LESS THAN THEY BARGAINED FOR: UNION BARGAINING FEES IN CERTIFIED AGREEMENTS- A MATTER OF LAW, POLITICS OR PUBLIC POLICY?

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[*The High Court of Australia's decision in* Electrolux No 3, *combined with the Australian government's changes to workplace relations law, has ensured that unions are prohibited from charging bargaining fees. The government claimed to have prohibited the fees on the basis that they offend the principle of "freedom of association". However, the government failed to consider other policy considerations and considerable international precedents that suggest if bargaining fees are limited to an amount covering bargaining services alone, they provide unions with a beneficial source of financial security, whilst also overcoming the free-rider problem and maintaining respect for the concept of voluntary unionism. Therefore, it is perhaps incorrect to suggest that the prohibition of bargaining fees was prescribed by the government on the basis of some overriding concern for the freedom of association. Rather it seems more realistic to suggest that freedom of association was the guise under which the government was able to further marginalise the role of unions in industrial relations in order to promote its own ideological and economic agenda*.]

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I INTRODUCTION

Trade unions have long held a central role in the Australian industrial relations system as the guardians of worker's rights; in order to maintain this position they have constantly looked to protect their organisational security. However, in more recent times legislative amendments have seen the pivotal role of unions stripped away and traditional union security arrangements invalidated. In an attempt to ensure their viability within this changing industrial environment, and more specifically to address the 'free-rider' problem, unions sought to enforce a new form of security whereby a non-union employee who obtained the benefit of a union negotiated agreement would pay a fee to the union for the provision of bargaining services.

The enforcement of these 'bargaining agent's fees' drew strong reaction from employers and industry groups. After extensive litigation the High Court eventually found that provisions purporting to implement bargaining fees could not be included in federally certified enterprise agreements. In reaching its decision the High Court took a legalistic approach to its interpretation of the *Workplace Relations Act 1996* (Cth) ('*WR Act*') without giving significant consideration to the practicalities of industrial relations under Australia's enterprise bargaining regime. This ensured that the task of unions in representing their members was made more demanding by virtue of the legal and financial constraints that the decision placed upon their operations.

Regardless of the High Court's apparent oversight, the federal government had preempted this decision through the passing of the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003* (Cth) ('*WRAPCUF Act*'). The government's legislation prohibited 'bargaining services fee' clauses from being included in certified agreements and deemed such clauses to be contrary to the principle of freedom of association. In doing so the legislation appears to have ignored competing public policy considerations, and also the fact that if bargaining fees are limited to a fair fee designed to reflect bargaining expenditure alone, they are an effective means of dealing with the free-rider problem without depriving individuals of freedom of choice over union membership.

II ENTERPRISE BARGAINING & THE ROLE OF UNIONS

The primary focus of the Australian industrial relations system has now unequivocally shifted to the regulation of employment relationships by direct negotiation at the level of workplace or enterprise.[1] The rhetoric at the time of moving away from the award system to enterprise bargaining was that it would allow workers and their employers to customise their agreements in order to suit their specific circumstances.[2] However, it has also resulted in stretching trade union resources and reducing their influence in the industrial system.

Enterprise bargaining is the name given to the process of negotiation between an employer and employees (or their representatives) in order to reach an agreement regulating the terms and conditions of employment within a particular workplace. In the federal jurisdiction, the provisions regulating collective agreements made at enterprise level are contained in Part VIB of the *WR Act*. Division 2 of Part VIB provides that an employer who is a constitutional corporation[3] may enter into an enterprise agreement with one or more trade unions[4] or directly with its employees.[5] For a union to be a party to an agreement under Division 2, it is required that they have 'at least one member employed in the single business or part of it that is to be covered by the agreement', and that they be 'entitled to represent the industrial interests of that member in relation to the work that will be covered by the agreement.'[6]

The involvement of unions in the agreement making process recognises the importance of the collective strength of employees in redressing the inequality of bargaining power between an individual employee and his or her employer.[7] However, the decentralisation of the Australian industrial relations regime has seen unions struggle to maintain their viability. The enterprise bargaining system has strained union resources by increasing the necessity to establish a collective agreement in each individual workplace. Moreover, unions are no longer considered an essential part of the industrial system; their powers have been extensively curtailed[8] and workers are given broad freedoms to negotiate enterprise agreements without trade union involvement.[9]

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[1] BREEN CREIGHTON AND ANDREW STEWART, LABOUR LAW: AN INTRODUCTION (3rd ed, 2000) [6.65].
[2] *See generally*, Commonwealth, Second Reading Speech to the Workplace Relations and Other Legislation Amendment Bill 1996, House of Representatives, 23 May 1996, 1302 (Peter Reith, Minister for Industrial Relations).
[3] Workplace Relations Act, 1996, s 170LH (Cth).
[4] Workplace Relations Act, 1996, s 170LJ (1) (Cth).
[5] Workplace Relations Act, 1996, s 170LK (1) (Cth).
[6] Workplace Relations Act, 1996, s 170LJ (1) (Cth).
[7] KAREN WHEELWRIGHT, LABOUR LAW 10.5 (2nd ed. 2003) .
[8] For a discussion of the reduction of union powers with the introduction of the Workplace Relations Act, 1996, Cth, *see* Richard Naughton, 'Sailing into Unchartered Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)' 10 AUSTRALIAN JOURNAL OF LABOUR LAW 112 (1997)
[9] Part VIB of the WR Act provides for the making of collective agreements without union involvement under s 170LK. Part VID permits employers to enter agreements with individual employees at the possible exclusion of the applicable award or certified agreement.

III THE 'FREE-RIDER' ISSUE

Under both the award and enterprise bargaining systems, terms and conditions of employment that bind an employer in respect to unions and their members are also extended to those employees covered by the award or agreement who are not members of the union. This has resulted in a free-rider problem, whereby non-union employees obtain the benefit of union endeavours without providing them with any financial support. Recent studies show that around 85 per cent of federally registered enterprise agreements are made with unions,[10] yet union membership stands at just 23 per cent of the workforce.[11]

In *Metal Trades Employers Association v Amalgamated Engineering Union*[12] *('Metal Trades')* the High Court held that a dispute between unions and employers about the terms on which non-unionists were employed was an industrial matter that could give rise to a dispute to be settled by the making of an award.[13] The union had an industrial interest in ensuring that its members' employment prospects were not undermined by employers being free to engage non-unionists on inferior terms.[14] The decision therefore, enabled awards in the settlement of industrial disputes to bind the employer in relation to all relevant employees, irrespective of union membership.

On a strict legal analysis though, an award does not accord rights to a non-union employee because he or she is not a party to the award, and is therefore not entitled to sue the employer if its terms are breached.[15] This situation was overturned in 1990 when s 178 of the *Industrial Relations Act 1988* (Cth) ('*IR Act'*) was amended to provide that a person whose employment was subject to an award, and who was affected by the breach of an award, could sue for breach and recover a penalty.[16] In relation to certified agreements a similar provision now appears in s 178(5A) of the *WR Act*. Furthermore, s 179(1) provides that an employee 'may sue where an employer is required by an award, order or certified agreement to pay an amount to an employee'.

Thus, the *Metal Trades* case combined with the subsequent legislative changes operated to protect unionists by ensuring that wages and conditions of union labour could not be undercut by employers engaging non-union workers on sub-award

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[10] Australian Government Department of Employment and Workplace Relations, Trends in Federal Enterprise Bargaining June 2004 (2004) Australian WorkPlace <http://www.workplace.gov.au/WP/Content/Files/WP/WR/Publications/Trends_J04.pdf> (last visited Oct. 2, 2004).

[11] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/88F55138D00A58E4CA2568A9001393B9> (last visited Oct. 2, 2004).

[12] (1935) 54 CLR 387 (High Court of Australia, 1935).

[13] WHEELWRIGHT, *supra* note 7, at 8.57.

[14] CREIGHTON, *supra* note 1, at 4.09.

[15] WHEELWRIGHT, *supra* note 7 at 8.63.

[16] *Id*. at 8.64.

conditions. However, in extending such wages and conditions to all employees irrespective of union membership, non-unionists were able to benefit from the union's representative activities without providing them with any monetary support.

Under the current enterprise bargaining regime s 170M ensures that collective agreements made with unions under Division 2 have application to employees who are non-union members. Furthermore, the AIRC must refuse to certify an agreement that breaches the 'freedom of association' provisions in Part XA of the *WR Act*, one requirement of which is that employers do not discriminate in the terms or conditions of employment on the basis of union membership.[17] Sections 298Y(1) and 298Z(3) then go on to provide that an existing certified agreement is void to the extent that it breaches Part XA.

The effect of these provisions is that even where an employer negotiates an agreement with a union, it is not possible for the union and the employer to agree that only union members will obtain the benefit of the agreement. Many unionists are frustrated by this free-riding problem. Therefore, the question arises: should employees who are not members of a union make a contribution to the union who has represented the 'workforce' in reaching an enterprise agreement with the employer?

