Government Senators' report

1.1 In considering the Workplace Relations Amendment (Agreement Validation) Bill 2004, the committee recognises the Senate's urgent task of expediting legislation required to remove any uncertainty about the validity of workplace agreements entered into between companies and their employees under the terms of the Workplace Relations Act.

1.2 This uncertainty arises from a ruling of the High Court handed down on 2 September 2004. The *Electrolux* case concerned claims by the Australian Workers' Union and other unions for inclusion of a bargaining agent's fee clause in a certified agreement, and recognition of the legitimacy of industrial action in support of that claim. The court ruled that bargaining fees are outside the employment relationship, and therefore industrial action will not be protected in support of such claims.

1.3 The *Electrolux* decision upholds what has been the law since 1996. The committee accepts the likelihood that some current agreements may contain provisions that do not bear on the employment relationship, and may therefore not be valid because the Australian Industrial Relations Commission did not have jurisdiction to certify them in the terms that they did. This has left some unions and employers confused about the implications of the decision. The bill now before the Senate has the purpose of remedying some of this uncertainty by ensuring the validity of certified agreements and Australian Workplace Agreements (AWAs) approved or varied by the Commission up to 2 September 2004, provided that such agreements pertain to the employment relationship.

1.4 The WR (Agreement Validation) Bill was introduced in the Senate on 17 November 2004. The newly formed legislation committee met and agreed to call for submissions, to hold a public hearing in Melbourne on 25 November and to report in accordance with the terms of the Senate resolution, on 29 November.

1.5 Seven submissions to the inquiry were received. These are listed in Appendix 1. A list of witnesses at the public hearing may be found in Appendix 2.

Background

1.6 The committee has considered the requirement for this legislation in the context of workplace relations policy implementation. After *Electrolux*, the bargaining fees issue is now beyond doubt, and in any event, the Senate, in its second attempt, with the Australian Democrats supporting the Government, succeeded in passing the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No.2] on 24 March 2003. The effect of this amendment was to nullify clauses in certified agreements requiring payment of bargaining services fees. But the significance of *Electrolux* goes beyond the issue of bargaining fees and supporting industrial action, as described in this report.

1.7 A brief outline of the sequence of legal proceedings is not out of place here. Section 170LI of the Workplace Relations Act provides for a jurisdictional test for matters that may be included in agreements before they can be certified by the Commission. A dispute over whether unions were within their rights to charge non-unionists bargaining fees for services vicariously rendered during enterprise agreement negotiations was taken by Electrolux Home Industries Pty Ltd to the Federal Court. Justice Merkel's decision in November 2001 overturned a Commission ruling on the validity of this matter as an inclusion in a certified agreement. Justice Merkel ruled that the inclusion of such a matter in the agreement went beyond what could be regarded as incidental or ancillary to the employment relationship.

1.8 However, this decision was itself overturned by the full bench of the Federal Court on 21 June 2002. The full bench ruled that unions could take industrial action in pursuit of claims, including the use of bargaining fees. After 31 October 2003 the Commission adopted the approach of the full Federal Court decision.

1.9 Following the 21 June 2002 decision of the full bench of the Federal Court, the Australian Industry Group (AiG), on behalf of Electrolux Home Products Pty Ltd, appealed to the High Court against the decision of the Federal Court. There was now widespread concern in industry that had the Federal Court decision stood, there was a risk of unions organising legally protected industrial action in support of a wide range of social and political claims.[1]

1.10 A decision by the High Court brought down on 2 September 2004 overturned the unanimous decision of the Federal Court and reinstated the orders made by Federal Court Justice Merkel in the original case. Since *Electrolux*, the Commission has applied the High Court's approach to section 170LI in all certification proceedings. The historical significance of *Electrolux* was its narrowing of the scope of both agreement negotiation and industrial action, limiting them to matters strictly relevant to the employment relationship.

The High Court ruling and its implications

1.11 The High Court's decision has clarified two important matters: that the Commission is not empowered to certify an agreement if it contains any provision that does not pertain to the relationship between an employer and its employees; and that industrial action taken by a union during a bargaining period will not be protected action if it is taken in support of claims that cannot be included in a certified agreement because they do not pertain to the employment relationship.

