MAJOR TRIBUNAL DECISIONS IN 2004

JOSEPH CATANZARITI* AND YASEEN SHARIFF**

In their review of the major decisions of the past 12 months, the authors focus on cases which they consider had a significant impact on the business of unions. These decisions include the High Court's rulings in Electrolux, Gribbles and Amcor. These decisions have had an impact on matters which unions can seek to include in certified agreements, matters in which unions can take protected action, the extent to which unions can seek to assert the operation of previously negotiated awards on new employers and finally the meaning of redundancy in the context of company restructures. The authors also analyse decisions relating to union right of entry and approval requirements for non-union certified agreements. The authors observe that significant industrial reforms can be expected after the re-election of the Coalition government, and that these reforms are likely to have a further impact on the business of unions.

INTRODUCTION

In October 2004, the Coalition government was returned to power with a majority in both Houses of Parliament. As foreshadowed in other contributions to this edition of the journal, these vital majorities provide the Coalition government with a broad canvas to fundamentally reform Australian industrial relations and establish a new province for industrial law and order.

In our contribution to this journal last year, we noted that there had been a distinct movement in industrial practice towards the assertion of *individual* rather than *collective* rights. The future may hold more of the same. If that proposition stands correct, then the next chapter of Australian industrial history will be an ominous period for the union movement or, more accurately, the business and activities of the union movement.

However, putting impending legislative changes to one side, the major decisions of the past 12 months have also had a significant impact on the business of unions. Most notably, three judgments of the High Court in the past year will impact on:

- the matters which unions can seek to include in certified agreements;
- the matters in which unions can take or seek to take protected action;
- the extent to which unions can assert or seek to assert the operation of previously negotiated awards on new employers; and
- the meaning of redundancy in the context of company restructures.

Each of these decisions of the High Court is reviewed in this contribution. In addition, we have also reviewed decisions arising in two other distinct areas of industrial law that are likely to be the subject of further discussion and deliberation in the coming months: union right of entry and approval requirements for non-union agreements.

*Partner and **Solicitor, Clayton Utz, Sydney Office, 1 O'Connell Street, Sydney, NSW 2000, Australia.

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Not a matter for bargaining

In a previous contribution to this journal,[1] it was noted that the judicial controversy surrounding the inclusion of union bargaining fees in federal certified agreements would need to be resolved by way of legislative intervention and/or a decision of the High Court. Since that time, there has been both legislative intervention[2] and, more recently, a decision of the High Court putting an end to the judicial controversy. However, the decision of the High Court has raised a number of other controversies that may well need further resolution.

In September 2004, the High Court delivered its judgment in the ongoing disputes involving the whitegoods company, Electrolux Home Products Pty Ltd ('Electrolux'). A majority of the High Court[3] held that union bargaining fees cannot be made the subject matter of a certified agreement, and further held that claims with respect to such matters cannot be relied on for the purposes of 'protected action' under the *Workplace Relations Act 1996* (Cwlth) (the 'Act').[4]

The facts of the decision have been recited in an earlier contribution to this journal[5] and we will only deal with them briefly here. During the course of negotiations between the Electrolux and the AWU, the AMWU and the CEPU, Electrolux was presented with a draft agreement which contained a clause dealing with a bargaining agent's fee, the effect of which was to require Electrolux to advise all new employees that a bargaining agent's fee was payable to the unions by non-union members and also required Electrolux to deduct the fee from employees' wages and remit it to the unions. The negotiations between the parties were not fruitful and the union subsequently commenced protected industrial action in support of its claims. Electrolux commenced proceedings in the Federal Court, claiming that the industrial action was not protected action for the purposes of the Act. Electrolux argued the inclusion of the bargaining agent's fee clause meant that the proposed certified agreement was not 'about' a matter pertaining to the relationship between Electrolux and its employees and, therefore, that the proposed agreement was neither capable of being certified by the Commission nor capable of providing to the unions the immunities associated with 'protected action'.

At first instance, Justice Merkel of the Federal Court was found in favour of Electrolux,[6] but His Honour's decision was overturned by a Full Court of the Federal Court.[7] Electrolux appealed to the High Court, which was required to resolve four specific questions, which we have summarised as follows:[8]

1. Whether claims with respect to bargaining agents' fees can be included in certified agreements for the purposes of satisfying s. 170LI(1) of the Act;
2. Whether the inclusion of a term in a 'proposed agreement' that does not 'pertain' to the employment relationship makes the entire agreement one that is not capable of certification by the Commission;
3. Whether industrial action taken by a union in support of claims with respect to a 'proposed agreement' can be 'protected action' within the meaning of s. 170ML(2)(e) of the Act where one of the claims does not pertain to the employment relationship; and

4. Whether industrial action taken by a union in support of a claim with respect to a 'proposed agreement' that contains a term that does not pertain to the employment relationship constitutes a breach of s. 170NC of the Act.

