Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submission no: 5

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Submitter: Mr John Sutton
National Secretary, Construction division

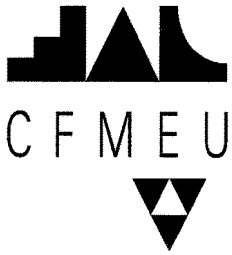
Organisation: CFMEU

Address: Level 2, Wentworth Avenue
SYDNEY NSW 2000

Phone: 02 9267 7644

Fax:

Email: troberts@fed.cfmeu.asn.au



Senate Employment,

Workplace Relations and Education Committee

Submission by the

Construction, Forestry, Mining and Energy Union

(Construction and General Division)

on the

Workplace Relations Amendment (Agreement Validation) Bill

2004.

23 November, 2004.

Partial Validation Only

1. The *Workplace Relations Amendment (Agreement Validation) Bill* 2004 [the Validation Bill] does not validate agreements that were certified prior to the decision of the High Court of Australia in *Electrolux Home Products Pty Ltd v. Australian Workers Union & Ors* [2004] HCA 40 (2 September, 2004) [*Electrolux*]. Its objective is to validate such agreements in part only.

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2. An approach of partial validation has at least two important consequences. The first is that far from providing the parties to such agreements with certainty, it creates greater uncertainty. This is because the pre-*Electrolux* agreements are to be validated only to the extent of those clauses that deal with "permitted matters". Permitted matters include matters pertaining to the employment relationship.

3. The question of which clauses do or do not pertain to the employment relationship in agreements already certified is the same as the one that arises in the certification of new agreements post-*Electrolux*. There is no certainty that a particular clause in a pre-*Electrolux* agreement would be validated by this Bill until that question is decided by a tribunal, just as parties to agreements awaiting certification cannot be sure that each clause within it will ultimately be found to 'pertain'.

4. There are already discrepancies emerging from the decisions of the Australian Industrial Relations Commission about whether or not particular clauses in agreements that are being certified in the wake of *Electrolux,* pertain.[1] As lines of authority begin to diverge, the effect of this legislation would be that the uncertainty will carry over into agreements already certified because the validity of each clause will depend on the same test.

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[1] See for example *Ballantyne* [PR 952656 - 22/10/04] and *Schefenecker* [PR 952801 - 28/10/04].

5. 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.

6. The second fundamental problem with adopting an approach of partial validation is that by legislative intervention, the bargain struck between the parties is undone and reconstituted. The Parliament is imposing an outcome on the parties that they might not have otherwise agreed to.

7. The objects of the *Workplace Relations Act 1996* include:-

> *3(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the enterprise level; and*
>
> *(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act.*

This Bill will validate some part of the original agreement of the parties, with the consequence that those matters cannot be renegotiated, whilst for the rest, *"It will be up to the parties to determine how to address the aspects of their agreement that do not pertain to the employment relationship. If the parties to an agreement agree that they wish to honour non-pertaining matters, they are free to do so through formal or informal arrangements including unregistered agreements"*[2] That means that substantive clauses that had been agreed upon on the basis that they would *all* be legally binding and enforceable as part of a certified agreement,

[2] Second reading Speech 17/11/04.

no longer form part of that valid agreement and an entirely new agreement is constituted in its place. Most certified agreements do not contain severability clauses which would permit an agreement to stand in part in the event that other parts were rendered invalid.

8. McHugh J alluded to the prospect of whether there would be any agreement at all in the *Electrolux* judgment:-

> *"The Act is also silent on the procedure for certifying an agreement which contains terms about matters that do not pertain to the requisite relationship, and on the effect of certification of such an agreement. Even if such a term would be effective under the general law, a question would remain as to whether the parties would have agreed to the term if it did not have legal operation as a term in a certified agreement."*[3]

9. If pre-Electrolux agreements are to be validated by legislation they should be validated to the full extent of their existing terms.

Non-Validation of Industrial Action

10. Although agreements themselves are to be partially validated, the Bill does not validate any industrial action taken in support of an agreement. In the Second reading Speech the Minister stated that the Bill would not validate industrial action taken to support matters that do not pertain to the employment relationship and that validating past industrial action would be *"complex and practically difficult."* Validation of industrial action has therefore been consciously omitted from the Bill.

