Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

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

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ACCI SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO THE

WORKPLACE RELATIONS AMENDMENT (AGREEMENT VALIDATION) BILL 2004

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ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

- ACCI is Australia's largest and most representative business organisation.

  - Through our membership, ACCI represents over 350,000 businesses nationwide, including:

    - Australia's top 100 companies.

    - Over 55,000 medium sized enterprises employing 20 to 100 people.

    - Over 280,000 smaller enterprises employing less than 20 people.

- Businesses within the ACCI member network employ over 4 million working Australians.

- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis.

- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

Summary of ACCI Submission

1. The Workplace Relations Amendment (Agreement Validation) Bill 2004 ('the Bill') is supported and should be enacted.

2. The Bill deals with a significant current issue concerning the validity of agreements made under the Workplace Relations Act 1996 ('the Act'). The

issue arises directly from a decision of the High Court in Electrolux Home Products v AMWU and Others (2nd September 2004).

3. Addressing the issue of validity of agreements consequential on the High Court decision can only be appropriately dealt with by legislative amendment to the Act.

4. The purpose of the Bill is to provide legal validity to Certified Agreements (CA's) and Australian Workplace Agreements (AWA's) certified, approved or varied on or before 2nd September 2004. ACCI supports that objective. It is in the interests of parties to agreements made before the High Court decision, and the public interest, that those agreements as a whole not be void by virtue of the High Court decision.

5. The manner in which the Bill seeks to achieve this objective is by amending the Act to insert a new division 10A (validating the two types of CA's made under Part VIB) and a new division 8A (validating AWAs made under Part VID). The new divisions do not assume that agreements are invalid, but statutorily validate agreements whether or not the agreements contain 'permitted matters'. However, the statutory validation is only with respect to matters that are 'permitted matters'. Permitted matters are defined as those which 'pertain to the employment relationship' or which are machinery matters or incidental or ancillary to matters which pertain to the employment relationship.

6. ACCI agrees with this approach to validation. In light of the High Court decision, it would not be appropriate for agreements to be validated with respect to non pertaining matters.

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Agreements under the Workplace Relations Act 1996

7. Broadly speaking, there are two forms of agreement under the *Workplace Relations Act 1996* ('the Act') - Certified Agreements (CAs) and Australian Workplace Agreements (AWAs).

8. CAs are collective agreements - between an employer and a trade union (s170LJ, 170LL or 170LO agreements) or an employer and a group of employees (s 170LK agreements).

9. AWAs are individual employer and employee agreements (although they may be collectively negotiated).

10. CAs and AWAs apply extensively throughout the Australian economy. It is estimated that more than 60% of Australian employees are employed under CAs or AWAs.

11. CAs and AWAs are industrial instruments that, once legally valid, oust in whole or in part the operation of an otherwise applicable award.

12. CAs and AWAs are regulated industrial instruments. Statutory provisions in the Act govern the process for negotiating, making, certifying, approving and enforcing CAs and AWAs.

13. CAs must be certified by the Australian Industrial Relations Commission (AIRC). AWAs must be approved by the Employment Advocate (EA) or, if referred by the EA, the Australian Industrial Relations Commission ('the Commission'/ 'AIRC').

14. The negotiation or re-negotiation of CAs and AWAs invokes a legal immunity from liability for economic damage caused by a strike or lockout. This legal immunity is known as 'protected action'.

15. The content of CAs is regulated. Section 170LI requires (in respect of ss170LJ, LK or LL agreements) 'an agreement in writing about matters pertaining to the relationship between an employer...and all persons employed in a single business of the employer'.

16. Similarly, s 170LO agreements must be in settlement of an "industrial dispute" which is defined in s4(1) to be "about matters pertaining to the relationship between employers and employees".

17. Similarly, s170VF(1) requires AWAs to be a written agreement that "deals with matters pertaining to the relationship between an employer and employee."

18. The content of agreements under the Act can therefore be said to be restricted to those matters "that pertain to the relationship between employers and employees".

19. This concept (of 'pertaining matters') has broader implications than simply the legal content of agreements. Under the Act, a nexus exists between the content of an agreement and 'protected action'. Protected action can only be taken in respect of claims that can be lawfully included in agreements capable of certification or approval. This means that claims made by negotiating parties must "pertain to the relationship between employers and employees" if they are to be cloaked with the legal immunity of 'protected action'.

