Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

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

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ACTU

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

ACTU SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (AGREEMENT VALIDATION) BILL 2004

November 2004

BACKGROUND TO THE ISSUE OF "PERTAINING TO THE EMPLOYMENT RELATIONSHIP"

1. The question of what issues can be the subject of regulation by the Industrial Relations Commission (and its predecessors) has occupied tribunals and courts since the very early days of the conciliation and arbitration system.

2. Prior to the 1983 *Social Welfare Case*,[1] the High Court had held that certain issues were not sufficiently "industrial" to attract the Commonwealth's jurisdiction over industrial disputes under s51(xxxv) of the Constitution and that certain persons (such as contractors or public servants) were not capable of being engaged in an industrial dispute.

3. In *Social Welfare* the Court held that the words "industrial dispute" were not a legal or technical expression and had to be given their popular meaning, as would be understood by the person in the street.

4. Since that time, the key limitation on the matters which might be the subject of an industrial dispute and dealt with in awards has been what is now the definition of "industrial dispute" in s4(1) of the *Workplace Relations Act 1996* ("the Act") which includes the requirement "that (the dispute) is about matters pertaining to the employment relationship between employers and employees".

5. The lack of a constitutional impediment to Commonwealth jurisdiction over disputes covering "non-pertaining matters" was confirmed by the High Court in *Alcan*[2] where, in considering a claim for employer deduction of union dues, it held:

> "*The material with respect to Australian and overseas practice takes on a different light in the context of the constitutional expression 'industrial disputes' which, it is now clear, must be given its popular meaning. Even if there were no material on the subject, the popular meaning would, in our view, extend to a dispute as to the deduction of union dues from the wages of employees who authorize that course. That is because trade unions exist to further the industrial interests of their members and to represent them in negotiations with employers and in proceedings in the various industrial tribunals established for the regulation of the industrial relationships of employers and employees. In an industrial relations system involving the active participation of trade unions as the recognized representatives of their members, a claim that employers should deduct union dues is, in our view, inherently industrial in character. Certainly, that is so where the claim is for deductions authorized by individual employees. The material, at least the Australian material and that relating to countries where trade unions have a similar role, confirms that a dispute with respect to that matter is an industrial dispute within the popular meaning of that expression and, hence, an*

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[1] *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297

[2] *Re Alcan Australia Limited; ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994)181 CLR 86

industrial dispute for the purposes of s.51(xxxv) of the Constitution.

"It is arguable, however, that the popular meaning of 'industrial disputes' does not extend to a claim for the deduction of union dues unless the deductions are in some way authorized by employees. That is because, prima facie, a union is acting in its own interest, not that of its members as employees, when it pursues a claim for the deduction of dues and it may well be that, even in popular understanding, it is necessary for the employees' interests to be seen as coinciding with the union's if the matter is to be regarded as industrial. On the other hand, if some employees have authorized the deduction of union dues or the union is acting with the support of some employees, there is obvious force in the argument that the dispute is an industrial dispute for the purposes of s.51(xxxv). It is, however, unnecessary to resolve that question for the purposes of the present case.

"Even though a dispute as to the deduction of union dues falls within s.51(xxxv) of the Constitution (at least if it relates to authorized deductions), it will not be an industrial dispute within the jurisdiction of the Commission unless it is also a dispute as defined in the Act. By s.4(1) of the Act, 'industrial dispute' is defined, so far as subject matter is concerned, as meaning 'an industrial dispute ... that is about matters pertaining to the relationship between employers and employees' and as including 'a demarcation dispute'. To the extent that the definition requires the subject matter of a dispute to pertain to the relationship between employers and employees (and that is the only part of the definition that is relevant to this case), it is different from the definitions of 'industrial matters' considered in R. v. Kelly and, later, in Reg. v. Portus (which were concerned with 'the relations of employers and employees) only in the manner of its expression."[3]

THE EFFECT OF THE *ELECTROLUX* DECISION

6. The High Court's decision in *Electrolux*[4] decided three issues:

   (i) Industrial action is not protected if taken in support of claims where one or more of those claims does not pertain to the employment relationship;

   (ii) A claim for a bargaining fee to be paid to a union does not pertain to the employment relationship (and, by implication, neither does a claim for deduction of union dues); and

   (iii) An agreement cannot be certified if it contains a provision that does not pertain to the employment relationship, unless it is machinery in nature or is ancillary or incidental to a matter which pertains to the relationship.

