The Senate

Employment, Workplace Relations and Education Legislation Committee

Workplace Relations Amendment (Agreement Validation) Bill 2004

November 2004

ISBN 0 642 71463 0

This document was produced by the Senate Employment, Workplace Relations and Education Legislation Committee and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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

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

Appendix 1

List of submissions

Sub No:	From:
1	Department of Employment and Workplace Relations
2	ACTU
3	Australian Chamber of Commerce and Industry
4	Suncorp Metway Ltd
5	CFMEU
6	Australian Industry Group
7	Agribusiness Employers Federation

Appendix 2

Hearings and witnesses

Melbourne, Thursday, 25 November 2004

Suncorp Metway Ltd

Mr Peter Johnston, *Group Executive, Human Resources*
Ms Sue Mather, *General Manager, Human Resources*
Mr Michael Harmer, *Harmer's Workplace Lawyers*

Construction, Forestry, Mining and Energy Union

Mr John Sutton, *National Secretary, Construction division*
Mr Tom Roberts, *Senior Legal Officer*

Australian Industry Group

Mr Tim Piper, *Director, Victorian branch*
Mr Leigh Stewart, *National Advocate, Industrial Relations*

Australian Chamber of Commerce and Industry

Mr Peter Anderson, *Director, Workplace Policy*
Mr Christopher Harris, *Senior Workplace Relations Adviser*

Australian Council of Trade Unions

Ms Linda Rubinstein, *Senior Industrial Officer*

Department of Employment and Workplace Relations

Mr James Smythe, *Chief Counsel, Workplace Relations Legal Group*
Mr Jeremy O'Sullivan, *Assistant Secretary, Legal Policy Branch, Workplace Relations Legal Group*
Ms Natalie James, *Director, Bargaining and Industrial Action Section, Workplace Relations Legal Group*
Ms Miranda Pointon, *Director, Bargaining and Industrial Framework Section, Workplace Relations Policy Group*

Appendix 3

Tabled documents

Hearing: **Melbourne, Thursday, 25 November 2004**

Suncorp Metway Ltd: Electrolux Issues

Suncorp Metway Ltd: Electrolux Issues – Statistics with respect to applications for certification

Australian Industry Group: Correspondence from the Electrical Trades Union of Australia