# Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

# Inquiry into the Workplace Relations Amendment (Agreement Validation) Bill 2004

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**Australian Government**

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Mr John Carter
Secretary
Senate Employment, Workplace Relations
and Education Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Carter

Attached is the submission of the Department of Employment and Workplace Relations to the inquiry into provisions of the Workplace Relations Amendment (Agreement Validation) Bill 2004.

I trust that the submission will be of use to the Committee in its deliberations regarding the Bill.

Yours sincerely

James Smythe
Chief Counsel
Workplace Relations Legal Group

23 November 2004

# WORKPLACE RELATIONS AMENDMENT (AGREEMENT VALIDATION) BILL 2004

## Introduction

1.1 The Workplace Relations Amendment (Agreement Validation) Bill 2004 (the Bill) was introduced into the Senate on 17 November 2004. The Bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee for consideration on 18 November 2004.

## Existing provisions

1.2 Section 170LI of the *Workplace Relations Act 1996* (WR Act) provides that for there to be a valid application to the Australian Industrial Relations Commission (the Commission) for the certification of an agreement made under Division 2 of Part VIB of the WR Act, there must be an agreement, in writing, about matters pertaining to the employment relationship. This requirement is a jurisdictional test. If an agreement fails to meet this requirement, it cannot form the basis of a valid application for certification. The Commission may not certify such an agreement.

## History of *Electrolux*

1.3 In November 2001 Justice Merkel handed down his decision in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600. Justice Merkel held that protected industrial action may only be taken in support of claims that may be included in a certified agreement. Under s. 170LI, an agreement will only be about matters pertaining to the employment relationship where every substantive, discrete and significant matter in the agreement pertains to the employment relationship. His Honour found that the requirement in s. 170LI may be met if an agreement contains matters that do not pertain to the employment relationship, but only if they are are incidental or ancillary to matters that do pertain to the employment relationship, or are machinery provisions.

1.4 In April 2002, the Commission adopted Justice Merkel's approach in *Atlas Steels Metals Distribution Certified Agreement* PR917092 (*Atlas Steels*). Subsequently, the Commission has made numerous decisions on what matters pertain to the employment relationship.

1.5 In June 2002, the Full Federal Court overturned Justice Merkel's decision (*AFMEPKIU v Electrolux Home Products Pty Limited* [2002] FCAFC 199). The High Court granted special leave to the Minister for Employment and Workplace Relations and Electrolux to appeal against the decision of the Full Federal Court. The High Court Bulletin published notice that special leave had been granted on 16 July 2003. The Commission continued to apply the principle that agreements could not contain non-pertaining matters until 31 October 2003, when a Full Bench of the Commission adopted the Full Federal Court's approach in *AFMEPKIU and Unilever Australia Ltd* PR940027 (*Unilever*).

1.6 On 2 September 2004 the High Court handed down its decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40 (*Electrolux*). The majority of the High Court (6-1) held that Justice Merkel's approach was correct. This decision is consistent with submissions made to the Court by the Minister for Employment and Workplace Relations.

1.7 Since *Electrolux,* the Commission has applied the High Court's approach to s. 170LI in all certification proceedings.

**Implications of *Electrolux* for existing agreements**

1.8 One implication of *Electrolux* is that if the Commission certified an agreement containing a substantial, significant or discrete matter that does not pertain to the employment relationship, it did so without jurisdiction. As a result, the certification may be invalid. No court has to date ruled on this question. However, the Government acknowledges that, since the High Court's decision, there has been considerable speculation about the potential invalidity of agreements.

1.9 The implications of a certification being invalid would be serious. They would include that:

- parties would be unable to enforce rights and obligations contained in the agreements;
- protected action would be available - provided statutory pre-conditions are met;
- there would be confusion as to whether the previous agreement, relevant award, or common law applies.

**The Government's position**

1.10 The Government agrees with the High Court's decision. The Government does not consider that it is appropriate for instruments that are made and enforceable under the workplace relations framework to contain matters that are extraneous to the employment relationship. This does not mean that employers and employees cannot make arrangements about such matters. It merely means that a certified agreement made under the WR Act is not the appropriate mechanism for making such arrangements. For example, such matters may be included contractual or other arrangements made either formally or informally.

1.11 The High Court's decision is consistent with the law that has applied in relation to awards. Awards are the result of the Commission arbitrating an industrial dispute, which is a dispute about matters pertaining to the relationship between employers and employees. The Parliament used the same terminology in s. 170LI to establish the scope of agreements made under Division 2 of the WR Act as it did to define an industrial dispute. It is appropriate that the words be interpreted in a similar manner in both cases.