1.12 The ACTU has noted in its submission to this inquiry that the High Court overturned the full Federal Court's decision on grounds based on statutory interpretation: that it did not deal with the legal arguments concerning policy.[2] The

1 Australian Industry Group, *Submission* 6, p.2

2 ACTU, *Submission* 2, p.4, para.22

implication is that the High Court has written 'black letter' law. Statutory interpretation is the task of the High Court, just as policy is the responsibility of the legislative and executive arms of government. In this regard it is worth noting the observation made by Blake Dawson Waldron in its commentary on *Electrolux.*

> The High Court has consistently held that the rejection of demands of an academic, political, social or managerial nature does not create a dispute about matters pertaining to the relationship between employer and employee. Neither does the rejection of a demand that the employer act as a financial agent for employees in their dealings with the union create a dispute pertaining to the employment relationship.[3]

1.13 The committee notes the Government's acknowledgement that *Electrolux* has clarified the interpretation that should be placed on section 170LI of the Workplace Relations Act. The Government concedes that past uncertainties of interpretation have resulted in some parties including matters in their agreements that may not pertain to the employment relationship, with the Commission certifying these agreements. Employers and employees are entitled to assume the validity of current agreements certified by the Commission.[4]

The purpose of the bill

1.14 The bill is in large measure a response to urgent calls to ensure a high degree of certainty to validly made agreements which are currently in force. As the Minister has stated, in a second reading speech incorporated in the Senate *Hansard*, the bill will put parties to an agreement in the position they would have been in, had they complied with the *Electrolux* decision when they made or varied their agreement.[5]

1.15 The committee was advised by DEWR officials that the Government had to take note of the possibility that parties to an agreement could exploit the potential invalidity of the agreements by refusing to honour the rights and obligations contained in them. Because the parties themselves are unable to take steps to validate agreements that have already been certified, the Government has had to take steps to enure that parties do not take advantage of those uncertainties, and that current rights and obligations remain enforceable.[6]

1.16 The Government's determination to ensure that certified agreements are upheld and enforced also arises from the possibility of a party to an agreement exploiting the potential invalidity of arguments. As the DEWR submission notes:

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3 Blake Dawson Waldron, *Industrial Relations and Employment Client Alert*, September 2004, p.2, at http://www.bdw.com/publications/irca/irca092004.pdf

4 DEWR, *Submission* 1, p.2, para.1.12

5 Senate *Hansard*, 24 November 2004, p.12

6 Mr James Smythe, DEWR, *Committee Hansard,* p.41

> Certain unions have publicly discussed a campaign to use potential invalidity as a trigger to reopen negotiations with employers regarding their members' terms and conditions. The Government also considers it would be highly undesirable for parties to exploit uncertainty in relation to past industrial action by initiating or threatening legal action. Employers, and employees, who have been operating in good faith under agreements certified by the Commission should not be left vulnerable to industrial action and coercion.[7]

1.17 The AiG submission to the inquiry has also warned that some unions have sought to exploit conditions of uncertainty for the purposes of renegotiating current certified agreements. It reports the Electrical Trades Union (ETU) as urging the renegotiation of agreements on the grounds that the invalidity of any clause to an agreement renders the entire agreement invalid. The AiG also reports that the CFMEU has announced its intention to renegotiate thousands of construction industry agreements which are not due to expire until October 2005 in Victoria, and in the following year in other states.[8] At the hearing the CFMEU, which opposes the bill, confirmed that it was 'dialoguing' with employers on the matter.[9] The ACTU, when questioned about this matter, argued that the actions of the CFMEU were lawful and did not require the endorsement of the ACTU.[10]

1.18 The committee also notes the submission from the Australian Chamber of Commerce and Industry (ACCI) which warned of likely instability in workplace relations following any attempt at renegotiation:

> It is not in the interests of a stable and effective system of workplace relations that either employers, unions or employees be provided with an opportunity to assert invalidity of agreements that those same parties freely entered into and regarded as legally valid and enforceable until the High Court decision. It is certainly not in the interests of good workplace relations for a new round of protected action to be opened simply by virtue of the High Court decision.[11]

1.19 The ACTU has questioned the need for the legislation, claiming that it will not address the problems created by *Electrolux*. It agrees with the Government's view that it would be highly undesirable for parties to exploit current uncertainties, but argues that the bill does not give effect to its stated objectives. The ACTU's main objections will be dealt with in the next section.

