

**WORKPLACE AND  
EMPLOYMENT LAW  
ALERT**

MARCH 2005

REVISED FEB 2006

**FOR FURTHER INFORMATION  
PLEASE CONTACT**

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**PERTAINING TO THE RELATIONSHIP OF  
EMPLOYERS AND EMPLOYEES**

A full bench of the AIRC (President Justice Geoffrey Giudice, Vice-President Michael Lawler and Commissioner Jim Simmonds) on 18 March 2005 have taken an approach with greater scope to what are matters pertaining to the relationship of employers and employees.

The full bench approved of interest clauses such as:

1. Right of entry to ensure compliance with industrial instruments and other matters related to the employment relationship;
2. A specific limitation on the proportion of labour hire to direct employees;
3. An obligation to consult with the Union about the use of labour hire;
4. A requirement that labour hire workers be offered permanent jobs in certain circumstances; and
5. A requirement that an employer instruct labour agencies to pass increases in the Enterprise Agreement onto their own employees.

The decision involved a review of:

- (a) The Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004;
- (b) The Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) - Enterprise Agreement 2004; and

- (c) The La Trobe University Children's Centre Enterprise  
Bargaining Agreement 2004.

The decision can be found on the Australian Industrial Relations  
Commission website - **PR956575** - 18/03/05.

Of interest is the summary Section from paragraphs 45 - 50. That  
summary Section is set out below:

- [45] *Following Electrolux it is clear that cases dealing with the construction of the term "pertaining to the relationship of employers and employees" apply to the construction of s.170LI(1). The High Court did not alter the developed law in relation to the meaning of that expression and the majority gave effect to decisions on the meaning of the expression in connection with the deduction of union dues, namely Portus and Alcan.*
- [46] *In deciding whether a provision in an agreement pertains to the relevant relationship there is no distinction to be made between a disputed claim on a particular subject and an agreed provision on the same subject. While such a distinction was drawn by the Full Bench in Atlas Steels, the distinction was implicitly rejected by a majority of the Court in Electrolux.*
- [47] *When dealing with applications to certify agreements pursuant to Division 2 of Part VIB of the Act, the following considerations are relevant:*
- (a) *The Commission has no jurisdiction to certify an agreement made pursuant to ss.170LJ, 170LK or 170LL unless the agreement answers the description in s.170LI(1).*
  - (b) *To answer that description each discrete, substantive and significant provision must be about a matter that pertains to the relationship between the particular employer, in its capacity as employer, and its employees, in their capacity as employees.*
  - (c) *For a matter to pertain to the requisite relationship it must be connected with the relationship between the employer in its capacity as an employer, and its employees, in their capacity*

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as employees, in a way which is direct and not merely consequential.

(d) The agreement may also contain:

- (i) machinery provisions - indexes, tables of contents and the like;
- (ii) provisions that are incidental or ancillary to a matter that pertains to the relationship;
- (iii) provisions that do not pertain to the relationship but they are so trivial they can be disregarded - some aspirational provisions which do not impose any enforceable legal obligations on a party to the agreement might fall into this category.

(e) When examining a provision to see whether it pertains in the relevant sense, regard must be had to the words of the clause in the context of the agreement as a whole and to any relevant evidence.

(f) The mere fact that a clause confers some rights on a union does not, of itself, lead to the conclusion that the clause does not pertain.

[48] When dealing with applications to certify agreements pursuant to Division 3 of Part VIB the same considerations apply, with one exception. Whether a provision pertains to the relevant relationship is to be decided in the context of the relations between employers and employees generally, rather than the relations between a particular employer and its employees covered by the agreement. Whether this distinction has any significant practical implications remains to be seen.

[49] In having regard to these considerations reference will often be necessary to cases dealing with the same or similar issues. It is worth noting that the fact that a given matter has been held to be capable of giving rise to an industrial dispute or a matter the Commission could make an award about is not necessarily the end of the inquiry. Some older decisions may be incompatible with subsequent authority. In the same way, the fact that a clause about a particular matter can be found in an award is not necessarily a reliable guide to whether a provision about that matter may properly be included in an agreement.

[50] It is clear that the Commission's decisions on these issues are very important ones. It follows from *Electrolux* that if an agreement contains a provision which does not pertain to the relationship the

*application for certification is invalid. It would seem to follow that if the Commission purports to certify an agreement containing a provision of that kind the agreement will have no legal effect under the Act.<sup>42</sup> Given the difficulties in characterisation which have arisen, and the likelihood that similar difficulties will arise in the future, the Parliament may think it appropriate to give consideration to a legislative amendment which might give a greater degree of certainty to the legal operation of an agreement once it has been certified.*

I recommend a reading of the decision to you.

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