Opposition Senators' report

2.1 The Opposition is opposed to the Workplace Relations Amendment (Agreement Validation) Bill 2004 in its current form. Opposition senators believe the bill demonstrates the Government's eagerness to press ahead with its divisive second wave industrial relations 'reform' agenda in the lead up to having a majority in the Senate after 1 July 2005. The Government has already flagged that it will re-introduce into the parliament a raft of workplace relations bills previously rejected by the Senate, including the controversial Building and Construction Industry and Improvement Bill 2003. The Government's claim that the Agreement Validation bill will provide certainty and stability to both employers and employees by validating enterprise bargaining agreements certified by the Australian Industrial Relations Commission ('the Commission') before the High Court's *Electrolux* decision of 2 September 2004, does not stand up to scrutiny.

2.2 In this dissenting report, Opposition senators challenge the assertion by the Department of Employment and Workplace Relations (DEWR) and employer groups that the bill is sensible and practical, delivering fair and just outcomes for all concerned, and that its immediate passage through the parliament is therefore a matter of urgency.[1] This benign view of the bill's likely impact can be challenged on the basis of evidence presented to the committee by the ACTU and the CFMEU. It is clear that the bill does not address the underlying problems and uncertainty created by the *Electrolux* decision, leaving unions exposed to potential legal liability for any industrial action that is found to be not protected. The *Electrolux* decision merely puts a spot light on ambiguity in section 170LI of the *Workplace Relations Act 1996* (WR Act) over the expression 'matters pertaining to the employment relationship'. For these reasons, Opposition senators firmly believe that the bill should be amended by the Senate.

The Government's agenda

2.3 The majority report states that the bill is in large measure a response to urgent calls to ensure a high degree of certainty for valid agreements which are currently in force. The Opposition, however, questions the Government's motive with respect to this bill. It seems clear to Opposition senators that the bill's main objective is to forestall any attempts by unions to renegotiate and put in place new three-year enterprise agreements, especially where claims are being made that were not included in the original agreements. Opposition senators note that there is nothing unusual or unlawful in unions wanting to renegotiate enterprise agreements on behalf of employees following the *Electrolux* decision. More to the point, the bill is justifiably regarded by some unions as an attempt by the Government to impose a political

1 AiG, *Submission 6*, p. 1.

settlement on the enterprise bargaining process and to realign the rules of bargaining in favour of certain industry employers.[2]

2.4 Opposition senators also view the bill as an attempt by the Government to place further limits on the range of matters over which unions can take protected industrial action. While DEWR claimed in its submission that the Government is determined to ensure that agreements certified by the Commission are upheld and enforced and that no one – employers or employees – can exploit their potential invalidity, there can be no question that it is unions and not employers which the Government has firmly in its sights in this regard. This much was acknowledged by the Minister for Workplace Relations in a provocative press release:

> The Government is determined to ensure agreements entered into by business are upheld and enforced. Unions in the electricity and construction industry have tried to take advantage of uncertainty caused by the Electrolux decision by pressuring businesses to re-negotiate agreements which contain clauses which are union friendly and bad for business. The new legislation will remove the need for businesses to re-negotiate their agreements.[3]

2.5 DEWR, in its submission, also referred to 'certain unions' which have discussed publicly a campaign to use potential invalidity as a trigger to reopen negotiations with employers regarding their terms and conditions.

2.6 Opposition senators take exception to this biased assessment. It is clear from evidence by the Australian Chamber of Commerce and Industry (ACCI) that employer groups have also seized on the opportunity presented by the *Electrolux* decision to dissuade unions from legitimately renegotiating enterprise agreements. ACCI is of the view that a combination of court and Commission judgements, based on test cases and appeals, will provide clarity to the concept of 'matters pertaining' in respect of contentious or grey areas. In the meantime, ACCI argues that certainty in enterprise bargaining is best achieved by parties only including in their proposed agreements matters which clearly pertain to the employment relationship. Yet the distinction which is being drawn between matters which 'clearly do' and those which 'clearly do not' pertain to the employment relationship is largely self-serving. A clear line in the sand has not yet been drawn by the courts or the Commission. The problem here is that any attempt to voluntarily restrict the terms of an agreement will in all likelihood leave employees in a state of uncertainty and unions concerned about the equity of future enterprise bargaining processes. ACCI claimed in its submission that 'Real certainty lies in caution'.[4] However, Opposition senators take a different view and believe that when employers talk about 'certainty' and 'stability' in the context of this

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2 CFMEU, *Submission 5*, p. 5.

