HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

ELECTROLUX HOME PRODUCTS PTY LIMITED APPELLANT

AND

THE AUSTRALIAN WORKERS' UNION & ORS RESPONDENTS

Electrolux Home Products Pty Ltd v Australian Workers' Union
[2004] HCA 40
2 September 2004
S245/2003, A211/2003 and A212/2003

ORDER

1. *Appeals allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 21 June 2002 and, in place thereof, order that each of the appeals to the Full Court Nos S6/2002, S11/2002 and N18/2002 be dismissed.*

On appeal from the Federal Court of Australia

Representation:

F Parry SC with C B O'Grady for the appellant (instructed by Cutler Hughes & Harris)

S C Rothman SC with S J Howells for the first to seventh respondents (instructed by Lieschke & Weatherill, Taylor & Scott and Moloney & Partners)

H J Dixon SC with M P McDonald for the eighth respondent (instructed by Blake Dawson & Waldron)

CATCHWORDS

Electrolux Home Products Pty Ltd v Australian Workers' Union

Industrial law (Cth) – Industrial action – Whether industrial action protected action – Industrial action in support of claims in respect of proposed certified agreement – Where proposed agreement included bargaining agent's fee payable to unions – Where bargaining agent's fee to be paid by all employees including non-union members – Whether bargaining agent's fee provision about matter pertaining to the relationship between employer and employee – Whether proposed agreement an agreement about matters pertaining to the relationship between an employer and its employees – Whether "protected action" in s 170ML of the *Workplace Relations Act* 1996 (Cth) includes industrial action in support of a proposed agreement that is not capable of certification under Div 4 of Pt VIB.

Industrial law (Cth) – Industrial action – Whether prohibition on industrial action in s 170NC of the *Workplace Relations Act* 1996 (Cth) includes industrial action in support of a proposed agreement that is not capable of certification under Div 4 of Pt VIB – Legislative objective of s 170NC.

Statutes – Interpretation – Presumption against abrogation of common law rights – Presumption against depriving persons of access to courts – Scope of interpretative presumptions – Application of presumptions to ss 170ML and 170MT of the *Workplace Relations Act* 1996 (Cth).

Workplace Relations Act 1996 (Cth), ss 170LI, 170ML, 170MT, 170NC.

1 GLEESON CJ. The outcome of these appeals turns upon three questions of construction of Pt VIB of the *Workplace Relations Act* 1996 (Cth) ("the Act").

2 The first question is whether a claim by a trade union that an employer should agree to deduct from the wages of future employees who do not join the union a "bargaining agent's fee", and pay it to the union, is a matter pertaining to the relationship between the employer and persons employed in the business of the employer, within the meaning of s 170LI of the Act. If the answer to that question is in the affirmative, the other questions do not arise.

3 The second question is whether, if the answer to the first question is in the negative, an agreement containing a term providing for such deduction and payment can satisfy the description of "an agreement ... about matters pertaining to the relationship between ... an employer ... and ... all persons who ... are employed in [the employer's] business" within the meaning of s 170LI. If the answer to that question is in the affirmative, the third question does not arise.

4 The third question is whether, if the first and second questions are answered in the negative, industrial action by a union in support of claims made for a proposed agreement including a bargaining agent's fee is "protected action" within the meaning of s 170ML of the Act. The answer to that question has consequences for the operation of the immunity conferred by s 170MT, and the prohibition in s 170NC.

5 The relevant facts, and the history of the proceedings, are set out in the reasons of other members of the Court.

The first question

6 A negative answer to the first question is required by the decisions of this Court in *R v Portus; Ex parte ANZ Banking Group Ltd*[1], and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[2]. There is no occasion to depart from those authorities, and every reason to follow them.

7 In Alcan the Court, applying Portus, deciding unanimously[3] that a demand by a union that an employer deduct union dues from employees' wages and remit

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1 (1972) 127 CLR 353.

2 (1994) 181 CLR 96.

3 Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

them to the union did not pertain to the relationship between employer and employees. The Court said[4]:

> "There are, in our view, three matters which tell persuasively against reconsideration of *Reg v Portus*. The first is that the principle on which it proceeds, namely, that for a matter to 'pertain to the relations of employers and employees' it must affect them in their capacity as such, has been accepted as correct in a number of subsequent cases, with no question ever arising as to whether the principle was correctly applied in the case. The second is that Parliament re-enacted, in s 4(1) of the Act, words which are almost identical with those considered in *Reg v Portus*. There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]', although the validity of that proposition has been questioned. But the presumption is considerably strengthened in the present case by the legislative history of the Act. The Committee of Review into the Australian Industrial Relations Law and Systems, whose report preceded the enactment of the Act, recommended that the jurisdiction of the tribunal be extended to the limits of the constitutional power under s 51(xxxv). Yet Parliament adopted, in almost identical terms, the language of the former Act into the Act, and the Minister acknowledged in his Second Reading Speech that the jurisdiction was to be limited by 'the requirement that disputes relate to matters concerning employers and employees'. These considerations reinforce the presumption that Parliament did not intend to overturn *Reg v Portus*.
>
> The third matter that tells against a reconsideration of *Reg v Portus* is that, academic criticism notwithstanding, there is no reason to think it is in any way affected by error. The considerations which lead to the conclusion that a dispute as to deduction of union dues (at least, where authorized by individual employees) is an industrial dispute within s 51(xxxv) of the Constitution, tend in favour of the conclusion that the subject matter does not pertain to the relationships of employers and employees in their capacity as such. Those considerations, which depend on the nature and role of trade unions in Australia, show that although the subject matter pertains to a relationship between employers and employees, it is a relationship involving employees as union members and not at all as employees. That appears even more clearly if, as earlier suggested, the industrial character of the claim for the purposes of s 51(xxxv) comes about only in the case of a claim for employee-authorized deductions. Finally and so far as the statutory definition of

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4 (1994) 181 CLR 96 at 106-107.

> 'industrial dispute' is concerned, the character of a claim for the deduction of union dues is not altered simply because it is bound up with a claim for a wage increase equivalent to the dues to be deducted." (footnotes omitted)

8 The second of the matters referred to in those passages applies with at least equal force in the present case. Two years after the decision in *Alcan*, and in the light of the long legislative history there considered, Parliament, in defining in s 170LI the nature of an agreement that may be a certified agreement for the purposes of Pt VIB, used the expression "an agreement, in writing, about matters pertaining to the [employment] relationship". No doubt there are circumstances in which it is artificial, and unpersuasive, to attribute to Parliament a consciousness of a judicial interpretation which might have been placed upon an expression, perhaps years before, and in some different context. But it is hard to think of a clearer case of parliamentary adoption of an expression, with a judicially settled meaning, to be applied in a particular context, than the present.

9 In one sense, anything that is capable of being made the subject of an agreement between an employer and employees could be said to be a matter pertaining to their relationship. An employer could agree, for example, to make regular donations to a particular political party. The established principle, however, is that, in the context with which this legislation is concerned, it is matters which affect employers and employees in their capacity as such that "pertain to the relations of employers and employees". Furthermore, a particular application of the principle, settled by authority, is that a proposal that an employer deduct amounts from the wages of future employees and remit them to a trade union is not one that affects employers and employees in their capacity as such. In *Portus*[5], Barwick CJ said:

> "In my opinion, the demand that the employer should pay out of earned wages some amounts to persons nominated by the employee is not a matter affecting the relations of employer and employee. It does not seem to me to advance the matter that the intended payee is the organization registered under the Act of which the employee is a member."

10 The Court[6] approved statements in *R v Kelly; Ex parte State of Victoria*[7] to the effect that "the relations of employers and employees" refers to the industrial relationship, and not to matters having an indirect, consequential and remote effect on that relationship. The actual decision in *Portus*, approved and applied

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5 (1972) 127 CLR 353 at 357.

6 (1972) 127 CLR 353 at 359 and 362.

7 (1950) 81 CLR 64 at 84.

in *Alcan*, was that for an employer to collect money from employees and remit such money to a third party on behalf of the employees had an insufficient connexion with the industrial relationship to fall within the statutory description.