1.20 The committee takes the view that on the basis of evidence provided, this legislation is justified. Legislation must serve a public need and parliaments have to be

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7 DEWR submission, p.3, para.1.13

8 Australian Industry Group submission, pp.9-10

9 Mr John Sutton, CFMEU, *Committee Hansard*, p.17

10 Ms Linda Rubinstein, ACTU, *Committee Hansard*, p.40

11 ACCI, *Submission* 3, p.13, para.66

responsive to these needs. The committee takes the view, nevertheless, that apprehension about the likely consequences of *Electrolux* has probably been exaggerated. For instance, the CFMEU expressed some concern about the possibility of retrospective legal action being taken against the union for industrial action subsequently ruled to be unprotected.[12]

1.21 The committee considers it to be highly unlikely that individual employers would take the initiative to exploit uncertainty at this time, as there would be no likelihood of gain. Industry associations would strongly discourage such attempts at litigation, and it is impossible to imagine how it could be in the interest of a corporation to attempt such an action. The committee accepts that some unions have engaged in sabre rattling exercises, but this seems almost to be normal behaviour from those unions involved. The record suggests that this requires much less of a pretext for work bans that is provided by this bill. It is difficult to imagine what interests would be served by parties to current agreement seeking court decisions on the legality of clauses in the light of *Electrolux*. Nonetheless, if the theoretical possibility of such developments exists, the committee concurs with the general consensus that legislation is in the best interests of all parties.

The role of the Commission

1.22 Another area of concern expressed in some submissions, notably from the ACTU and the CFMEU, was that uncertainty will continue as a result of the slow progress likely to be made by the Commission in establishing new guidelines for the certification of agreements. The Commission is reported to be currently adjourning applications for certification of agreements to enable parties to make submissions on whether provisions to be included in agreements do pertain to the employment relationship. The committee understands, however, that cases are due to be heard in December 2004 which will provide guidance and, most probably, reassurance, to employers and employees who have conducted exhaustive negotiations in reaching their agreements.

1.23 The committee was advised by DEWR officials that the Commission has not been certifying agreements containing non-pertaining matters since the *Electrolux* decision was handed down. An opinion was expressed that prior to the original *Electrolux* case before Justice Merkel, the Commission did not turn its mind to whether all the provisions in an agreement pertained to the employment relationship or not: commissioners simply certified the agreements.[13]

1.24 It was also put to the committee that areas of uncertainty in industrial law are those at the periphery. There was a largely settled agreement about core issues. The committee sensed that there was possibly an overreaction to claims of uncertainty, and

12 Mr Tom Roberts, CFMEU, *Committee Hansard*, p.11

13 Mr James Smythe, DEWR, *Committee Hansard,* p.46

believes that that such matters are likely to be addressed by the Commission sooner rather than later.[14]

Issues in contention

1.25 The committee heard evidence from witnesses at its public hearing which highlighted differences of opinion, and so far as the union movement was concerned, opposition to broad policy matters which extend far beyond this legislation. The ACTU's position can be dealt with first.

The question of 'pertaining to'

1.26 As noted above, the High Court has determined a narrow reading of 'matters pertaining to the employment relationship'. The ACTU has argued that the problem arising from *Electrolux* can be broadly addressed by such measures as: legislating to widen the scope of matters pertaining to the employment relationship; or, validating current agreements in all respects, including those containing clauses that may be of doubtful validity under section 17LI.[15]

1.27 It would not be expected, least of all by the ACTU, that the Government would be likely to reverse its workplace relations policy by amending the legislation. But the committee did hear discussion at length on changes to the legislation which would validate all agreements currently certified, regardless of whether the Commission may not have used the appropriate test in certifying them. DEWR officials gave authoritative advice that such a provision would be in breach of important legal principles.