1.12 Although it considers the High Court's decision correct, the Government acknowledges that, prior to the High Court's decision, there was uncertainty about the correct interpretation of s. 170LI. This resulted in some parties including matters in their agreements that may not pertain to the employment relationship, and the Commission certifying these agreements. The Government considers that employees and employers are entitled to presume that existing agreements certified by the Commission, are valid. This is why it has introduced this Bill.

1.13 In introducing this Bill, the Government is determined to ensure agreements certified by the Commission are upheld and enforced and that no one is able to exploit the potential invalidity of agreements. 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.

**Scope of the Bill**

1.14 The Bill provides for the validation of certified agreements and AWAs certified, varied, or approved on or before 2 September 2004. The Bill will only validate those matters that agreements can include in line with *Electrolux.*

*'Permitted matters'*

1.15 The Explanatory Memorandum explains how the Bill is structured, and notes that it uses the term 'permitted matter', which it defines. The Bill uses this device in recognition of the different scope of the various types of agreements made under the WR Act. The Bill does not seek to define what does and does not pertain to the employment relationship. There is a large body of law arising out of courts and the Commission which deals with this question. Since the High Court's decision, the Commission has been declining to certify agreements that contain matters that do not pertain to the employment relationship. In this short period of time, it has made a number of considered decisions about a range of matters. These decisions provide guidance to those making agreements about which matters may fall outside the requirements of s. 170LI.

1.16 In brief, matters that have been the focus of recent Commission decisions fall into three categories. Firstly, matters that seek to regulate the relationship between employees and their representatives, eg clauses granting union delegates the right to recruit members during work time. Many of these matters have been found to meet the requirements of s. 170LI.[1] Secondly, clauses that seek to regulate the relationship between the employer and third parties it may seek to form a commercial relationship with, eg clauses seeking to limit the use of contractors. Thirdly, clauses that contain a mechanism for payroll deduction. These matters have been the subject of legal precedents that have developed in the award making context. For example, the third category of clauses were found by the High Court in *R v Portus; ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353. This decision was upheld in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, which found that these matters were either about the relationship between the union and its members, or created a new relationship where the employer is agent or debtor and the employee is principal or creditor. In either case, the matter is not about the relationship between the employer and the employee in those capacities.

1.17 In considering these issues, the Commission has applied law that is well established, while taking into account the particular clause in the context of the particular employment relationship that the agreement will apply to. While there continues to be some inconsistencies at the margins, the Government anticipates that settled principles will emerge over the course of the coming months.

*Validating only matters that agreements can include in line with Electrolux*

1.18 As noted above, the Government considers that the High Court's interpretation of s. 170LI is correct and consistent with the objectives of the workplace relations framework. Therefore, the Bill will only validate those matters in agreements that pertain to the employment relationship. The Government has excluded from the validation those matters that agreements should have never contained.

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[1] See for example, the decision of Ross VP in K L Ballantyne of 22 October 2004, which considered many clauses that fall into this category. (PR952656)

*Validating Division 2 and Division 3 agreements*

1.19 The Explanatory Memorandum to the Bill[2] explains that the Bill will validate agreements made under both Division 2 (agreements made with corporations and the Commonwealth) and Division 3 (agreements made about industrial disputes or industrial situations). The *Electrolux* matter arose out of bargaining for a Division 2 agreement. Section 170LI applies to Division 2 agreements. However, Division 3 agreements must also be about matters pertaining to the employment relationship. This requirement is not directly imposed by Division 3, but it arises because the definitions of industrial dispute and industrial situation include a requirement that the dispute or situation be about matters pertaining to the employment relationship.

1.20 Although the *Electrolux* decision did not directly consider the requirements of Division 3 agreements, the validity of such agreements that contain matters that do not pertain to the employment relationship may be in doubt. The Government considers that it is important to provide certainty to all forms of agreement made under the WR Act. The Bill therefore validates Division 3 agreements that may have been certified containing non-pertaining matters.

*Validating Australian Workplace Agreements*

1.21 Section 170VF of the WR Act provides that an employer and an employee may make and Australian Workplace Agreement (AWA), that deals with matters pertaining to the employment relationship.