11 The dispute in *Portus* was held not to be "with respect to a matter pertaining to the relations of employers and employees"[8]. The words "with respect to" are no narrower than the word "about"[9]. The use of the preposition "about" does not widen the scope of the expression "matters pertaining to the [employment] relationship" beyond that identified in *Portus* and *Alcan*. And the introduction into industrial legislation of the concept of certified agreements does not create a new context in which it can be said, with any degree of conviction, that the expression takes on a new and different meaning.

The second question

12 The second question must be considered in the wider context of Pt VIB, the object of which is to facilitate the making, and certifying by the Australian Industrial Relations Commission, of certain agreements, particularly at the level of a single business or part of a single business (s 170L). Applications may be made to the Commission to certify certain agreements. Where an application is made to the Commission in accordance with Div 2 or Div 3 to certify an agreement, the Commission must certify the agreement if, and must not certify the agreement unless, it is satisfied that certain requirements, set out in s 170LT, are met. An agreement comes into operation when it is certified (s 170LX). While in operation it prevails over an award or order of the Commission (s 170LY), and over terms and conditions of employment specified in a State law (s 170LZ). The binding effect of a certified agreement is prescribed by Div 6. Division 8 of Pt VIB deals with negotiations for certified agreements, bargaining periods and, in s 170ML, "protected" industrial action. Section 170MT provides:

> "(2) Subject to subsection (3), no action lies under any law (whether written or unwritten) in force in a State or Territory in respect of any industrial action that is protected action unless the industrial action has involved or is likely to involve:
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> (a) personal injury; or
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> (b) wilful or reckless destruction of, or damage to, property; or
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> (c) the unlawful taking, keeping or use of property.

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8 (1972) 127 CLR 353 at 357-358 per Menzies J.

9 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

(3) Subsection (2) does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action."

13 A central provision of Pt VIB is s 170LI, which defines the nature of an agreement which may be a certified agreement. It provides:

"(1) For an application to be made to the Commission under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:

(a) an employer who is a constitutional corporation or the Commonwealth; and

(b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement."

14 Reference has already been made, in the course of answering the first question, to authorities on the meaning of the concept of an industrial dispute with respect to matters pertaining to the relationship of employers and employees. Here we are concerned with the concept of an industrial agreement about matters pertaining to that relationship. The context is not materially different.

15 It is argued that, even if a claim, a dispute, or a term of a proposed agreement, about a bargaining agent's fee is not about a matter pertaining to the relationship referred to in s 170LI, that does not necessarily require a conclusion that an agreement containing a term about a bargaining agent's fee is not an agreement of the nature described in s 170LI. It is true that, theoretically at least, it might be possible to describe an agreement as one about matters pertaining to the relationship referred to if it contained even one term that was about a matter pertaining to the relationship, regardless of whatever else was in the agreement. No party contended for this construction of s 170LI, and the reason is obvious. When regard is had to the statutory context in which s 170LI appears, to the purpose of certification, to the powers and procedures of the Commission in respect of certification, and to the legal consequences of certification, it is impossible to conclude that s 170LI bears such a meaning.

16 The contention of the appellant, and of the Minister for Employment and Workplace Relations, is that, for an agreement to be of the nature described in s 170LI, it must be wholly about matters pertaining to the relationship referred to. This contention, which was accepted by Merkel J at first instance, is consistent with the context, and, in particular, the purpose and effect of certification of an agreement. It is also consistent with the legislative history reflected in decisions such as *Portus* and *Alcan*. Part VIB does not provide for certification of part of

an agreement. The focus of the legislative provisions about the certification procedure, and the consequences of certification, is upon matters pertaining to the employment relationship. If an agreement contains terms about matters extraneous to that relationship it is difficult to accommodate that agreement to the scheme of Pt VIB.

17 Counsel for the union respondents argued for an intermediate position. It was submitted that an agreement which contains a term or terms about matters pertaining to the employment relationship, and a term or terms about other matters, must be subjected to a process of characterization, by which its real or essential nature can be determined, and, in some cases, the requirements of s 170LI can be satisfied. There are at least two difficulties with this argument. The first is that it leaves unanswered the problem of what is to be done, in relation to the certification procedure, and in relation to the legal effect of a certified agreement, about those parts of the agreement which, by hypothesis, are not about matters pertaining to the employment relationship. The second is that it gives no guidance as to how the process of characterization is to proceed. There may be cases in which a matter extraneous to the employment relationship may be so trivial that it should be disregarded as insignificant. Putting such cases to one side, all the terms of an agreement ordinarily constitute part of the consideration flowing from one side or the other, and there is no way of knowing whether, or what, the parties would have agreed about the other terms if one term were excluded from the legal operation of the agreement. The argument appears to amount to the proposition that, if an agreement is mainly about the matters referred to in s 170LI, then the fact that it is partly about other matters as well is immaterial. In many cases, it will be impossible to say what an agreement is mainly about, but, in any event, there is no support, either in the text, or in the scheme of Pt VIB, for a conclusion that an agreement that is, in part, about matters other than the matters referred to in s 170LI may be a certified agreement. If it were otherwise, it is difficult to see any logical stopping place short of a proposition that an agreement would fall within the section if it contained even one term about the relevant matters.

The third question

18 Protected action is defined in s 170ML. Sub-sections (2) and (3) of s 170ML protect action, during the bargaining period, by employees and employers, for the purpose of supporting or advancing claims made in respect of the proposed agreement, that is to say, the proposed certified agreement the subject of negotiations (s 170MI). Section 170NC prohibits coercion in respect of certified agreements, but the prohibition does not apply to protected action (s 170NC(2)).

19 Reliance was placed in argument upon what was said to be a general principle of construction that, where a statute takes away or interferes with common law rights, then it should be given, if possible, a narrow interpretation[10]. The generality of that assertion of principle requires some qualification. It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language[11]. It is also true that there is a presumption, relevant for example to the construction of privative clauses, that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied[12]. However, as McHugh J pointed out in *Gifford v Strang Patrick Stevedoring Pty Ltd*[13] modern legislatures regularly enact laws that take away or modify common law rights. The assistance to be gained from a presumption will vary with the context in which it is applied. For example, in *George Wimpey & Co Ltd v British Overseas Airways Corporation*[14], Lord Reid said that in a case where the language of a statute is capable of applying to a situation that was unforeseen, and the arguments are fairly evenly balanced, "it is ... right to hold that ... that interpretation should be chosen which involves the least alteration of the existing law". That was a highly qualified statement and, if it reflects a presumption, then the presumption is weak and operates only in limited circumstances.

20 In *Coco v The Queen*[15], Mason CJ, Brennan, Gaudron and McHugh JJ said:

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with

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10 See, for example, *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206.

11 *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

12 *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492-493 [32].

13 (2003) 214 CLR 269 at 284 [36].

14 [1955] AC 169 at 191.

15 (1994) 179 CLR 427 at 437.

> fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights." (footnote omitted)

21 The joint judgment in *Coco* went on to identify as the rationale for the presumption against modification or abrogation of fundamental rights an assumption that it is highly improbable that Parliament would "overthrow fundamental principles, infringe rights, or depart from the general system of law" without expressing its intention with "irresistible clearness"[16]. In *R v Home Secretary; Ex parte Pierson*[17], Lord Steyn described the presumption as an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts. The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

22 We are here concerned with the meaning of provisions (ss 170ML and 170MT) which have as their immediate purpose and effect the conferring of an immunity from civil liability for a certain kind of conduct. The legislature, recognizing that parties to disputes, and third parties, might suffer actionable damage as a result of such conduct, has conferred a limited immunity from action. The immunity given by s 170MT(2) is qualified by pars (a)-(c). The rights of action taken away are common law rights of a kind frequently modified by statute in the industrial context with which the legislation is concerned.

23 The present case gives rise to no issue concerning the principle of legality or the rule of law. Furthermore, there is no uncertainty in the meaning of the statute that is not capable of being resolved by an examination of the legislative text and purpose.

24 The Full Court of the Federal Court, overruling the decision of Merkel J, held that action is protected by s 170ML(2) even if it is partly in support of claims that are not matters pertaining to the employment relationship, and even if the presence of those claims means that the proposed agreement in support of which the action is taken does not satisfy the requirements of s 170LI.[18] The

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16 The quotation is from *Potter v Minahan* (1908) 7 CLR 277 at 304, where O'Connor J cited a passage from *Maxwell on Statutes*, 4th ed (1905) at 122.

