Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

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Mr John Carter
Secretary
Senate Employment, Workplace Relations
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Parliament House, Suite SG.52
Canberra ACT 2600

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Dear Mr Carter

RE. WORKPLACE RELATIONS AMENDMENT (AGREEMENT VALIDATION) BILL 2004

Ai Group welcomes the opportunity to express its views to the Senate Committee on the *Workplace Relations Amendment (Agreement Validation) Bill.*

Ai Group strongly supports the Bill. It is a sensible and practical piece of legislation which deserves the support of all political parties.

It is important that the Bill is passed without delay given speculation that the High Court's *Electrolux* Decision may have led to existing enterprise agreements, which contain matters that extend beyond the employment relationship, becoming invalid.

The Bill clears this issue up and creates certainty for all parties. The Bill would ensure that employers (and employees) are not exposed to protected industrial action during the life of their enterprise agreements. It would also ensure that employees remain entitled to the wages and employment conditions provided for in enterprise agreements. In short, it would deliver a fair and just outcome for all concerned.

It is in the interests of both employers and employees that existing enterprise agreements remain valid and enforceable.

The sections which follow deal with some background issues and the provisions of the Bill in more detail.

THE HIGH COURT'S *ELECTROLUX* DECISION - BACKGROUND

On 2 September 2004, the High Court of Australia upheld by a 6-1 majority[1] an appeal initiated by Ai Group, on behalf of its member company Electrolux Home Products Pty Ltd, against a Full Federal Court decision of June 2002[2] which extended the right of unions to take industrial action to matters extending beyond the relationship between an employer and its employees. The Full Federal Court's decision had overturned an earlier decision of Justice Merkel of the Federal Court[3] which was largely consistent with the High Court's decision.

The case related to a union claim for non-union members at Electrolux to pay a bargaining fee to the unions involved in enterprise agreement negotiations at the company but the case had much wider implications. If the Full Federal Court's decision had stood there was the risk of unions organising legally protected industrial action in pursuit of a wide range of political and social causes.

The case revolved around an interpretation of s.170LI of the *Workplace Relations Act* which provides that for an application to be made to the Australian Industrial Relations Commission (AIRC) for the certification of an agreement under Division 2 of Part VIB of the Act, the agreement must be about matters pertaining to the relationship between an employer and its employees.

Ai Group funded the significant costs associated with the High Court appeal to preserve the integrity of Australia's enterprise bargaining system.

THE IMPLICATION'S OF THE HIGH COURT'S DECISION

The three main effects of the High Court's decision are that:

- A provision which does not pertain to the relationship between an employer and its employees cannot be part of a log of claims which is the subject of protected action;

- A certified agreement which contains any provision (other than ancillary, incidental or machinery provisions) that does not pertain to the relationship between an employer and its employees cannot be certified; and

- A bargaining agent's fee clause, similar to the one sought by the unions at Electrolux, is not a matter which pertains to the relationship between an employer and its employees.

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[1] *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40

[2] *AFMEPKIU and Ors v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177

[3] *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600

THE "PERTAINING TO THE EMPLOYMENT RELATIONSHIP" TEST

In its *Electrolux* decision, the High Court strongly reconfirmed its earlier decisions in the *Portus*[4] and *Alcan*[5] cases.

There are a significant number of statements within the various judgments in the *Electrolux* case which clarify the nature of the relationship referred to in s.170LI of the Act. Such statements include the following:

