



IR Client Alert

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Bargaining Confined to Industrial Matters – High Court Rules

The High Court of Australia handed down its decision in *Electrolux Home Products Pty Limited v The Australian Workers' Union and Others* on 2 September 2004. The case concerned claims by the AWU and other unions for inclusion of a bargaining agent's fee clause in a certified agreement and industrial action in support of that claim.

The key rulings of the Court were:

- 1 A claim that non-union members be required under the terms of their employment to pay a bargaining agent's fee to a particular union is not a claim about matters pertaining to the employment relationship.
- 2 The presence of a term in a proposed certified agreement which is not about matters pertaining to the employment relationship makes the agreement not one about such matters and therefore one which is not capable of being the subject of an application for certification by the Australian Industrial Relations Commission.
- 3 Industrial action taken by a union in support of claims in respect of a proposed certified agreement will not be protected action under the *Workplace Relations Act 1996* where one of the substantive claims does not pertain to the employment relationship.

4 Such industrial action in this case constituted a breach of section 170NC of the Act which prohibits coercion in support of claims about the making, etc, of a certified agreement.

The High Court's ruling was made by a 6 to 1 majority. Chief Justice Gleeson and Justices McHugh, Gummow, Hayne, Heydon and Callinan were in the majority. Justice Kirby dissented.

The High Court's ruling overturned a unanimous decision of the Full Court of the Federal Court and reinstated the orders made by the Federal Court trial judge, Justice Merkel.

Background

During the course of negotiations for an enterprise agreement to govern Electrolux Home Products, a whitegoods manufacturer in South Australia, the unions took industrial action in support of claims which included a claim for a bargaining agent's fee.

A bargaining agent's fee would:

- impose an obligation on the employer to advise employees prior to commencing work for the company that the fee is payable to the union;
- place an obligation on the employee under his or her employment contract to pay an annual fee to the union, apparently for the provision of bargaining services by the union whether or not the employee wished to receive those services; and

Industrial action will not be protected if it is in support of claims which include a substantive claim for something outside the employment relationship.

- require the employer to provide a payment facility to pay the bargaining agent's fee to the union.

Electrolux, supported by the Commonwealth Minister for Employment and Workplace Relations as intervenor, argued that industrial action taken in support of this claim was not capable of being protected action. This was the view which had been accepted by Justice Merkel. The unions argued the contrary, and had carried the day before the Full Court of the Federal Court.

The High Court's analysis of the issues

The first and pivotal question was whether the bargaining agent's fee claim pertained to the employment relationship in the manner required by section 170LI of the *Workplace Relations Act 1996*. Section 170LI describes the agreements capable of being certified under Division 2 of Part VIB of the Act.

The High 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

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employer act as a financial agent for employees in their dealings with the union create a dispute pertaining to the employment relationship.

These decisions had been reached in connection with the definition of industrial disputes where the language used is similar but not identical to that in section 170LI of the Act. The High Court considered that, in the words of the Chief Justice:

"There is no occasion to depart from those authorities, and every reason to follow them."

The suggestions made by the Full Court of the Federal Court, and in a decision of the Full Bench of the Commission (*Re Unilever*, 31 October 2003, PR940027), that those decisions may not be applicable in an enterprise bargaining context have been dismissed.

The second question was if a bargaining agent's fee provision did not pertain to the employment relationship, did its inclusion in an agreement render that agreement incapable of being certified? The Full Court of the Federal Court considered that such an agreement might still be certifiable. Justice Merkel had taken the view that it would not be certifiable if the provision in question was a substantive one, as would be the case with the bargaining agent's fee provision. The High Court agreed with Justice Merkel.

The third question was whether industrial action taken genuinely in support of claims believed to be capable of being dealt with in a certified agreement could be protected industrial action where, as a matter of law, the particular provisions sought could not be included in a certified agreement. The Full Court of the Federal Court had considered this was so, but Justice Merkel had considered that it was not so. Again, the High Court considered that Justice Merkel had the matter right and the Full Court had it wrong.

