



## Workplace Relations Amendment (Agreement Validation) Bill 2004

Jacob Varghese  
Law and Bills Digest Section

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## Workplace Relations Amendment (Agreement Validation) Bill 2004

**Date Introduced:** 17 November 2004

**House:** Senate

**Portfolio:** Employment and Workplace Relations

**Commencement:** On the day of Royal Assent

### Purpose

This Bill proposes to retrospectively validate certain Certified Agreements whose validity has been brought into question following the High Court of Australia's decision in [\*Electrolux Home Products Pty Ltd v The Australian Workers' Union and Others\*](#) (*Electrolux*).<sup>1</sup>

### Background

#### The *Electrolux* decision

On 2 September 2004, the High Court delivered its judgement in the *Electrolux* matter. The case concerned a question as to whether 'bargaining agent's fees'—in which employees are required to pay a fee to a union as a contribution to the costs of negotiating a certified agreement—could be included in Certified Agreements (CA) made under the *Workplace Relations Act 1996*.<sup>2</sup>

Under s. 170LI of that Act, an agreement can only be certified if it is 'about matters pertaining to the relationship between' employers and employees. Under s. 170ML, parties are entitled to take industrial action in support or advancement of a proposed CA. The Act provides that action taken under this provision is 'protected action' immune from civil or criminal liability. Under s. 170NC, industrial action taken or threatened in pursuit of a new agreement or a variation to an agreement is illegal, unless it is protected action. The interaction between ss. 170LI, 170ML and 170NC means that action taken in pursuit of matters that *do not* pertain to the employment relationship may not be protected action and may therefore be illegal. Accordingly, *Electrolux* also concerned a secondary question as to whether action taken in pursuit of bargaining agent's fees was protected and legal action.

By a majority of six judges to one—with Justice Kirby the dissenter—the court made the following key findings:

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- i. CAs can contain only matters which pertain to the relationship between employers and employees ‘in their capacity as such’.<sup>3</sup> Provision for the collection of bargaining agent’s fees from employees by employers is not such a matter and therefore may not be included in CAs
- ii. any CA which contains matters which do not pertain to the employment relationship (‘non-pertaining matters’) is invalid, and
- iii. any action taken in support or advancement of a proposed agreement which includes non-pertaining matters is not protected action.

Each of these findings has brought its own uncertainty to the conduct of industrial relations in Australia.

The first finding reaffirmed a test that has been used by previous courts to determine the allowable content of awards and agreements (hereafter referred to as the ‘pertaining to’ test).<sup>4</sup> As far as the application of that test to bargaining agent’s fees was concerned, the Court’s finding was moot—at least with respect to any future cases—as Parliament had enacted legislation specifically prohibiting such provisions while *Electrolux* was still being litigated.<sup>5</sup> But by reaffirming a narrow test as to what ‘pertains’ to the employment relationship, the Court has left some observers wondering about what other types of matters might also be ‘non-pertaining’. The *Australian Financial Review* suggested that ‘restrictions on the use of casuals, labour hire or non-union contractors, rights of union entry, dues deductions and training leave for delegates’ were all ‘now unenforceable’.<sup>6</sup>

The second finding, that any CA containing non-pertaining matters was invalid, cast into doubt the validity of many existing agreements. The full bench of the Federal Court had earlier decided that, even if a CA contains some non-pertaining matters, it could be a valid agreement if the agreement ‘as a whole’ could be said to pertain to the employment relationship.<sup>7</sup> The High Court took a much narrower approach, requiring that valid certification only occurs where ‘all the terms of the agreement are about matters pertaining to the requisite relationship’ (with an exception for matters that are merely ‘ancillary, incidental or machinery’ in nature).<sup>8</sup>