17 [1998] AC 539 at 587, 589.

18 (2002) 118 FCR 177 at 195.

reasoning was that s 170ML(2) requires only the existence of a genuine intention of supporting or advancing claims made in respect of a proposed agreement. On that approach, if there is a proposed agreement, if claims are made in respect of it, and if the industrial action is undertaken with a genuine purpose of supporting or advancing those claims, the statutory protection applies.

25 The reference in s 170ML(2) to "the proposed agreement" is a reference to an agreement of the nature identified in s 170LI. The fact that parties to industrial action may be acting under a mistake of law as to whether a proposed agreement is of that nature is no more relevant to the protection given by s 170ML(2) than would be the fact that they neither knew nor cared whether the proposed agreement was of that nature. The protection conferred by s 170ML(2) is attracted by a combination of two circumstances: the purpose of supporting or advancing claims the subject of a proposed agreement; and the nature of the proposed agreement. The kind of proposed agreement being supported is not at large. It is not merely the fact of the proposal and support that is sufficient to gain protection; the nature of that which is proposed is also material. Section 170ML appears in Div 8 of Pt VIB, which deals with negotiations for certified agreements. It relates to action taken during the bargaining period. The bargaining period is for the negotiation of an agreement under Div 2 or Div 3 (s 170MI). Reference has earlier been made to s 170L, which identifies the object of Pt VIB as the facilitation of the making and certifying by the Commission of certain agreements. That is the statutory purpose which is furthered by the protection and immunity in question, and that protection and immunity does not extend beyond action in support of agreements of the nature of the agreements with which Pt VIB is concerned, that is to say, agreements of the kind identified in s 170LI.

26 Counsel for the union parties argued that, on this approach, when it comes to the application of s 170NC, the appellant is hoist with its own petard. If an agreement the object of concern is not an agreement under Div 2 or Div 3, then, so it is argued, the prohibition against taking action with intent to coerce cannot apply. That does not follow. The elements of the conduct prohibited by s 170NC, so far as presently relevant, are action, or threats of action, with intent to coerce another to agree, or not to agree, to the making of an agreement under Div 2 or Div 3. An accurate appreciation of the legal nature of the agreement in question is not an element of the intent required by s 170NC. It is possible to intend to coerce another person into making, or not making, a certified agreement, even if the agreement the object of the coercive intent, as a matter of law, is not capable of being certified.

Conclusion

27 The decision of Merkel J was correct. The appeals should be allowed. The orders of the Full Court of the Federal Court should be set aside, and it should be ordered that the appeals to that Court be dismissed.

28 McHUGH J. These appeals concern the interpretation and application of Pt VIB of the *Workplace Relations Act* 1996 (Cth) ("the Act") and, in particular, Divs 2 and 8 of that Part, including ss 170ML and 170LI. In negotiations with the appellant, an employer, the respondent trade unions claimed that the appellant 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 (together, "the bargaining agent's fee claim").

29 The employer rejected the claim. As a result, the unions took industrial action against the employer and claimed that it was "protected action" within the meaning of s 170ML of the Act and immune from civil action. The Full Court of the Federal Court upheld the unions' claim[19]. Subsequently, this Court gave the employer special leave to appeal against the decision of the Full Court.

30 The questions in these appeals are:

1. whether the bargaining agent's fee claim is "about matters pertaining to the relationship between an employer ... and all persons who ... are employed in a single business ... of the employer" within the meaning of s 170LI(1) of the Act;

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 of the Act makes the agreement not one about such matters for the purposes of that section and therefore not capable of being the subject of an application for certification by the Australian Industrial Relations Commission ("the Commission");

3. whether industrial action taken by a union in support of claims in respect of a proposed agreement under Div 2 of Pt VIB of the Act constitutes "protected action" within the meaning of s 170ML(2)(e) of the Act where one of the claims does not pertain to the relationship between an employer and its employees; and

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19 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 ("*AMWU*").

4. whether industrial action taken by a union in support of a claim in respect of a proposed agreement under Div 2 of Pt VIB of the Act about a matter that does not pertain to the relationship between an employer and its employees within the meaning of s 170LI(1) constitutes a breach of s 170NC of the Act.

31 In my opinion, these questions should be answered:

(1) No.

(2) Yes.

(3) No.

(4) Yes.

Statement of the case

32 In April 2001, the respondent unions ("the Unions") commenced negotiations with the appellant, Electrolux Home Products Pty Ltd ("Electrolux"), concerning a new certified agreement. During the negotiations the Unions produced a draft proposed national agreement. The draft contained a claim for a bargaining agent's fee:

"**46.0 BARGAINING AGENTS FEE**

46.1 The company shall advise all employees prior to commencing work for the company that a 'Bargaining Agents' Fee of $500.00 per annum is payable to the union.

46.2 The relevant employee to which this clause shall apply shall pay the 'Bargaining Agents fee' to the union in advance on a pro rata basis for any time which the employee is employed by the company. By arrangement with the union this can be done in quarterly instalments throughout the year.

46.3 The employer will, at the request of the employee to whom this clause applies, provide a direct debit facility to pay the bargaining agents fee to the union."

33 The negotiations failed. In September 2001, the Unions notified Electrolux that they intended to take industrial action. They believed that this action would be "protected action" within the meaning of s 170ML of the Act. Later, the Unions took industrial action falling within the terms of the notices.

34 Electrolux instituted proceedings in the Federal Court against the Unions alleging that the industrial action was not "protected action". Whether the industrial action was "protected action" depended on whether it fell within s 170ML. In turn, that depended on whether the Unions had undertaken the action "for the purpose of supporting or advancing claims made in respect of the proposed agreement" within the meaning of s 170ML(2)(e) of the Act.

35 In the proceedings, Electrolux accepted that the Unions' claim in respect of the bargaining agent's fee was genuinely made. However, Electrolux claimed that the industrial action was not protected because cl 46 of the proposed agreement was not about a matter pertaining to the relationship between Electrolux and its employees. That was because the inclusion of this term in the proposed agreement meant that the proposed agreement did not satisfy the requirements of s 170LI of the Act and was therefore not capable of being certified. This in turn meant that the industrial action taken by the Unions could not be "protected action" within the meaning of s 170ML(2)(e) of the Act.

36 The primary judge, Merkel J, accepted Electrolux's contentions[20]. His Honour found that the bargaining agent's fee claim was "substantive, discrete and significant" and that the claim did not pertain to the relationship between Electrolux and its employees[21]. Merkel J held that the proposed agreement, containing the claim, was not an agreement that would comply with s 170LI of the Act and could not be certified. Accordingly, he held that industrial action taken for the purpose of supporting or advancing such a claim was not "protected action" under the Act.

37 Merkel J subsequently made declarations to the effect that the action taken by the Unions was not protected action within the meaning of s 170ML of the Act and that the action breached s 170NC of the Act[22]. The Unions appealed to the Full Court of the Federal Court against Merkel J's decision.

38 The Full Court (Wilcox, Branson and Marshall JJ) allowed the Unions' appeals. The Full Court held that, for the purposes of s 170ML(2)(e) of the Act, the only essential matter is that the claim be genuinely made "in respect of the proposed agreement"[23]. In a joint judgment, their Honours held that, because the Unions' claim in respect of the bargaining agent's fee was genuinely made, "whether or not the insertion of a provision along the lines of the bargaining fee

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20 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600.

21 *Electrolux* [2001] FCA 1600 at [52]-[54] .

22 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1840.

23 *AMWU* (2002) 118 FCR 177 at 194.

claim would give rise to a certification difficulty under s 170LI(1)"[24] did not matter. Hence, because the Unions' claim was genuinely made, the Court concluded that the purpose of the Unions' industrial action fell within s 170ML(2).

39 Although it was not necessary to decide the issue, the Full Court also held that, for the purpose of s 170LI, the presence of one or more provisions that do not pertain to the relationship of employer and employee does not necessarily take an agreement outside the description embodied in s 170LI(1). That is, the presence of a term in the agreement that does not pertain to the relevant employment relationship does not mean that the agreement itself does not so pertain[25].