The Electrolux Decision

20. In Electrolux Home Products v AMWU and Others (2nd September 2004) the High Court was asked to rule on whether industrial action in support of a claim by a trade union for a clause in a CA requiring employer support to impose a bargaining fee payable to a union by non union employees was 'protected action'.

21. The court, by a 6:1 majority, decided it was not protected action.

22. Four separate judgments were issued by the seven High Court justices. Majority judgments were by Chief Justice, Gleeson, Justice McHugh, Justice Callinan and (jointly by) Justices Gummow, Hayne and Heydon. The dissenting judgment was by Justice Kirby.

23. Pivotal in each of the Electrolux judgements and earlier Federal Court decisions was an interpretation of section 170LI of the Act.

24. The Court concluded that under the Act protected action could only be action taken in support of demands that were, if agreed, capable of certification under the Act. This meant that the demands had to "pertain to the relationship between employers and employees".

25. The Court also suggested that all of the demands in pursuit of a CA had to have this character if the action was to be protected. Further the Court suggested that all of the terms of an agreement submitted for certification

had to have that character for the agreement to be certifiable by the Commission.

ACCI Response to Electrolux Decision

26. The High Court decision in Electrolux has been widely welcomed by employers from both a legal and a policy perspective.

27. In legal terms, it adopts a construction of the Act that reflects the express language of the Act and the ordinary meaning of the terms used in the Act, and is largely as employers had understood the Act to operate.

28. In policy terms, it is logical and sensible.

29. It restores one of the limits on protected action that had existed since protected action was first introduced into law in 1993 – and until the Full Federal Court in Electrolux decided otherwise – that is, that protected action must relate to matters that are capable of inclusion in a certified agreement.

30. Limits on protected action are both necessary and appropriate having regard to the nature of protected action, its effect and purpose. For example, protected action was never intended to support claims for matters outside of the employment relationship – such as claims on employers for environmental or political causes.

31. Further, the linkage between protected action in support of demands for an agreement and the content of agreements capable of certification is logical.

32. The High Court decision does not make it unlawful for demands to be made for agreement on matters that do not pertain, nor does it make it illegal for an agreement to be made by consenting parties on matters that do not pertain and for that agreement to have legal force under general law.

33. It is only when demands are made that seek to invoke protected action that the obligation that they pertain arises. Similarly, only agreements that are to be certified under the Act need have the character of 'pertaining to the employment relationship'.

34. Hence, the making of demands of a non-pertaining character is not prima facie unlawful so long as the demands are not advanced by protected action. Likewise the conclusion of an agreement by genuine consent on

matters that do not pertain is not unlawful so long as it is not submitted for certification.

35. The formal response of ACCI to the High Court decision was formulated by the ACCI Council on 4th November in the resolution set out below. This resolution reflected the unanimous view of the 36 employer and business organisations that comprise the ACCI network:

Council:

- Notes and welcomes the decision of the High Court majority on 2nd September 2004 in the 'Electrolux Case';
- Reaffirms support by employers for the restoration by the High Court of one of the appropriate limits on protected industrial action, being the limit on protected action to matters which are capable of inclusion in certified agreements;
- Welcomes the conclusion of the High Court that union demands on employers relating to bargaining fees being payable to unions by non union employees are not matters that should be capable of inclusion in certified agreements or be the subject of protected action, and reaffirms ACCI policy that such compulsory fees are inimical to freedom of association;
- Supports the principle of law set out in the Electrolux decision that matters which do not pertain to the relationship between employers and employees should not give rise to protected action nor be capable of inclusion in certified agreements;
- Notes that matters outside of this description can still be agreed by employers, employees and unions through letters of agreement or other means, but cannot give rise to legally protected strike or lockout action;
- Recommends that individual employers take advice on the implications of the Electrolux decision for existing certified agreements, for bargaining claims in respect of new or re-negotiated certified agreements, in relation to the lawfulness of protected action taken in support of bargaining demands, and be advised on matters pertaining/not pertaining, and to not include matters in agreements that do not pertain to the employment relationship; and

- Recommends that ACCI and ACCI members advise employers of the implications of the Electrolux decision, monitor the manner in which the decision is applied by the Commission and by trade unions, and take appropriate steps in the Commission and within industry to advance employer interests.