IV UNION SECURITY: THE INTRODUCTION OF BARGAINING FEES

In order to overcome the free-rider problem and also to ensure their own longevity, Australian trade unions have consistently sought to enforce union security arrangements. In recent times, bargaining agent's fee clauses have arisen as the latest form of union security. A bargaining agent's fee is a fee levied on non-union workers that is designed to pay unions for their services in negotiating enterprise agreements which benefit all employees at a workplace. However, although bargaining fees have the potential to provide a useful financial resource for unions, the charging of these fees does not appear to be a universal remedy for all of the current challenges faced by the trade union movement.

Bargaining fee clauses are a diluted form of union security compared to those arrangements that have formerly existed. Despite not being sanctioned by the law, closed shops have historically been common in Australia.[18] In addition, an express power previously existed to include provisions in awards directing that preferential treatment be given to union members in relation to a range of employment matters.[19] However, the *WR Act* now provides explicit legal expression for the concept of voluntary unionism. Pursuant to Part XA preference clauses or closed shop

[17] Workplace Relations Act, 1996, ss 170LU(2A), 170LU(3), 298K(1)(e), 298L(1)(b) (Cth).
[18] CREIGHTON, *supra* note 1, at 12.72.
[19] Industrial Relations Act, 1988, s 122 (Cth).

arrangements are unenforceable, as it is unlawful to discriminate against employees on the ground that they do not belong to a union.[20]

The free-rider problem combined with the abolition of preferential treatment for union members, the move away from the award system and anxieties created by falling union membership prompted the search for new forms of union security. This search led a number of unions to attempt to include bargaining fee clauses in certified agreements.

In Australia, the impetus for charging bargaining fees gained momentum in June 2000 when the Australian Council of Trade Unions ('ACTU') Congress endorsed the following policy:

> Provision should be made for certified agreements to include a term providing that a specified negotiating fee be deducted from the wages of all employees covered by the agreement to be forwarded to the relevant union, with such fee to be offset against union dues if paid by the employee.[21]

The aim of inserting a bargaining fee clause into a union negotiated enterprise agreement under s 170LJ of the *WR Act*, is ostensibly to prevent non-unionists free-riding on employees who pay union membership fees. Unions were attracted to this idea and began to levy bargaining fees at a rate above that of ordinary union dues. However, an amount set at a level below membership fees, calculated to reflect the bargaining and representational work done on a worker's behalf by a union would seem to be the most appropriate means of enforcing a fee upon non-union employees that is to be strictly regarded as a 'bargaining' fee. Despite the risk that these fees may attract lukewarm union members into a lower form of contribution, any system which provides additional financial resources to unions by eliciting payment from workers who would not otherwise contribute, provides much needed financial security for unions.[22]

In order to reach an agreement containing a bargaining fee clause, unions would inevitably have to overcome negative employer responses in many enterprises.[23] Moreover, under s 170LT(5) of the *WR Act* a union negotiated enterprise bargaining agreement must be approved by the majority of employees at a workplace to be certifiable. Even assuming that the broad political arguments as to the merits of bargaining fees were won with employees, there would be a big difference between that victory and achieving majority support at workplaces where individual workers may still be inclined to protect their own hip-pocket.[24] Unions would also have to

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[20] Workplace Relations Act, 1996, ss 298K, 298L(1)(b) (Cth).
[21] Australian Council of Trade Unions, Industrial Legislation Policy 2000 Australian Council of Trade Unions <http://www.actu.asn.au/public/papers/2000leg/> (last visited Sept. 15, 2004)
[22] Graeme Orr, Agency Shops in Australia? Compulsory Bargaining Fees, Union (In) Security and the Rights of Free-Riders, 14 AUSTRALIAN JOURNAL OF LABOUR LAW 1, 17 (2001).
[23] *Id.*
[24] *Id.* at 31.

motivate support in each workplace against a possible perception that any union security gains would involve a trade-off for other benefits in negotiations.[25]

It is quite likely that bargaining fee clauses would only achieve majority support in highly unionised workplaces. Yet these may be the areas that least need the extra resources or are best placed to organise and recruit members.[26] Furthermore, with only about 37 per cent of the workforce being covered by collective agreements[27] (21 per cent in the federal jurisdiction)[28] and with up to about 15 per cent of these employees being covered by non-union agreements[29] the coverage that bargaining fees have the potential to achieve is not particularly substantial.

The 'message' that the fees send about the purpose of trade unions may also be of some concern. This strategy effectively sees unions define themselves as service-providing agencies and has the potential to undermine the organising capacity of trade unions. New conscripts who may wish to avoid the fee and join the union instead, are likely to have a clear focus on union services.[30] However, there is more to union security than financial security; if a union is merely an agent providing a service for its members it cannot effectively organise the workforce in order to strengthen its bargaining position in negotiations with employers.[31] Therefore, it may be a better strategy to overcome the free-rider problem through a more systematic focus on organising.

Nevertheless, some level of financial security for unions is necessary to ensure collective bargaining occurs on a relatively even playing field. That goal is dependant on unions being able to service a large number of sites in the system of enterprise bargaining, which requires a higher level of resources than most unions enjoy.[32]

V THE LEGAL STATUS OF BARGAINING FEES

Just as unions began to view bargaining fees as a viable method of funding their activities, questions arose as to their validity. There were many practical consequences dependent upon these questions that remained unresolved despite the statutory prohibition of bargaining fees in 2003. Extensive litigation upon facts arising before this date saw multiple issues proceed all the way to the High Court, which eventually confirmed the demise of bargaining fees as a form of union security.

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[25] *Id.*.
[26] *Id.* at 32.
[27] DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS, AGREEMENT MAKING IN AUSTRALIA UNDER THE WORKPLACE RELATIONS ACT 2000 AND 2001 43 (2003)
[28] *Id.*
[29] *Id.* at 53.
[30] Rae Cooper, *Trade Unionism in 2001*, 44(2) JOURNAL OF INDUSTRIAL RELATIONS 247, 257 (2002).
[31] PHILLIPA WEEKS, TRADE UNION SECURITY LAW 260 (1995).
[32] Orr, *supra* note 22, at 6.

A *Certification & Protected Action*

Particularly contentious in the judicial proceedings were the questions as to whether bargaining fee clauses could be included in an agreement to be certified by the Australian Industrial Relations Commission ('AIRC') and whether unions could take industrial action in support of an agreement containing a bargaining fee clause.

1 *The Electrolux Litigation*

In this case, trade unions had attempted to include in a collective agreement a term that the employer (Electrolux) should:

a) advise new employees that a bargaining agent's fee would be payable to the union by non-union members;
b) require new employees to pay the fee; and
c) provide a direct debit facility to enable the payment of the fee.

Electrolux refused to include the bargaining fee clause in the agreement and as a result the unions took industrial action. This deadlock could not be broken and the matter proceeded to the Federal Court for resolution.

Section 170LI(1) of the *WR Act* provides that, for an application to be made to the AIRC under Division 2 for certification of an enterprise bargaining agreement, there must be an agreement about matters pertaining to the relationship between an employer who is a constitutional corporation and all persons employed in the employer's single business. Electrolux asserted that the bargaining fee clause of the agreement was not about a matter pertaining to the relationship between Electrolux and its employees under s 170LI(1) and therefore the agreement was not capable of being certified.

Further, s 170ML located in Division 8 of Part VIB identifies particular types of industrial action, termed 'protected action', which attracts certain legal immunities pursuant to s 170MT. Section 170ML(2)(e) provides that an organisation of employees is entitled, for the purpose of supporting or advancing claims made in respect of a proposed agreement to organise or engage in industrial action directly against the employer and, if the organisation, member, officer or employee does so, the organising of, or engaging in, the industrial action is protected action. Electrolux claimed that as the agreement was not capable of being certified, the industrial action taken by the unions in support of the agreement could not be deemed to be 'protected action' within the meaning of s 170ML(2)(e).

At first instance Merkel J, as a single judge of Federal Court,[33] upheld Electrolux's propositions, however, his Honour's decision was overturned on appeal to the Full

[33] Electrolux Home Products Pty Ltd v Australian Workers' Union [2001] FCA 1600 (Unreported, Merkel J, 14 November 2001) (Federal Court of Australia, 2001) ('Electrolux No 1').

Court of the Federal Court.[34] Electrolux subsequently appealed the decision to the High Court.

