the same in most of the State jurisdictions.[14]

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12 For example, *Workplace Relations Act 1996 (Cth), ss. 298K, 298L(1)(b); Industrial Relations Act 1996 (NSW) s.210(b)*; *Industrial and Employment Relations Act 1994 (SA), s.115(b), 116-116B*

13 For comparable State provisions, see *Industrial Relations Act 1996 (NSW), s.211; Industrial Relations Act 1999 (Qld), s.109*.

14 See *Industrial Relations Act 1996 (NSW), s.221; Industrial Relations Act 1999 (Qld), s.109.*

This reflects the almost universal rejection in Australia of legislative measures which may have either the direct or indirect effect of compelling union membership. Parliaments across Australia have legislated to protect the position of non-unionists. In sum, voluntary unionism is enshrined as part of the law of the land.

## 5.3 AIRC and Federal Court proceedings

The AIRC was called upon to deal with the important public policy issue of compulsory bargaining fees when the Employment Advocate challenged the standard CEPU bargaining fee clause.[15] The Employment Advocate argued that the clause offended the freedom of association provisions of the Act, and therefore should be purged.

Section 298(1)(b) of the Act says, in effect, that an employer may not discriminate against an employee or prospective employee because that person "*is not, or does not propose to become, a member of an industrial association*".

The Employment Advocate submitted that the clause in question was indirectly discriminatory: on its face it applied equally to unionists and non-unionists, but in fact the union's likely waiver of the bargaining fee for those who joined the union as members meant that there would be a disparate and prejudicial impact.

[15] *Re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003,* McIntyre VP, AIRC, 9 February 2001, PR900919. The CEPU pattern bargaining fee clause is set out in Section 5.1 above.

McIntyre VP came to the conclusion that the clause in issue was there to *"persuade . . . or coerce new employees into joining the [CEPU]"*.[16] He also found that if employees failed to pay the fee, they would be in breach of their employment obligations and the employer would consequently be entitled to take disciplinary action against them. However, McIntyre VP found, on technical grounds, that the clause did not breach the freedom of association provisions and therefore the Commission had no power to remove it from the certified agreements.

VP McIntyre's decision was upheld on appeal[17] - once again on technical grounds. The Full Bench said:

> *"It was submitted that because the Vice President made a finding of fact that the clause effectively coerces new employees into joining the CEPU, it was an error not to find that the clause is an objectionable provision. It was contended that because the finding of fact is not appealed against, we are bound to accept it for the purpose of the appeal.*
>
> *We have some reservations about counsel for the Advocate's characterisation of the Vice President's view of the operation of the clause as a finding of fact. Nevertheless we agree with the Vice President's assessment of the situation. It is likely that the CEPU will waive the enforcement of the bargaining agent's fee for CEPU members and it follows that the clause, if it is enforced against those who are not union members, will encourage new employees to join the CEPU by providing a substantial financial incentive to do so. We do not agree, however, that it must follow that the Vice President was bound to find that the sub-clause is an objectionable provision.*

16 Ibid at [20].
17 Jiudice P, Kaufman SDP and Whelan C, 12 October 2001, PR910205, paras 25 and 26.

*In our view the outcome of this appeal must depend in large measure on the meaning of the phrase "conduct that would contravene this Part " in s.298Z(5). If the clause requires or permits, etc such conduct then the clause is objectionable." (Emphasis added)*

In the above proceedings, the Full Bench questioned whether or not the clause was a matter pertaining to the relationship between an employer and its employees. Under s.170LI of the Act, certified agreements can only deal with matters pertaining to such relationships. However, ultimately the Full Bench decided that it would not deal with this question in the proceedings but rather leave the matter to be resolved at another time. The Full Bench said: *"In the circumstances we shall not express our view on the issue"*[18].

The issue of whether or not a clause dealing with compulsory bargaining fees is a matter pertaining to the employment relationship was subsequently considered by the Federal Court.

In the *Electrolux* case[19], Justice Merkel held that the unions' claim for the payment of a bargaining fee by non-union members is not a matter pertaining to the employment relationship and therefore:

- protected action cannot be taken if the claim is included amongst any of the claims being pursued during enterprise agreement negotiations; and
- agreements cannot be certified by the AIRC if they contain compulsory bargaining fee provisions.

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18 Ibid. Para 22.

19 *Electrolux Home Products v AWU* [2001] FCA 1600 (14 November 2001)

The unions have lodged an appeal against Justice Merkel's findings on bargaining fees and the appeal is scheduled to be heard by the Full Federal Court on 28 and 29 May 2002.