The Act

40 The critical provisions of the Act for the purposes of these appeals are ss 170LI and 170ML, located in Pt VIB of the Act. Part VIB, entitled "Certified agreements", provides for formalised collective agreements, known as "certified agreements", made between employers and unions or made directly between employers and employees. Part VIB sets out a regime for the making and certifying of agreements. Part VIB therefore furthers the principal object of the Act of providing "a framework for cooperative workplace relations" by "enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances"[26].

41 Division 1 of Pt VIB deals with preliminary matters and sets out the object of the Part. Section 170L states the object of the Part "is to facilitate the making, and certifying by the Commission, of certain agreements, particularly at the level of a single business or part of a single business."

42 Division 2 is entitled "Making agreements with constitutional corporations or the Commonwealth". The Division sets out requirements that must be satisfied for applications to be made to the Commission to certify certain agreements between employers who are constitutional corporations and either organisations of employees or employees[27]. Electrolux is a "constitutional corporation" as defined in s 4 of the Act. The Unions are "organisations of employees".

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24 *AMWU* (2002) 118 FCR 177 at 195.

25 *AMWU* (2002) 118 FCR 177 at 196-197.

26 Section 3(c).

27 Section 170LH.

43 Section 170LI sets out two important requirements in relation to an application for certification of an agreement under Div 2 of Pt VIB. First, the agreement must be in writing. Second, the agreement must be one that is about matters pertaining to the relationship between the employer and the persons employed in the single business or part of the business of that employer to which the agreement relates[28]. Section 170LI(1) provides:

> "For an application to be made to the Commission under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:
>
> (a) an employer who is a constitutional corporation or the Commonwealth; and
>
> (b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement."

44 Division 3 of Pt VIB covers agreements concerning industrial disputes and industrial situations. The Division sets out requirements that must be satisfied for applications to be made to the Commission to certify certain agreements to settle, further settle or maintain the settlement of, or to prevent, industrial disputes; or to prevent industrial situations from giving rise to industrial disputes[29].

45 Division 4 prescribes the process for certification. Where an application is made to the Commission in accordance with Div 2 to certify an agreement, the Commission must certify the agreement if, and must not certify the agreement unless, it is satisfied that the requirements of s 170LT are met[30]. The Commission must also refuse to certify an agreement in certain other circumstances[31], but may certify an agreement that contains certain non-compliant provisions upon the acceptance of undertakings from the parties to the agreement[32].

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28 Australia, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) Senate Explanatory Memorandum, (1996) at 69 ("Explanatory Memorandum").

29 Section 170LN.

30 Section 170LT(1).

31 See, eg, ss 170LT and 170LU.

32 Section 170LV(1)(a).

46 Division 5 sets out the effect of certified agreements. An agreement comes into operation when it is certified[33]. While an agreement is in operation, it prevails over an award or order of the Commission to the extent of any inconsistency[34]. With a number of limited exceptions, a certified agreement also prevails over conditions of employment specified in a State or Territory law[35]. For enforcement purposes, a certified agreement has an effect similar to an award[36]. The finding by the Full Federal Court[37] that the "only" effect of certification is that prescribed by ss 170LY and 170LZ of the Act is, with respect, incorrect.

47 Division 6 prescribes the binding effect of certified agreements. Relevantly, a Div 2 certified agreement binds the employer and the employees who are the subject of the agreement[38]. It also binds unions if the unions made the agreement with the employer in accordance with s 170LJ or s 170LL[39].

48 Division 7 provides for certified agreements to be varied. Significantly, the Commission must not approve a variation unless the Commission "would be required to certify the agreement as varied if it were a new agreement whose certification was applied for under [Pt VIB]."[40] The Commission may approve a variation of an agreement, in respect of which the Commission otherwise has grounds to refuse, on the acceptance of an undertaking in relation to the operation of the agreement as varied[41].

49 Division 8 is headed "Negotiations for certified agreements etc". The Division outlines when, how and by whom a "bargaining period" may be

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33 Section 170LX(1).

34 Section 170LY(1).

35 Section 170LZ.

36 See, eg, ss 178 and 179.

37 *AMWU* (2002) 118 FCR 177 at 196.

38 Section 170M(1).

39 Section 170M(2).

40 Section 170MD(3)(b).

41 Section 170ME(1)(a).

initiated and when a bargaining period commences[42]. The Division also permits unions which are negotiating parties to take "protected action" during a bargaining period. Each Union was a "negotiating party". Section 170ML is located in Div 8. The section identifies particular types of industrial action, termed "protected action", which attract certain legal immunity from civil action under s 170MT. Section 170ML(1) provides:

> "This section identifies certain action (***protected action***) to which the provisions in section 170MT (which confers certain legal immunity on protected action) are to apply."

50 Section 170ML(2) deals with employee action during a bargaining period and provides:

> "During the bargaining period:
>
> (a) an organisation of employees that is a negotiating party; ...
>
> is entitled, for the purpose of:
>
> (e) supporting or advancing claims made in respect of the 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, that industrial action is protected action."

51 Division 9 prohibits coercion of persons to make, vary or terminate certified agreements. Section 170NC relevantly prohibits persons from taking or threatening to take industrial action (other than "protected action") with intent to coerce another person to agree to the making of an agreement under Div 2.

52 Division 10 deals with enforcement and remedies. The Division provides that whilst a breach of s 170NC is not an offence, an eligible court such as the Federal Court may impose a penalty on a person who is found to have contravened s 170NC[43]. Injunctive relief is also available in relation to a contravention[44].

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42 Sections 170MI-170MK.

43 Sections 170ND, 170NE, 170NF(1).

44 Section 170NG.

The issues

53 Electrolux contends that the immunity in respect of "protected action" conferred by ss 170ML and 170MT of the Act does not apply where a proposed agreement under Div 2 contains a provision that is not

> "about matters pertaining to the relationship between an employer … and … all persons who, at any time when the agreement is in operation, are employed in a single business … of the employer and whose employment is subject to the agreement" ("the requisite relationship").

Electrolux contends that a bargaining agent's fee claim is not such a matter. This contention involves four propositions:

1. that the bargaining agent's fee claim is not a "[matter] pertaining to the relationship between an employer … and … all persons who, at any time when the agreement is in operation, are employed in a single business … of the employer and whose employment is subject to the agreement" within the meaning of s 170LI(1);

2. that an agreement or proposed agreement which contains such a term is not "an agreement … about matters pertaining to the relationship between an employer … and … all persons who, at any time when the agreement is in operation, are employed in a single business … of the employer and whose employment is subject to the agreement" within the meaning of s 170LI(1);

3. that industrial action by a union in support of a claim in a proposed agreement that includes a bargaining agent's fee claim is not "protected action" within the meaning of s 170ML; and

4. that in the circumstances of the case the Unions breached s 170NC by taking industrial action that was not "protected action" within the meaning of s 170ML.

54 It is appropriate to consider each proposition in turn.

1. Characterisation of the bargaining agent's fee claim

55 The bargaining agent's fee claim consists of three elements: an obligation on the employer to advise employees prior to commencing work for the company that a so-called "bargaining agent's fee" is payable to the Union; an obligation on the employee to pay an annual fee to the Union, apparently for the provision of bargaining services by the Union; and an obligation on the employer, at the

employee's request, to provide a payment facility to pay the bargaining agent's fee to the Union.