> *"The established principle however, is that, in the context with which this legislation is concerned, it is matters which affect employers and employees in their capacity as such that 'pertain to the relations of employers and employees'."* **Gleeson CJ, paragraph 9**
>
> *"The Court approves statements in R v Kelly; Ex parte State of Victoria, to the effect that 'the relations of employers and employees' refers to the industrial relationship and not to matters having an indirect, consequential and remote effect on that relationship. The actual decision in Portus, approved and applied in Alcan, was that for an employer to collect money from employees and remit such money to a third party on behalf of the employees had an insufficient connection with the industrial relationship to fall within the statutory description."* **Gleeson CJ, paragraph 10**
>
> *"This 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 financial agent for employees in their dealings with the union. The cases emphasise that 'matters pertaining' to the relations of employers and employees must pertain to the relation of employees as such and employers as such, that is, employees in their capacity as employees and employers in their capacity as employers."* **McHugh J paragraph 60**
>
> *"It concluded that a dispute about the deduction of union fees pertained to 'a relationship involving employees as union members and not at all as employees'. The Court said that a claim directed to strengthening the position of a union or union members is not, without more, a matter pertaining to the employment relationship involving employers, as such, and employees, as such."* **McHugh J, paragraph 61**
>
> *"His Honour also noted that, notwithstanding the important functions that unions have, this did not support 'a conclusion that anything which serves to benefit one of them and to give it additional strength, by increasing its financial stability or otherwise, is to be regarded as an industrial dispute within the meaning of the [Conciliation and Arbitration Act].' Stephen J said that a dispute about an 'industrial matter' must 'concern either of the broad aspects with which the relations of employers and*

[4] *The Queen against Portus and Another; Ex parte Australia and New Zealand Banking Group Limited and Others* 1973 127 CLR 353

[5] Re *Alcan Australia Limited and Others*; *Ex parte FIMEE* (1994) 181 CLR 96

employees are concerned, namely the performance of work by the employee and the receipt of reward for that work from the employer". **McHugh J, paragraphs 69 and 70 with reference to *Portus***

"These provisions give rise to the inference that Div 2 and Div 3 agreements have a common element, namely, that for such an agreement to be certifiable, it must be about matters pertaining to the requisite relationship or to 'the relationship between employers and employees' in their capacity as such." **McHugh J, paragraph 81**

"The bargaining agent's fee claim in question appears to be too general to constitute a matter pertaining to the requisite relationship in Electrolux's workplace. First, the bargaining agent's fee clause requires Electrolux to inform the new employee of a debt due by that person to the Union for purposes which the clause does not specify. Nothing in the clause suggests that the debt relates to the employment relationship. Second, even if a broad view is taken of the requisite relationship and matters pertaining to that relationship, the bargaining agent's fee clause appears to relate to the relationship between the Unions and non-members to be employed at Electrolux's workplace. Third, the claim appears to be directed to strengthening the position of the Unions at Electrolux's workplace, but this, without more, does not make such a clause a matter pertaining to the requisite relationship. Fourth, Electrolux does not undertake to deduct the fee from the employee's wages". **McHugh J, paragraph 82**

"The test of sufficient direct effect on the employment relationship remains the key to the statutory limitation in section 170LI." **McHugh J, paragraph 89**

"In Alcan, the Court held that a demand made by a union that an employer deduct union dues from the wages of its employees and remit the deductions to the union did not pertain to the relationship between employer and employees. The Court emphasised that a dispute as to the deduction of union dues pertained to a relationship involving 'employees as union members and not at all as employees'." **Gummow, Hayne and Heydon JJ, paragraph 160**

"The reasoning why, on that footing, the proposed agreement in question here failed that criterion appears sufficiently in the following passage in the judgment of Merkel J: 'The claim implicitly, if not explicitly, is that Electrolux is to act as the Unions' agent in entering into a contract with new employees which requires the employees, who are not union members, to employ the Unions as their bargaining agent to reflect the Unions' service in negotiating agreements with Electrolux under the Act. The relationship between the employer and the employee that would be created were the claim acceded to is, essentially, one of agency.'" **Gummow, Hayne and Heydon JJ paragraph 165**

PRINCIPLES WHICH CAN BE DRAWN FROM THE HIGH COURT'S *ELECTROLUX*, *PORTUS* AND *ALCAN* DECISIONS

The following eight principles, relating to the nature of the relationship referred to in s.170LI of the Act, can be drawn from the High Court's *Electrolux*, *Portus* and *Alcan* decisions.