Can a clause relating to bargaining agent's fees be included in a certified agreement for the purposes of s. 170LI of the Act?

Section 170LI of the Act provides that certified agreement can be made 'about matters pertaining to the relationship' between employers and employees. Each of the majority judgments noted that there was a similarity between these words and those that had been expressed by the High Court in previous authorities.[9] These authorities had established that for a matter pertaining to the relationship of employment, the matter must pertain to the relationship between employers in their capacity as employers and employees in their capacity as employees.

Gleeson CJ,[10] McHugh J,[11] Gummow, Hayne and Heydon JJ[12] and Callinan J[13] all found that the previous High Court authorities applied with equal force to s. 170LI of the Act, especially given that the section incorporated similar words. In fact, the majority judges held that given the relative similarity in the words used, it was either clear or capable of inference or imputation, that Parliament intended s. 170LI of the Act, and therefore certified agreements, to be subject to the same tests as established in those previous High Court authorities.[14]

In applying those previous High Court authorities to the present case, each of the majority judges concluded that a clause making provision for bargaining agents' fees was not a matter pertaining to the relationship between employers and employees in their capacity as such. It was found that, in reality, such clauses pertained to the relationship between union and non-union employees.[15]

In a dissenting judgment, His Honour, Justice Kirby, differed with the majority judges for three main reasons (among others). The first reason was that His Honour reasoned that the previous decisions of the High Court were made in circumstances where federal industrial legislation had historically relied on s. 51(xxxv) of the Constitution, with respect to which the federal parliament's power was more constrained than under s. 51(xx) of the Constitution (which is the head of power relied on by the federal parliament to enact s. 170LI of the Act).[16] Accordingly, His Honour was of the opinion that the previous High Court authorities were of limited application to considerations involving the subject matter of certified agreements. The second reason that Justice Kirby differed with the majority was that the previous decisions of the High Court relied on by the majority were not always cohesive and were progressively being developed or reformulated in line with the evolutionary nature of industrial reality.[17] The third reason why His Honour differed with the majority was based on the use of the word 'about' in s. 170LI, which His Honour stated had the effect of broadening the types of matters that could be the subject of a certified agreement. His Honour was of the view that the real intent of s. 170LI was to remove from certified agreements matters that were wholly extraneous to the employment relationship such as demands in relation to purely political issues and overseas conflicts.[18]

Does the inclusion of a term in a 'proposed agreement' that does not pertain to the employment relationship make the agreement one that is not capable of certification by the Commission?

The majority of the High Court held that to satisfy s. 170LI of the Act, the 'proposed agreement' must be wholly about matters pertaining to the employment relationship.[19]

The rationale for the majority's approach was grounded on what their Honours considered to be the plain and ordinary meaning of s. 170LI consistent with the scheme of Part VIB of the Act. Justice McHugh expressed a slightly different view to the other majority judges, and agreed with the decision of Justice Merkel (at first instance) that the Commission may certify an agreement that contains matters that do not pertain to the employment relationship, but only where those matters are ancillary or incidental to, or a machinery provision relating to, matters pertaining to the employment relationship and are not 'substantive' matters that are both discrete and significant.[20]

However, all of the majority agreed that in the present case the inclusion of a clause about bargaining agent's fees, meant that the entire agreement was not capable of certification under s. 170LI of the Act.

Can industrial action taken in support of claims in respect of a 'proposed agreement' be 'protected action' within the meaning of s. 170ML(2)(e) of the Act where one of the claims does not pertain to the employment relationship?

Section 170ML(2)(e) of the Act provides that during a bargaining period, the unions and the employees are entitled to organise or engage in industrial action 'for the purpose of supporting or advancing claims made in respect of the proposed agreement'. For the purposes of the Act, this action is described as 'protected action'. Section 170MT(2) confers immunity on employees and unions from certain legal actions and consequences with respect to involvement in 'protected action'.

In short, the majority of the High Court held that a party can only obtain the benefits of 'protected action' and its associated immunities if, *first*, the action is taken for the genuine purpose of supporting or advancing claims with respect to a proposed agreement and *second*, the proposed agreement is one that satisfies the requirements of the Act, namely, that it contains matters pertaining to the employment relationship. There were two main reasons why the majority arrived at this conclusion.

First, it was noted that the effect of ss. 170ML(2)(e) and 170MT was to curtail the application of fundamental common law rights; that is, these provisions prevent employers from taking certain legal actions in response to industrial action.[21] In such circumstances, it was the view of the majority that courts should, in light of the serious intervention into fundamental common law rights, give effect to such provisions only to the extent of parliament's objects and intentions.[22] Second, the majority held that the operation and objects of Division 2 of Part VIB of the Act (the Division and Part relating to the making of certified agreements with constitutional corporations), favoured a construction that 'protected action' should only extend to a 'proposed agreement' that satisfied the requirements under Division 2, namely a 'proposed agreement' of the kind that would fall under s. 170LI.[23]

It followed that because the majority had found that the 'proposed agreement' in the present case was not capable of certification, it followed that the unions' engagement in industrial action was not protected.