*Electrolux* made it clear that inclusion of a bargaining agent’s fee provision could invalidate an entire agreement, but uncertainty remains about agreements that contain other matters that might be ‘non-pertaining’. The narrower the pertaining test is applied in practice, the larger the number of agreements in question. Doubt over the validity of existing agreements can create serious concerns for both employers and employees.<sup>9</sup> For employers, the prohibition in the Workplace Relations Act on industrial action during the life of a valid agreement would be ineffective if the agreement is in fact invalid under the *Electrolux* test. This would allow unions to initiate new bargaining periods and take industrial action before the nominal expiry date of the old (invalid) agreement. For employees, a question mark over the validity of a CA puts a question mark over any of the

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employment conditions it guarantees. Accordingly, a simple underpayment claim could quickly escalate into major—and costly—litigation over the validity of the CA itself.

It is the uncertainty created by this finding that the current Bill seeks to address.

The third finding has also introduced uncertainty into the legal status of protected action. By deciding that industrial action is not protected, and potentially illegal, when it is taken in pursuit of a proposed agreement that includes even one non-pertaining matter, the High Court has cast doubt over the status of both past and future industrial action. As *Electrolux* shows, industrial action which was thought to be protected and legal at the time it was taken may later be found to be unprotected under a different application of the ‘pertaining to’ test. It is possible that some employers or other parties adversely affected by industrial action will use the *Electrolux* precedent to initiate proceedings for penalties or compensation in relation to industrial action taken long ago.

Given the uncertainty over what is and is not ‘pertaining’, the status of any future industrial action will be also uncertain. As *Electrolux* shows, even High Court and Federal Court judges can disagree over whether or not matters pertain to the employment relationship. Yet an effect of *Electrolux* is that unions are expected to make a reliable prediction as to whether proposed provisions ‘pertain’ before commencing any industrial action, or risk penalties later on. As Justice Kirby noted:

To expose an industrial organisation of employees to grave, even crippling, civil liability for industrial action, determined years later to have been “unprotected”, is to introduce a serious chilling effect into the negotiations that such organisations can undertake on behalf of their members.<sup>10</sup>

### **Proposed legislative response to *Electrolux***

The present Bill is the Government’s proposed legislative response to the uncertainty that *Electrolux* has generated. As the second reading speech said:

The Government is determined to address the concerns of employers and workers across Australia in putting forward this Bill. Not to remedy the uncertainty raised by the *Electrolux* decision would be unjustifiable, particularly in the lead up to the Christmas holiday period.<sup>11</sup>

In summary, the Bill specifically addresses the uncertainty over the status of existing CAs and Australian Workplace Agreements (AWAs). It does not address the uncertainty over the application of the ‘pertaining to’ test, nor the uncertainty over future agreements, nor the uncertainty over the status of past and present industrial action.

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## Senate inquiry and significant interest group views

This Bill has been referred to an [inquiry](#) by the Senate Employment, Workplace Relations and Education Committee. At the time of writing, it has received submissions and is due to report on 29 November 2004.

Significant interest groups have submitted to the inquiry and their positions are summarised below.

### Australian Council of Trade Unions (ACTU)

The [ACTU submits](#) that the Bill ‘does little, if anything, to resolve the problems associated with the need for certainty for parties to certified agreements’.<sup>12</sup> In particular, the ACTU notes that the Bill does not address concerns about the validity of post-2 September 2004 agreements. The ACTU also submits that the narrowing of the allowable content in agreements undermines the principles of collective bargaining, which requires Government to enforce those agreements reached between employers and unions on matters they believe are relevant.<sup>13</sup>

The ACTU makes the following recommendations:

- (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 unions, 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.<sup>14</sup>

The ACTU also recommends ‘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’.<sup>15</sup>

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### Australian Industry Group (AIG)

[AIG submits](#) that the Bill is ‘a sensible and practical piece of legislation’ that it ‘strongly supports’.<sup>16</sup> According to AIG, ‘[s]ome unions have sought to exploit the uncertainty regarding the validity of existing agreements and embarked upon industrial campaigns to renegotiate existing certified agreements’.<sup>17</sup> For this reason, it supports the Government’s attempt to validate existing agreements through this Bill.