The High Court in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[35] *('Electrolux No 3')* identified three main questions for determination:

1. Whether a claim by a union that an employer should agree to a bargaining agent's fee is a matter pertaining to the relationship between an employer and persons employed in the business of the employer, within the meaning of s 170LI(1).
2. Whether the presence of a term in a proposed agreement that is not 'about matters pertaining to the relationship' between an employer and its employees within the meaning of s 170LI(1) makes the entire agreement not one about such matters for the purposes of that section and therefore not capable of being certified by the AIRC.
3. Whether industrial action by a union in support of claims made for a proposed agreement, which includes a bargaining agent's fee clause that is deemed not to pertain to the employment relationship, is protected action within the meaning of s 170ML(2)(e).[36]

(a) *Issue 1: Characterisation of the Bargaining Agent's Fee Claim*

In *Electrolux Home Products Pty Ltd v Australian Workers' Union ('Electrolux No. 1')* Merkel J held that in order for matters to pertain to the relationship between an employer and an employee in accordance with s 170LI(1), 'they must be connected with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential.'[37] On his Honour's reading of previous High Court decisions,[38] a bargaining fee clause was not a clause that pertains to the relationship between the employer and its employees in their capacities as such, because the relationship that is created is one of agency in which the employer contracts with its employees on behalf of the relevant union, as its agent.[39]

Doubt was thrown on this conclusion when *Electrolux No 1* was appealed to the Full Court of the Federal Court in *Automotive, Food, Metals, Engineering, Printing*

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[34] Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Ltd (2002) 118 FCR 177 (Federal Court of Australia 2001) ('Electrolux No 2').
[35] (2004) 209 ALR 116 (High Court of Australia, 2004).
[36] Electrolux No 3 (2004) 209 ALR 116, 199,120 (Gleeson CJ) (High Court of Australia, 2004).
[37] Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures (1986) 160 CLR 341 (High Court of Australia, 1986) as cited with approval in Electrolux No 1 [2001] FCA 1600, 20 (Unreported, Merkel J, 14 November 2001) (Federal Court of Australia, 2001).
[38] R v Portus; Ex parte ANZ Banking Group Ltd (1972) 127 CLR 353 (High Court of Australia, 1972), subsequently affirmed in Re Alcan Australia Ltd; Ex Parte Federation of Industrial, Manufacturing and Engineering Employees (1994) 181 CLR 96 (High Court of Australia, 1994).
[39] Electrolux No 1 [2001] FCA 1600, 40 - 41 (Unreported, Merkel J, 14 November 2001) (Federal Court of Australia, 2001).

& Kindred Industries Union v Electrolux Home Products Pty Ltd ('*Electrolux No 2*'). On the facts of the case the Full Court held that Merkel J had incorrectly identified the issue. The question was not whether the proposed agreement satisfied s 170LI(1) so as to be capable of certification, but rather, whether the unions had engaged in protected action in accordance with s 170ML(2)(e). Thus, although the Court found it unnecessary to express a final view about all of Merkel J's conclusions, their Honour's doubted whether his propositions were correct.[40] In relation to the characterisation of the bargaining fee clause, the Court stated that a claim by a union that an employer impose a requirement on future employees to pay a bargaining fee as a condition of employment 'might give rise to a matter pertaining to the relationship between Electrolux and those employees...'[41]

However, the law remained in a state of flux, as after this decision, in *Re Health Minders Limited and National Union of Workers Comprehensive Enterprise Agreement 2002*[42] *('Health Minders Appeal')*, a Full Bench of the AIRC endorsed the position of Merkel J in ruling that bargaining fee clauses were not matters pertaining to the relationship between employers and employees in their capacities as such.

The High Court in Electrolux No 3

When the decision in *Electrolux No 2* was appealed to the High Court a 6:1 majority determined that a bargaining agent's fee clause does not pertain to the employer/employee relationship as required by s 170LI(1).[43] Similarly to Merkel J, the majority followed the previous High Court ruling in *Re Alcan Australia Ltd; Ex Parte Federation of Industrial, Manufacturing and Engineering Employees*[44] ('*Re Alcan'*). The issue in *Re Alcan* was whether a dispute about a demand by a union that an employer deduct union dues from its employees' wages and remit them to the union was an 'industrial dispute…about matters pertaining to the relationship between employers and employees' under s 4(1) of the *IR Act*. The Court held that the demand did not pertain to employer/employee relationship and by analogy, the High Court in *Electrolux No 3*, reached the same conclusion regarding bargaining fees.

In *Re Alcan*, the Court followed its earlier decision in the case of *R v Portus; Ex parte ANZ Banking Group Ltd*[45] *('Portus')*. In *Portus*, it was held that a demand by a union that an employer make deductions from employees wages did not affect the industrial relationship of employers and employees under the *Conciliation and Arbitration Act 1904* (Cth) ('*CA Act*'). The High Court in that case concluded that a matter must be connected with the relationship between an employer and an

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[40] Electrolux No 2 (2002) 118 FCR 177, 196 (Federal Court of Australia, 2002).
[41] Electrolux No 2 (2002) 118 FCR 177, 197 (Federal Court of Australia, 2002).
[42] (2003) 120 IR 438 (Australian Industrial Relations Commission, 2003).
[43] Electrolux No 3 (2004) 209 ALR 116 (Gummow, Hayne and Heydon JJ in a joint judgment and Gleeson CJ, McHugh and Callinan JJ in separate judgments; Kirby J in dissent) (High Court of Australia, 2004).
[44] (1994) 181 CLR 96 (High Court of Australia, 1994).
[45] (1972) 127 CLR 353 (High Court of Australia, 1972).

employee in their capacities as such in order to pertain to the employment relationship. According to the Court, a dispute about the deduction of union fees did not have this connection as it pertained to a relationship involving employees as union members, not as employees. The view was taken that the demand to pay union dues from the employees' wages would create a relationship between the parties, in which the employer acts as the financial agent of the employee for the benefit of the union.[46]

Constitutional Foundation for Division 2 of Part VIB

Unlike the provisions considered in *Re Alcan* and *Portus*, the constitutional foundation for Division 2 is 'primarily' the broader corporations power under s 51(xx) of the Commonwealth Constitution and not the conciliation and arbitration power under s 51(xxxv).[47] Even so, the majority held that in *Re Alcan* and *Portus* the Court's construction of 'matters pertaining to the relationship between employers and employees' did not depend upon the scope of the conciliation and arbitration power but rather the meaning of the definition of 'industrial dispute' in the *IR Act* and 'industrial matters' in the *CA Act.*[48]

Gleeson CJ and McHugh J agreed that there was nothing in the *WR Act* to indicate that the approach taken in *Re Alcan* and *Portus* was no longer applicable. The federal Parliament enacted the *WR Act* two years after the *Re Alcan* decision, and the drafters would have been aware of the interpretation of the language applied by the High Court.[49]

It was further stated by McHugh J that the terms of s 170LI revealed that the section was not intended to be commensurate with the scope of the corporations power. The constitutional basis of Division 2 was therefore neither determinative of the scope of the section nor of itself a reason for distinguishing the earlier cases.[50] In *Health Minders Appeal* the AIRC had in fact taken the view that the incorporation of s 170LI into the *WR Act* was intended to confine the broad extent of the corporations power.[51]

In dissent, Kirby J opined that without the same constitutional limitations it was unnecessary to read down 'matters pertaining to' the employer/employee relationship in order to avoid exceeding the bounds of s 51(xxxv).[52] His Honour argued that the words of s 170LI(1), in stating that the relationship in question is one between an employee and an 'employer who is a constitutional corporation', makes it

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[46] Portus (1972) 127 CLR 353, 360 (High Court of Australia, 1972).
[47] Electrolux No 3 (2004) 209 ALR 116, 136 (High Court of Australia, 2004).
[48] Electrolux No 3 (2004) 209 ALR 116, 136 (McHugh J), 156 (Gummow, Hayne and Heydon JJ) (High Court of Australia, 2004).
[49] Electrolux No 3 (2004) 209 ALR 116, 120 (Gleeson CJ), 138 (McHugh J) (High Court of Australia, 2004).
[50] Electrolux No 3 (2004) 209 ALR 116, 137 (High Court of Australia, 2004).
[51] (2003) 120 IR 438, 450 (Australian Industrial Relations Commission, 2003).
[52] Electrolux No 3 (2004) 209 ALR 116, 169 (High Court of Australia, 2004).

clear that Parliament had intended to free the *WR Act* from the limitations of s 51 (xxxv), and to substitute 'new and additional reliance' on the corporations power.[53]

Further, Kirby J noted that the majority were also reverting back to an outdated view of what may be considered the permissible subject of industrial disputation. There are references in the judgements of both McHugh J and Callinan J to the notion that a dispute over 'managerial' issues cannot be considered to be 'industrial' in character,[54] despite such ideas having been overridden in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*.[55] The majority therefore seemed to be confirming the application to certified agreements of the technical case law on 'industrial matters', and also making a retreat from the more liberal view of what may be the subject of industrial regulation.[56]

Text of s 170LI Differs from Sections Considered in Re Alcan & Portus

The *CA Act* as considered in *Portus* required that there be a dispute 'as to' a matter pertaining to the relationship between employers and employees. Conversely, s 170LI(1) requires that there be an agreement 'about' matters pertaining to the requisite relationship.