Justice Kirby again disagreed with the majority's conclusion. His Honour's main reasons for dissenting were very much based on an assessment of industrial realities. For example, His Honour reasoned that enterprise bargaining between the parties had become 'robust' and that it was expected that the parties were going to make excessive claims.[24] Given such conditions of bargaining, His Honour held that it would be a 'disproportionate and excessive consequence' if the presence of an excessive claim would deprive employees and unions of protection.[25] Justice Kirby also held that parties engaged in bargaining rely on certainty, and that this could be set at nought if the parties had to operate on the basis that some years down the track they are found to have engaged in unlawful action in respect of claims, which at the time they felt they were advancing on a genuine basis.[26]

Can industrial action taken by a party in support of a 'proposed agreement' that contains a matter that does not pertain to the employment relationship constitute a breach of s. 170NC of the Act?

Section 170NC prohibits a person from taking industrial action (except 'protected action') with the intent to coerce another person to agree or not agree to make a certified agreement. The unions asserted that as the 'proposed agreement' did not comply with the requirements of the Act (such as s. 170LI), then, s. 170NC was inapplicable. The majority of the High Court rejected this argument. Put simply, the majority held that it is possible to have an intent to coerce another person into making a certified agreement, even if the agreement was not capable of being certified.[27]

The majority noted that the important element of an offence under s. 170NC was intent to coerce another person to make an agreement, and consequently, it was immaterial that the contravening party did not appreciate the legal nature of the 'proposed agreement' or that the 'proposed agreement' was not capable of certification under Division 2 of the Act.[28]

As a result, a majority of the High Court found that as the industrial action was not 'protected action' within the meaning of s. 170ML(2), the subsequent industrial action amounted to a contravention of s. 170NC(1).

The aftermath and the consequences

Before the controversy surrounding union bargaining fees parties involved in the negotiation of certified agreements had assumed that such agreements could contain matters of a far greater reach than those that could be included in federal awards because they rely, for their validity, on a separate constitutional head of power. That assumption, if it was held, is evidently an incorrect one.

In short, certified agreements under the current statutory scheme cannot contain provisions that do not pertain to the relationship of employment. To the extent that they do (even if they contain only one such term), those agreements are not capable of certification and the parties may not rely on them to obtain the

benefits of protected action. While the decision put all parties on notice in respect of future negotiations, it left open the question of the validity of previous certified agreements that had already been certified by the Commission. However, the federal parliament passed the *Workplace Relations Amendment (Agreement Validation) Act 2004* (Cwlth), which has the effect of validating all certified agreements and variations certified before 2 September 2004 (the date of the High Court's judgement) that include matters that are not 'permitted matters'. The amending legislation also has the effect of validating industrial action engaged before 2 September 2004 in reliance of matters that were not 'permitted matters'.

A number of other matters remain uncertain. For example, it is unclear whether parties will need to recommence the entire validation and approval process (including the holding of new ballots) if the Commission refuses to certify an agreement on the grounds that it contains a matter that is not a 'permitted matter'. A majority of the Full Bench of the Commission in *NTEU v Monash University and Another*[29] held that the agreement approved by a majority of employees must be the agreement lodged for certification. This decision suggests that if a clause is to be removed from a 'proposed agreement' after a ballot has already been held, then another ballot will need to be held to approve the agreement.

In addition, a number of other clauses are likely to be closely scrutinised by the negotiating parties and the Commission on the grounds that they too do not pertain to the employment relationship. Such clauses include those relating to:

- trade union training leave;
- union meetings;
- payroll deduction of union dues;
- engagement of contractors and conditions of engagement; and
- conditions for use of labour hire.

Ironically, what commenced as a dispute over 'free rider' fees with the object of increasing union membership has opened a pandora's box that may have the effect of whittling away some hard-negotiated gains.

Another succession on transmission of business

Previous contributions to this journal have considered the operation of the transmission of business provisions of the Act.[30] It was noted that the High Court's decision in *PP Consultants Pty Ltd v Finance Sector Union of Australia* ('PP Consultants')[31] clarified the appropriate approach to the interpretation of the transmission of business provisions. In that decision, the High Court held that the question whether one person 'has taken over or succeeded to the business or part of a business of the business of another is a mixed question of fact and law'[32] and, further, as the word 'business' is 'chameleon-like',[33] it was not possible to formulate a general test to determine whether one employer is a successor to the business or part of the business of another.[34] Nevertheless, the High Court expressed a general rule that