## 5.4 Arguments against compulsory bargaining fees

Numerous Ai Group member companies have expressed concern about what they perceive as the introduction of a form of compulsory unionism via the de facto mechanism of compulsory bargaining fee clauses in certified agreements. Indeed, many of these companies are currently facing union demands to insert compulsory bargaining fee clauses within new certified agreements. Invariably, the fees exceed the standard union dues by several hundred dollars.

**Freedom of choice is a fundamental tenet**

Perhaps the most unfair aspect of the compulsory bargaining fee clauses currently being pursued by trade unions is that they restrict an individual's freedom of choice, and effectively operate by way of financial coercion toward non-union members.[20]

Bargaining fees represent a mere financial variation of the closed shop, and thereby destroy individual freedom of choice.

[20] This conclusion was reached by McIntyre VP and concurred with by a Full Bench of the AIRC, including the President of the Commission. See notes 13, 14,15 and 16 above.

While unions seek to promote bargaining fees as a "neutral" arrangement which applies equally to unionist and non-unionist alike, this simply masks the fact that they are a form of compulsory contribution aimed at non-unionists. In practice, union members are not required to pay the fee. (Unions will typically waive the fee for those who join their ranks).

Moreover, although unions frequently argue that compulsory bargaining fees do not mandate union membership, this ignores the financial reality of bargaining fees. Under the standard clause, an individual non-union member who does not wish to join the union is faced with a stark "choice": either pay the exorbitant "service fee" levied under the relevant certified agreement, or face the prospect of disciplinary action. Given the choice of a hefty service fee or disciplinary action (possibly including termination of employment), the individual non-unionist is driven towards taking out union membership. This is a draconian and unfair situation for an individual non-union member.

It is also fundamentally unfair for two parties (that is, the employer and the union) to agree to impose something on a third party which so fundamentally affects that third party's civil liberties – in this case, his or her freedom of association or dissociation in the workplace.

It is inappropriate that old-fashioned concepts of compulsory union membership be pursued by unions under the guise of "service fees".[21]

[21] This attitude has been adopted by both federal and State governments in public sector bargaining negotiations, including the Bracks Labor Administration: M Shaw, "Service Fees Rejected" *The Age*, 30 July 2001, p6.

**Benefits of voluntary unionism**

Most people can understand the frustration which comes with managing a voluntary membership organisation. Many who do not commit to membership benefit from the organisation's effort. The challenge rests with the organisation to persuade non-members to join and contribute to the collective effort.

Under the current statutory scheme, unions acquire upon registration corporate status and a wide range of rights, powers and privileges. Unions are allocated organisational and representational rights through control over registration of rival unions and through demarcation orders. They are also empowered to compel employers to participate in conciliation and arbitration for the determination of minimum wages and other conditions of employment, and to enforce agreements and awards against employers. In aid of their representational and enforcement activities, unions have been granted rights of entry and inspection of employers' premises.

The fact that unions (and employer associations for that matter) have legal status and other privileges given to them through registration under the Act is benefit enough because this provides the right and opportunity to enrol members. Decisions about membership should take into account the overall benefits offered and the values and objectives of the organisation concerned. This freedom of choice is a fundamental tenet of our industrial relations system.

Voluntary unionism also creates a climate where unions must serve their "customers" well if they wish to succeed. While one can be sympathetic to the idea that all those who benefit from collectively negotiated wage increases should contribute to the negotiating

costs, effective unions lose little in an environment of voluntary non-coercive unionism. This is because effective unions are able to demonstrate the benefits of membership of their organisation.

**Unfairness towards employers**

Compulsory bargaining agency fees are fundamentally unfair toward the employer because they compel the employer to do the unions' bidding. Under the standard clause, the employer is obliged to take disciplinary action against any individual who refuses either to join the union or pay the fee of $400-$600 for "bargaining services". Otherwise, the employer is in breach of the relevant certified agreement and, in turn, exposed to serious financial and other possible penalties under the Act.

Furthermore, it is evident that most certified agreements which include clauses dealing with compulsory bargaining agent's fees have resulted from union pattern bargaining campaigns. In many circumstances, employers have been compelled to agree to the provisions under duress.