AIG also supports the Government’s decision not to address other consequences of *Electrolux*. In particular, it would not support any attempt to validate post-2 September agreements as these have been vetted by the Australian Industrial Relations Commission (AIRC) or the Employment Advocate already. Similarly, it considers the Government’s decision not to provide a fuller definition of the ‘pertaining to’ test sensible as ‘to do so would be almost impossible’ and the ‘issue is best left to the AIRC and relevant Courts to determine’.<sup>18</sup>

### Australian Chamber of Commerce and Industry (ACCI)

The [ACCI submission](#) also supports the Bill. However, ACCI does suggest that some leeway might be provided to validate those agreements certified after 2 September 2004 but agreed and voted on before that date.<sup>19</sup> ACCI makes no comment on the areas the Bill does not address.

### ALP/Australian Democrat/Greens policy position

The Australian Labor Party has not stated its position on this Bill. Its new industrial relations spokesperson, Stephen Smith, has been reported as saying that, along with any other new workplace relations proposals, the ALP will be judging this Bill on its merits.<sup>20</sup>

Newspaper reports suggest that the Australian Democrats intend to support the Bill. Senator Andrew Murray has been quoted as saying that the Bill ‘appeared to be sensible, but he needed to see it and consult his colleagues.’<sup>21</sup>

The Australian Greens do not appear have stated a position on the Bill at this stage.

## Main Provisions

### Schedule 1—Amendment of the Workplace Relations Act 1996

**Item 1** would retrospectively validate certain certified agreements made or varied before 2 September 2004, the date the High Court delivered its judgment in *Electrolux*. Specifically, it provides that agreements made or varied before that date remain valid to the extent that they contain *permitted matters*, even if they contain one or more matters

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that are not permitted (**proposed s. 170NHA** for new agreements and **s. 170NHB** for variations to agreements).

**Proposed s. 170NHC** defines *permitted matters* for the purposes of CAs under s. 170LI (otherwise known as ‘Division 2 agreements’) in almost the same terms used in s. 170LI to describe the content of certifiable agreements. In other words, a permitted matter under the Bill is a ‘pertaining matter’ under the *Electrolux* test.

The effect of these provisions is to rectify the uncertainty regarding the validity of *existing CAs* that has followed *Electrolux*. It will be recalled from the Background that one of the key findings of *Electrolux* was that an agreement is invalid if it contains even one non-pertaining matter. That rule would remain for all agreements concluded and certified after the 2 September 2004. However, the Bill proposes to retrospectively declare valid any such agreements certified before that date, at least as far as the pertaining matters are concerned. Any non-pertaining (or, in the language of the Bill, non-permitted) provisions will be unenforceable, but they will not undo the validity of the remainder of the agreement.

The Bill goes beyond validation of CAs made under s. 170LI (which were the subject of *Electrolux*) but also deals with agreements made under ss. 170LO and 170LP and with Australian Workplace Agreements (AWAs).

Certified agreements can be made under ss. 170LO and 170LP to settle, prevent or maintain a settlement of an ‘industrial dispute’ or ‘industrial situation’ (these are known as ‘Division 3 agreements’).<sup>22</sup> As with Division 2 agreements, **proposed s. 170NHC** would define ‘permitted matters’ in similar terms to those used in ss. 170LO and 170LP to describe the circumstances in which these agreements can be made. As the definition of the industrial dispute includes a requirement that the dispute concerns ‘matters pertaining to the relationship between employers and employees’, this essentially means that permitted matters are pertaining matters. As with Division 2 agreements, the effect of the Bill would be to ensure that pre-2 September Division 3 agreements are not invalid simply because they include one or more non-permitted matters.