1.28 Such an action would amount to a retrospective change in the law. Logically, it should require an amendment to sections of the Workplace Relations Act which would override the *Electrolux* ruling and alter the scope of the powers of the Commission. This would be entirely contrary to Government policy in any event, and consistency in policy must be reflected in consistency in the legislation and the way it has been, and will be, interpreted. The committee is fully aware that decisions based on possible misinterpretation cannot be dealt with by retrospective legislative expediencies which are likely to create more problems than they solve, as well as being at odds with jurisprudential principles. In putting forward this bill the Government is confirming its original legislative intentions.[16]

1.29 The committee also heard of concerns relating to 'matters pertaining' from a rather different angle. Suncorp Metway told the committee about its anxieties in regard to its impending appearance before the Commission, and how the Commission might apply the *Electrolux* test to clauses in its agreement to do with salary sacrifice,

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14 ibid., p.45

15 ACTU, *Submission* 2, p.6, para.29

16 Mr James Smythe, DEWR, *Committee Hansard*, p.47

superannuation and family support benefits.[17] Suncorp Metway, a national company with 8000 employees was apprehensive about the thought of having to renegotiate its agreement. It appeared to the committee that Suncorp was being unduly pessimistic. This was borne out to some extent by the decision made in the Commission the day after the company's appearance before the committee, when Vice-President Lawler duly certified the agreement which had caused the company so much anxiety.

The issue of timing

1.30 The committee received strong representations from Suncorp Metway urging an amendment to the bill which would ensure that agreements placed before the Commission for post *Electrolux* certification can be dealt with expeditiously, preferably before Christmas, and without requirement for further workplace consultation.

1.31 The committee has been advised that the timeframe for the legislation to be passed and given royal assent precludes the possibility of amendments along the lines proposed by Suncorp Metway. As a DEWR official noted:

> Off the top my head I think there were 1,100 or so agreements in that category, about 700 of which have already been to the commission and the commission has either certified them or has said, 'Go away and fix it up and come back.' We would expect the remaining 400 to go to the commission and be dealt with within the next two to three weeks. Bearing in mind that this bill will not become law, even if passed within the next two or three weeks, until royal assent, which will take us till about mid- to late December, the practical view that we took was that it would be unlikely that this bill could rectify the situation of agreements such as Suncorp-Metway's because they would have already gone to the commission and either been certified or refused and re-mediated before the bill comes into force.[18]

1.32 As noted earlier, Suncorp Metway had its agreement certified, but holds to the view that some kind of transitionary arrangements should be included in the bill.

1.33 While sympathetic to the predicament in which Suncorp Metway found itself, the committee is loath to recommend amendments which present difficult administrative problems or technical legal difficulties, particularly in order to deal with transient problems.

Common law agreements

1.34 Discussion at the hearing in relation to non-pertaining matters gave rise to a brief consideration of the likely increase in the use of common law agreements to augment certified agreements in instances where parties agree that it is in their

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17 Mr Michael Harmer, Suncorp Metway, *Committee Hansard*, p. 5

18 Mr James Smythe, DEWR, *Committee Hansard*, p.49

interests to do so. *Electrolux* has provided incentive for some radical thinking in this area. The committee particularly notes advice from ACCI in the case of the Franklins-SDA agreement recently certified. As the committee was told:

> It was identified in the proceedings that there was a provision in the agreement which was arguably not pertaining and the union and the company agreed to remove that from the agreement, to continue to apply that as a matter of obligation between themselves and to reach a private common-law agreement in those same terms to do that. The agreement was, therefore, resubmitted to the commission in terms which would unquestionably allow for its certification, and it was certified.[19]

1.35 The committee takes the view that it is highly likely that over time, both unions and employers will see advantage in such arrangements.

Conclusion

1.36 The committee majority is satisfied that this bill fulfils the requirements which are intended. That is, to bring a substantial measure of reassurance to employers and employees who have worked hard at negotiations for certified agreements, and who can now be certain, to the extent of the likely application of the processes of law, that those agreements are secure.

Recommendation

The committee majority recommends that the Senate pass this bill.

Guy Barnett
Chair

19 Mr Peter Anderson, ACCI, *Committee Hansard*, p.30