1.22 While the wording of s. 170VF is different to s. 170LI, the Government considers that it is important to provide the same degree of certainty for individual agreements as for collective agreements. The Bill therefore validates AWAs that may have been approved although they contained matters that did not pertain to the employment relationship.

*Validating variations*

1.23 The Government considers that it is appropriate to validate variations to agreements. If an agreement was varied and part of the variation included a non-pertaining matter, the entire variation may be invalid. The Government considers that it would be unfair to allow agreements that were varied in good faith to be made entirely invalid. This is consistent with the Government's view on agreements made in good faith. Therefore, the Bill provides for the validation of agreements varied on or before 2 September 2004. Also, the Bill will only validate those matters that variations can include in line with *Electrolux.*

*Validating agreements certified, approved or varied on or before 2 September 2004*

1.24 The Government acknowledges that, prior to the High Court's decision, there was uncertainty about the correct interpretation of s. 170LI. The Government's primary policy objective in introducing this Bill is to ensure that existing rights and obligations are clear and enforceable. Parties to existing agreements certified by the Commission are not in a position to take remedial action themselves to overcome the potential invalidity of their agreements.

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[2] See paragraphs 14-21, which explain why the definition of 'permitted matter' is different for Division 2 and Division 3 agreements.

1.25 The uncertainty faced by parties operating under existing agreements can be contrasted with the situation of parties who have or will make agreements after 2 September 2004, the date of the High Court decision. After that date, the Commission adopted the correct approach to certifying agreements. That is, it has applied the test under s. 170LI appropriately, and has declined to certify agreements containing matters that do not pertain to the employment relationship.

1.26 As noted above, the matters pertaining test has been a feature of Australian workplace relations law for decades. The High Court's decision makes it clear that this test applies to agreements. Parties making agreements after the High Court's decision were fully aware of the requirements of s. 170LI. The decision was well publicised, not just in workplace relations media, but in the general media. Once the High Court handed down its decision, parties involved in bargaining were able to review their proposed agreement and make any necessary adjustments to ensure that it met the requirements of the WR Act.

1.27 After 2 September 2004, parties that include matters in their agreement that may not pertain to the employment relationship do so knowing that the agreement may not be certifiable.

*Not validating industrial action*

1.28 The Bill does not validate industrial action that would, but for the fact that it was taken to support a non-pertaining claim, have been protected action.

1.29 The situation with agreements is quite different from industrial action. Parties who have had agreements certified by the Commission are entitled to presume the agreement is valid. However, unlike certified agreements, no third party vets protected action to ensure it meets the requirements of the Act. It has always been up to the party taking industrial action to ensure that they meet the requirements of protected action in order to take advantage of the very generous immunity that applies to protected action. While some decisions of courts and the Commission may have suggested that non-pertaining matters could be included in agreements, parties taking industrial action could not have reasonably thought there was no risk involved in taking industrial action in respect of matters that do not pertain to the employment relationship.

*Not validating future agreements containing non-pertaining matters*

1.30 There have been suggestions that the Bill should make permanent changes to the requirements of certification of agreements to address uncertainty about whether the Commission will certify a particular agreement.

1.31 For example, it has been suggested that the requirement that agreements be about matters that pertain to the employment relationship should be removed or amended.

1.32 As stated earlier, the Government supports *Electrolux* and does not intend to change the test in s. 170LI. The Government's position is that agreements that are made and enforceable under the WR Act should be about matters that pertain to the employment relationship.

1.33 It has also been suggested that validation mechanism could have ongoing operation, that is, that parties making agreements under the WR Act could include non-pertaining matters in their agreement, and the Commission could certify such agreements, but the non-pertaining matters would not be enforceable. This could be done by giving the Commission the discretion to certify such agreements.

1.34 The Government considers that this would be an invitation to parties to continue to include non-pertaining matters in their agreement, and to take protected action in pursuit of such matters. Parties would not be able to be certain about which parts of their agreements were enforceable. This is inconsistent with the agreement making framework in the WR Act.

1.35 These proposals overstate the degree of uncertainty about what does and does not pertain to the employment relationship. As noted above at paragraphs 1.15 – 1.18, the matters the Commission has found to not pertain to the employment relationship fall into identifiable areas which have been the subject of judicial consideration over the last century. These matters deal with peripheral issues and usually involve third parties. The WR Act establishes a framework which focuses on agreements made directly between an employer and its employees. Consistent with this framework, matters that do not directly relate to the relationship between an employer and its employees should not be included in certified agreements.