56 Merkel J at first instance described the first and second elements of the bargaining agent's fee claim as follows[45]:

> "The claim, implicitly if not explicitly, is that Electrolux is to act as the union's agent in entering into a contract with new employees which *requires* the employees, who are not union members, to employ the unions as their bargaining agent to reflect the unions' service in negotiating agreements with Electrolux under the Act.
>
> The relationship between the employer and the employee that would be created were the claim acceded to is, essentially, one of agency; Electrolux is to contract with its employees on behalf of the relevant union, as its agent. The agency so created is for the benefit of the union, rather than for the benefit of the employee upon whom the contractual liability is to be involuntarily imposed. The resulting involuntary 'bargaining' agency is, as a matter of substance, if not form, a 'no free ride for non-unionists' claim, rather than one by which the union is undertaking its traditional role of representing the interests of union members in respect of the terms of employment of employees. Although the claim was argued as if it were a claim for future services, it may also be characterised as a claim for payment for the unions' services in securing the new employee's terms and conditions of employment in the proposed certified agreement, notwithstanding that the new employee will only have commenced employment after the date of the agreement. ... Thus, payments claimed for bargaining 'services' prior to re-negotiation of a new agreement would appear to relate, primarily, to bargaining services rendered prior to the non-union member having commenced employment." (original emphasis)

57 His Honour described the third element of the bargaining agent's fee claim as follows[46]:

> "The other aspect of the claim, the bargaining fee debit facility, is analogous to a demand by unions that an employer pay its employees' union dues by making deductions and payments from salary due and payable to employees in accordance with authorities provided by them."

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45 *Electrolux* [2001] FCA 1600 at [40]-[41].

46 *Electrolux* [2001] FCA 1600 at [42].

58 Merkel J described the claim for payment of a bargaining agent's fee as "substantive, discrete and significant (ie, in the sense that it is substantial) … [and] was treated by [the parties] as such."[47] He held that the claim was not a matter pertaining to the relationship between an employer and persons employed by the employer[48] and concluded that the bargaining agent's fee claim "relates to a substantive, discrete, and significant matter that does not pertain to the employment relationship."[49]

59 The Full Federal Court disagreed with Merkel J's conclusions. The Full Court acknowledged that everything depends upon the precise formulation of the claim or term[50]. However, their Honours held that, because the words of s 170LI(1) differed significantly from those contained in the definition of "industrial dispute" in previous enactments, "[c]ases decided with reference to that definition may not apply."[51] Without expressing a concluded view, their Honours said that the claim by the Unions that Electrolux impose a requirement (being a condition of their employment) upon future employees "might give rise to a matter pertaining to the relationship between Electrolux and those employees, notwithstanding that the relevant Union, and its members, will benefit from the imposition"[52]. In addition, the requirement of a direct debit facility seemed to their Honours "to be merely facilitative and intended to be there for the benefit of those who wish to use it."[53]

60 This Court has consistently held that the rejection of demands of an academic, political, social or managerial nature does not create a dispute about matters pertaining to the relationship between employer and employee[54]. Neither

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47 *Electrolux* [2001] FCA 1600 at [53].

48 *Electrolux* [2001] FCA 1600 at [45].

49 *Electrolux* [2001] FCA 1600 at [54].

50 *AMWU* (2002) 118 FCR 177 at 196.

51 *AMWU* (2002) 118 FCR 177 at 196.

52 *AMWU* (2002) 118 FCR 177 at 196-197.

53 *AMWU* (2002) 118 FCR 177 at 197.

54 See, eg, *Australian Tramway Employes Association v Prahran and Malvern Tramway Trust* ("*Union Badge Case*") (1913) 17 CLR 680 at 705 per Higgins J, 718 per Powers J; *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 at 371 per Stephen J; *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153 at 163-164 per Stephen J.

does the rejection of a demand that the employer act as a financial agent for employees in their dealings with the union[55]. The cases emphasise that "matters pertaining" to the relations of employers and employees must pertain to the relation of employees as such and employers as such, that is, employees in their capacity as employees, and employers in their capacity as employers[56]. The Court has not followed statements in earlier cases – *Australian Tramway Employes Association v Prahran and Malvern Tramway Trust* ("*Union Badge Case*")[57] and *Federated Clothing Trades of the Commonwealth of Australia v Archer*[58] – that an industrial dispute arises whenever employers refuse union demands to do something that is within the power of the employers to concede and carry out[59]. However, all the cases rejecting this approach were decided before the enactment of Pt VIB of the Act. The Unions claim that they are not decisive of the issues arising under Pt VIB of the Act. It is necessary, therefore, to examine the reasoning in those pre-Act cases.

61 In *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[60], decided two years before the enactment of the Act, the Court held that a demand by a union that an employer deduct union dues from its employees' wages and remit them to the union did not pertain to the relationship between employers and employees. The issue in *Re Alcan* was whether a dispute about such a demand was an "industrial dispute" within the meaning of the *Industrial Relations Act* 1988 (Cth). Section 4(1) of that Act defined "industrial dispute" as "an industrial dispute ... that is about matters pertaining to the relationship between employers and employees". The

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55 *Portus* (1972) 127 CLR 353; *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96.

56 See, eg, *Portus* (1972) 127 CLR 353 at 357 per Menzies J (Barwick CJ and McTiernan J agreeing), 368 per Walsh J; *Coldham* (1976) 137 CLR 153 at 163-164 per Stephen J; *Federated Clerks' Union (Aust) v Victorian Employers' Federation* (1984) 154 CLR 472 at 481-482 per Gibbs CJ, 488 per Mason J; *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 353; *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 at 363 per Mason CJ, Deane, Toohey and Gaudron JJ; *Re Alcan* (1994) 181 CLR 96 at 106-107.

57 (1913) 17 CLR 680.

58 (1919) 27 CLR 207.

59 See *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64 at 85; *Portus* (1972) 127 CLR 353 at 358-359 per Menzies J.

60 (1994) 181 CLR 96.

Court described the expression "matters pertaining to the relationship between employers and employees" as relating to matters "pertaining to the employment relationship involving employers, as such, and employees, as such."[61] The Court said that "for a matter to 'pertain to the relations of employers and employees' it must affect them in their capacity as such."[62] It also said that the matter must "pertain to the relationships of employers and employees in their capacity as such."[63] It concluded that a dispute about the deduction of union fees pertained to "a relationship involving employees as union members and not at all as employees"[64]. The Court said that a claim directed to strengthening the position of a union or union members is not, without more, a matter pertaining to the employment relationship involving employers, as such, and employees, as such[65].

62 In *Re Alcan*, the Court refused to reconsider its previous decision in *R v Portus; Ex parte ANZ Banking Group Ltd*[66], handed down over 20 years earlier, for the following reasons[67]:

> "The first is that the principle on which it proceeds, namely, that for a matter to 'pertain to the relations of employers and employees' it must affect them in their capacity as such, has been accepted as correct in a number of subsequent cases, with no question ever arising as to whether the principle was correctly applied in the case. The second is that Parliament re-enacted, in s 4(1) of the Act, words which are almost identical with those considered in *R v Portus*. There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]', although the validity of that proposition has been questioned. But the presumption is considerably strengthened in the present case by the legislative history of the [*Industrial Relations Act*]. The Committee of Review into the Australian Industrial Relations Law and Systems, whose report preceded the enactment of the [*Industrial Relations Act*], recommended that the jurisdiction of the

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61 *Re Alcan* (1994) 181 CLR 96 at 106.

62 *Re Alcan* (1994) 181 CLR 96 at 106.

63 *Re Alcan* (1994) 181 CLR 96 at 107.

64 *Re Alcan* (1994) 181 CLR 96 at 107.

65 *Re Alcan* (1994) 181 CLR 96 at 106.

66 (1972) 127 CLR 353.

67 (1994) 181 CLR 96 at 106-107.

> tribunal be extended to the limits of the constitutional power under s 51(xxxv). Yet Parliament adopted, in almost identical terms, the language of the former [*Conciliation and Arbitration Act* 1904 (Cth)] into the [*Industrial Relations Act*], and the Minister acknowledged in his Second Reading Speech that the jurisdiction was to be limited by 'the requirement that disputes relate to matters concerning employers and employees'. These considerations reinforce the presumption that Parliament did not intend to overturn *R v Portus*.
>
> The third matter that tells against a reconsideration of *R v Portus* is that, academic criticism notwithstanding, there is no reason to think it is in any way affected by error. The considerations which lead to the conclusion that a dispute as to deduction of union dues (at least, where authorized by individual employees) is an industrial dispute within s 51(xxxv) of the Constitution, tend in favour of the conclusion that the subject matter does not pertain to the relationships of employers and employees in their capacity as such. Those considerations, which depend on the nature and role of trade unions in Australia, show that although the subject matter pertains to a relationship between employers and employees, it is a relationship involving employees as union members and not at all as employees. That appears even more clearly if, as earlier suggested, the industrial character of the claim for the purposes of s 51(xxxv) comes about only in the case of a claim for employee-authorized deductions. Finally and so far as the statutory definition of 'industrial dispute' is concerned, the character of a claim for the deduction of union dues is not altered simply because it is bound up with a claim for a wage increase equivalent to the dues to be deducted." (footnotes omitted)

63 In *Portus*, the Court held that a demand by a union that an employer make deductions and payments from the salaries due and payable to its employees in accordance with authorities provided by them did not affect the industrial relationship of employers and employees. Accordingly, the refusal of the demand did not give rise to a dispute about an "industrial matter" within the meaning of s 4 of the *Conciliation and Arbitration Act*, which defined "industrial matters" to mean "all matters pertaining to the relations of employers and employees".