Mason CJ, Deane, Toohey and Gaudron JJ observed in *Re Amalgamated Metal Workers Union; Ex parte Shell Co of Australia Ltd ('Shell')* that:

> As has been seen, the present definition of 'industrial dispute' is satisfied if there is a dispute 'about [a] matter ... pertaining to the relationship between employers and employees'. And that is satisfied by a less direct relationship than might be necessary in the case of a requirement that a dispute be as to an industrial matter.[57]

Nevertheless, the majority in *Electrolux No 3* felt that the decision in *Re Alcan* suggests that the term 'about' does not significantly expand the scope of the matters that fall within s 170LI(1).[58] Kirby J on the other hand, embraced the wider scope as identified by the High Court in *Shell*. His Honour noted that 'it was not even necessary, as such, that the agreement should actually "pertain to" the relationship itself.'[59]

The differences in interpretation of the language and context of s 170LI(1) allowed Kirby J to take a broader view than the majority as to what matters pertain to the employment relationship. His Honour's judgement is more sensitive to the consti-

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[53] Electrolux No 3 (2004) 209 ALR 116, 171 (High Court of Australia, 2004).
[54] Electrolux No 3 (2004) 209 ALR 116, 132 (McHugh J), 178 (Callinan J) (High Court of Australia, 2004).
[55] (1987) 163 CLR 117 (High Court of Australia, 1987).
[56] Andrew Stewart, *Electrolux in the High Court: Strict Interpretation, Uncertain Results* 9 CCH AUSTRALIAN INDUSTRIAL LAW NEWS (2004), *available at* <www.cch.com.au> (last visited Oct. 2004).
[57] (1992) 174 CLR 345, 357 (High Court of Australia, 1992).
[58] Electrolux No 3, (2004) 209 ALR 116, 139 (McHugh J) (High Court of Australia, 2004).
[59] Electrolux No 3, (2004) 209 ALR 116, 171 (High Court of Australia, 2004)

tutional context in which the previous decisions were handed down and therefore appears to provide a more progressive and realistic interpretation of s 170LI(1). Nevertheless, despite taking a conservative view on what may be the subject of industrial regulation, the majority in following *Re Alcan* and *Portus* made their decision on an arguable application of established precedent and statutory interpretation.[60]

In a sense, these more technical arguments did little to obscure the fact that this area of law is inextricably linked with political values and ideological beliefs. In determining whether bargaining fee clauses pertain to the employment relationship it seems difficult to avoid making value judgements about the role of unions in the industrial relations system, in fact it is almost necessary to do so. Ultimately, the Court found that a proposal that an employer deduct amounts from the wages of future employees and remit them to a trade union was not one that affected employers and employees in their capacities as such. The majority held, as espoused by McHugh J, that:

> Notwithstanding that a bargaining agent's fee may contribute indirectly to the enforcement of employment conditions and may be relevant to each employment relationship, this does not alter the characterisation of the relationship created between employer and employee by the bargaining agent's fee clause as an "agency" relationship in which the employer effectively acts as the union's agent in making the relevant payment.[61]

Thus, the majority focused on the legal technicalities of the requirement and not what lies behind the agency relationship. Furthermore, the Court followed the decision in *Re Alcan* in stating that despite the importance of unions in the bargaining process, a claim directed to strengthening the position of a union or union members was not, without more, a matter pertaining to the employment relationship involving employers, as such, and employees, as such.[62]

Kirby J on the other hand, argued that:

> in the context of contemporary employment issues in Australia - where questions of enterprise bargaining, the role of unions in it and the terms of the Act continue to make such issues highly pertinent ones on the shop floor - the notion that the Unions' claim is one about matters pertaining to the employment relationship is irresistible.[63]

His Honour felt that the real work of s 170LI(1) was to exclude from agreements wholly extraneous demands having no relevant connection to the particular employment relationship.[64] According to Kirby J, it was unconvincing to suggest that

[60] Stewart, *supra* note 56.
[61] Electrolux No 3, (2004) 209 ALR 116, 140 (High Court of Australia, 2004)
[62] Electrolux No 3, (2004) 209 ALR 116, 133 (High Court of Australia, 2004)
[63] Electrolux No 3, (2004) 209 ALR 116, 172 (High Court of Australia, 2004)
[64] Electrolux No 3, (2004) 209 ALR 116, 172 (High Court of Australia, 2004)

the Unions' demand for the fee pertained solely to the relationship between employees and the Unions and that least of all it is convincing to say that it was not about matters pertaining to the employment relationship.[65]

Objectively it does seem as though union security has a clear, rational and direct impact on the enforcement of employment standards, their maintenance and improvement.[66] Bargaining agent's fees are 'necessarily incidental to the bargaining and enforcement process without which certified agreements would not exist.'[67] There is little content to the employment relationship in a workplace principally governed by Division 2 certified agreements, without a process of collective negotiation and continuing representation and oversight. An arrangement mandating that employees contribute to funding that process could be considered to be of direct relevance to the employment relationship.[68] However, this argument did not prove convincing to the majority of the High Court.

(b) *Issue 2: Certification of an Agreement Which Contains a Term That Is Not a Matter Pertaining to the Requisite Relationship*

In *Electrolux No 1* s 170LI(1) was interpreted as precluding an agreement from being certified if it contains a clause that is substantive, discrete and significant, and which does not pertain to the employment relationship.[69] However, if a term within an agreement not pertaining to the employment relationship is ancillary or incidental to, or is a machinery provision relating to, a matter pertaining to the employment relationship then the agreement may still be certified.[70] Merkel J found the bargaining agent's fee clause to be substantive, discrete and significant and not pertaining to the employment relationship, thus the agreement could not be certified under s 170LI(1).[71] Following this decision the question as to whether bargaining fee clauses pertain to the employment relationship came before the AIRC on a number of occasions in the context of applications for certification. Some agreements were certified with the AIRC distinguishing *Electrolux No 1* on the basis that the application dealt with claims rather than a concluded agreement, while others were refused certification.[72]

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[65] Electrolux No 3, (2004) 209 ALR 116, 172 (High Court of Australia, 2004).
[66] Orr, *supra* note 22, at 21.
[67] *Id*.
[68] *Id*.
[69] Electrolux No 1, [2001] FCA 1600, 51 (Unreported, Merkel J, 14 November 2001) (High Court of Australia 2001).
[70] Electrolux No 1, [2001] FCA 1600, 50 (Unreported, Merkel J, 14 November 2001) (High Court of Australia 2001).
[71] Electrolux No 1, [2001] FCA 1600, 54 (Unreported, Merkel J, 14 November 2001) (High Court of Australia 2001).
[72] Sam Eichembaum and Deivina Peethampparham, *What's it all about?*, 78(5) LAW INSTITUTE JOURNAL 60 (2003). *See* Re Webforge NSW Certified Agreement 2001 (unreported: PR914378, AIRC, 18 February 2002) (Australian Industrial Relations Commission, 2002) for an example of a decision dealing with a concluded agreement. See Health Minders Appeal, (2003) 120 IR 438 (Australian Industrial Relations Commission, 2003) and Atlas Steels, (2002) 114 IR 62 (Australian Industrial Relations Commission, 2002) for examples of decisions dealing with a claim.

Conversely, on appeal the Full Court of the Federal Court looked at the plain meaning of the words in s 170LI(1) that refer to 'an agreement ... about matters pertaining to the relationship.' In light of these words the Court considered it is necessary to characterise the 'agreement itself, considering it as a whole.'[73] Their Honours concluded that there was 'nothing in the statutory scheme suggesting that a certified agreement that, considered as a whole, answers to the description of 170LI(1), may not include a particular term that does not.'[74] However, in *Health Minders Appeal* the AIRC held that the Federal Court in *Electrolux No 2* was incorrect, in that an agreement containing matters that do not pertain to the employer/employee relationship cannot be classed as an agreement about matters pertaining to that relationship.[75]

Following these decisions and the introduction of the statutory prohibition of bargaining fees, the AIRC in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors v Unilever Australia Ltd*[76] *('Unilever')* adopted a more liberal approach to the issue, and expanded on the decision handed down *Electrolux No 2*. Rather than examining each provision individually, it was said that the language of s 170LI(1) requires the agreement to be assessed objectively and as a whole in determining whether it pertains to the employment relationship in the 'actual business under consideration'.[77] The AIRC noted that 'the reference relationship is not the abstract construct developed for purposes of identifying a constitutional industrial dispute or the statutory counterpart of it.' [78] Therefore, read in conjunction with the objects of the *WR Act*, [79] s 170LI(1) was said to allow the parties to best judge subjectively what rights and duties come within their own employment agreement.[80] The result of this decision was that whether or not a bargaining fee clause in isolation was held to pertain to the employment relationship, the agreement as a whole could still be deemed to pertain to that relationship and therefore be capable of certification.

The High Court in Electrolux No 3

Contrary to this interpretation of the *WR Act* the High Court's view was that an agreement cannot be certified if it contains a clause that does not pertain to the relationship between the employer and employees concerned. The majority concluded that there was nothing in the text or the scheme of Part VIB to find that an

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[73] Electrolux No 2, [2002] 118 FCR 177, 196 (Federal Court of Australia, 2002).
[74] Electrolux No 2, [2002] 118 FCR 177, 196 (Federal Court of Australia, 2002).
[75] Leigh Johns, *To Certify Or Not To Certify – That Is (Still) the Question*, 16 AUSTRALIAN JOURNAL OF LABOUR LAW 108, 117 (2003).
[76] (unreported, PR940027, AIRC, Full Court, 31 October 2003) (Australian Industrial Relations Commission, 2003).
[77] Eichembaum and Peethampparham, *supra* note 72.
[78]Unilever (unreported, PR940027, AIRC, Full Court, 31 October 2003), 163 (Australian Industrial Relations Commission, 2003).
[79] The objects of the WR Act 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 workplace or enterprise level. 3(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or nor that form is provided for by this Act.
[80] This was said to be the case unless the agreement was considered to be a 'sham'.

agreement that contains matters other than those referred to in s 170LI may be the subject of a certified agreement.