For a certified agreement provision to meet the requirements of s.170LI, it must:

1. Affect employers and employees in their capacity as such (*Electrolux*, Gleeson CJ, paragraph 9 and McHugh J, paragraph 81);

2. Have a sufficient direct effect on the employment relationship (*Electrolux*, McHugh J, paragraph 89);

3. Not have only an indirect, consequential or remote effect on the employment relationship (*Electrolux*, Gleeson CJ, paragraph 10);

4. Concern either of the two aspects with which the relations of employers and employees are concerned, namely the performance of work by the employee or the receipt of reward for that work from the employer (*Electrolux*, McHugh J, paragraph 69, approving Stephen J in *Portus*);

5. Not be of an academic, political, social or managerial nature (*Electrolux*, McHugh J, paragraph 60 and Callinan J, paragraph 245);

6. Not strengthen the position of a union, without other factors of importance being present (*Electrolux*, McHugh J, paragraphs 61 and 81);

7. Not pertain to the relationship of employees as union members or non-union members, rather than as employees (*Electrolux,* McHugh, paragraph 81; Gummow, Hayne and Heydon JJ, paragraph 160 and Callinan J, paragraph 241);

8. Be within the sphere of a businessperson as employer with a person as an employee (*Portus*, Menzies J, paragraph 7, approving *R v Kelly*[6]);

The nature of the relationship must be objectively determined (*Electrolux*, Callinan J, paragraph 241).

In addition to provisions which are consistent with the above principles, certified agreements are able to contain "ancillary, incidental and machinery provisions" (McHugh J, paragraph 104).

[6] (1950) 81 CLR 64

In a recent decision[7], Senior Deputy President O'Callaghan of the AIRC set out some principles, drawn from the relevant High Court decisions, for determining whether a provision in a certified agreement pertains to the employment relationship. SDP O'Callaghan's principles are relatively similar to those formulated by Ai Group, as set out above. The following extract from SDP O'Callaghan's decision is relevant:

> *"[31] Consideration of the various High Court determinations relative to what pertains to relationships between employers and employees establishes that there is no endorsed or uniform test. However the Court has held that claims or matters in dispute must:*
>
> - *affect employers and employees in their capacities as such, or in their relations as such,*
> - *not go to academic, political, social or managerial functions,*
> - *must not be for the principal purpose of strengthening the position of a union,*
> - *must not be viewed narrowly, and*
> - *may be ancillary to a pertaining matter.*
>
> *[32] Clearly such a characterisation of a range of High Court deliberations is neither exhaustive nor conclusive."*

RELEVANT PROVISIONS OF THE *WORKPLACE RELATIONS ACT*

Division 2 Certified Agreements

The enterprise agreement which was involved in the *Electrolux* Case was an agreement under Division 2 of Part VIB of the *Workplace Relations Act*.

Section 170LI of the Act states that for an application to be made to the Commission under Division 2 of Part VIB of the Act:

> *"there must be an agreement, in writing, about matters pertaining to the relationship between:*
>
> *(a) an employer who is a constitutional corporation or the Commonwealth; and*
> *(b) all persons who, at the time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement."*

Division 3 Certified Agreements

Section 170LI of the Act does not apply to certified agreements entered into under Division 3 of Part VIB of the Act. However, section 170LO – Agreement About Industrial Disputes, applies to such agreements. This section states that:

> *"If an employer who is carrying on a single business is or was a party to an*

[7] *Re. Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004* (PR952449), 29 October 2004

industrial dispute, the employer may agree with one or more organisations of employees with whom the employer is or was in dispute on terms for:

(a) settling or further settling all or any of the matters that are in dispute; or
(b) maintaining a settlement of all or any of the matters that were in dispute, whether the settlement was made by an award, a certified agreement or otherwise; or
(c) *preventing further industrial disputes between them."*

It can be seen from the above that Division 3 certified agreements are able to contain provisions which are the subject of an "industrial dispute". An "industrial dispute" is defined in section 4 of the Act as:

"(a) an industrial dispute (including a threatened, impending or probable industrial dispute):

(i) extending beyond the limits of any one State; and
(ii) that is about matters pertaining to the relationship between employers and employees; or

(b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a)". (Emphasis Added).

Accordingly, both Division 2 and Division 3 certified agreements are only able to contain provisions which pertain to the employment relationship.