64 Menzies J (with whom Barwick CJ and McTiernan J agreed), pointed out that not every dispute between a union and employers is an industrial dispute. That was so even if employers refuse a demand from a union or employees to do something that is within the power of the employer to do. His Honour said that "[t]o fall within that description the dispute must, in the most general terms, be with respect to a matter pertaining to the relations of employers and

employees"[68]. He said that the relationship that would be created by the obligation sought to be imposed would be:

> "a financial relationship of debtor and creditor arising from the earning of salary, not the industrial relationship in which the salary has been earned and has become payable. What is sought, in reality, is to make the employer the financial agent of the employee for the benefit of the association."[69]

65 Walsh J warned that:

> "[W]hilst the Court has laid stress on the requirement that the relationship to which an industrial matter must pertain is that between an employer as employer and an employee as employee, *a narrow view is not to be taken of what may arise out of that relationship or may be sufficiently connected with it to bring a demand within the description of an industrial matter*."[70] (emphasis added)

66 Nevertheless, Walsh J found that[71]:

> "[A] provision for the payment by employers of subscriptions due by their employees to their union has no real connexion with the relations of the employers and the employees. The payment of subscriptions is a matter pertaining to the relationship between the employees and their union. In my opinion it is not a matter with which the employer, as such, has any concern and it does not become an 'industrial matter' merely because the association makes a demand upon the employers to which they are not willing to accede."

67 His Honour also found that any benefit or privilege that accrued to an employee by having the employer deduct union dues from the employee's salary was "not a benefit or privilege of a kind which has any relevant connexion with the relationship of employer and employee."[72]

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68 *Portus* (1972) 127 CLR 353 at 357-358, citing *Kelly* (1950) 81 CLR 64, see also at 359.

69 *Portus* (1972) 127 CLR 353 at 360.

70 *Portus* (1972) 127 CLR 353 at 363.

71 *Portus* (1972) 127 CLR 353 at 364.

72 *Portus* (1972) 127 CLR 353 at 365.

68 Walsh J noted that among the employers there was no practice where the deduction of union dues from employees' salaries was a term of employment of each employee or each employee who belonged to a particular union. He therefore concluded that[73]:

> "From the employer's point of view, there is not an obligation owed by the employer to each employee because he is an employee. The making of the deductions depends upon an authority given by an employee, who is free to withdraw the authority if he wishes to do so. The system should, therefore, be regarded, in my opinion, as pertaining primarily to the relationship between an employee and his own union, from which relationship arises the obligation which is discharged by the payment made to the union by the employer. In so far as the practice also involves any relationship between an employee and his employer, this is not, in my opinion, a relationship between the employer as employer and the employee as employee, but is one in which the employer acts as agent for an employee in the making of a payment at his request and on his behalf from money to which he has become entitled."

69 His Honour also noted that, notwithstanding the important functions that unions have, this did not support

> "a conclusion that anything which serves to benefit one of them and to give it additional strength, by increasing its financial stability or otherwise, is to be regarded as an industrial matter within the meaning of the [*Conciliation and Arbitration Act*]."[74]

70 Stephen J said that a dispute about an "industrial matter" must

> "concern either of the broad aspects with which the relations of employers and employees are concerned, namely the performance of work by the employee and the receipt of reward for that work from the employer."[75]

71 His Honour found that a matter with respect to a demand for reward for work performed[76]:

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73 *Portus* (1972) 127 CLR 353 at 368.

74 *Portus* (1972) 127 CLR 353 at 369.

75 *Portus* (1972) 127 CLR 353 at 370.

76 *Portus* (1972) 127 CLR 353 at 371.

> "must always pertain to the employer-employee relationship ... The necessary quality of a subject matter demanded which is concerned with reward for work performed is, I think, that it be, of itself, inherently associated with the relationship of employer and employee and not with some other type of relationship."

72 Accordingly, his Honour took the view that there was[77]:

> "no necessary connexion between the service which the association, on behalf of employees, demands should be rendered by the employer banks for their employees and the relationship between them of employer and employee. The subject matter of the demand is concerned with a service to be performed by the employer which, viewed in the abstract and without knowledge of the existing relationships of the parties to the demand, does not bear any appearance of association with the employer-employee relationship. This is because the demand does not seek to operate within the sphere of that relationship but instead would create a new relationship between the parties, in which the employer is agent or debtor and the employee is principal or creditor."

73 Stephen J compared the union's demand with one that the employer accept back a portion of the employees' wages, retain that portion and then pay it to a third party. He held that "such a demand would be seeking to create a new, distinct relationship between the employer and its employees, having no connexion with the pre-existing employer-employee relationship."[78] Accordingly, he concluded that[79]:

> "The fact that the present demand is made to operate at a slightly earlier stage, before salary is in fact paid over to employees, thereby obviating one step in the imaginary demand I have postulated, that of the acceptance of money back from employees, does not appear to me to convert a transaction foreign to the relationship of employer and employee into one which pertains to that relationship.
>
> There may, no doubt, be instances where the subject matter of a demand appears to have no connexion with the employer-employee relationship but is nevertheless ancillary to a matter forming part of that relationship and is, for that reason, an industrial matter. This cannot, however, be said of the present case."

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77 *Portus* (1972) 127 CLR 353 at 371-372.

78 *Portus* (1972) 127 CLR 353 at 372.

79 *Portus* (1972) 127 CLR 353 at 372.

74 The question then is whether the reasoning in *Re Alcan* and *Portus* applies to the present claim of the Unions in the context of Pt VIB of the Act and, in particular, to s 170LI. If so, the related question arises whether this Court should depart from that line of authority. The Unions suggest that a number of matters justifies this course.

(a) Constitutional foundation for Div 2 of Pt VIB

75 The constitutional basis of Div 2 of Pt VIB of the Act is one feature that distinguishes it from the enactments considered in the earlier cases. Unlike the provisions considered in *Re Alcan* and *Portus*, the constitutional foundation for Div 2 is "primarily" the corporations power[80], not the conciliation and arbitration power[81]. The corporations power provides a broader basis upon which s 170LI may operate. In so far as it affects a constitutional corporation, a bargaining agent's fee clause in an agreement between a corporation and a third party is a matter capable of regulation under the corporations power. In *Re Alcan*, however, the Court's construction of "matters pertaining to the relationship between employers and employees" did not depend upon or involve the scope of the conciliation and arbitration power in s 51(xxxv). The Court said[82]:

> "The question is not one involving s 51(xxxv); it is simply a question of the meaning of the definition of 'industrial dispute' in s 4(1) [of the *Industrial Relations Act*]. And although there are some minor differences between that definition and the relevant definitions previously found in the *Conciliation and Arbitration Act*, the requisite nature of the subject matter of a dispute remains precisely the same, namely, that it pertain to the employment relationship involving employers, as such, and employees, as such."

76 The Court also noted that each judgment in *Portus* was based on the statutory definition of "industrial matters" in the *Conciliation and Arbitration Act* and not the meaning of "industrial disputes" in s 51(xxxv) of the Constitution[83].

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80 Constitution, s 51(xx). See Explanatory Memorandum at 68; *AMWU* (2002) 118 FCR 177 at 180.

81 Constitution, s 51(xxxv).

82 *Re Alcan* (1994) 181 CLR 96 at 105.