**"Majority rules" is no defence**

Those in favour of compulsory bargaining fees argue that such arrangements are legitimised by the democratic concept of "majority rules" in enterprise bargaining. Union "service fees" are only imposed, so the argument runs, where a majority of the workforce and

the employer are in favour of it. It is employees within the particular workplace who ultimately make the decision about whether or not service fees should be imposed.[22]

However, the fatal flaw with this argument is that it affords priority to collective consent over fundamental rights and freedoms of an individual – in this case, an individual's freedom of choice about whether or not to belong to a union. Under this argument, the concept of "majority rules" can be used to sanction highly coercive arrangements. But the democratic notion of "majority rules" always has its limits. To adopt a famous Diceyan example, a law which requires the killing of all blue-eyed babies is no less repulsive because it may have been enacted by a majority of elected parliamentarians. Just as the Senate often stands as a bulwark against any "tyranny of the majority" in Australian politics, legislation needs to be passed to ensure that the concept of majority rules is not invoked to implement a "tyranny" of de facto compulsory unionism in the workplace.

**Drawing the line between bargaining and non-bargaining services**

A further difficulty with compulsorily-levied bargaining fees is that they cover not only bargaining and bargaining-related purposes – they also cover political or social activities undertaken by an industrial association.

It is well known that unions spend funds upon political activities or campaigns, or towards the advancement of other ideological causes not germane to their duties as collective bargaining representatives.

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[22] G Combet, ACTU Secretary, "Most Unionists Subsidise Workmates?" *The Age* 16 February 2001.

It is both unfair and undemocratic for such expenditures to be financed from charges or dues paid by employees who are effectively coerced into doing so against their will. Further, as many academic commentators have noted,[23] any attempt to clearly demark the line between union activities germane to collective bargaining and others is fraught with considerable difficulty given that union activities will invariably transcend a narrow focus upon a particular workplace.

## 5.5 Overseas developments

Agency or bargaining fees are only permitted in collective agreements in a limited number of overseas jurisdictions. Typically, these countries (like the United States and Canada) have industrial relations systems which are quite different from that in Australia. These jurisdictions often operate under a system of collective bargaining, whereby unions must overcome substantial hurdles before gaining the right to represent employees in collective bargaining negotiations.

For example, in the United States unions must gain majority membership amongst employees at a particular workplace before having the right to bargain with the employer on behalf of the workforce.

By contrast, unions are afforded greater representation and organisational rights under the Australian workplace relations system. Unions in Australia do not require majority membership in order to gain employer recognition for the purposes of collective bargaining. Instead, under the current statutory framework, unions are entitled to (amongst other things):[24]

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[23] See, eg, G Orr, "Agency Shops In Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders" (2001) 14 *Aust Journal of Labour Law* 1 at 13-15.

[24] See Part VIB of the Act.

- meet and confer with the employer in respect of any proposed agreement where at least one employee requests it;
- negotiate on behalf of members employed at a particular workplace;
- take protected industrial action in support of claims for a new collective agreement;
- become parties to collective agreements where at least one member requests it.

Furthermore, while countries like the United States and Canada operate under collective bargaining systems, Australia's workplace relations framework is a "hybrid" system - enterprise bargaining underpinned by an industry-wide award "safety net" system. Under the award system, unions derive significant representational and corporate rights to act on behalf of both members and non-members. For example, arbitral awards are usually the product of union action and (under the *Metal Trades case* doctrine[25]) apply equally to unionist and non-unionist alike.

It is noteworthy that in those foreign jurisdictions where agency shop arrangements are permitted, the law usually introduces strict controls to limit the inevitable inroad into freedom of association which agency shops represent. Monies collected by a union in this way are typically ring-fenced to prevent them from being used to support political parties or activities. In addition, the law in other jurisdictions will often go on to specify that:

- bargaining fees may only be spent in ways that benefit all employees;
- provision must be made for conscientious objection;

[25] *Amalgamated Engineering Union v Metal Trades Employers Association* (1935) 53 CLR 658.

- in particular, fees may not exceed the standard union dues.

There is an urgent need for legislation to be passed to ban the compulsory imposition of bargaining levies upon Australian workers.

## 5.6 Provisions of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

It appears that the terms of the Bill are designed to remedy the mischief created by the emerging practice of **compulsory** bargaining fees being levied by unions via certified agreements. Ai Group strongly supports appropriate legislative amendments which would have such effect.

However, Ai Group proposes an important amendment to the definition of *"bargaining services fee"* in the bill as the existing definition may have significant unintended consequences for registered employer organisations such as Ai Group and their member companies. Unlike the definition of *"non-compulsory fee"* in the former *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001*, the proposed definition of *"bargaining services fee"* does not adequately exempt fees which a person has voluntarily agreed to pay.

Ai Group has a large number of professional industrial advisers who are involved in providing enterprise bargaining services to companies on a fee-for-service basis. Ai Group's enterprise bargaining services include strategic advice and assistance with the drafting, negotiation and certification of enterprise agreements. Typically, a letter is sent to member companies before any services are provided outlining the charges which apply to such services.