**Item 2** deals with AWAs. As with CAs, the Bill would ensure that pre-2 September AWAs are not invalid simply because they contain some matters that do not pertain to the employment relationship. *Electrolux* did not consider AWAs at all. Nonetheless, the Government felt that the logic of *Electrolux* could apply equally to AWAs and have accordingly made appropriate provision to validate pre-*Electrolux* AWAs in this Bill.<sup>23</sup>

## Comments

### What the Bill does not do

This Bill is less likely to be controversial for what it does than for what it does not do. There seems to be a consensus that *Electrolux* has generated intolerable uncertainty over

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the validity of existing agreements that contain potentially ‘non-pertaining matters’. This Bill is an effective mechanism to correct that uncertainty.

However, *Electrolux* has also generated uncertainty in other ways which this Bill does not address. Firstly, and most importantly, is the uncertainty over what may and may not be included in agreements. Following from this is the uncertainty over whether new agreements are valid or invalid. *Electrolux* has demonstrated that parties cannot rely on certification as an indication that they have a reliable and enforceable agreement. Also following from the first uncertainty is uncertainty over the legal status of protected action, both past and future. In the absence of Parliamentary intervention, these uncertainties will either be resolved by the AIRC and the Courts or linger on for years to come.

### **Pertaining or not pertaining?**

The first uncertainty that *Electrolux* generated, and the most serious, is over the question of what is and is not a ‘pertaining matter’ and therefore a matter which may be provided for in an industrial instrument. The majority in *Electrolux* adopted the test which had been used in previous cases involving the definition of ‘industrial dispute’, which, as we have seen, also involves a test of whether the matters concerned pertain to the employment relationship.<sup>24</sup> Noting that Parliament had adopted very similar language in the enactment of the provision relating to certified agreements (s 170LI), the majority applied the old test to the new instrument of certified agreements.<sup>25</sup> Justice McHugh summarised the test in the following terms:

The cases emphasise that “matters pertaining” to relations of employers and employees must pertain to the relation of employees as such and employers as such, that is employees in their capacities as employees, and employers in the capacities as employers.<sup>26</sup>

The test is vague and difficult to apply to actual provisions. The majority held that bargaining agent fee provisions did not pass muster under the test. Such provisions were more appropriately characterised as

pertaining either to the relationship between the union and employees; or, to the extent that the claim concerned deduction of the fee from the employees’ wages, to the relationship between the union and the employer in its effective capacity as agent for the union.<sup>27</sup>

But how the test applies to other types of provisions remains unclear. Questions have been raised about the validity of:

provisions on shop stewards’ time off for trade union training leave; deducting union dues; encouraging union membership; extending right of entry; giving unions a role in recruitment of employees; obliging employers to contribute to trust funds for redundancy and employee entitlements; and the use of contractors and casuals.<sup>28</sup>

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Other commentators have also suggested that provisions dealing with alternative dispute resolution, grievance procedures and post-separation employee obligations (such as confidentiality requirements) might cause problems.<sup>29</sup> Even provisions importing parts of a corporate strategic plan or mission statement might be non-pertaining and affect the validity of an entire agreement. Absent parliamentary modification of the law, the status of these types of provisions can only be tested through the AIRC and the Courts.<sup>30</sup> As *Electrolux* shows, the Commission, the Federal Court and the High Court can easily disagree on whether a provision ‘pertains’, so protracted litigation and lingering uncertainty could be expected for many years until reliable precedents are established on each of the contentious species of provision.