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[3] *Ibid* at 103-105

[4] *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40 (2 September 2004)

7. The *Electrolux* decision has led to considerable uncertainty, and created some difficulties for all those engaged in enterprise bargaining.

8. First, although not determined in the Court, it is at least arguable that certified agreements which include a matter which does not pertain to the employment relationship are void; that is, irrespective of when they were certified it is as if there never was an agreement.

9. Second, although the *Electrolux* decision went no further than its finding in relation to bargaining fees in determining what is, or is not a matter pertaining to the employment relationship, the decision is being taken by some, including some members of the Industrial Relations Commission ("the Commission") to support a contention that a significant number of matters, some of which have routinely been included in awards as well as agreements, do not pertain.

10. Individual members of the Commission have come to different conclusions on a range of issues. For example, in *Transfield Worley - and - AMWU*[5] Lacy SDP held that trade union training leave pertained to the employment relationship, while in *Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004*[6] O'Callaghan SDP held that it did not pertain. On the other hand, in *Iplex Pipelines Australia Pty Limited Certified Agreement (Elizabeth SA) 2004*[7] O'Callaghan SDP found that a clause for leave for union training did pertain because the provision stated that the company supported the training in order "to promote industrial relations and industrial efficiency", making it ancillary to the objects of the agreement.

11. Other provisions on which there have been different determinations include right of entry, recognition and rights of union representatives and employment of contractors.

12. 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 case with different factual circumstances.

13. The effect of this uncertainty is that employees and employers do not know whether or not their agreements are enforceable, not just to the extent of any non-pertaining matters, but as a whole.

14. While a Full Bench of the Commission may, in due course, resolve differences within the Commission, this will not necessarily be finally determinative.

15. The consequence of this uncertainty is that 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.

16. It also means that parties taking industrial action are not in a position to know with any certainty whether or not the action is protected from very serious

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[5] PR952538 21 October 2004
[6] PR952801 28 October 2004
[7] PR952586 20 October 2004

legal sanctions.

DOES THE AGREEMENT VALIDATION BILL SOLVE THE PROBLEM?

17. The *Workplace Relations Amendment (Agreement Validation) Bill 2004* ("the Bill") does little, if anything, to resolve the problem associated with the need for certainty for parties to certified agreements.

18. Although the Bill validates pre-*Electrolux* agreements to the extent of matters which pertain to the employment relationship, it does not provide any certainty as to which provisions are enforceable and which are not.

19. In some cases, this lack of certainty could affect the functioning of the whole agreement. For instance, in *Iplex* it was held that a provision enabling employees to "salary sacrifice" did not pertain other than to the extent that it allowed salary sacrifice into superannuation.[8] Should the *Iplex* decision be upheld, an employer who had been deducting salary sacrifice payments in good faith could find itself obliged to pay the amounts deducted again in order to comply with the wage provisions of the agreement.

20. Further, and even more seriously, the Bill does nothing to resolve ongoing uncertainty about the bargaining process and certification of agreements post-*Electrolux*.

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

22. The High Court overturned the Full Court of the Federal Court's decision in *Electrolux*[9] on grounds based on statutory interpretation. The Court did not deal with the policy issue set out in the Federal Court decision:

> *"There are sound policy reasons for reading para (e) literally. Fundamental to Part VIB of the Act is the notion that, within strict and objectively definable limits, organisations, employees and employers are entitled to engage in industrial warfare. We agree with the comment of North J in Australian Paper Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (1998) 81 IR 15 at 18:*
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> *"'The purpose of this statutory scheme is to allow negotiating parties, both employer and employee, maximum freedom consistent with a civilised community to take industrial action in aid of the negotiation of agreements without legal liability for that action.'*

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[8] PR952801 paras 62-69

[9] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199 (21 June 2002)

"If that purpose is to be achieved, a high degree of certainty is essential. If parties are to make rational and confident decisions about their courses of conduct, they need to know where they stand. It would be inimical to the intended operation of Part VIB to interpret s 170ML(2)(e) in such a way as to make the question whether particular industrial action is 'protected action', and therefore immune from legal liability, depend upon a conclusion concerning a technical matter of law: whether a particular claim, if conceded, would cause any resultant agreement to fall outside s 170LI(1). As this case demonstrates, that may be a matter about which well-informed people have different views.