Presumably though, as Merkel J held, if a term within an agreement does not pertain to the employment relationship, but is ancillary or incidental to, or is a machinery provision relating to, a matter pertaining to the employment relationship then the agreement may still be certified. Only McHugh J expressly approved Merkel J's finding on this point, though the other members of the majority may be taken to have implicitly accepted it by referring to his Honour's judgment with approval.[81] Therefore, it appears as though it is only the inclusion of substantive, discrete and significant provisions not pertaining to the employment relationship that will prevent an agreement from being certified. [82]

In coming to its decision the High Court relied upon the comments of the Full Bench of the AIRC in *Re Atlas Steels Distribution Certified Agreement 2001-2003 ('Atlas Steels')*. In that case it was held that the construction, as subsequently adopted by the Full Court of the Federal Court:

> gives rise to uncertainty in the application of the section and of the Division. It requires a weighing-up or balancing of provisions which are about matters which do pertain and those which do not in order to reach a conclusion as to whether the agreement as a whole is about matters which pertain. That might involve difficult value judgments in particular cases. [83]

The High Court also observed that the *WR Act* is silent on the procedure for certifying an agreement which contains terms about matters that do not pertain to the employment relationship, and on the effect of certification of such an agreement.[84] Furthermore, it was stated that it would be anomalous if the *WR Act* conferred statutory privileges and enforced penalties in relation to substantive matters in a certified agreement that did not pertain to the requisite relationship under s 170LI(1).[85]

However, it seems that the view expressed by the AIRC in *Unilever* and referred to by Kirby J with approval in his dissent[86] is to be preferred, in that it promotes a simpler and more industrially realistic interpretation of the *WR Act*.[87] The characterisation of each provision of an agreement, as the High Court's decision requires, is certainly more arduous than the characterisation of an entire agreement. Furthermore, the problems identified by the High Court in characterising an agreement

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[81] K L Ballantyne & National Union of Workers (unreported, PR952656, Ross VP, 22 October 2004) 36 – 41, (Australian Industrial Relations Commission, 2004).
[82] This approach was confirmed in Section 45 appeal against decision (PR952449) by Australian Nursing Federation, (PR956575, Giudice J, Lawler VP and Simmonds C, 18 March 2005), (Australian Industrial Relations Commission, 2005).
[83] (2002) 114 IR 62, 67 (Australian Industrial Relations Commission, 2002).
[84] Electrolux No 3, (2004) 209 ALR 116, 122 (High Court of Australia, 2004).
[85] Electrolux No 3, (2004) 209 ALR 116, 145 (High Court of Australia, 2004).
[86] Electrolux No 3 (2004) 209 ALR 116, 165 (High Court of Australia, 2004).
[87] Stewart, *supra* note 56.

as a whole, seem to be less significant compared to the complexity that the majority's approach will bring to the negotiation of agreements. The decision of the High Court will ensure that a great deal of time is spent on obtaining advice about, or disputing, what can or cannot be included in an agreement. It seems that if the parties are to have true freedom in determining the terms of their employment relationship, as identified in the objects of the *WR Act*, s 170LI(1) should be afforded the broader construction as adopted in *Unilever*.[88]

(c) *Issue 3: Whether Industrial Action in Support of a Proposed (Non-Certifiable) Agreement is "Protected Action"*

In *Electrolux No 1* Merkel J held that industrial action taken for the purpose of supporting or advancing a proposed agreement that was incapable of being certified was not 'protected action' under the *WR Act*. On the other hand, the Full Court of the Federal Court held that 170ML(2)(e) is concerned only with the purpose of the relevant organisation or individuals and not with their 'realism, or legal knowledge or the likely result of their industrial action.' Provided the claims are genuinely made 'in respect of the proposed agreement', however 'optimistically or misguidedly,' the industrial action taken to advance them falls within the scope of s 170ML(2)(e). It does not matter that the insertion of a provision would give rise to certification difficulty under s 170LI(1).[89]

The High Court in Electrolux No 3

The High Court, again with a 6:1 majority, agreed with the decision of Merkel J, that industrial action does not become protected merely because the party taking the action is genuinely advancing claims that they wish to see included in an agreement. It was said that industrial action is not 'protected' under the *WR Act* unless the proposed agreement can be certified. In this case, the presence of the bargaining fee clause meant that the agreement was not certifiable, and hence industrial action in support of the agreement was not protected action.

McHugh J, undertaking a close analysis of the statute, held that the 'proposed agreement' that the action must be taken to support or advance is identified in s 170MI(1) as that which the initiating party 'wants to negotiate', being 'an agreement under Division 2'. In the context of Part VIB, the term 'under' was said to be understood to mean meeting the requirements or specifications set out in Division 2. Accordingly, the 'proposed agreement' has to be an agreement that satisfies the requirements for the making of an application to the AIRC for certification. Those requirements include that the agreement must pertain to the employment relationship as mandated by s 170LI(1).[90]

The protection conferred by s 170ML(2)(e), was therefore deemed to operate if the following two criteria are satisfied:

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[88] Eichembaum et al, *supra* note 77, at 61.
[89] Electrolux No 2 (2002) 118 FCR 177, 194 -197, (Federal Court of Australia, 2002).
[90] Electrolux No 3 (2004) 209 ALR 116, 146, (High Court of Australia, 2004).

1. the action has the genuine purpose of supporting or advancing claims the subject of a proposed agreement; and
2. the nature of the proposed agreement satisfies the requirements of s 170LI(1).[91]

Furthermore, it was held that a party, in taking industrial action, may contravene the prohibition in s 170NC against 'coercion' in relation to the making of an agreement, even if it turns out that the agreement they are seeking is not one that may be certified. Accordingly, unions will need to be very careful as to the basis on which they seek to take protected action.[92]

With such consequences in mind, Kirby J took a more practical, realistic approach to the question. According to his Honour, the very generality of the words of connection ('for the purpose of' and 'in respect of') support a broad interpretation of s 170ML(2)(e).[93] Consistent with this interpretation, Kirby J agreed with the comments of North J in *Australian Paper Ltd v Communications, Electrical, Electronic, Energy and Allied Services Union,* as approved by the Federal Court in *Electrolux No 2*, that:

> the purpose of this statutory scheme is to allow negotiating parties, both employer and employee, maximum freedom consistent with a civilised community to take industrial action in aid of the negotiation of agreements without legal liability for that action.[94]

Again in much the same vein as the Court in *Electrolux No 2*, Kirby J acknowledged the realities of industrial relations that make it clear that 'dramatic consequences' can flow from denying protection to a union for industrial action taken in support of a proposed agreement. His Honour believed that it would be an excessive outcome if the mere inclusion in a 'proposed agreement' of a clause that might later be found to be outside the ambit of that which can be certified by the AIRC would deprive the industrial organisation propounding it of protection under Part VIB of the *WR Act*.[95] The union might scrupulously go through all of the formalities contemplated by the Act, yet all such precautions could be set at nought by a subsequent judicial declaration.[96] According to Kirby J, to expose an industrial organisation of employees to serious 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.'[97]

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[91] Electrolux No 3, (2004) 209 ALR 116, 147, (High Court of Australia, 2004).
[92] Stewart, *supra* note 56.
[93] Electrolux No 3, (2004) 209 ALR 116, 165, (High Court of Australia, 2004).
[94] (1998) 81 IR 15, 18, (Federal Court of Australia, 1998).
[95] Electrolux No 3 (2004) 209 ALR 116, 163, (High Court of Australia, 2004).
[96] Electrolux No 3, (2004) 209 ALR 116, 163-164, (High Court of Australia, 2004).
[97] Electrolux No 3, (2004) 209 ALR 116, 163-164, (High Court of Australia, 2004).

Although the majority's decision can be justified on a strict interpretation of the statute, Kirby J's interpretation of s 170ML(2)(e) leads to a more workable conclusion. In consideration of the heavy liability that can flow from a declaration that industrial action is not protected, it seems unrealistic to expect an industrial organisation to have the foresight to determine whether every single clause of an agreement pertains to the employment relationship before taking industrial action. Therefore, given the supposed freedoms that industrial parties are granted to engage in industrial action to aid their negotiations, it seems more realistic to deem action as protected where it is taken for the genuine purpose of supporting or advancing claims that are the subject of a proposed agreement.

Effect of the Electrolux No 3 Decision

Therefore, the High Court by a 6:1 majority held that:

- a bargaining agent's fee clause does not pertain to the employment relationship under s 170LI(1);
- a bargaining agent's fee clause is substantive, discrete and significant and therefore cannot be included in a certified agreement under s 170LI(1); and
- industrial action in support of a claim to include a bargaining agent's fee clause in a certified agreement is not protected action under s 170ML(2)(e).[98]

More generally, the effect of the High Court's decision was threefold:

- the AIRC will not have the power to certify agreements which contain any substantive, discrete and significant provisions that do not relate to the relationship between employers and their employees;
- existing agreements which the AIRC had purported to certify may not have been legally binding if they contained any terms that were substantive, discrete and significant which did not relate to the employment relationship; and
- industrial action taken in support of agreements that cannot be certified will not be protected industrial action.