> ...the question whether a non-government employer who has taken over the commercial activities of another non-government employer has succeeded to the business or part of the business of that other employer will require the identification or

> characterisation of the business or the relevant part of the business of the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer.[35]

Since the High Court's decision, industrial practitioners have at large applied this 'general rule' in the course of determining whether there has been a transmission, succession or assignment of or part of a business. In most such circumstances, there has usually been a direct commercial relationship between the former employer and the transmittee, successor or assignee. However, in *Health Services Union of Australia v Gribbles Radiology Pty Ltd*,[36] Gray J of the Federal Court ruled that there need not be a direct transaction between two successive employers for a transmission, succession or assignment of a business or part of it to have occurred pursuant to s. 149(1)(d) of the Act. The facts of that decision have been outlined in a previous contribution to this journal,[37] but briefly they surrounded the provision of radiology services. Region Dell Pty Ltd ('Region Dell') operates a number of medical clinics, including the Moorabbin Clinic. Region Dell licensed the use of part of the premises for a 'radiography practice' and provided the equipment necessary to carry out these services. Southern Radiology was the initial radiology service provider, followed by Melbourne Diagnostic Imaging Group ('MDIG') and then Gribbles Radiology Pty Ltd ('Gribbles') were granted a license by Region Dell in 1999.

Both Southern Radiology and MDIG were parties to the *HSUA (Private Radiology—Victoria) Award 1993* (the 'Radiology Award'). While Gribbles engaged some of the employees formerly employed by Southern Radiology and MDIG, it was not a respondent party to the Radiology Award.

In 2000, Gribbles ceased providing services at the Moorabbin Clinic and it terminated the employment of the radiographers. The Health Services Union of Australia (the 'HSU') commenced proceedings seeking severance payments for the employees whose employment had come to an end in accordance with the provisions of the Radiology Award. The HSU claimed that Gribbles was a 'successor' to a part of the MDIG's business and was accordingly bound by the Radiology Award. At first instance, Gray J of the Federal Court found that Gribbles was a 'successor' to MDIG's business, and this finding was upheld by the Full Court of the Federal Court.

Gribbles appealed to the High Court. The primary question before the High Court was whether there was a succession to any part of MDIG's business.[38]

A majority of the High Court[39] in considering what was meant by the words 'successor' or 'business', echoed the views expressed in *PP Consultants* that it would be 'wrong' to attempt any general definitions.[40] Nevertheless, the majority held that to be a 'successor' to the business or part of the business of a former employer:

> ...the new employer must enjoy some part of the 'business' of the former employer. For the reasons given earlier, it will not suffice to show that the new employer pursues

> the same kind of business activity. If the new employer does not enjoy any part of the business of the former employer, it cannot be said to be a successor to or of that business, or a part of it.[41]

In effect, the majority held that two steps are required to establish whether an employer is a 'successor' for the purpose of s. 149(1)(d). The *first* step requires an identification of exactly what is the business or part of the business of the former employer, and the *second* step requires an identification of what part of that business of the former is now 'enjoyed' by the person alleged to be the successor. On one view, this formulation by the majority is largely consistent with the 'general rule' expressed in *PP Consultants*.

However, it is arguable that the majority in the present case went further than in *PP Consultants* by providing guidance as to how, in a commercial setting, the business or part of the business of the former employer may be identified and how it may be determined whether the alleged 'successor' enjoys that business or part of that business. As to the first step, the majority noted that identification of the business of the former employer could be determined by considering the terms of the transaction between the two relevant entities, but the majority acknowledged that there may be circumstances where there is no relevant transaction between the former employer and the employer alleged to be its successor.[42] The majority proceeded to state that in the case of a commercial enterprise, identifying the employer's 'business' will usually require identification:

> ...both of the particular activity that is pursued and of the tangible and intangible assets that are used in that pursuit. The 'business' of an employer will be identified as the assets that the employer uses in the pursuit of the particular activity.[43]

As to the second step, the majority, in effect, stated that for the alleged 'successor' to enjoy the business of the former employer, it is not sufficient that the same kind of business activity is being pursued, but that the tangible or intangible assets of the former employer are being used in pursuit of those activities:

> It is the assets used in that way that can be assigned or transmitted and it is to the assets used in that way that an employer can be a successor.[44]

In the present case, the majority held that Gribbles was not a successor. While Gribbles pursued the same activity as MDIG, namely, the provision of radiography services for profit, Gribbles did not enjoy any of the tangible or intangible assets that MDIG had used to provide the service.[45]

The majority further expressed the view that if a succession could occur by simply establishing that one entity was undertaking the same business activities as a predecessor without anything else, then, the transmission of business provisions could in effect be used to set common rule awards,[46] which would fall foul of the principles expressed in *Whybrows Case*.[47]

Kirby J dissented with the majority and held that ' "successor" simply means an employer who comes later, that is, "succeeds" another'.[48] His Honour noted that, whereas, there is often a direct connection between the former employer and the new employer, such a nexus or privity is not essential.[49]

Although the majority's decision, on one view, may be seen as applying a more mechanical approach to the construction of the transmission of business provisions, it provides greater certainty and clarity as to the approach to be taken in determining whether a transmission of business has occurred for the purposes of the Act. When this decision is read together with the decision in *PP Consultants*, practitioners can discern a considered manner in which to approach the transmission of business provisions in the context of commercial enterprises. However, it should be noted that the decision of the majority is limited to the extent that it only considered whether an entity was a 'successor', but, nevertheless, it has provided further clarity on what has been a confounding area of law.