3 Media release, the Hon. Kevin Andrews, Minister for Employment and Workplace Relations, 'New Workplace Relations Legislation', 29 October 2004, KA256/40.

4 ACCI*, Submission 3*, p. 11.

bill it is code for wanting to further restrict the number of allowable matters under section 170LI of the WR Act.

Why the bill is flawed

2.7 Notwithstanding the Government's motive for rushing this bill into the parliament, Opposition senators believe it is fundamentally flawed in at least four ways. First, the bill does not solve the fundamental problem which it is designed to address; specifically it does not provide certainty for parties to certified agreements which came into force before the *Electrolux* decision. Neither does it provide certainty for parties who negotiated agreements before the decision but which are currently awaiting certification by the Commission. Evidence presented to the committee by Suncorp Metway Ltd highlights the bill's shortcomings in this respect. While Suncorp supports the underlying principles of the bill, it advised the committee that the bill fails to address the concerns of many employers and employees who had consulted extensively over agreements before the *Electrolux* decision:

> At the time of the High Court decision, Suncorp was in the final 'cooling off' stage of a highly consultative, six-month process involving 4000 staff across the nation. We had circulated the final iteration of the Agreement to more than 4000 employeers by the time the Electrolux decision was handed down. Of those who voted, 87% of Suncorp staff voted in favour of the Agreement.[5]

2.8 The dilemma now facing many employers, including Suncorp, is that if the bill is passed in its current form their employees face the prospect of having agreements declined certification, with new resource-intensive negotiation processes having to commence with implications for cost, resources and good working relationships with employees.[6]

2.9 The bill also leaves unresolved the important issue of defining which matters pertain to the employment relationship. While the majority decision of the High Court found that certified agreements were valid only where substantive, discrete and significant matters in agreements pertain to the employment relationship, uncertainty remains as to what constitutes significant or extraneous matters. In fact, the uncertainty extends beyond matters pertaining to the employment relationship. As noted by the ACTU: '…parties to agreements, irrespective of when they were certified, do not know which provisions of the agreements are enforceable or if their agreements are valid in whole or in part'.[7] In partially validating agreements, the Government is attempting to give employers a strategic advantage in the bargaining process.

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5 Suncorp Metway Ltd, *Submission* 4, p. 1.

6 ibid., p.2.

7 ACTU, *Submission* 2, p. 3.

2.10 Second, the bill does not attempt to resolve the uncertainty about the bargaining process and certification of agreements after *Electrolux*. This, according to the ACTU, is arguably the bill's major shortcoming:

> the fact is that no-one can say whether or not [certified agreements since 2 September 2004] are enforceable, even to the extent of the matters which pertain to the employment relationship. It is completely unsatisfactory that parties are unable to reach agreements which they know to be final and enforceable[8].

2.11 Third, the bill will have the effect of altering the terms of existing enterprise agreements, a situation which Opposition senators find unacceptable. By refusing to validate those matters which may subsequently be ruled invalid, the legislation interferes with the substance of agreements entered in to in good faith by employers and employees. It undermines the bargain that has been struck between groups on the assumption that matters included in an agreement are those which pertain to the employment relationship. This was confirmed by Suncorp Metway Ltd in evidence to the committee.

2.12 The ACTU reminded the committee that an important bargaining principle was at stake; that is, the right of parties to an agreement to determine for themselves the matters about which they will bargain and reach agreement: 'Where a union and an employer have reached agreement on matters which they believe are relevant, the role of Government should be to ensure that these agreements are valid and enforceable'.[9] The bill does not provide this level of certainty.