There is a strong policy rationale against applying the test that has traditionally be used to define ‘industrial disputes’—and by extension the permitted scope of awards—to agreements. The move toward enterprise-level bargaining was intended to provide more room for parties at the enterprise level to ‘self-regulate’ their relations, without the intervention of third parties such as the arbitral commission.<sup>31</sup> The interventionist nature of compulsory arbitration arguably warrants a short legislative leash restraining the scope of matters dealt with in awards. But where parties at the workplace are expected to negotiate the substance of the rights and obligations which will govern their relationship, it seems logical that they should be given a broader scope to determine the range of matters that might be relevant to that relationship. This changed context was recognised by Justice Kirby who explained that the purpose of s. 170LI was:

to restore the capacity of employers and employees, with or without the interposition of arbitrated awards, freely to negotiate employment conditions to govern employment relationships. They were to be able to do so largely on an enterprise basis, without all of the constraints of arbitrated industry-wide awards that had been such a feature of regulation of Australian industrial conditions virtually from federation and until recent years.<sup>32</sup>

This argument seems even more powerful when applied to AWAs. These allow negotiation of employment conditions on an even more decentralised basis, between employer and individual employee without the intervention of the collective of employees. Yet, as the Government acknowledges through this Bill, *Electrolux*’s narrow ‘pertaining to’ test logically applies to AWAs as it does to CAs, thereby reducing the negotiating terrain for employers and employees in concluding an AWA.

In rejecting Justice Kirby’s reasoning for a broader ‘pertaining to’ test for agreements, the majority of the High Court has effectively strengthened the hand of state intervention in employment relationships. Applying *Electrolux*, the Commission and Employment Advocate must now take much closer interest in the content of proposed agreements to vet them for allowable and non-allowable content. This reduces the ambit of self-regulation and, with it, the negotiating options available to employers and employees alike. Where the Commission or Employment Advocate fails and lets a non-pertaining matter through, *Electrolux* requires the Courts to rule the entire agreement invalid.

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Now that the High Court has determined that the same narrow test that governed the scope of awards does apply to CAs and, by extension, to AWAs, Parliament has an opportunity to clarify what it wants of these agreements. If the self-regulatory philosophy of CAs and AWAs is to be maintained, a variety of options are open to the legislature, such as:

- reinstating the position adopted by the full Federal Court, that agreements must pertain to the employment relationship when considered as a whole. If there are concerns that certain objectionable or irrelevant matters might become enforceable provisions of agreements if left to this broad test, Parliament could match this approach with specific prohibition of those types of matters. This approach has already been taken with the prohibition on bargaining agent's fees in the *Workplace Relations Amendment (Prohibition on Compulsory Union Fees) Act 2003*, or
- clear statutory provision for the types of matters that may be included in agreements, notwithstanding the *Electrolux* test. This approach suffers the disadvantage that Parliament would have to pre-empt new categories, rather than allow them to develop organically through negotiation between employers and employees.

Either of these approaches would have the advantage of involving Parliament—and through it, broad public debate—in deciding what types of matters that ought to be included in statutory agreements. If the post-*Electrolux* status quo is maintained, these important policy choices will be made by the Commission and the courts, with little public discussion until after judgement is delivered.

### **Validity of new agreements**

While this Bill addresses the uncertainty over pre-*Electrolux* agreements, it does not deal with the uncertainty generated by *Electrolux* for new agreements. It would remain the case that if a new agreement contains a single non-pertaining matter the entire agreement could be invalid and unenforceable. Given that the pertaining/non-pertaining distinction is not always clear, and that this Bill makes no effort to make it clearer, the status of new agreements will remain under a cloud of uncertainty, at least until clear precedents are developed by the Commission and the courts.

A possible legislative response to this aspect of *Electrolux* might be to provide that non-pertaining provisions do not invalidate an entire agreement but are simply unenforceable. This is the approach the Bill takes to pre-*Electrolux* agreements. If this approach were taken, the party insisting on the inclusion of a non-pertaining provision would carry the risk that such a provision would be an unenforceable part of the agreement. Such uncertainty over a provision would be an incentive for parties to stick to clearly pertaining matters as the core of their negotiating position. The benefit of this approach would be that any uncertainty is quarantined to the questionable provision, not undoing the entire agreement and the many pertaining matters therein.

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## Status of protected action

The Bill does not address the uncertainties for both past and future protected action that has followed *Electrolux*.