Common sense prevails in Amcor case

As discussed in a previous contribution,[50] the Federal Court applied a strict and technical approach to interpreting a certified agreement that applied to workers employed by Amcor Ltd ('Amcor') in its paper manufacturing business. The result of the application of this technical approach was that the employees engaged in the paper manufacturing business were held to have been entitled to severance payments when they consensually transferred their employment from Amcor to a related entity, Paper Australia Pty Ltd, for which they carried out the same jobs on the same terms and conditions.

The decision focused on the meaning of clause 55.1.1 of the relevant certified agreement between Amcor and CFMEU, under which Amcor was obligated to make severance payments to its employees 'should a position become redundant and an employee subsequently be retrenched'. At first instance, Finklestein J of the Federal Court held that a redundancy was a situation in which 'the employee is no longer required by his (or her) employer to perform the work that the employee was performing' and the fact that the old employer had been able to arrange for continued employment with the new employer was irrelevant.[51] Accordingly, Finklestein J held that as Amcor no longer required the employees to perform their respective jobs, there was a redundancy for the purpose of the certified agreement. The Full Court of the Federal Court upheld Justice Finklestein's decision.[52]

In a previous contribution to this journal,[53] it was noted that the decision of the Federal Court was at odds with the seminal case on the issue of redundancy, the *Termination, Change and Redundancy Case* (the 'TCR Case'),[54] wherein it was not envisaged that severance payments should be made in cases of succession, assignment or transmission of a business.[55]

The High Court found in favour of Amcor and overturned the judgment of the Full Court of the Federal Court in a decision that may be considered a good example of industrial common sense prevailing.

The main difference in the approach of the High Court and that of the Federal Court was that the High Court interpreted the word 'position' in clause 51.1.1 to mean 'position in the business', whereas the Federal Court in effect interpreted the word 'position' to mean 'position with the employer'.[56] The High Court held that as the position of each employee continued to exist despite the termination of employment by Amcor, then, no 'positions' were in fact redundant.[57] Justice Callinan stated:

> It is not possible, I think, to hold that a position has become redundant when the person filling it, continues to fill it, albeit with a different employer, and continues to do exactly the same work, at the same place for the same remuneration (except perhaps for a share of profits) during the same hours of work.[58]

Gummow, Heydon and Hayne JJ noted that a different conclusion could have arisen if there were changes in the terms or conditions or the tasks that the employees were required to perform by Paper Australia.[59]

There were two main grounds which the High Court relied on to support its approach. First, the High Court relied on the TCR Case wherein a Full Bench of the Commission had expressed that it did not envisage severance payments being made, as in the present case, where employees were employed by a successor, transmittee or assignee.[60] Furthermore, Gummow, Hayne and Heydon JJ also noted that the word 'redundancy' ultimately requires an analysis of whether a 'job' or 'position' is any longer being required to be performed, and, therefore, if the 'job' or 'position' continued, there could be no redundancy.[61]

Second, the High Court noted that its approach was consistent with the statutory scheme of the Act, specifically in relation to circumstances giving rise to a succession, assignment or transmission.[62] For example, Justice Kirby held that the existence of the transmission of business provisions meant that it could be possible to interpret a 'position' as relating not only to a position with Amcor, but also to a position with the new owner.[63]

For these reasons, the High Court found that as the employees were continuing to perform the same jobs in circumstances where it was clear that Paper Australia was a successor to Amcor's paper manufacturing business, then there was no redundancy for the purposes of the certified agreement.

The decision of the High Court restores the understanding that has been held by practitioners since the TCR Case, and importantly restores an element of industrial common sense in the context of company restructures. As Kirby J relevantly noted, the concern in redundancy situations is about the injustice to employees who are retrenched after a long period of service, and as a result, find it difficult to get a new job, but such concerns simply do not arise where employees are immediately re-engaged under identical conditions.[64]

Qualifying union right of entry

Right of access to workplaces is a crucial part of union business. However, right of access to workplaces under the Act is by no means an unqualified right as two cases in the past 12 months demonstrate.

No right of entry where Australian Workplace Agreements (AWAs) cover all employees

In *National Union of Workers v Aldi Foods Pty Ltd* ('Aldi')[65], a Full Bench of the Commission found that unions have no right of entry under the Act where all employees engaged at the relevant workplace are covered by AWAs.