2.13 Fourth, under the proposed legislation parties taking industrial action will not know with any certainty whether or not the action is protected from legal sanction.[10] As noted in evidence by the CFMEU and the ACTU, the Government has taken the view that it is not necessary, desirable or even practical to validate industrial action that was taken in the belief that it was protected.[11] The minister's second reading speech states that parties could not have reasonably expected that protected action was available to support claims for non-pertaining matters. Opposition senators do not accept the Government's position and note the ACTU's assessment that it is perfectly normal for unions to have accepted the ruling of a Full Court of the Federal Court which found that protected action *could* be taken in support of non-pertaining matters.[12] To suggest otherwise is unacceptable.

2.14 It is also understandable that unions take very seriously the threat of legal action by employers which could be used a very powerful bargaining tool against

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8 ibid., p. 4.

9 ibid., p. 6.

10 ibid., pp. 3-4.

11 Ms Linda Rubinstein, ACTU, *Committee Hansard*, 25 November 2004, p. 36.

12 ibid., p.37

either unions or individual employees in a new round of negotiations. According to the CFMEU, parties to an agreement:

> …not only get less than what they bargained for by way of the valid and enforceable terms of the agreement itself, but also a potential liability for all of the industrial action leading up to that agreement even where, as would likely be the case, a small part only of the total claim made the action unprotected because it did not 'pertain'.[13]

2.15 Overall, Opposition senators are reluctant to support a bill which will partially validate workplace agreements and provide a transitional arrangement only until the time those agreements have expired. As previously noted, the Government's primary policy objective in introducing the bill is to ensure that existing rights and obligations are clear and enforceable in the light of uncertainty about the correct interpretation of section 170L of the WR Act. Yet legislating to partially validate agreements will do nothing to remove this uncertainty. The bill is simply a stop-gap measure that will not have the effect it so desires. The ACTU concludes that unless the issue of uncertainty is addressed satisfactorily: 'the only consequence can be a future characterised by parties litigating the issues in order to gain some tactical advantage. While good for lawyers, it is not good for employers and employees and the relations between them'.[14]

Partial validation will not provide certainty or stability

2.16 Opposition senators are of the view that DEWR and ACCI have understated the degree of uncertainty about the issue of the employment relationship and 'matters pertaining' following the *Electrolux* decision. It is not surprising that they both paint an overly optimistic and simplistic assessment of the bargaining situation faced by parties before and after the High Court's decision. According to DEWR, since the decision the Commission has adopted the 'correct approach' to certifying agreements which has resulted in it declining to certify agreements which contain matters which do not pertain to the employment relationship.[15] While DEWR claimed that three categories of matters have been the focus of recent Commission decisions – those that seek to regulate the relationship between employees and their representatives; clauses that seek to regulate the relationship between the employer and third parties; and clauses that contain a mechanism for payroll deduction – this overlooks the issue of uncertainty surrounding matters that exist even at the margins of enterprise agreements. In other words, the waters are far more muddied than DEWR is prepared to state.

2.17 The ACTU, in its submission, emphasised that the High Court's finding in *Electrolux* only applied to the issue of bargaining fees to be paid to a union (and, by implication, a claim for deduction of union dues). That this has since been interpreted

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13 CFMEU, *Submission 5*, p. 4.

14 ACTU, *Submission 2*, p. 5.

15 DEWR, *Submission 1*, p. 5.

by the Government and employer groups to support the argument that a large number of matters, some of which have routinely been included in awards and agreements, do not pertain to the employment relationship remains a matter for contention and debate.