### Past industrial action

The uncertain status of industrial action taken before *Electrolux* was discussed in the Background. Although the Bill would retrospectively validate agreements certified before *Electrolux*, it has deliberately chosen not to take legislative action to retrospectively ensure that industrial action taken before the decision is deemed protected. The second reading speech explained the rationale for this approach:

Parties could not have reasonably expected that protected action was available to support claims for non-pertaining matters. Further, validating past industrial action would be complex and practically difficult.<sup>33</sup>

Nonetheless, the speech went on to add that:

... 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.<sup>34</sup>

The statement that parties could not have ‘reasonably expected’ to take protected action in pursuit of non-pertaining matters seems at odds with the Government’s recognition that ‘prior to the High Court’s decision, there was uncertainty about the correct interpretation of s. 170LI.’<sup>35</sup> In making judgements about the likely legal status of action they were about to commence, unions suffered the same uncertainty over the meaning of s. 170LI—and therefore the scope of protected action—as everyone else.

Should it want to, Parliament could take action to retrospectively protect industrial action which was taken before *Electrolux* based on misreading of s. 170LI. The difficulty would be in distinguishing between industrial action based on a genuine misreading of s. 170LI and action that was clearly beyond the scope of s. 170LI however construed. This would be a much easier task if Parliament had taken the approach of more clearly defining the ‘pertaining to’ test, as discussed above. Then action could be retrospectively protected if it was in pursuit of an agreement which conformed to the new test. In the absence of this approach, Parliament could nonetheless retrospectively protect action taken in pursuit of an agreement which is, by virtue of this Bill, valid except in a defined list of cases. That list could include bargaining agent’s fees and other provisions considered objectionable. Alternatively, the list could take its lead from Justice Kirby’s interpretation of s. 170LI and include ‘wholly extraneous demands—such as those concerned with purely political issues, overseas matters or matters having no relevant connection to the particular Australian employment relationship’.<sup>36</sup> Many options are available and the task need not be as ‘complex and practically difficult’ as the Minister suggests.

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The Department of Employment and Workplace Relations has suggested the following policy rationale for the decision to validate pre-*Electrolux* agreements but not pre-*Electrolux* industrial action:

... 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.<sup>37</sup>

The nub of DEWR's argument seems to be that the incorrect certification of an invalid agreement is not the fault of the parties whereas a misjudgement as to the status of industrial action is. Accordingly there is a more important rationale for validating those wrongly certified agreements than for validating misjudged industrial action.

However, it should be noted that there are immediate opportunities for other parties to bring industrial action to an end where it is not protected action. Accordingly, it is not only up to the party taking action to ensure it is acting within the requirements for protected action. First among these mechanisms is an order to return to work under s. 127 of the Workplace Relations Act, which may be made by the Commission on its own motion or on the application of a party to the dispute or any other person directly affected by it. Second, the Federal Court may order an injunction against anyone taking unprotected action in pursuit of an (invalid) certified agreement under s. 170NG (on the basis of a contravention of s. 170NC). If these remedies are not pursued, a unions' misjudgement as to the status of protected action might be considered to have been shared by the other parties and the Commission. It seems anomalous that Parliament should enact legislation to validate agreements all parties previously considered to be valid, while not enacting legislation protecting industrial action which all parties previously considered protected.

#### Future industrial action

The Bill does not address the 'serious chilling effect' in the negotiation of CAs that Justice Kirby identified as a result of *Electrolux*.<sup>38</sup> As discussed in the Background, an effect of that judgment is that unions must be very careful to ensure that any action they take is not in pursuit of a proposed agreement containing non-pertaining matters. A misjudgement on that issue can result in the action being 'unprotected' and possibly subject to penalties and substantial civil remedies. This issue might not be so problematic if the test of what does and does not pertain were clearer, but this Bill makes no effort to provide a clearer test. *Electrolux* itself shows that highly educated and experienced commissioners and judges can disagree on whether a matter pertains. As the full Federal Court said:

If the 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

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operation of [the relevant provisions of the Act] 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... As this case demonstrates, that may be a matter about which well-informed people have different views.<sup>39</sup>

This is the effect of the High Court’s majority decision in *Electrolux*. This may act as a strong disincentive to taking any industrial action and/or a strong disincentive to think of new and creative (but untested) ways of regulating the employment relationship through agreements.