Commission Response to Electrolux Decision

36. Since the Electrolux decision, the Commission and parties seeking certification or approval of agreements (or variation to agreements) have been on notice that their agreements must only contain provisions that 'pertain to the employment relationship' for the statute to authorise certification or approval.

37. Some private legal advice suggests that certified agreements containing matters that do not pertain are at risk of being void at law by virtue of the Commission not being authorised to have certified such agreements. The High Court did not rule on this question.

38. Since 2nd September, the practice of the parties to Commission proceedings and, perhaps more relevantly, the practice of the Commission itself, has been to be more deliberative about the content of certified agreements in proceedings for their approval.

39. This is because the High Court decision has implications for other terms and conditions in certified agreements beyond "bargaining fee" clauses.

40. The decision does not identify a list of contemporary matters that are not likely to be "about matters pertaining to the relationship between (employers and employees)".

41. However, based on the decision, a strong argument exists that demands of an academic, political, social, environmental or managerial nature do 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.

42. Although the Commission is not a judicial body, since 'Electrolux' a number of decisions have been made by the Commission on the question of 'matters pertaining to the relationship between employers and employees'.

43. Some examples of Commission proceedings have been:

- Decision of SDP Hamberger on 7th September certifying the Franklins/SDA Agreement after the parties agreed to remove from a proposed certified agreement clauses that may not pertain (specifically clauses relating to payroll deductions for union members) and to have those clauses in a separate private agreement;

- Decision of SDP O'Callaghan on 15th September to approve the Mitsubishi Motors/AMWU and Others Redundancy Agreement on the basis that provisions which on their face were non pertaining were found to be ancillary or incidental;

- Decision of SDP O'Callaghan on 20th October in the Iplex Pipelines/AMWU Certified Agreement that provisions in the agreement regulating the terms and condition of contactors and advance notice to the unions of the use of contractors were not matters pertaining;

- Decision of VP Ross on 22nd October in the Ballantyne/NUW Agreement that clauses concerning no extra claims clause, a clause prohibiting AWA offers, introduction of change, indemnity on employee liability, pay rates for causal employed by contractors, union rights over public holiday substitution, trade union training leave, notice board for union delegates, union recognition, union meetings, union rights of entry, time and wage records were all matters pertaining; clauses concerning union recruitment and deduction of union fees from payroll were not matters pertaining, and that a clause prohibiting contracting out did not need to be ruled upon;

- Decision of SDP O'Callaghan on 28th October in the Schefenacker Vision Systems/AWU/AMWU Certified Agreement that salary sacrifice (into superannuation) and introduction of change provisions in the agreement were matters pertaining, but that shop steward training leave, site rates payable by labour hire workers, right of entry and payroll deduction provisions were not matters pertaining;

- Decision of DP McCarthy on 17th November in the Global Electrotech/CEPU and Others Agreement to certify the agreement, finding that clauses dealing with income protection insurance, representation role of unions and union rights of entry were matters pertaining.

44. To date, there has not been a Full Bench hearing on the matter. The Ballantyne case had the benefit of submissions from the peak councils (the ACTU and ACCI) as interveners.

45. In November 2004 the Commission President referred two Victorian construction industry agreements to a Full bench (Merkon Constructions and Fire Protection Systems), only to have the applicants subsequently withdraw the applications for certification.

46. ACCI understands that the AMWU have lodged an appeal to a Full Bench against the decision of SDP O'Callaghan in the Schefenacker Vision Systems/AWU/AMWU Certified Agreement (above).

47. In addition, the Federal Court in the Wesfarmers Coal/AMWU Case is to consider whether industrial action by a union in support of a bargaining claim was protected action. The employer gained injunctive relief from French J on 8th October on the ground that there were serious questions to be tried whether proposed clauses in the agreement relating to leave for union training courses or conferences, the engagement of contractors, the performance of warranty work, redundancies, leave for the purposes of attendance at local government meetings and the right of entry on the part of the AMWU were matters pertaining.

Policy Considerations

48. The Electrolux decision did not change Australian law. The law applicable to the certification of agreements is the law set out in the Act. What the Court has done is to interpret the statute, and in the process overturn a decision of the Full Federal Court. It was the decision of the Full Federal Court that adopted an interpretation of the law that would have expanded protected action beyond what industry understood its legislative intention to be. It was the decision of the Full Federal Court that created a gap between legislative policy and the law, not the decision of the High Court.