83 *Re Alcan* (1994) 181 CLR 96 at 101. The Court held that a dispute as to the deduction of union dues from the wages of employees who authorise that course would constitute an "industrial dispute" for the purposes of s 51(xxxv) of the Constitution: at 103-104, applying *R v Coldham; Ex parte Australian Social Welfare Union* ("*CYSS Case*") (1983) 153 CLR 297.) The Court said (at 104):

(Footnote continues on next page)

77 The terms of s 170LI show that the section is not intended to be commensurate with the scope of the corporations power. The constitutional basis of Div 2 is therefore neither determinative of the scope of the Division nor of itself a reason for distinguishing the earlier cases. The Full Bench of the Commission (Polites SDP, Watson SDP and Larkin C) in *Re National Union of Workers* ("*Health Minders*") took the view, correctly in my opinion, that the incorporation of s 170LI into the Act was intended to *confine* the broad extent of the corporations power[84].

(b) Text of s 170LI differs from sections considered in *Re Alcan* and *Portus*

78 Unlike the provisions considered in *Re Alcan* and *Portus*, s 170LI is not concerned with the meaning of "industrial dispute" or "industrial matter". The expression "matters pertaining to the relationship between an employer … and … all persons who, at any time when the agreement is in operation, are employed in a single business … of the employer and whose employment is subject to the agreement" differs from the expressions considered in those cases. In those cases, the relevant expressions were "matters pertaining to the relationship between employers and employees" and "matters pertaining to the relations of employers and employees". Hence, the matters being assessed fell to be determined by reference to a more generalised notion of the relationship between employers and employees.

79 Section 170LI, however, does not refer to the relationship between employers and employees generally, but rather to the relationship between the employer bound by the agreement and all persons employed in a single business of that employer. As the Full Bench of the Commission (Giudice J, McIntyre VP

> "In an industrial relations system involving the active participation of trade unions as the recognized representatives of their members, a claim that employers should deduct union dues is, in our view, inherently industrial in character. Certainly, that is so where the claim is for deductions authorized by individual employees."

The Court queried (at 104) whether the constitutional term "industrial dispute" would cover a claim for the deduction of union dues where the deductions are not in some way authorised by at least some of the employees. In such a situation the union would be acting in its own interest, not that of its members as employees, and the Court observed that it may be necessary for the employees' interests to be seen as coinciding with the union's if the matter is to be regarded as industrial.

84 (2003) 120 IR 438 at 452.

and Whelan C) observ*ed in Re Atlas Steels Metals Distribution Certified Agreement 2001-2003*[85]:

> "The terms of s 170LI(1) indicate that the nature of the matters is to be assessed by reference to the relationship between the employer and the employees to whom the agreement applies rather than by reference to a generalised notion of the relationship between employers and employees."

For example, there may be matters particular to the relationship between an individual employer and the persons employed in a single business of that employer. Those matters may not pertain to the relationship between employers and employees *generally* in their capacity as such. But they may pertain to the requisite relationship in that workplace and require an examination of the issue or issues between the parties that give rise to the claims[86].

80 The analytical framework that the Court adopted in *Re Alcan* and *Portus* to determine what is a matter that pertains to the relationship between an employer and its employees is whether the matter affects the relationship of employers and employees *in their capacity as such*. Such an approach applies both to employers and employees *generally* and to *particular* employers and the persons employed in their business.

81 Nothing in the Act suggests that this approach is no longer applicable. The Act still defines "industrial dispute" in s 4(1) as a dispute "about matters pertaining to the relationship between employers and employees". Division 3 agreements operate in respect of "industrial disputes"[87]. These provisions give rise to the inference that Div 2 and Div 3 agreements have a common element, namely, that for such an agreement to be certifiable, it must be about matters pertaining to the requisite relationship or to "the relationship between employers and employees" *in their capacity as such*. Because the Federal Parliament enacted the Act two years after the *Re Alcan* decision, the drafters of the Act almost certainly knew of the decision and the interpretation applied by this Court to the expression "about matters pertaining to the relationship between employers and employees". The principle that the re-enactment of a rule after judicial consideration is to be regarded as an *endorsement* of its judicial interpretation has been criticised, and the principle may not apply to provisions re-enacted in

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85 (2002) 114 IR 62 at 66.

86 See *Re Printing and Kindred Industries Union; Ex parte Vista Paper Products Pty Ltd* (1993) 67 ALJR 604 at 609, 612 per Gaudron J (Brennan, Dawson and Toohey JJ agreeing), 617-618 per McHugh J; 113 ALR 421 at 428, 432, 439-440.

87 See, eg, s 170LN.

"replacement" legislation[88]. However, industrial relations is a specialised and politically sensitive field with a designated Minister and Department of State. It is no fiction to attribute to the Minister and his or her Department and, through them, the Parliament, knowledge of court decisions – or at all events decisions of this Court – dealing with that portfolio. Indeed, it would be astonishing if the Department, its officers and those advising on the drafting of the Act would have been unaware of *Re Alcan.*

82 The bargaining agent's fee claim in question appears to be too general to constitute a matter pertaining to the requisite relationship in Electrolux's workplace. First, the bargaining agent's fee clause requires Electrolux to inform the new employee of a debt due by that person to the Union for purposes which the clause does not specify. Nothing in the clause suggests that the debt relates to the employment relationship. Second, even if a broad view is taken of the requisite relationship and matters pertaining to that relationship, the bargaining agent's fee clause appears to relate to the relationship between the Unions and non-members to be employed at Electrolux's workplace. Third, the claim appears to be directed to strengthening the position of the Unions at Electrolux's workplace, but this, without more, does not make such a clause a matter pertaining to the requisite relationship. Fourth, Electrolux does not undertake to deduct the fee from the employee's wages. Rather, the fee is payable "in advance". Consequently, there is not even an agreement or authorisation from the employee that Electrolux deal with the employee's wages in a particular manner. In other words, there is no nexus between the obligation imposed on Electrolux by the clause and the requisite relationship[89].

(c) The use of the word "about"

83 Predecessor legislation to the Act required that there be a dispute "as to" a matter pertaining to the relationship between employers and employees. Section 170LI 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* that[90]:

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88 See, eg, *Flaherty v Girgis* (1987) 162 CLR 574 at 594 per Mason ACJ, Wilson and Dawson JJ; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329 per Toohey, McHugh and Gummow JJ.

89 See, eg, *Health Minders* (2003) 120 IR 438 at 454; but see *Atlas Steels* (2002) 114 IR 62 at 68-72.

90 (1992) 174 CLR 345 at 357.

> "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."

84 Nevertheless, in *Re Alcan* the Court rejected the argument that a dispute arising from a demand by a union that an employer deduct union dues from its employees' wages and remit them to the union was a dispute "about" a matter pertaining to the relationship between employers and employees. This suggests that the term "about" does not significantly expand the scope of the matters that must fall within s 170LI for the purpose of obtaining certification of a Div 2 agreement.

(d) Expanding conceptions of employment

85 It was suggested that expanding conceptions of employment may justify a broader reading of s 170LI, in particular, whether a matter pertains to the requisite relationship. This Court's decision in *Hollis v Vabu Pty Ltd*[91] was cited as an example. The Unions also referred to the expanded application of Div 2 of Pt VIB of the Act. However, neither the majority decision in *Hollis* nor the expanded application of Div 2 supports the proposition for which the Unions contend.

86 In *Hollis*, the majority (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) found that a courier engaged to deliver articles by a company which operated a courier business was an employee of the company. At issue was what constitutes a relationship of employment between a courier and the courier company, rather than whether a particular matter pertained to that relationship.

87 Division 2 of Pt VIB has an expanded application in respect of:

1. an agreement about matters pertaining to the relationship between an employer who is carrying on a single business or part of a single business in a Territory and employees employed in the single business of the employer or part of same[92];

2. an agreement about matters pertaining to the relationship between an employer (being one of the three specified types of employers: a waterside employer, an employer of maritime employees and a flight crew

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91 (2001) 207 CLR 21.

92 Section 5AA(2).

officers' employer), and the counterpart employees employed in a single business of the employer, or part of same, so far as the matters relate to trade and commerce between Australia or elsewhere, within a Territory or between the States[93]; and

3. an agreement about matters pertaining to the relationship between an employer in Victoria who is carrying on a single business or part of a single business and employees employed in the single business or part[94].