A dispute arose between Aldi and NUW, when Aldi refused to permit officers of the NUW entry at one of its sites. Aldi resisted the application on grounds that

the NUW had no right of entry as all its employees at the site were covered by AWAs.

Section 285C of the Act provides as follows:

(1) Subject to subsections (2) and (3), a person who holds a permit in force under this Division may enter premises in which:
   (a) work is being carried on to which an award applies that is binding on the organisation of which the person holding the permit is an officer or employee and
   (b) employees who are members, or eligible to become members, of that organisation work

for the purposes of holding discussions with any of those employees who wish to participate in those discussions.

The relevant question for determination was whether work was being carried on at the relevant site 'to which an award applies'.[66] The NUW argued that such an award did apply as Aldi was a respondent party to the *Storage Services—General—Award 1999* (the 'Storage Award'). However, Aldi contended that the Storage Award did not apply at the site because all of its employees at that site were engaged under AWAs. Aldi relied on s. 170VQ(1) of the Act, which provides as follows:

> During its period of operation, an AWA operates to the exclusion of any award that would otherwise apply to the employee's employment. This subsection has effect subject to ss. (2) and (3).

The Full Bench of the Commission observed that:

> Part IX of the Act confers significant rights on registered organisations and that we should be slow to find that those rights have been abrogated. In particular we agree that a clear expression of intention would be required. On the other hand, we disagree with the submission that the right conferred by s.285C(1) is unqualified. It is qualified, in the sense that the right only exists if the requirements of the section are fulfilled. One of the requirements is that at the premises in question 'work is being carried on to which an award applies'. That requirement cannot be ignored.[67]

In the light of these observations, the relevant question was whether s. 170VQ(1) operates so as to exclude the application of the Storage Award. The Full Bench noted that the language of s. 170VQ(1) was distinct to ss. 170VQ(3) and (6).[68] Specifically, the language of the s. 170VQ(1) excludes the operation of one instrument while the other is operating, whereas the language of the other sections involves resolution of clashes between the terms of one instrument and those of the other by providing that one will prevail over the other to the extent of any inconsistency.[69]

As a result, the Full Bench held that the effect of s. 170VQ(1) was that the Storage Award ceased to apply for the duration of the AWAs. It followed that:

> If every employee at a particular workplace who would otherwise be covered by a relevant award is party to an AWA, the application of the award is excluded completely from the work being carried on at that workplace.[70]

Consequently, the Full Bench held that the NUW did not have a right of entry to the particular site.

Right of entry still exists where non-union agreement applies

In *Construction, Forestry, Mining and Energy Union v Ensham Resources Pty Ltd* ('Ensham'),[71] the same Full Bench held that the operation of a non-union certified agreement did not prevent right of entry being permitted to officers of the CFMEU.

Ensham refused to allow officers of the CFMEU to enter its mine premises. The CFMEU applied to the Commission for resolution of the dispute.

Whereas Ensham is party to the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (the 'Mining Industry Award'), it is also a party to a non-union agreement, the *Ensham Mine Employees' Certified Agreement 2001* (the 'Ensham Agreement').

Clause 2 of the Ensham Agreement provided:

> This Agreement sets out all of the provisions and entitlements of Employees employed under terms and conditions of this Agreement at the Ensham Mine. No other Award or Agreement shall apply to such Employees.

The Full Bench found that this clause was not simply a statement of intent, but had substantive operation.[72] It further held that the clause deprived the operation of certain provisions in the Mining Industry Award governing wages and other conditions of employment.[73] However, the Full Bench found that the question of whether the award continues to have application for the purpose of s. 285C(1)(a) needed to be resolved by having regard to other provisions of the Act. Relevantly, the Full Bench referred to s. 170LY(1)(a) of the Act, which provides:

'While a certified agreement is in operation:

(a) subject to this section, it prevails over an award or order of the Commission, to the extent of any inconsistency with the award or order'.

The Full Bench found that whereas s. 170LY deals with the effect of certified agreements in relation to other instruments, there was nothing in the provision to suggest that other rights and obligations created by the Act 'should be modified or obliterated'.[74] This showed an important distinction between a provision such as s. 170LY and other provisions relating to AWAs, which had the effect of providing that AWAs operate to the exclusion of awards. Section 170LY does not permit certified agreements to operate to the exclusion of awards or other laws. The Full Bench also held that clause 2 of the Ensham Agreement could not have an effect that would go beyond or be inconsistent with the provisions of the Act.[75] As noted by the Full Bench:

> Those who suggest otherwise invite us to attribute to a provision directed on its face to the resolution of inconsistency between industrial instruments a powerful collateral effect which would remove significant rights. Clear words would be needed, either in s.285C, s.170LY or elsewhere, for such a construction. We therefore conclude that s.170LY(1) does not operate to deprive the award of application at Ensham for the purpose of s.285C(1)(a).[76]

Accordingly, it was held that the officers of the CFMEU did have a right of entry to Ensham's mine.