49. However, what the decision of the High Court has done is to compel compliance with the strict terms of the statute, and to interpret those terms strictly. This approach, whilst supported by employers, raises the possibility that CAs currently in operation at the date of the High Court decision had been certified by the Commission (or had variations certified by the Commission) where they contained matters that did not pertain to the employment relationship.

The Case for 'Certainty' – The Content of Agreements

50. Two issues of uncertainty have arisen following Electrolux:

- Firstly, the content of agreement - what are and what are not matters pertaining to the employment relationship (or 'incidental, ancillary or machinery' to that relationship); and

- Secondly, the validity of existing agreements - what is the legal status of existing agreements entered into and certified in good faith which contain non pertaining mattes.

51. ACCI supports the continuation of the concept in the Act that certain matters be 'objectionable provisions'. It is not necessary at this time for the parliament in the statute to specify what are and what are not pertaining matters.

52. In this respect it should be noted that agreements are qualitatively different from awards. Awards operating as a general community safety net lend themselves to a statutory restriction on 'allowable matters'. Agreements by their nature are intended to be more expansive in content – whilst still having an important outer boundary limit to the traditional concept of matters pertaining.

53. However, there is a legitimate concern with the potential for the Commission or courts to widely expand the notion of what is 'incidental, ancillary or machinery' in a way that would defeat the statutory requirement that agreements contain pertaining matters only. This is discussed below.

54. It is likely that through a combination of court and Commission judgements based on test cases and/or appeals that a clearer indication will be given to the concept of 'matters pertaining' in respect of the 'contentious 'or 'grey' areas. It should also be noted that this concept of 'matters pertaining' is not a new concept to agreement making. There is a body of law on many of these issues, based in part on the existing statutory definition of 'industrial dispute'.

55. There are also a number of approaches that can be applied by the parties and the Commission to address the problem of 'uncertainty' in the content of agreements post Electrolux.

56. Parties should only include matters which pertain to the employment relationship in their proposed agreements. Real certainty lies in caution. The understandable desire for 'certainty' post-Electrolux does not warrant the inclusion of terms in agreements that might not pertain to the employment relationship. It is also not in the public interest or consistent with the objects of the Act to certify agreements with uncertain

foundations. The simplest answer to removing any potential for disputation in agreement making would be for parties to only bring to the Commission agreements containing matters that clearly pertain to the employment relationship.

57. As mentioned above, unions and employers also have the option of including non-employment based matters agreed with employers in written (but non-certified) agreements.

58. There will always be a degree of uncertainty whatever the parliament does, given the need for statutory interpretation of legislation based on the facts of each case.

a. Any application for certification can only be based on the circumstances of that agreement as applied to the law.

b. This means that the individual content of clauses in agreements needs to be examined, plus any evidence or submissions the parties to the agreement seek to make about the intention or the operation of the proposed terms of the agreement. Every party has the right to seek the approval of their agreement and explain the facts of their agreement

c. It is only after that process that the law as decided in Electrolux can be applied to conduct a characterisation exercise to determine if the agreement contains matters that pertain to the employment relationship.

d. The Commission has an active obligation under the Act to be satisfied that each agreement that it certifies contains (after the High Court decision) only matters that pertain to the employer/employee relationship.

The Case for 'Certainty' – The Validity of Agreements

59. ACCI supports legislative amendments to confer legal validity of agreements that have been certified or approved under the Act prior to the Electrolux decision of 2nd September where that certification may have not been authorised by the Act due to the agreement containing non pertaining matters.

60. This is the purpose of the the Workplace Relations Amendment (Agreement Validation) Bill 2004 ('the Bill').

61. Based upon our analysis of the Bill, it would also be its effect - should it be enacted.

62. There are clear justifications for the Bill.

63. It is in the interests of parties to agreements made before the High Court decision, and the public interest, that those agreements as a whole not be void by virtue of the High Court decision.

64. Parties making agreements on lawful matters and in good faith should comply with those agreements and receive the benefits and meet the obligations of those agreements for the term of their agreement.

65. Parties have, prima facie, been entitled to rely on the certification or approval by the Commission (or, for that matter the EA) as conferral of legal status for their agreements and a judgement that such agreements comply with the Act.