"Further, there is usually more than one way of achieving a desired end. If an employer is disposed to concede a claim expressed in language that might create a problem, if repeated in an agreement presented for certification under s 170LI(1), the parties may find it possible to substitute different words. They may even agree on a different methodology."[10]

23. The very problem which the Bill is designed to address - the possibility of parties to agreements acting on the basis that they do not have a valid agreement in place - will continue to exist in relation to agreements certified after 2 September 2004 because of the uncertainty about the application of *Electrolux*.

24. The lack of certainty and, therefore, enforceability, runs counter to the Principal Object of the Act, which includes:

providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; (emphasis added)[11]

25. Unless this issue is addressed, the only consequence can be a future characterised by parties litigating the issues in order to gain some kind of tactical advantage. While good for lawyers, it is not good for employers and employees and the relationships between them.

THE RIGHT TO BARGAIN

25. Apart from the significant issue of uncertainty, there is an issue of principle involved; that is, the right of parties to an agreement to determine for themselves the matters about which they will bargain and reach agreement.

26. The International Labour Organisation places great significance on the importance of parties being free to negotiate their conditions of employment. For instance, the Freedom of Association Committee has held that:

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[10] *Ibid* paras 92-93
[11] WRA s3(e)

"In keeping with the principles of freedom of association, it should be possible for collective agreements to provide for a system for the collection of union dues, without interference by the authorities."[12]

27. 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.

ACTU RECOMMENDATIONS

28. The ACTU submits that the Bill will be of no assistance in addressing the problems created by *Electrolux*.

29. These problems could be addressed by any of the following proposals:

    (i) Remove the requirement for industrial disputes and certified agreements to be about matters pertaining to the employment relationship;

    (ii) Amend the current requirement that the dispute or agreement be about matters pertaining to the 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;

    (iii) Amend the Act in either of the above ways in respect of agreements only;

    (iv) Amend the Bill to validate agreements in their entirety, irrespective of when they were certified;

    (v) Amend the Bill to validate, in their entirety, agreements certified prior to the Bill's commencement date and, in respect of agreements certified after that date, to provide for their certification if, taken as a whole, they pertain to the employment relationship.

30. In addition to the recommendations above, the ACTU submits that the Act should be amended to protect industrial action which has been taken in support of claims for a certified agreement, whether or not those claims include matters which might be held not to pertain to the employment relationship.

31. Given the serious penalties which apply to the taking of unprotected action, failure to amend the Act would remove any real right to take lawful, industrial action, as required by Australia's adherence to ILO Conventions.

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[12] *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th edition ILO Geneva 1996 para 808

32. The ACTU is also concerned to ensure that unions and their members who took industrial action in good faith, believing on reasonable grounds that it was protected, should have legal protection from any action which might be taken against them by employers.

33. The Government states in the Second Reading Speech, that:

"Parties could not have reasonably expected that protected action was available to support claims for non-pertaining matters."

34. Given that a Full Court of the Federal Court held that protected action could be taken in support of non-pertaining matters, it seems reasonable to the ACTU that unions adopted a similar view of the law.

35. The ACTU does agrees with the Government's statement in the Second Reading Speech:

"However, the Government considers it would be highly undesirable for parties to exploit uncertainty in relation to past industrial action by initiating or threatening legal action."

34. Irrespective of our joint aspirations, however, the Bill does not give effect to the stated objective. Although the Government believes that legislating to protect past industrial action to the extent that the action was taken in support of non-pertaining matters would be complex or practically difficult, the reasons for this are not obvious.