2.18 Opposition senators believe it is disingenuous for DEWR to make out that the Commission now speaks with one voice on this issue and that unanimity on what constitutes matters pertaining to the employment relationship is within reach of the full bench of the Commission. How DEWR knows this for certain remains a mystery to Opposition senators. The AiG is also confident that full bench proceedings in the *Schefenacker* case, which is listed for 20 and 21 December 2004, 'will lead to a greater degree of clarity regarding what matters can and cannot be included in certified agreements'.[16] The Opposition notes the view of AiG that the High Court ruling has placed a 'significant statutory duty' upon members of the Commission for they must now ensure that 'every provision of every agreement pertains to the employment relationship before certifying an agreement'.[17]

2.19 There is every indication that such an expectation is a long way from being realised. The short term prospect is for more uncertainty and confusion arising from conflicting rulings of the Commission on a very complex set of issues. Opposition senators note that important discrepancies have already begun to emerge in recent decisions by the Commission. As the ACTU emphasised in its submission, individual members of the Commission have recently reached different conclusions on a range of issues, including provisions on the right of entry for unions and paid union meeting provisions, recognition and rights of union representatives, and employment of contractors.[18] A ruling by Commission vice-president, Mr Iain Ross, on 22 October 2004, which found that only a narrow number of matters could not be included in an enterprise agreement, is further evidence that the permissible scope of enterprise agreements is in a state of flux.[19]

2.20 While DEWR states in its submission that recent decisions by the Commission 'provide guidance to those making agreements about which matters may fall outside the requirements of s.170LI',[20] this is a far cry from the certainty and 'settled principles' which DEWR confidently predicts will emerge sometime in the near future.

2.21 Opposition senators note the ACTU's assessment that: 'A determination that an issue pertains or does not pertain to the employment relationship in a particular case does not mean that a similar provision will elicit the same result in a different

16 AiG, *Submission 6*, p. 8.

17 ibid.

18 ACTU, *Submission 2*, p. 3.

19 'AIRC ruling casts doubt on enterprise agreements', *Australian Financial Review*, 23 October 2004, p.3.

20 DEWR, *Submission 1*, p. 3.

case with different factual circumstances'. This assessment is supported by the CFMEU:

> In the case of enterprise bargaining agreements, the problem of whether or not clauses pertain is compounded. Award clauses dealing with a common subject matter were and are often in identical or substantially similar terms. However the wording of agreements can vary markedly. This means that a decision in respect of a clause in one agreement does not necessarily translate directly across to a clause that deals with the same topic but in different terms, in other agreements.[21]

2.22 DEWR told the committee at a public hearing that the High Court's *Electrolux* decision had found that the Commission's role was to certify only those agreements that contain matters pertaining to the employment relationship. Opposition senators are concerned by DEWR's admission that the Commission's search for consistent and objective decision-making on the issue of 'matters pertaining' boils down to an interpretation of individual clauses based on how they are drafted:

> If [a clause] is drafted in such a way as to make it clear that the clause has some benefits and some relevance to the employees and their obligations and rights, and the employer, then it is likely to pertain, whereas if it is drafted in such a way as to simply make a bald statement which would appear to confer a right on a third party with no reference or relevance to the employees then it is less likely to pertain. That is the approach the commission appears to have taken.[22]

2.23 Opposition senators find that it is ridiculous for DEWR to be arguing for consistency and certainty from Commission rulings on the issue of 'matters pertaining' when it concedes that matters are determined valid or invalid on the basis of how clauses in different agreements which deal with the same matters are being drafted. Opposition senators do not accept the proposition that rulings by the Commission on whether individual matters do or do not pertain to the employment relationship are dependant upon the methodology used for drafting individual clauses. This reinforces Opposition senators' concern that the bill does not adequately address the current uncertainty and confusion surrounding the question of how matters which do and do not pertain to the employment relationship are being decided by the Commission.

2.24 The important point is that while a full bench of the Commission may, in due course, resolve differences within the Commission, this will not necessarily be finally determinative, a point which employer groups and DEWR seem to have conveniently overlooked.

2.25 Opposition senators also note that certified agreements are voted on as whole packages. The WR Act does not allow employees to agree to certain clauses and not agree to others – they are required to vote on an agreement in its entirety.