66. 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.

67. Conferral of legal validity can only be effectively undertaken by the parliament through legislative amendment. The alternative process of having to amend existing agreements, re-balloting amendments and submitting variations to agreements is likely to create industrial disputation, and in any event would only be achievable where agreement is reached. That in itself would lead to disputes.

Workplace Relations Amendment (Agreement Validation) Bill 2004

68. The manner in which the Bill seeks to achieve its objective is by amending the Act to insert a new division 10A (validating the two types of CA's made under Part VIB) and a new division 8A (validating AWAs made under Part VID). The new divisions do not assume that agreements are invalid, but statutorily validate agreements whether or not the agreements contain 'permitted matters'.

69. ACCI agrees with this approach. Both CAs and AWAs should be validated in this manner.

70. Under the Bill the statutory validation is only with respect to matters that are 'permitted matters'. Permitted matters are defined as those which 'pertain to the employment relationship' or which are machinery matters or incidental or ancillary to matters which pertain to the employment relationship.

71. ACCI also agrees with this approach to validation. As mentioned above, the concept of industrial instruments being matters that must 'pertain to the employment relationship' is a longstanding feature of Australian industrial law - a concept that preceded the Act and which was retained in that Act.

72. The High Court did not alter that long standing distinction between matters pertaining and matters not pertaining. Parties making applications for agreements prior to 2nd September 2004 that contain a combination of pertaining and non pertaining matters ought to have been aware that non pertaining matters have at no time been permissible in agreements. All that the High Court has done is to make it clear that non pertaining matters in agreements constitute a barrier to certification.

73. Given this, it is logical and necessary to confer a legal validity on those agreements with respect to the pertaining matters, but not with respect to the non pertaining matters.

74. If non pertaining matters were to be given legal validity, the parliament would be for the first time extending the content of industrial instruments to include non pertaining matters - something quite at odds with the intention of the parliament for many years and quite at odds with the whole tenor of the High Court decision.

75. It would also be an approach likely to create more anomalies and disputes, not fewer. For example, an agreement certified in, say October 2004 in the same industry could not at law include a non pertaining matter but that same non pertaining matter would have legal validity in a competitors agreement that was certified in, say, August 2004. That would be laying a legislative foundation for disputes.

76. An issue also arises with respect to clauses in agreements that are ruled to be 'incidental, ancillary or machinery'. Whilst ACCI accepts that scope should exist for 'incidental, ancillary or machinery' provisions, they must truly be of that character - that is, 'incidental, ancillary or machinery' to

matters pertaining and not in themselves containing non pertaining matters. ACCI does not accept the proposition that an 'incidental, ancillary or machinery' provision in an agreement should be permitted to transform a non pertaining matter into a pertaining matter. In the event that a practice develops that does so, the parliament will need to consider an appropriate legislative amendment.

77. A further issue concerns the practical management of existing agreements once the Bill is enacted. An issue obviously remains as to what are pertaining and non pertaining matters, or matters 'incidental, ancillary or machinery' (discussed above). The Bill provides no guidance on how severance of non pertaining matters is to occur. The Bill could be improved by provision of that guidance - for example, a provision requiring parties to remove non pertaining matters from their pre 2nd September agreements by a specified date.

78. ACCI has also given consideration to whether the appropriate date for the conferral of legal validity is 2nd September 2004 or some alternative date - such as the date of proclamation of any amendments. On balance, ACCI supports the 2nd September date. It is the logical date given that it is the date of the High Court decision. It is clear from the Commission's dealing with agreements in the days following the Electrolux decision that the Commission has been on notice and - where necessary - put the parties on notice that their agreements must only contain pertaining matters for certification to be authorised by the Act.

79. There may however be a case for a transitional provision with respect to any agreements that were voted on and approved prior to 2nd September but not lodged for certification until after 2nd September. This would only be a very narrow range of applications (given the obligation under statute to apply for certification within 21 days after a ballot approving the agreement, subject to an extension of time). If parties have complied with that time limit, a transitional provision would seem appropriate.

80. There is also a drafting issue which ACCI has picked up - the headings for Division 10A and Division 8A should refer to "agreements made on or before 2 September 2004" not "agreements made before 2 September 2004".

81. For these reasons, ACCI supports the Bill.