Further qualification of rights

Whereas the Act provides unions with a right of entry to workplaces, such a right is not an unqualified one. In fact, where all employees at a workplace are covered by AWAs, it is most probable that unions will have no right of entry. Although such circumstances may be limited, it is clear that a strategy of shifting employees onto AWAs could have a significant impact on the ability of unions to represent those employees, let alone to have a voice, other than being a bargaining agent for the purpose of negotiating the AWAs. However, it is equally clear that the operation of non-union certified agreements does not have the same impact on union right of entry.

It is expected that this is an area of industrial law which the federal government will seek to reform.

Clarity on approval requirements for non-union certified agreements

Although the Act makes provision for the making and certification of non-union certified agreements, there are a number of steps that need to be taken before such agreements can be approved. A recent decision of the Commission in *Ahrens Construction Pty Ltd* ('Ahrens') *and Another re Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (the 'Ahrens Agreement')[77] highlights that not only are these steps mandatory, but also they are steps that are likely to be the subject of close scrutiny by the Commission.

The mandatory approval requirements

During the course of the hearings relating to the approval of the Ahrens Agreement, O'Callaghan SDP expressed concern that some elements that were mandatory for the approval of non-union agreements had not been satisfied. Subsequent to those hearings, Ahrens corresponded with the Commission outlining an amended approach, but it became apparent to O'Callaghan SDP that guidance was needed to be issued to the parties so that the approval requirements under the Act could be satisfied

Accordingly, His Honour outlined, for the purposes of guidance only, that the following steps were fundamental to the approval of a non-union certified agreement:

(a) **Written notice of intention:** Under ss. 170LK(2) and (4) a notice must be sent in written form to every person to be covered by the proposed agreement:
   - stating that the employer intends to make an agreement with employees;
   - giving the employees at least 14 days notice of the intention to make the agreement; and
   - stating that the employee may request a union to represent him/her in meetings and conferring with the employer about the agreement if that employee is a member of a union, and that union is entitled to represent the employee in relation to work that will be covered by the agreement.[78]

(b) **Provision of the agreement to employees:** Under s. 170LK(3), the written notice of intention must be either preceded by, or accompanied by the proposed agreement, in writing, or the employer must take reasonable steps to ensure ready access by employees to the agreement.[79]

(c) **Consultation:** Under s. 170LK(7), the employer is required to take reasonable steps to ensure that the terms of the agreement are explained to all employees whose employment will be covered by the agreement.[80] Furthermore, these steps must take place in ways that are appropriate in having regard to employees' circumstances and needs (for example, they may be from non-English-speaking backgrounds). If a union has been requested to represent an employee or employees, the employer must give the union a reasonable opportunity to meet and confer about the agreement before it is made.[81]

(d) **Changes to the agreement:** If there are any amendments to the proposed agreement, the approval process must be recommenced.[82]

(e) **Making the agreement:** Under s. 170LT(6), the agreement is only made when a valid majority of employees, who are employed at the time and whose employment would be subject to the agreement, have genuinely made the agreement.[83] In common practice, the making of an agreement is usually done by way of a ballot.

(f) **Certification of the Agreement:** Under s. 170LM(2), an application for the certification of the agreement must be filed in the Commission within 21 days of the day on which it is made.[84]

While His Honour detailed these requirements for the purposes of guidance only, the decision provides a useful outline of the approval requirements for non-union certified agreements.

ENDNOTES

1. Catanzariti J, Shariff Y, Brown S (2003) Major tribunal decisions in 2002. *Journal of Industrial Relations* 45 (2): 166–83.
2. See the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* 2003 (Cwlth).
3. The majority judgment of the High Court was delivered in the single judgments of Gleeson, McHugh and Callinan, and a joint decision of Gummow, Hayne and Heydon (Kirby J dissented).
4. *Electrolux Home Products Pty Ltd v Australian Workers' Union and Others* (2004) 209 ALR 116.
5. Supra n1.
6. *Electrolux Home Products Pty Ltd v Australian Workers Union and Others* (2001) FCA 1600.
7. *Automotive Food, Metals Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 115 IR 102.
8. *Electrolux Home Products Pty Limited v Australian Workers' Union* (2004) 209 ALR 116, pp. 125–6.
9. *Re Portus; Ex parte ANZ Banking Group Pty Ltd* (1972) 127 CLR 353; *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96.
10. *Electrolux Home Products Pty Ltd v Australian Workers' Union and Others* (2004) 209 ALR 116, pp. 119–21.
11. *Ibid*, pp. 136–41.
12. *Ibid*, p. 158.
13. *Ibid*, p. 180.
14. Supra n4–6.