Ai Group, like virtually all employer associations, relies on fee-for-service revenue to help fund its representational activities. Membership subscriptions only partially fund our operations.

The proposed new s.298SA, when read with the definition of "bargaining services fee" in s.298B(1), appears to prevent employer associations charging a fee for enterprise bargaining services. If this interpretation is correct, then the Bill would have severe negative consequences for registered organisations such as Ai Group and for member companies which rely on our enterprise bargaining services.

Ai Group would no longer have the means to fund a core service which we provide to our members. Further, the restrictions which would be imposed on Ai Group under the legislation would not apply to law firms and consultants which also provide enterprise bargaining services. Such a situation would be very unfair on registered employer associations.

Whether or not our concerns are valid appears to hinge around the meaning of the term "demand" in s.298SA of the bill. It could be argued that where a person agrees to pay a fee before the bargaining services are provided then such arrangement would not amount to a "demand" for the payment of a fee. However, Ai Group is concerned about the scope for differences of interpretation. For example, would the legislation prevent Ai Group demanding payment of an unpaid invoice for enterprise bargaining services rendered?

Given concern about this issue, Ai Group has obtained a legal opinion from our solicitors - Cutler Hughes and Harris - regarding the wording of the bill. A relevant extract from the opinion is set out below:

*"You have asked me to advise on the implication for The Australian Industry Group (Ai Group) of the proposed definition of "bargaining services fee", and the proposed s298SA of the above Bill.*

*The definition of "bargaining services fee" relates to payment of a fee for the provision of "bargaining services", but does not include membership dues.*

*"Bargaining services", in turn, is defined in a very broad manner to cover services provided by an industrial association in relation to certified agreements. This definition of "bargaining services" would apply to the general services that Ai Group offers to its members, and others, regarding negotiation, drafting and processing of certified agreements, where a fee for service basis is adopted. If the services are provided as general services of the Association covered by membership fees, membership fees would not be considered to be a bargaining services fee.*

*Section 298SA asserts bluntly that an industrial association must not seek payment of a bargaining services fee from another person. Coupled with the definition of "bargaining services" and "bargaining services fee", it seems to me to be quite clear that your Association would be committing an offence whenever it charged a fee for providing services in respect of a certified agreement on a fee for service basis.*

*The effect of this clause is quite obvious, and is quite inexplicable. It may be that the draftsperson was under the impression that all services provided by an industrial association in respect of certified agreements would be provided as a general service of the association, covered by normal membership fees. I would suggest that this problem be brought to the attention of the Minister without delay."*

Ai Group proposes that the approach previously taken in the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001* be adopted. That is, the bill should specifically state that where a person agrees to pay a fee before the bargaining services are provided then such arrangement would not be covered by the legislation.

With the amendment proposed by Ai Group, the Bill would meet the objective for which it is apparently designed – namely, to ensure freedom of individual choice in the workplace.

**Table 5.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002***

| Proposed Amendment | Ai Group's Position | Basis of Ai Group's Position |
|---|---|---|
| To define the term 'bargaining services'. | Conditionally supported | This definition is linked to the definition of "bargaining services fee". (See below for Ai Group's concerns about the definition of "bargaining services fee"). |
| To define the term "bargaining services fee" | Not supported | The proposed definition would appear to have significant unintended consequences for registered employer organisations such as Ai Group. Unlike the definition of *"non-compulsory fee"* in the former *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001*, the proposed definition of *"bargaining services fee"* does not adequately exempt fees which a person has voluntarily agreed to pay.<br><br>Ai Group has a large number of professional industrial advisers who are involved in providing enterprise bargaining services to companies on a fee-for-service basis. |

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| | | Ai Group's enterprise bargaining services include strategic advice and assistance with the drafting, negotiation and certification of enterprise agreements.<br><br>Typically, a letter is sent to member companies before any services are provided outlining the charges which apply to such services.<br><br>Ai Group, like virtually all employer associations, relies on fee-for-service revenue to help fund its representational activities. Membership subscriptions only partially fund the operations of Ai Group.<br><br>The proposed new s.298SA, when read with the definition of "bargaining services fee", appears to prevent employer associations charging a fee for enterprise bargaining services. If this interpretation is correct, then the Bill would have severe negative consequences for associations such as Ai Group and for companies which rely on our enterprise bargaining services.<br><br>Ai Group would no longer have the means to fund a core service which we provide to our members and the restrictions which would be imposed on Ai Group under |