Given the High Court’s interpretation of the current law, Parliament may want to consider whether a different approach is warranted to ensure that the liability of parties does not depend on such ‘technical matters of law’. The following approaches might be considered:

- providing that all action in pursuit of an agreement—assuming other requirements such as notification of a bargaining period and notification of proposed action are met—is protected, unless in pursuit of specifically prohibited provisions (such as bargaining agent’s fees, political matters or other provisions determined by Parliament)
- providing a very short limitation period for actions and prosecutions arising out of protected action, to encourage any remedies to be pursued at the time of the dispute, not years afterwards, or
- providing that industrial action is not unprotected on the basis that a matter in the proposed agreement is non-pertaining unless notice is given by the other parties, the Minister or the Commissioner to those participating in the industrial action, before or during the action, that the status of the relevant provisions is in dispute.

## Conclusion

The *Electrolux* decision has generated significant uncertainty in Australian workplace relations. This Bill effectively addresses one very important aspect of that uncertainty, being the validity of existing certified agreements and Australian Workplace Agreements.

However, it does not address the post-*Electrolux* uncertainty in the following areas:

- the lack of clarity over what is and is not a matter pertaining to the employment relationship
- the uncertainty over the validity of agreements concluded after 2 September 2004, given the remaining uncertainty over the ‘pertaining to’ test
- the uncertainty over the protected or unprotected status of industrial action taken prior to the 2 September 2004, and

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- the uncertainty over the protected or unprotected status of future industrial action, given the continuing uncertainty over the ‘pertaining to’ test.

In the absence of Parliamentary intervention, much of this uncertainty will only be resolved after cases have appeared and been resolved by the Commission and the courts. This could take many years and involve millions of dollars in litigation expenses to taxpayers and parties.

In addition, the narrow approach to the ‘pertaining to’ test will be an obstacle to the development of new types of agreement provisions. This will reduce the dynamic benefits that can be expected to flow from the decentralisation of employment regulation embodied in the shift to CAs and AWAs from awards. The ability for employers and employees to develop enforceable instruments that remain up-to-date with contemporary management techniques and business models may be stymied by an overly restrictive approach to the allowable content of these instruments. It is true that non-pertaining matters can be formalised through non-workplace relations mechanisms such as common law contracts and deeds. But these lack the practical and inexpensive enforcement options available through the AIRC that make CAs and AWAs so useful and attractive in the first place.

As well as generating uncertainty, *Electrolux* can also be seen as a re-exertion of active state intervention in workplace relations. Following more than a decade’s worth of reforms in which self-regulation at the workplace or individual level has been promoted, *Electrolux* requires the Commission and courts to play a more integral role in policing the borders of self-regulation. While employers and employees remain free to determine the content of agreements, subject to certain minimum requirements, the breadth of those agreements has been circumscribed. Parliament now has an opportunity to decide whether agreements should be so limited, and if so how.

## Endnotes

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- 1 [2004] HCA 40. (Hereafter, *Electrolux*.)
- 2 See Steve O’Neil, ‘Workplace Relations Amendment (Prohibition on Compulsory Union Fees) Bill 2002 [No.2]’, Bills Digest, 101, Parliamentary Library, Canberra, 2002-2003 for background to the bargaining agent’s fee issue.
- 3 *Electrolux*, op. cit., per Gleeson CJ at para 9, McHugh J at para 60, Gummow, Hayne and Heydon JJ at paras 161-162.
- 4 The most important previous cases had been *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) CLR 96.
- 5 *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003*.