On a practical level, the strict reasoning adopted by the majority in reaching its conclusion regarding the characterisation of bargaining fee clauses may throw into question many provisions that have previously been included in certified agreements. It seems likely that the decision will introduce greater complexity into the conduct of enterprise bargaining at federal level.[99]

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[98] *See* Section 45 appeal against decision (PR952449) by Australian Nursing Federation, (PR956575, Giudice J, Lawler VP and Simmonds C, 18 March 2005) (Australian Industrial Relations Commission, 2005) in which the AIRC provided a summary of the law in this area following Electrolux No 3.

[99] *See for example* K L Ballantyne & National Union of Workers (unreported, PR952656, Ross VP, 22 October 2004) (Australian Industrial Relations Commission, 2004) and section 45 appeal against decision (PR952449) by Australian Nursing Federation, (PR956575, Giudice J, Lawler VP and Simmonds C, 18 March 2005) (Australian Industrial Relations Commission, 2005) which deal with disputes as to whether certain clauses do or do not pertain to the employment relationship.

Unions may be able to overcome the effect of the High Court's decision by settling two agreements with an employer; one certified under the *WR Act* containing provisions limited to matters pertaining to the relationship between the employer and employee as prescribed by s 170LI(1), and the second being an unregistered agreement dealing with other agreed matters. However, it is difficult to construct unregistered agreements that satisfy all the requirements of a common law contract to ensure the agreement is enforceable.[100]

Questions have also arisen concerning what is to occur to an agreement that contains a clause(s) that does not pertain to the employment relationship but is brought before the AIRC for certification. There was some suggestion by McHugh J that the clause(s) that is not certifiable may operate at general law,[101] whilst the remainder of the agreement is certified, but this again encounters the difficulties of enforcing an unregistered agreement. The answer now appears to be that if the agreement requires amendment in order to satisfy the requirements of s 170LI(1) the changes must be implemented through the same process as is required for the making of agreements under the *WR Act.*[102]

In the case of an existing agreement containing a clause that does not pertain to the employment relationship, the effect of *Electrolux No 3* may have been to render the entire agreement invalid. In relation to bargaining fee clauses, such consequences may have been averted by the amendments to the *WR Act* prohibiting bargaining fees. Included in these amendments is the power to remove clauses that purport to impose bargaining fees, it would therefore seem that such agreements are not invalid, but rather just that the offending clause will be removed from the agreement.[103]

In any event, the Federal Government has directly dealt with this issue by passing the *Workplace Relations Amendment (Agreement Validation) Act* 2004 (Cth) ('*WRAAV Act'*). The *WRAV Act* validates agreements that were certified, varied or approved on or before 2 September 2004 by preventing those matters that do not pertain to the employer/employee relationship rendering the entire agreement invalid.[104] The *WRAAV Act* does not validate these non-pertaining matters, it merely allows the rest of the agreement to remain operational.

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[100] *See* Ryan (rec & mgr of Homfray Carpets Australia Pty Ltd) v Textile Clothing & Footwear Union of Australia, [1996] 2 VR 235 (Supreme Court of Victoria, 1996).
[101] Electrolux No 3, (2004) 209 ALR 116, 143 (High Court of Australia, 2004).
[102] K L Ballantyne & National Union of Workers (unreported, PR952656, Ross VP 22 October 2004), 264 (Australian Industrial Relations Commission, 2004). For a union negotiated enterprise agreement this would require the conditions under s 170LJ to be adhered to. However, also see Re Independent Supermarkets Certified Agreement 2002 (PR922821) (Australian Industrial Relations Commission, 2002) and Icon Plastics Pty Ltd v The Australian Workers Union (PR953215, Richards C 15 November 2004) (Australian Industrial Relations Commission, 2004) where the AIRC has endorsed a 'negative' approval process for the amendment of an agreement.
[103] Workplace Relations (Prohibition of Compulsory Union Fees) Act, 2003, s 298Z (Cth).
[104] Workplace Relations Amendment (Agreement Validation) Act, 2004, ss 170NHA and 170NHB (Cth).

The *WRAAV Act* also provides a limited validation for industrial action, however, the changes do little to address the concerns expressed by Kirby J. The amending legislation merely validates protected industrial action taken prior to *Electrolux No 3* that might have been deemed unprotected as it was taken in support of non-pertaining matters.[105] It does not address the disincentive for unions to take industrial action in the future because it is still the case following *Electrolux No 3* that industrial action taken in pursuit of a proposed agreement containing non-pertaining matters will not be protected.

Position in the Australian States

The Industrial Relations Commissions of both New South Wales and South Australia have held that bargaining fee clauses may be included in certified agreements, depending on the precise nature of the clause. However, it has been acknowledged in both jurisdictions that the structure of local industrial legislation has enabled the respective Commissions to take a broader view as to what may be included in a certified agreement compared to the view taken at the federal level.[106]

Section 141(1) of the *Industrial Relations Act 1999* (Qld) offers a closer comparison to the *WR Act* in providing that an agreement cannot be certified if it contains a provision that is not about the relationship between the employer and employees. In *AWU v Skills Training Mackay*[107] the Full Bench held that certified agreements may not contain bargaining fee clauses because the fee is not a matter that relates to the relationship between an employer and its employees.

Thus, despite some support for the concept of bargaining fee clauses, the position of the High Court in regard to the legal status of bargaining fees in the federal jurisdiction is largely confirmed by the position in the State with legislation most closely reflecting the *WR Act*.

Regardless of these decisions of the State Industrial Relations Commissions, the Federal Government has now introduced the Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005 to amend the freedom of association provisions of the WR Act to extend the prohibition on bargaining fee clauses to State employment agreements to which a constitutional corporation is a party.

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[105] Workplace Relations Amendment (Agreement Validation) Act, 2004, s 170NHB (Cth).
[106] In Re: Review of the Principles for Approval of Enterprise Agreements 2002 (2002) 121 IR 144 (New South Wales Industrial Relations Commission, 2002) the Industrial Relations Commission of NSW looked at the provisions of the Industrial Relations Act 1996 (NSW). In Ian Gregory Morrison Pty Ltd (SA) Pty Ltd Security Officers Enterprise Agreement 2002-2004 [2003] SAIRComm 36 (South Australian Industrial Relations Commission, 2003), the SA Industrial Relations Commission looked at the provisions of Industrial and Employee Relations Act (1996) (SA).
[107] (2002) 51 AILR 9-206 (Queensland Industrial Relations Commission, 2002).

B *Freedom of Association Provisions*

It is also an individual's right to freedom of association that is said to be in jeopardy by the imposition of bargaining fees. The objects of the *WR Act* in s 3 include, to promote the economic prosperity and welfare of the people of Australia by:

> (f) ensuring freedom of association including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association.

In *The Employment Advocate and Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003*[108] *('Accurate Factory Maintenance')* the Employment Advocate (EA) intervened in the certification process of agreements that contained bargaining fee clauses. The EA argued that the clauses were in breach of the freedom of association provisions under Part XA of the *WR Act*.

Despite Part XA having been subsequently amended to give it a broader operation[109] the provisions dealt with in this case still exist under the current *WR Act*. Pursuant to s 298K(1) of Part XA, employers must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

a) dismiss an employee;
b) injure an employee in his or her employment;
c) alter the position of an employee to the employee's prejudice;
d) refuse to employ another person or;
e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person.

Under s 298L prohibited reasons include, a situation in which an employee is not, or does not wish, to become a member of a union. Thus, an employer must not perform any of the actions listed under s 298K(1) for this reason.

Any attempt to include a clause in an agreement that provides for behaviour breaching s 298K of Part XA would render the offending clause invalid. This is made clear by s 170LU(2A) of the *WR Act* which provides that the AIRC must refuse to certify any agreement containing objectionable provisions.[110] Objectionable provisions are defined in s 298Z(5) to include provisions of an award or a certified agreement that require or permit any conduct that would contravene Part XA. Section 298Z(3) goes on to require the AIRC to remove 'objectionable provisions' from existing certified agreements. More broadly, s 298Y(1) of the *WR Act* stipu-

[108] (unreported, PR910205, AIRC, Full Court, 12 October 2001) (Australian Industrial Relations Commission, 2001).
[109] *See* Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act, 2003 (No 2), (Cth).
[110] Workplace Relations Act, 1996, s 170LU(2A) (Cth).

lates that 'a provision of an industrial instrument, or an agreement or arrangement, is void to the extent that it requires or permits, or has the effect of requiring or permitting, any conduct that would contravene' the prohibitions in Part XA concerning freedom of association.

In *Accurate Factory Maintenance* the EA therefore, argued that the agreements contained objectionable provisions preventing certification of the agreements under s 170LU(2A), because the bargaining fee clause provided for conduct that would violate Part XA of the *WR Act*. The compulsory payment of a fee to a union at the direction of the employer, the EA submitted, required or permitted conduct within paragraphs (b) and (c) of s 298K(1). Further, the EA argued, to offer employment to a person on the condition that a fee of this kind is payable to a union requires or permits conduct within paragraph (e) of s 298K(1).