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| | | the legislation would not apply to law firms and consultants who also provide enterprise bargaining services. Such a situation would be extremely unfair on registered employer associations.<br><br>Whether or not our concerns are valid appears to hinge around the meaning of the term "demand" in s.298SA of the bill. It could be argued that where a person agrees to pay a fee before the bargaining services are provided then such arrangement would not amount to a "demand" for the payment of a fee. However, Ai Group is concerned about the scope for differences of interpretation. For example, would the legislation prevent Ai Group demanding payment of an unpaid invoice for enterprise bargaining services rendered?<br><br>Ai Group proposes that the approach previously taken in the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001* be adopted. That is, the bill should specifically state that where a person agrees to pay a fee before the bargaining services are provided then such arrangement would not be covered by the legislation. |
| To prevent coercion against persons because such person is not prepared to pay | Supported | Such provisions will prevent the coercion by unions which is currently occurring. On many occasions industrial action has been taken against companies in pursuit of |

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| a compulsory bargaining fee. **(298Q, 298S and 298SB)** | | enterprise bargaining clauses dealing with compulsory bargaining fees. |
| To prevent industrial associations demanding the payment of a bargaining services fee from another person. **(298SA)** | Only supported if the definition of "bargaining services fee" is amended | As set out above, Ai Group is concerned that this provision might be interpreted to prevent employer associations such as Ai Group charging companies a fee for enterprise bargaining services. The legislation should not apply to fees which a person has agreed to pay before the bargaining services are provided. |
| To prevent persons making false or misleading representations about another person's liability to pay a bargaining services fee. **(298SC)** | Supported | This provision is consistent with the standards which apply to companies under fair trading legislation. |
| To provide that a certified agreement is void to the extent that it provides for the | Supported | Ai Group regards compulsory bargaining fees as inconsistent with the objects of the Act. |

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| payment of a bargaining services fee. **(298Y(2))**<br><br>To extend the definition of 'objectionable provision' so that it includes *'a provision (however described) of a certified agreement that requires payment of a bargaining services fee'*. This would allow the Commission to remove clauses dealing with compulsory bargaining fees from certified agreements. **(298Z(5))** | Supported | Ai Group regards compulsory bargaining fees as highly objectionable and inconsistent with the freedom of association provisions of the Act. |

## 6.0 Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002

Ai Group's concern with compulsory secret ballots has been that in some circumstances they can polarise the position of parties and make disputes more difficult to resolve. However, having carefully studied the scheme of secret ballots proposed in the Bill, Ai Group believes that the proposed process would operate as an appropriate precondition for the taking or organising of protected industrial action by employees and organisations or employees. Importantly, the process is to be overseen by the AIRC.

The amendments proposed in the Bill mean that:

- Employees would have the opportunity to vote without fear or favour in a fair and democratic ballot on whether they are prepared to lose wages through protected industrial action in support of enterprise bargaining claims;

- No ballot would be ordered and therefore protected action would not be available if the Commission finds that the relevant union/s and employees proposing to take industrial action have not genuinely tried to reach agreement with the employer prior to the application for a ballot.

The process set out in the act is sufficiently flexible to allow the Commission the necessary latitude when issuing a ballot order to take account of the specific circumstances surrounding a ballot application.

Given the above, Ai Group supports the legislative scheme with one important exception, namely that employees eligible to vote in a secret ballot should not be limited to union members. To do so may create hostility and division within the enterprise. Ai Group proposes an alternative to the effect that all employees in the relevant enterprise, workplace, section or sections where the proposed agreement will apply, whose industrial interests the organisation or organisations of employees proposing to take the protected action are entitled to represent, are eligible to vote in the secret ballot.

## 7.0 Concluding Comments on the Five Bills

Ai Group strongly supports passage of all the Bills, with the amendments proposed in this submission. The Bills address issues that are of immediate relevance and considerable concern to our members.

The Fair Termination Bill addresses the gap in the legislation which has recently emerged as a result of the *Hamzy* decision.

The Fair Dismissal Bill is of significant importance to employers in small businesses and relevant to the decisions which they make about whether to employ new staff.

The Genuine Bargaining Bill provides added protection to employers targeted during campaigns by unions to turn back the clock and replace enterprise bargaining with industry agreements. The focus of the workplace relations system has permanently shifted to the enterprise level and there would be disastrous economic and employment effects if this shift was undermined.

The Compulsory Union Fees Bill (amended as proposed by Ai Group) ensures that unions do not undermine the freedom of association laws and impose unfair outcomes on non-union members.

Finally, the Secret Ballots Bill enhances democracy in the workplace by providing the opportunity for employees to vote on whether or not they are prepared to lose wages through industrial action in support of enterprise bargaining claims.