In a decision of 22 September 2004[8], with reference to the High Court's *Electrolux* decision, Commissioner Richards of the AIRC expressed the view that:

"...it is unlikely that there is any distinction of substance to be made in relation to the implications of the High Court's decision for an agreement made pursuant to Division 2 or Division 3 of the Act, even though that implication arises by way of s.170LI in relation to agreements made pursuant to Division 2 of Part VIB of the Act and the definition of industrial action by way of s.4(1) of the Act in relation to agreements made pursuant to Division 3 agreements."

Australian Workplace Agreements (AWAs)

Neither section 170LI or section 170LO of the Act apply to AWAs. However, section 170VF(1) – Matters Pertaining to the Employer / Employee Relationship, applies to such agreements. This section states that:

[8] *Application by Belyando Shire Council and Others for the Certification of an Agreement*, Richards C, 22 September 2004, PR952089

> *"An employer and employee may make a written agreement, called an Australian workplace agreement, that deals with matters pertaining to the relationship between an employer and employee."* (Emphasis Added).

Accordingly, AWAs, together with Division 2 and Division 3 certified agreements, are only able to contain provisions which pertain to the employment relationship.

DEVELOPMENTS IN THE AIRC AND FEDERAL COURT

Given that the High Court has held that an enterprise agreement which contains any provision (other than an ancillary, incidental or machinery provision) that does not pertain to the employment relationship, cannot be certified, a significant statutory duty has been placed upon members of the Commission in dealing with applications for the certification of agreements. Commission Members must ensure that every provision of every agreement pertains to the employment relationship before certifying an agreement.

Whilst the views expressed by the parties to a certified agreement may assist the relevant Commission Member in determining whether or not the requirements of the Act have been met, the responsibility for ensuring compliance with the Act rests with the Commission Member dealing with the application for certification.

The High Court's decision makes it clear that a blanket approach cannot be adopted and the specific terms of each enterprise agreement clause need to be considered.

Every day Members of the Commission, in dealing with applications for the certification of agreements, are making decisions regarding whether or not particular clauses of such agreements pertain to the employment relationship. A greater degree of consistency is developing as more and more decisions are handed down. Also, the Full Bench proceedings in the *Schefenacker* Case[9], listed for hearing on 20 and 21 December 2004, will lead to a greater degree of clarity regarding what matters can and cannot be included in certified agreements.

Examples of recent decisions of the AIRC relating to whether or not particular clauses in certified agreements pertain to the employment relationship include:

- VP Ross's decision in *KL Ballantyne & National Union of Workers (Laverton Site) Agreement 2004* (PR952656);
- SDP O'Callaghan's decision in *Re. Iplex Pipelines Australia Pty Ltd Certified Agreement [Elizabeth SA] 2004* (PR952586);
- SDP O'Callaghan's decision in *Re. Shefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004* (PR952801);
- SDP Lacy's decision in *Re. Transfield Worley North West Shelf Onshore (Maintenance, Modification and Upgrades) Certified Agreement 2004* (PR952538);
- SDP O'Callagan's decision in *Re. WEN Ames Enterprises Pty Ltd / CFMEU Collective Agreement 2004* (PR952816);

[9] *C2004/6679 - Appeal by the AMWU against the decision of SDP O'Callaghan in PR952801*

- DP McCarthy's decision in *Re. Pinjarra Efficiency Upgrade Project, CBI Constructors Pty Ltd and AFMEPKIU Certified Agreement 2004* (PR952722);
- SDP O'Callaghan's decision in *Re. Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004* (PR952449).

In addition to the abovementioned AIRC cases, a relevant case has been progressing before Justice French of the Federal Court relating to various claims pursued by the Australian Manufacturing Workers Union (AMWU) against. In an interlocutory decision of 8 October 2004[10], French J decided to issue an injunction restraining the AMWU and the employees from taking further industrial action against Westfarmers Premier Coal Limited on the basis that there was an arguable case that certain claims being pursued by the union and employees did not pertain to the employment relationship. The matter of whether or not the claims pertain to the employment relationship, was fully heard before Justice French on 4 and 5 November in Perth. The decision is reserved.