11. Although there may be practical difficulties in distinguishing industrial action taken in support of matters that pertain and industrial action in support of claims

[3] At paragraph 109.

that do not, where there is a mixture of such claims, it would be a relatively straightforward matter to validate any industrial action irrespective of whether the claim was for a matter pertaining or not. For example the Bill could provide that where industrial action is taken and that action would have been protected action but for the fact that it was taken in support of claims wholly or partly relating to matters not pertaining, then such action is, by virtue of the legislation, taken to be protected action.

12. As the present Bill stands it attempts to give certainty to the agreement itself, (which for the reasons described above it does not do), without giving any certainty in respect of industrial action that may have preceded it. The same clauses that are excised from the agreement by the Bill and the claims that gave rise to them, expose a party to potential legal liability for any industrial action subsequently held to be not "protected" even though the remainder of the agreement is validated. The parties 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. If validating legislation is to be enacted, all pre-2 September, 2004 industrial action that would have been protected action but for the fact that it was taken in support of claims that included a matter or matters not pertaining to the employment relationship should, by legislation, be rendered protected action. That should be the case whether or not such claims ultimately became part of a certified agreement.

The Government's Objective for the Construction Industry

14. This legislation should not be seen purely as a means to ensure that existing agreements are enforceable. One of the Government's stated purposes is to ensure

that construction industry unions do not have the option of re-negotiating agreements. This is because they do not want such bargaining to take place in the industry prior to new anti-union laws taking effect. Thus the Bill should be regarded as a politically imposed settlement and a realignment of the rules of bargaining designed to favour construction industry employers in the bargaining process.

The Context of the Legislation

15. By the time the High Court's decision in *Electrolux* was handed down, legislation had already passed preventing the inclusion of bargaining agents fees in certified agreements.

16. However the decision in *Electrolux* has led to speculation as to whether other clauses would fail the test set out by the Court for the same reasons. That speculation has been generated in the main by employer groups who have taken the decision as an opportunity to re-argue that clauses that make reference to trade unions do not pertain to the employment relationship.

17. Employer groups have actively argued that certain clauses are incapable of inclusion in certified agreements because of *Electrolux* notwithstanding that such clauses have been agreed to by the individual employers involved. There is also speculation about the validity of existing certified agreements in light of the *Electrolux* decision. That speculation is fueled by the ongoing efforts of employers to expand the category of matters that can be said not to 'pertain'.

18. In a typically politically loaded media release, the Minister for Workplace Relations has said:-

> *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.

The fact is that many employers and unions would not seek to re-open existing agreements because of the *Electrolux* decision , especially those that had been recently concluded. In those cases each party would continue to comply with the terms of their agreement. The question of re-negotiation and enforceability would simply not arise.

19. The construction industry is in a different situation. Since its election victory, the Government has re-stated its intention to reintroduce the *Building and Construction Industry Improvement Bill* 2003, an industry specific Bill that was roundly rejected by the report of the Senate Employment, Workplace Relations and Education References Committee in June 2004. That Bill significantly restricts the capacity for unions to negotiate enterprise agreements and introduces harsh penalties for non-compliance. It has been variously described as "*selectively and unfairly target(ing) building workers with exclusion from basic and universally accepted labour standards*"[4], "*extraordinary*" and it has been put that the Bill "*should not be enacted in its present form.*"[5]

20. The prospect of the re-negotiation of agreements in the construction industry arises because of the decision in *Electrolux and* because the Government will legislate to make it more difficult for unions to negotiate once the *Improvement Bill* becomes law.

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[4] International Centre for Trade Union Rights - Submission to Senate Employment, Workplace Relations and Education References Committee February 2004.

[5] Professor R. McCallum evidence to the Senate Employment, Workplace Relations and Education References Committee - Transcript 2 February, 2004.

21. The alternative to validating the totality of the agreements and any industrial action that preceded them is to leave the question of the validity of current agreements, where it arises, to be determined by the courts at the option of either party. Inevitably courts will be required to determine the validity of various clauses in agreements if the proposed Bill is approved. But in any event for the reasons given above, the legislation being considered by this Committee should not be approved in its current form.