However, a Full Bench of the AIRC held that the bargaining fee clause was not objectionable:[111]

- The clause did not require employees to discriminate between members and non-members when offering terms of employment under s 298K(1)(e) because the fee applied to all employees.
- The discriminatory action alleged would only arise when the union waived the bargaining fee for members. Such an action would not be in breach of s 298K(1), which only covers conduct by an employer.
- The bargaining fee clause would bind employees via the contract of employment and the agreement and could not be waived by the union. The likelihood that the fee obligations would only be enforced against non-members did not alter the legal character of the obligations.
- The term in the agreement did not constitute adverse conduct under s 298K(1), so no question of a proscribed reason arose under s 298L(1).

Thus, as the legislation stood prior to the amendments to the *WR Act* bargaining fee clauses did not breach the freedom of association provisions.

VI STATUTORY PROHIBITION OF BARGAINING FEES

After the decision in *Accurate Factory Maintenance*, the federal government made its third attempt to take legislative action in order to prohibit bargaining fees. This time they were successful, and the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* 2003 (No 2) (Cth) came into effect on 9 May 2003. It amended the certified agreement and freedom of association provisions of the *WR Act* so as to proscribe clauses in certified agreements that purported to require the payment of a bargaining services fee.

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[111] Accurate Factory Maintenance (unreported, PR910205, AIRC, Full Court, 12 October 2001) 33 (Australian Industrial Relations Commission, 2001).

The amending Act defines a number of terms under s 298B(1):

- 'Bargaining Services' are defined as services provided by or on behalf of an industrial association in relation to the negotiation, making, certification, operation, extension, variation or termination of an agreement under Part VIB of the *WR Act*.
- 'Bargaining services fee' is defined as a fee, however described, payable to an industrial association or to someone else in lieu of an industrial association wholly or partly for the provision, or purported provision, of bargaining services. This definition ensures that provisions of the amended *WR Act* apply in cases where an industrial association purports to, but has not in fact, provided bargaining services in respect of which it is claiming a fee. Membership dues are specifically exempted from the definition.

The amendments:

- prevent the AIRC from certifying an agreement that contains a provision requiring the payment of a bargaining services fee (s 170LU(2A));
- make clear that a clause in a certified agreement is void to the extent that it requires payment of a bargaining services fee (s 298Y(2));
- extend the definition of objectionable provision in s 298Z(5) so that it includes 'a provision of a certified agreement that requires payment of a bargaining services fee'. (This allows the AIRC to remove these clauses on application by a party to the agreement or the Office of the EA);
- prohibit employers and others (eg persons who engage independent contractors) from engaging in discriminatory or injurious conduct (eg dismissal or refusal to employ) against an employee or an independent contractor, because he or she has refused to pay, or does not propose to pay, a bargaining services fee (s 298L(1));
- prohibit an industrial association from taking action or inciting others to take action prejudicing a person in their employment because of their refusal to pay a bargaining services fee (s 298Q);
- prohibit an industrial association from encouraging or inciting others to take discriminatory action prejudicing a person because he or she has refused to pay, or does not propose to pay, a bargaining services fee (s 298S);
- prohibit an industrial association from demanding a bargaining services fee from another person (s 298SA);
- prohibit an industrial association from taking action (or threatening to take action) against a person with intent to coerce that person, or another person, to pay a bargaining services fee (s 298SB); and

- prohibit a person making a false or misleading representation about another person's liability to pay a bargaining services fee (s 298SC).[112]

The *WRAPCUF Act*, in extending the definition of objectionable provision under s 298Z(5) to cover provisions under a certified agreement requiring the payment of a bargaining services fee, allows such a provision to be removed from a certified agreement regardless of whether it is deemed to otherwise offend the freedom of association provisions under Part XA. This rectifies the deficiency in the *WR Act* as identified by the government following the decision in *Accurate Factory Maintenance*. Furthermore, by listing as a prohibited reason for engaging in prohibited conduct 'that an employee has not paid or agreed to pay a bargaining services fee',[113] the amendments also make the charging of bargaining fees contrary to the freedom of association provisions under Part XA, and therefore capable of falling within the definition of objectionable provision as it existed prior to the amendments. The practical effect of this does not extend too far beyond the decision of the High Court in *Electrolux No 3*. Under both the High Court decision and the *WRAPCUF Act*, agreements containing bargaining fee clauses cannot be certified and those in existing agreements are not enforceable. The only apparent difference is that the *WRPCUF Act* expressly provides for the removal of bargaining fee clauses from agreements. This may be important in prevent the offending clause from invalidating the entire agreement.

The *WRPCUF Act* does not prevent people from making 'voluntary' contributions to a union, provided there is no coercion or misrepresentation involved. Thus, the payment of bargaining fees is endorsed in circumstances of individual consent as opposed to majority consent. However, in effect this leaves the concept of bargaining fees largely redundant.

In addition to the prohibition of bargaining fees in federally certified agreements, the government has signalled its intention to exclude bargaining fees from State agreements through its introduction of the Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2004. The Bill seeks to amend the freedom of association provisions to provide that a bargaining fee clause in a State employment agreement to which a constitutional corporation is a party is void. To achieve this the Bill would:

- amend the definition of bargaining services in s 298B(1) to include services provided by an industrial association in relation to a State employment agreement; and
- amend s298Y to provide that a provision of a State employment agreement to which a constitutional corporation is a party is void to the extent that it requires the payment of a bargaining services fee.

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[112] CCH, AUSTRALIAN LABOUR LAW REPORTER, vol 4 (at 336-10-04) 57-218.
[113] Workplace Relations Act, 1996, s 298L(1)(o) (Cth).

If successfully passed through Parliament these amendments will overcome the effect of the Commission decisions in both NSW and SA and preclude the inclusion of bargaining fee clauses in State certified agreements in the same way that they are precluded from inclusion in federally certified agreements pursuant to ss 298Z and 298Y of the *WR Act*.

VII SHOULD UNIONS BE ENTITLED TO CHARGE BARGAINING FEES?

The government passed the *WRPCUF Act* at a time when there was litigation before the courts concerning the validity of bargaining fee clauses. If the courts had been prepared to say that bargaining fees could be included in certified agreements, why was the government so keen to impose itself? Was this justified on broad public policy grounds supporting freedom of association or was it part of a general anti-union agenda?

A *Freedom of Association*

In his second reading speech introducing the Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) ('WROLA Bill') the Honourable Peter Reith MP, identified the principle of freedom of association as being '…[a]mong the fundamental principles underpinning the government's industrial relations policy'.[114] The principle of freedom of association is promoted by the *WR Act* by ensuring that employers, employees and independent contractors are free to join, or not to join, an industrial association of their choice and are also protected from victimisation and discrimination regardless of that choice.[115] It was argued in the Second Reading Speech to the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No. 2] that while the use of bargaining fees in certified agreements might not have technically contravened freedom of association provisions, one could not ignore the financial reality of the fees; under the pain of a service fee or the penalty of disciplinary action the individual non-unionist is drawn towards taking out union membership.[116]

The demand for a fee for bargaining services does not expressly remove the right of an individual to join or not to join an industrial association. It is arguable though, that the structure and amount of a fee charged for the provision of bargaining services may coerce an individual to join an industrial association. A bargaining fee

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[114] SECOND READING SPEECH TO THE WORKPLACE RELATIONS AND OTHER LEGISLATION AMENDMENT BILL 1996, *supra* n 2.

[115] Workplace Relations Act, 1996, Part XA (Cth). There is debate as to whether the freedom of association can also include the 'negative right' to disassociate; however, the government seems to have accepted that there is such a right for the purposes of their legislation.

[116] Commonwealth, Second Reading Speech to the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No. 2], House of Representatives, 20 February 2002, 501, 502 (Tony Abbott, Minister for Employment and Workplace Relations).

clause demanding an amount in excess of union dues, or even the equivalent to, would appear to be primarily aimed at increasing declining union membership. Conversely, 'fair share' fees set below ordinary union dues, designed to cover bargaining services alone, seem to provide a reasonable compromise between overcoming the free-rider problem and maintaining respect for the concept of voluntary unionism.[117] Such a practice occurs in many overseas jurisdictions and both the ACTU and the Australian Labor Party were willing to consider this type of arrangement.[118] However, it was ignored by the government, suggesting that the passing of the *WRPCUF Act* was not motivated by any broad concern to protect freedom of association but rather to undermine a potential resource base for unions.

Furthermore, bargaining fees are sanctioned by the International Labour Organisation (ILO) principles and standards, which are founded on core doctrines such as freedom of association. The ILO's General Survey explicitly states that 'bargaining fee provisions, when negotiated between unions and employers, are consistent with freedom of association principles.'[119] The fact that the ILO considers that bargaining fees are not contrary to the principle of freedom of association again indicates a political agenda behind the government's actions that cannot be justified on broader public policy grounds.

B *User-pays*

Enterprise bargaining is very resource intensive. Unions must provide personnel to attend the workplace in order to assist employees in the negotiation and the drafting of agreements, and also to oversee the certification process in the AIRC. The amendments to the *WR Act* allow employees to enjoy the advantages of these union endeavours without any associated obligations. Bargaining fees conform to the user-pays principle, a principle the government has adopted in a variety of public services.