15. *Ibid.*
16. *Ibid*, p. 168.
17. *Ibid*, pp. 168–71.
18. *Ibid*, pp. 171–2.
19. *Ibid*, per Gleeson, pp. 121–2; per McHugh, pp. 141–5 and per Gummow, Hayne and Heydon, pp. 155–6.
20. *Ibid*, per Mchugh J, pp. 141–142.
21. per Gleeson, p. 123 and per McHugh, p. 147.
22. *Ibid.*
23. *Ibid*, per Gleeson, pp. 124–5, per McHugh, p. 146 and per Gummow, Hayne and Heydon, pp. 155–6.
24. *Ibid*, per Kirby J, pp. 162–3.
25. *Ibid*, p. 163.
26. *Ibid*, pp. 163–4.
27. *Ibid*, per Gleeson, p. 125, per McHugh, p. 149 and per Gummow, Hayne and Heydon, pp. 159–60.
28. *Ibid.*
29. *National Tertiary Education Industry Union and Monash University and another* – re Appeal – certification of agreement PR947598 (10 June 2004).
30. See Catanzariti J, Shariff Y (2001) Major tribunal decisions in 2000 *Journal of Industrial Relations* 43 (2): 161–76 and Catanzariti J, Shariff Y, Brown S (2003) Major tribunal decisions in 2002 *Journal of Industrial Relations* 45 (2): 166–83.
31. [2000] HCA 59 (16 November 2000).
32. *Ibid*, para 14.
33. *Ibid.*
34. *Ibid.*
35. *Ibid*, para 15.
36. (unreported: No. V144 of 2001, Federal Court of Australia, 5 July 2002).
37. See Catanzariti J, Shariff Y, Brown S (2003) Major tribunal decisions in 2002 *Journal of Industrial Relations* 45 (2): 166–83.
38. *Gribbles Radiology v Health Services Union of Australia & Anor*; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd & Anor* [2005] HCA 9 (9 March 2005).
39. Gleeson, Hayne, Callinan and Heydon (Kirby J dissented).
40. *Gribbles Radiology v Health Services Union of Australia & Anor*; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd & Anor* [2005] HCA 9 (9 March 2005), para 35.
41. *Ibid.*
42. *Ibid*, para 38.
43. *Ibid*, para 39.
44. *Ibid.*
45. *Ibid*, para 46.
46. *Ibid*, para 50.
47. *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co and Australian Boot Trade Employes' Federation v Whybrow & Co* (1910) 11 CLR 311.
48. *Gribbles Radiology v Health Services Union of Australia & Anor*; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd & Anor* [2005] HCA 9 (9 March 2005), para 96.
49. ibid, para 97.
50. See Catanzariti J, Shariff Y, Brown S (2003) Major tribunal decisions in 2002 *Journal of Industrial Relations* 45 (2): 166–83.
51. *Construction, Forestry, Mining and Energy Union v Amcor Ltd* [2002] FCA 878.
52. *Amcor Ltd v CFMEU* [2003] FCAFC 57.

53. See Catanzariti J, Shariff Y, Brown S (2003) Major tribunal decisions in 2002 *Journal of Industrial Relations* 45 (2): 166–83.
54. (1984) 8 IR 34.
55. *Ibid*, p. 75.
56. *Amcor Ltd v CFMEU; Minister for Employment and Workplace Relations v CFMEU & Ors* [2005] HCA 10 per Gummow, Hayne and Heydon, paras 52 and 56; per Gleeson and McHugh, para 14; per Callinan, para 137; and per Kirby, paras 81, 97 and 115.
57. *Ibid*.
58. *Ibid*.
59. *Ibid*, para 52.
60. *Ibid* per Gummow, Hayne and Heydon, paras 44 and 54 and per Callinan, para 141.
61. *Ibid*.
62. per Gummow, Hayne and Heydon, para 51; per Callinan, para 143; and per Kirby J, para at 112.
63. *Ibid*, para 112.
64. *Ibid*, para 106.
65. (Guidice P, Harrison SDP and Cribb C, PR943894).
66. *Ibid*, para 6.
67. *Ibid*, para 22.
68. *Ibid*, para 25.
69. *Ibid*.
70. *Ibid*, para 26.
71. (Guidice P, Harrison SDP and Cribb C, PR943725).
72. *Ibid*, paras 13–14.
73. *Ibid*, paras 15.
74. *Ibid*, paras 34–5.
75. *Ibid*.
76. *Ibid*.
77. (SDP O'Callaghan, PR943578).
78. *Ibid*, para 20.
79. *Ibid*, para 21.
80. *Ibid*, para 22.
81. *Ibid*, para 23.
82. *Ibid*, para 24.
83. *Ibid*, para 25.
84. *Ibid*, para 27.