VALIDITY OF EXISTING ENTERPRISE AGREEMENTS

The High Court's *Electrolux* decision has raised doubts about the validity of existing certified agreements and AWAs that contain clauses which do not pertain to the employment relationship.

The potential difficulties are short-term ones of relevance only to some existing certified agreements and AWAs.

Some unions have sought to exploit the uncertainty regarding the validity of existing agreements and embarked upon industrial campaigns to renegotiate existing certified agreements.

On 29 October 2004, the Electrical Trades Union (ETU) wrote to 1200 electrical contractors, initiating bargaining periods and seeing to renegotiate the existing enterprise agreements which expire on 31 October 2005. In the letter, signed by the Victorian State Secretary of the ETU, Dean Mighell, the following statements are made:

> *"As the ETU understands the Electrolux decision, the High Court has ruled that every clause in any enterprise agreement must pertain to the relationship between employer and employee. If any clause does not do that, then not only is that clause void, but also the whole certified agreement is void.*
>
> ---
>
> *"The existing certified agreements were due to expire in October 2005 and, given those agreements ae now void, it makes sense to us to put in place new three year agreements as soon as possible."*
>
> ---

[10] ([2004] FCA 1339)

"Accordingly, the CEPU seeks to reach a new agreement with you to replace the current void certified agreement".

Similar to the ETU, the Construction, Forestry, Mining and Energy Union (CFMEU) has announced its intention to seek to renegotiate thousands of construction industry agreements which expire on 31 October 2005 in Victoria and early 2006 in various other States.

It would be extremely counterproductive and damaging for a large number of enterprise agreements to be rolled over across various States and various industries for the maximum period (three years) at the one time because that would result in all of those agreements having a common expiry date. Common expiry dates are a device used by unions to pursue highly damaging pattern bargaining campaigns such as those pursued in the construction and manufacturing sectors over recent years.

PROVISIONS OF THE BILL

The *Workplace Relations Amendment (Agreement Validation) Bill* would:

- Validate certified agreements and AWAs certified, approved or varied prior to the date of the High Court's decision (2 September 2004);
- Not validate clauses which do not pertain to the employment relationship.

The Bill is a sensible and practical piece of legislation which deserves the support of all political parties. It is in the interests of all parties that existing enterprise agreements remain valid and enforceable.

If an agreement is held to not be valid, the following difficulties could arise:

- The terms of such agreement (eg. Wage rates and over-award conditions of employment for employees) will not be enforceable;
- There is the risk of the employees or the employer bound by the agreement taking protected industrial action during the life of the agreement;
- The AIRC will not have the power to settle disputes which arise during the life of the agreement (NB. The AIRC derives such dispute settling powers through the avoidance of disputes procedure in the agreement);
- For agreements which are inconsistent with awards or State laws, the employer may be found to have breached such awards or laws.

The Bill, appropriately does not validate clauses in agreements which do not pertain to the employment relationship. Such clauses should never have been included in agreements in the first place as they are inconsistent with the *Workplace Relations Act* and inconsistent with a long line of High Court decisions of which *Electrolux* is only the latest.

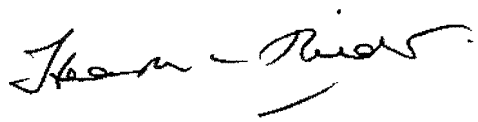
Despite the fact that "non-pertaining" clauses in agreements will not be enforceable, it is very likely that the overwhelming majority of employers and employees will continue to honour the terms of such clauses. This issue is best left to be dealt with at the enterprise level – as the Bill does.

Also, appropriately, the Bill only validates agreements certified or approved before the date of the High Court's decision (2 September 2004). Other agreements have been considered by the AIRC or the Office of the Employment Advocate in the context of the *Electrolux* decision and should not have any clauses in them which do not pertain to the employment relationship.

Further, quite sensibly, the Bill does not endeavour to define what is or is not a matter that pertains to the employment relationship. To do so would be almost impossible. This issue is best left to the AIRC and relevant Courts to determine, consistent with the High Court's *Electrolux* decision.

Ai Group urges all political parties to support the passage of the Bill without delay, in the interests of Australian employers and employees.

Yours sincerely



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