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- 6 'Labor in limbo on right to strike' (Editorial), *Australian Financial Review*, 6 September 2004, p. 62.
- 7 *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199, quoted from Andrew Stewart, 'Electrolux in the High Court: Strict interpretation, uncertain results', *Australian Industrial Law News*, Issue 9, 30 September 2004.
- 8 *Electrolux*, per McHugh J, para 100.
- 9 See 'Court clarification raises new IR doubts' (Editorial), *The Age*, 10 September 2004, p. 12.
- 10 *Electrolux*, per Kirby J, para 193.
- 11 Senator Ian Campbell, 'Second reading speech: Workplace Relations Amendment (Agreement Validation) Bill 2004', Senate, *Debates*, 17 November 2004, p. 12.
- 12 Australian Council of Trade Unions, *Submission to Senate Employment, Workplace Relations and Education Legislation Committee*, Melbourne, 23 November 2004, p 4.
- 13 *ibid*, p. 5-6.
- 14 *ibid*, p. 6.
- 15 *ibid*, p. 6.
- 16 Australian Industry Group, *Submission to Senate Employment, Workplace Relations and Education Legislation Committee*, Sydney, 23 November 2004, p. 1.
- 17 *ibid*, p. 9.
- 18 *ibid*, p. 11.
- 19 Australian Chamber of Commerce and Industry, *Submission to Senate Employment, Workplace Relations and Education Legislation Committee*, Melbourne, 23 November 2004, p. 15.
- 20 Karen Middleton, 'Labor won't be pushed on IR reforms', *West Australian*, 1 November 2004, p. 4.
- 21 Megan Shaw, 'IR laws to receive second airing', *The Age*, p. 6.
- 22 'Industrial dispute' and 'industrial situation' are defined by s. 4, of the *Workplace Relations Act 1996*. For relevant purposes, an 'industrial dispute' is an industrial dispute that 'extends beyond the borders of any one State' and 'is about matters pertaining to the relationship between employers and employees'. An 'industrial situation' is a situation which could lead to an industrial dispute if preventative action is not taken.
- 23 Senator Campbell, *op.cit.*
- 24 Principally, the majority relied on *R v Portus* and *Re Alcan*. See note 4 above.
- 25 *Electrolux*, *op. cit.*, per Gleeson CJ at para 8, McHugh J at para 61.
- 26 *Electrolux*, *op. cit.*, per McHugh J, para 60.
- 27 Stewart, *op. cit.*

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- 28 'Electrolux: The ramifications', *Workplace Express*, 3 September 2004.  
<http://www.workplaceexpress.com.au>
- 29 Paul Munro, 'Swings, roundabouts and allowable matters', paper for the Centenary Convention of the Industrial Relations Association of South Australia: The Conciliation and Arbitration Journey, Adelaide, 22 October 2004, p. 35.
- 30 A series of possible test cases are already being litigated: see 'Matters pertain: Win for unions in post-Electrolux case' *Workplace Express*, 22 October 2004, 'WA court case shaping up as next Electrolux test' *Workplace Express*, 27 October 2004 and 'Electrolux uncertainty continues as Merkon case withdrawn', *Workplace Express*, 8 November 2004.
- 31 See Breen Creighton and Andrew Stewart, *Labour Law: an Introduction, 3rd Edition*, Federation Press, Sydney, 2000, p. 122.
- 32 *Electrolux*, per Kirby J, para 183.
- 33 Senator Campbell, op. cit.
- 34 ibid
- 35 Department of Employment and Workplace Relations, 'Submission to the Senate Employment, Workplace Relations and Education Legislation Committee', Canberra, 23 November 2004, p. 2. (Hereafter, DEWR.)
- 36 *Electrolux*, per Kirby J, para 219.
- 37 DEWR, op. cit., p. 5.
- 38 See above p. 4.
- 39 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177, p. 195. Quoted in *Electrolux*, per Kirby J, para. 190.

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