However, the government argues that for the user-pays principle to apply, a service must be requested and delivered.[120] In contrast, bargaining fees included in a union negotiated agreement are imposed upon an individual without the individual's consent. The fact that agreement applies to non-union employees does not mean the service is being provided for them because there is limited likelihood that the

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[117] Orr, *supra* n 22, at 3.
[118] SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION COMMITTEE, PARLIAMENT OF THE COMMONWEALTH, INQUIRY INTO THE THE WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2001 18 [1.28] (2001).
[119] INTERNATIONAL LABOUR ORGANISATION, FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: GENERAL SURVEY OF THE REPORTS ON THE FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANISE CONVENTION (NO 87, 1948 AND THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION (NO 98), GENEVA (1994).
[120] SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION AND LEGISLATION COMMITTEE, PARLIAMENT OF THE COMMONWEALTH REPORT ON THE PROVISIONS OF BILLS TO AMEND THE WORKPLACE RELATIONS ACT 1996 23 [2.53] (2002).

union will consult with non-members, or address their specific needs.[121] Further, the government contends that the union negotiates exclusively for its own members because it has a vested interest in applying the outcome of enterprise bargaining to non-members to ensure that wages and conditions upon which union members are employed are not undercut by other employees.

However, under the freedom of association laws employees cannot be discriminated against on the basis union membership. It therefore seems hypocritical for the government to outlaw the charging of bargaining fees for expenses incurred by a trade union in negotiating a collective agreement that must apply to all workers in an enterprise.[122] Unions tend to negotiate for the workers as a collective, and the government's own statistics show that enterprise agreements negotiated by unions consistently produce higher Average Annualised Wage Increases for workers compared to agreements negotiated without union involvement.[123] Consequently, there are strong grounds for arguing that non-members, who receive all of the benefits of a certified agreement, should contribute something towards the cost of such an achievement. A fee for bargaining services, if agreed to by the majority of employees, seems to be a fair way to implement a user-pays system and help alleviate the free-rider problem.

C *Enterprise Bargaining*

The amendments also run counter to the objects of the *WR Act* and the comments of the then Minister for Workplace Relations Mr Reith when he introduced the WROLA Bill. Mr Reith in the Second Reading Speech stated that:

> The bill promotes a legislative framework, without unnecessary complexity or unwanted third party intervention. Above all, the legislation is designed to empower employers and employees to make decisions about relationships at work, including over wages and conditions, based on their appreciation of their own interests.[124]

In each case where a collective agreement requires payment of a bargaining fee, this is subject to a vote of a valid majority of all employees whose employment will be subject to the agreement. Despite this, the government does not accept that the

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[121] SUBMISSION TO SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION AND LEGISLATION COMMITTEE, PARLIAMENT OF THE COMMONWEALTH, 'DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS, SUBMISSION NO 25' REPORT ON THE PROVISIONS OF BILLS TO AMEND THE WORKPLACE RELATIONS ACT 1996 29 [27] (2002).

[122] REPORT ON THE PROVISIONS OF BILLS TO AMEND THE WORKPLACE RELATIONS ACT 1996, *supra* n 113, at 40 [1.33].

[123] Australian Government Department of Employment and Workplace Relations, Trend*s in Federal Enterprise Bargaining (2004) Australian WorkPlace* available at <http://www.workplace.gov.au/WP/Content/Files/WP/WR/Publications/Trends_J04.pdf> (last visited Oct. 2, 2004).

[124] SECOND READING SPEECH TO THE WORKPLACE RELATIONS AND OTHER LEGISLATION AMENDMENT BILL 1996, *supra* note 2.

process for employees to vote on certified agreements provides the necessary degree of consent. The focus of the freedom of association provisions of the *WR Act* is on the individual. In view of this focus on individual freedom of choice, the government does not consider it appropriate that the operation of the freedom of association provisions be negated by a majority vote which results in the imposition of the will of the majority on individuals who are not, and do not wish to become, associated with a union.[125] However, this overlooks the nature of the government's enterprise bargaining regime which gives the power to the majority to dictate conditions to the minority, provided those conditions are not discriminatory under the *WR Act*.

Furthermore, the amendments overturn agreements made at the workplace by imposing unwanted third party intervention. It denies the right of employers and employees to make decisions about their relationships at the workplace. The government argues that the amendments merely clarify the operation of one aspect of the enterprise bargaining process.[126] However, the *WRAPCUF Act* appears to be another attempt by the government to dictate the terms and conditions of enterprise bargaining through the imposition of limits on what employers and unions and/or employees can put on the bargaining table, in a supposedly deregulated workplace.[127]

The freedom of collective bargaining at enterprise level seems to demand that the law allow bargaining fee clauses to be included in certified agreements as agreed to between the negotiating parties. Regulations limiting the level of the fee, allowing for non-member objections, and mandating a minimum level of support for bargaining fee clauses, would seem to be fair trade-offs for their imposition, along with any other conditions that the parties see fit to agree to between themselves. [128]

D *Overseas Examples*

Bargaining fees paid by employees covered by collective agreements who are not union members are provided for in a number of countries, including the United States, Canada, Switzerland, Israel and South Africa.[129] Instead of outlawing bargaining fees, these countries have introduced controls to regulate their application.

The US courts have implemented a policy compromise that has promoted the 'fair-share' version of bargaining fees designed to cover the bargaining activities of unions. Further, Congress has not covered the field, with the exception of certain

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[125] DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS, *supra* note 114, at 11 [47].
[126] REPORT ON THE PROVISIONS OF BILLS TO AMEND THE WORKPLACE RELATIONS ACT 1996, supra note 113, at 20 [2.47].
[127] Pursuant to s 89A(2) of the Workplace Relations Act 1996 (Cth) the federal government had also previously reduced the number of matters with which an award can deal to 20 allowable matters.
[128] Orr, *supra* note 22, at 3.
[129] REPORT ON THE PROVISIONS OF BILLS TO AMEND THE WORKPLACE RELATIONS ACT 1996, *supra* note 113, at 40 [1.34].

key industries – it has given States the power to enact legislation to restrict union security arrangements.[130] In addition, restrictions in other jurisdictions include a guarantee that bargaining fees only be spent in ways that benefit all employees at the workplace and that provision be made for conscientious objectors.[131]

Thus, there is significant international precedent for the implementation of bargaining fees that has been largely ignored by the Australian government. This is not to say that the playing fields are identical; there are significant differences between the Australian industrial relations system and those of international jurisdictions; however, these differences do not appear to render comparisons irrelevant.[132]

VIII CONCLUSION

Trade unions play an important role in representing the interests of the workforce in industrial relations, therefore, under the enterprise bargaining system, where unions require a high level of resources to service a large number of workplaces, it seems reasonable that those who reap the benefits of union representation should be required to pay a fee for their services. In the absence of other, more potent, forms of union security, bargaining fees levied at a rate to reflect the bargaining services provided by a union offer an appropriate means of ensuring that this occurs.

However, the High Court in ruling that bargaining fee clauses cannot be included in certified agreements seemed to give limited consideration to the role of unions in the industrial relations regime and their importance in the collective bargaining process. Moreover, in largely ignoring the industrial realities of enterprise bargaining and preferring to implement a legalistic interpretation of the *WR Act*, the High Court in *Electrolux No 3* ensured that greater complexity in the negotiation of certified agreements will ensue. The opposing view as expressed by Kirby J, provides a more liberal interpretation of the legislation which accommodates the practicalities of industrial relations. This broader line of argument ensures that no undue complication is brought into the negotiation of certified agreements and also enables unions to better fulfil their role in representing the workforce by providing them with a much needed means of financial security.

Unfortunately, the High Court's decision in *Electrolux No 3* combined with the government's amendments to the *WR Act* has ensured that unions are prohibited from charging bargaining fees. The government claimed to have prohibited the fees

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[130] Orr, *supra* note 22, at 9.

[131] SUBMISSION TO SENATE COMMITTEE, PARLIAMENT OF THE COMMONWEALTH, AUSTRALIAN INDUSTRY GROUP AND THE ENGINEERING EMPLOYERS' ASSOCIATION, SUBMISSION NO 25 SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION COMMITTEE INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2001 (2001)

[132] For instance, unions in Australia do not require majority membership in order to gain employer recognition for the purposes of collective bargaining as is the case in some other jurisdictions, however, all agreements negotiated by a union must be approved by a majority of employees.

on the basis that they offend the principle of freedom of association, and it is certainly arguable that bargaining fees levied at a rate above ordinary union dues have the potential to coerce employees into union membership. However, the government failed to consider other policy considerations and considerable international precedents that suggest if bargaining fees are limited to an amount covering bargaining services alone, they provide unions with a beneficial source of financial security, whilst also overcoming the free-rider problem and maintaining respect for the concept of voluntary unionism. Therefore, it is perhaps incorrect to suggest that the prohibition of bargaining fees was prescribed by the government on the basis of some overriding concern for the freedom of association. Rather it seems more realistic to suggest that freedom of association was the guise under which the government was able to further marginalise the role of unions in industrial relations in order to promote its own ideological and economic agenda.