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21 CFMEU, *Submission 5*, p. 2.

22 Mr Smythe, *Committee Hansard*, 25 November 2004, p. 43.

2.26 It is unfair for the Government to expect employers and employees to presume that existing agreements certified by the Commission are valid when the bill stops short of defining what does and does not pertain to the employment relationship. Opposition senators believe it is premature for the Government to use this bill as a vehicle to exclude from validation those matters that it believes should not have formed part of an agreement when, according to DEWR, it will be at least several months before 'settled principles' emerge about what can and cannot be included in enterprise deals. The Government's proposed legislation is presumptuous because it assumes that the negotiation of future workplace agreements will further narrow the range of permissible matters, thus delivering more favourable outcomes for employers.

2.27 In concluding that the bill will be of no assistance in addressing the problems created by the *Electrolux* decision, the ACTU argued that certainty will only be restored to the enterprise bargaining process by amending the bill, or by making far-reaching changes to the WR Act. Thus, the ACTU concluded its submission with two suggested options:

- Amend the Agreement Validation bill to validate agreements in their entirety, irrespective of when they were certified; or
- Amend the WR Act to remove the requirement for industrial disputes and certified agreements to be about matters pertaining to the employment relationship between employers and employees to permit it to, alternatively, pertain to the relationship between employers and unions, employer organisations and employees, unions and employees, or employer organisations and unions.[23]

2.28 While Opposition senators are sympathetic to calls for more radical changes to the WR Act, this is clearly beyond the scope of this inquiry. An appropriate legislative response to the *Electrolux* decision would be one that validates all existing enterprise agreements in their entirety irrespective of when they were certified, thus remaining faithful to workers and employers operating under existing workplace agreements.

Conclusion and recommendation

2.29 Opposition senators are not convinced that legislation in response to the High Court's decision is required as a matter of urgency. As acknowledged by DEWR, to date no court has ruled on the question of whether the certification of agreements may be invalid, notwithstanding speculation about the potential invalidity of hundreds of workplace agreements following the *Electrolux* decision. Opposition senators believe that it is reasonable to expect some employers and employees to want to renegotiate their workplace agreements in good faith consistent with any future rulings of the Commission regarding matters which pertain to the employment relationship.

23 ibid., p. 6.

2.30 Like previous workplace relations bills introduced by the Coalition Government and rejected by the Senate, this bill follows a familiar pattern of the Government rushing legislation into the parliament before the issues and all options have been properly considered and the interests of all parties taken into consideration. The extent of the Government's arrogance in these matters is demonstrated by its blanket assertion that the bill is in the best interests of employers and employees, contrary to a range of shortcomings identified by unions in evidence before the committee. This bill is not a genuine attempt to improve enterprise bargaining and provide for more certainty and productive and harmonious workplaces. It represents the Government's latest attempt to legislate to skew future enterprise bargaining agreements in favour of employers and at the expense of employees and their union representatives.

2.31 A proposal to partially validate enterprise agreements is neither sensible nor practical and will only fuel a climate of uncertainty and speculation about matters which do and do not pertain to the employment relationship. The Opposition believes that any legislative proposal to address uncertainty created by *Electrolux* must provide real certainty for both employers and employees who have negotiated enterprise agreements in good faith. The current bill falls short of this objective. At the very least, any new legislation should validate in their *entirety* certified agreements and AWAs certified, approved or varied before the *Electrolux* decision, and agreements negotiated but not yet certified by the Commission at the time of the decision.

2.32 For all of these reasons, Opposition senators recommend that the Workplace Relations Amendment (Agreement Validation) Bill 2004 in its current form be amended by the Senate. Specifically, Opposition senators recommend that the legislation:

- **Validate agreements certified before the *Electrolux* decision unconditionally to the full extent of their existing terms; and**
- **Validate protected action that may have been taken in the process of negotiating an enterprise agreement.**

Senator Gavin Marshall
Deputy Chair