The final substantive question was whether section 170NC (prohibiting coercion in connection with a proposed agreement) applied where the claims advanced included the impermissible bargaining agent's fee claim. If there could be no protected action in support of a proposed agreement which included a bargaining agent's fee provision, it was argued by the unions (and held by the Full Court of the Federal Court) that coercion to enter such a non-conforming agreement would not be caught by section 170NC. The Court approached this issue purposively – the mischief Parliament was addressing in the section was coercion in support of claims about a certified agreement even if the agreement was not capable of being certified in a particular form.

Implications of the decision

The ruling that protected action is not available in support of claims which include something not pertaining to the employment relationship is especially important. This is because of the impossibility, in the general run of affairs, for the employer to know what is in the mind of union officials and employees embarking upon industrial action.

The ruling means that there is both a subjective and objective touchstone when determining the availability or otherwise of legal protection for industrial action. Not only must industrial action genuinely be for the purpose of supporting claims to be included in a certified agreement, but those claims must objectively be capable of being so included.

The particular issue in this case was a bargaining agent's fee. But the implications of the case go much wider to other issues which might be supported by a union – for example, green bans over environmental issues, claims about coal prices to be required by Australian coal exporters, political strikes over matters of foreign or domestic governmental policy, etc.

There are other implications of this important decision. An application for certification of an agreement will not be valid if the agreement contains substantive provisions which do not pertain to the employment relationship. This is clearly relevant for the future. Particular care should be taken in the preparation of agreements to see that matters not capable of pertaining to the employment relationship are excluded and those which are capable of so pertaining are written in a form which does not give rise to an avoidable concern.

The same point also has an important implication for current certified agreements. The validity of many agreements which have been certified may now be open to question. In *Atlas Steels* (29 April 2002, PR917092 – see *IR Bulletin* June 2002, pages 2-4, available at www.bdw.com), a Full Bench of the Commission ruled that while a *claim* in respect of payroll deductions for union fees did not pertain to the employment relationship, an *agreement* about such a matter could pertain because it affected the disposition of an employee's wages. This ruling must now be regarded as wrong, and agreements certified in reliance on it, while perhaps entitled to a presumption of regularity, are open to doubt. So too are other agreements providing for things beyond industrial matters such as wages and conditions of employment.

This means that there is a potential for unions or employers during the life of a current (invalid) certified agreement to serve a bargaining notice and to take industrial action in support of claims for a new agreement. It also means that employees may have a legitimate concern about whether their employer will honour a current agreement.

Employers should give these matters thought and, in appropriate cases, take advice. If there is reason to doubt the validity of a current agreement, thought may need to be given to the best strategy to assure employees that their entitlements are secure and to receive assurance that claims will not be advanced mid-term by unions or employees.

Richard Bunting, Partner, Melbourne
richard.bunting@bdw.com



Lessons for Employers

- Industrial action will not be protected if it is in support of claims which include a substantive claim for something outside the employment relationship.
- Employers will need to ensure, as best they can, that unions specify their claims so that the question whether any industrial action is entitled to protection can be tested. If necessary, directions should be sought from the Industrial Relations Commission requiring that unions specify their claims or produce a draft of the agreement proposed.
- Care should be taken in the preparation of agreements to see that matters not capable of pertaining to the employment relationship are excluded and those which are capable of so pertaining are written in a form which does not give rise to an avoidable concern.
- If there is reason to doubt the validity of a current agreement, consider the best strategy to assure employees that their entitlements are secure and to receive assurance that claims will not be advanced mid-term by unions or employees.

BDW Contact Details:

Sydney	Adrian Morris, Helen McKenzie Stephen Nettleton, Jan Dransfield David Lloyd, Stephen Woodbury Lea Constantine, Ken Brotherson (02) 9258 6000	Brisbane	Ian Humphreys, Steve Bennett (07) 3259 7000
Melbourne	Richard Bunting, Steven Amendola Jonathan Sandler, Vince Rogers (03) 9679 3000	Perth	David Parker, Tony Davies (08) 9366 8000
		Canberra	Paul Vane-Tempest (02) 6234 4000
		London	Geoff Hone +44 20 7600 3030

This publication is authorised by Blake Dawson Waldron. The firm can be contacted by emailing marketing@bdw.com

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