88 Each of the extended applications of Div 2 of Pt VIB has the common feature that the primary requirement for the certification of a Div 2 agreement is that each agreement be about matters pertaining to the requisite relationship. Thus, notwithstanding the expanded application of Div 2 to certain other classes of persons, an application for certification nevertheless falls to be determined according to the "requisite relationship" test[95].

(e) Academic criticism

89 The test of sufficient direct effect on the employment relationship remains the key to the statutory limitation in s 170LI. This test has been criticised. Mr Graeme Orr argues that the test has required the Court to affirm a "pedantic distinction" between the employee as employee and the employee as creditor, and between the employer as employer, and the employer as debtor[96]. He contends that bargaining agents' fees are "necessarily incidental to the bargaining

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93 Section 5AA(3).

94 Section 494.

95 See *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Unilever Australia Ltd* (Unreported, PR940027, Australian Industrial Relations Commission, 31 October 2003, Munro J, Drake SDP and Larkin C) at [34].

96 Orr, "Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders", (2001) 14 *Australian Journal of Labour Law* 1 at 20.

and enforcement process without which certified agreements would not exist."[97] On this view, a bargaining agent's fee clause is about[98]:

> "each employee, in relation to their particular workplace, mutually insisting that each other (and themselves) contributes to the cost of bargaining and enforcing wages and conditions applicable to that place and class of employment. ... An arrangement mandating that employees contribute to funding [a process of collective negotiation and continuing representation and oversight] is of direct relevance to each employment relationship, whether the representative is a union or an enterprise association."

90 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. Mr Orr also acknowledges that "there is little by way of precedent to suggest that the courts will take such a realistic line in interpreting the federal employment matters requirement"[99], despite the broader constitutional foundation for Div 2 of Pt VIB and the Act itself.

(f) Subsequent amendments to the Act

91 Since the enactment of the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* 2003 (Cth), the Act now stipulates that "a provision (however described) of a certified agreement that requires payment of a bargaining services fee" is an "objectionable provision"[100]. By reason of s 170LU(2A), the Commission must now refuse to certify an agreement that contains "objectionable provisions". The Commission must vary a certified

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97 Orr, "Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders", (2001) 14 *Australian Journal of Labour Law* 1 at 21.

98 Orr, "Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders", (2001) 14 *Australian Journal of Labour Law* 1 at 21.

99 Orr, "Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders", (2001) 14 *Australian Journal of Labour Law* 1 at 21.

100 Section 298Z(5)(b).

agreement so as to remove the objectionable provisions, where it is satisfied that a certified agreement contains objectionable provisions[101]. In addition, s 298Y(2) provides that "[a] provision of a certified agreement is void to the extent that it requires payment of a bargaining services fee."

92 The term "bargaining services fee" is defined in s 298B as follows:

> "***bargaining services fee*** means a fee (however described) payable:
>
> (a) to an industrial association; or
>
> (b) to someone else in lieu of an industrial association;
>
> wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership dues".

93 Neither the Explanatory Memorandum to the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (No 2) (Cth) nor the second reading speeches for the Bill mention the decision of the Full Federal Court. However, the enactment of the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* does not suggest that the Full Court's decision is correct.

94 Accordingly, none of the matters relied on to distinguish the earlier cases justifies a departure from their holdings. The bargaining agent's fee clause does not concern a matter pertaining to the requisite relationship.

2. Certification of an agreement which contains a term that is not a matter pertaining to the requisite relationship

95 If the bargaining agent's fee clause is not a matter pertaining to the requisite relationship, can the Commission certify an agreement that contains such a clause?

96 Merkel J held that s 170LI "does not require that *all* of the terms of the proposed agreement must pertain to the requisite relationship" between employer and employee[102]. In his Honour's view, the section[103]:

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101 Section 298Z.

102 *Electrolux* [2001] FCA 1600 at [50] (original emphasis).

103 *Electrolux* [2001] FCA 1600 at [50].

> "requires that the agreement be characterised as one that is about *matters* pertaining to the relationship. If a term of the agreement does not pertain to that relationship it does not follow that the agreement is not about matters pertaining to the relationship. For example, the term may be ancillary or incidental to, or a machinery provision relating to, a matter pertaining to the employment relationship. Thus, an agreement may be about the requisite matters notwithstanding that some of its terms may not, strictly, be about such matters." (original emphasis)

However, Merkel J held that[104]:

> "If one of the substantive *matters* provided for in the agreement is not within the required description and that matter is discrete and significant then the proposed agreement may properly be characterised as about matters that are within the relationship *and* a matter that is not. While it is arguable that s 170LI only requires that the agreement in question be characterised as one that is 'substantially' or 'primarily' about the requisite matters it would be inappropriate to add those words absent a clear legislative purpose in favour of that construction: see *Saraswati v The Queen* (1991) 172 CLR 1 at 22 per McHugh J." (original emphasis)

97 Thus, Merkel J distinguished between ancillary, incidental or machinery provisions in an agreement – which for the purposes of certification need only relate to a matter pertaining to the employment relationship – and a substantive matter that is both discrete and significant – which must pertain to the employment relationship. Such an approach is consistent with the decision of this Court in *Shell*[105] and an obiter statement of Stephen J in *Portus*[106] about an ancillary aspect of a claim.

98 In contrast, the Full Federal Court suggested (without deciding the issue) that while it may be necessary to consider an agreement "as a whole"[107]:

> "We do not see why the presence of one or more provisions that do not pertain to the relationship necessarily takes an agreement outside the description embodied in s 170LI(1). As counsel for the Unions pointed out, s 170LI(1) does not refer to the terms of an agreement. It talks about

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104 *Electrolux* [2001] FCA 1600 at [51].

105 (1992) 174 CLR 345 at 359. *Shell* concerned a machinery provision in a claim, rather than a term of an agreement.

106 (1972) 127 CLR 353 at 372.

107 *AMWU* (2002) 118 FCR 177 at 196.

> 'an agreement ... about matters pertaining to the relationship'. So it is necessary to characterise the agreement itself, considering it as a whole. An agreement for the sale of a house is an agreement pertaining to real estate, notwithstanding it includes a provision regarding furniture.
>
> Nothing in the statutory scheme suggests that a certified agreement that, considered as a whole, answers the description of s 170LI(1) may not include a particular term that does not."

99 Whether an agreement containing a term that is not a matter pertaining to the relationship between an employer and employees may be certified under Pt VIB depends upon the proper construction of s 170LI. Integral to the construction of the section is whether it is directed to the nature of the agreement proposed for certification, looked at as a whole, or to each substantive provision by which, in aggregate, such an agreement is comprised[108].

100 Critical to the operation of s 170LI is that, for the purposes of certification under Div 2 of Pt VIB, there must be

> "an agreement, in writing, about matters pertaining to the relationship between an employer … and all persons who, at any time when the agreement is in operation, are employed in a single business … of the employer".

Nothing in Pt VIB nor in the rest of the Act suggests that s 170LI should not be given its plain and literal meaning. The statutory context in which s 170LI appears, the purpose of certification, the powers and procedures of the Commission in respect of certification and the legal consequences of certification suggest that s 170LI only permits the certification of an agreement where all the terms of the agreement are about matters pertaining to the requisite relationship or about matters ancillary or incidental to those matters or machinery provisions with respect to those matters.

101 Part VIB does not provide for the certification of part of an agreement made under Div 2. Subject to one exception[109], if the Commission is satisfied that the requirements of ss 170LT and 170LU are met, the Commission must

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108 See *Unilever* (Unreported, PR940027, Australian Industrial Relations Commission, 31 October 2003, Munro J, Drake SDP and Larkin C) at [91].

109 The Commission may certify a non-compliant agreement – that is, where not all the terms meet the requirements of Pt VIB and the Commission has grounds to refuse certification under ss 170LT and 170LU – on the acceptance of undertakings from the parties in relation to the operation of the agreement: s 170LV(1).

certify the agreement. If not, the Commission must not certify the agreement[110]. Section 170LT requires that the agreement, viewed as a whole, pass the "no-disadvantage test" (or not be contrary to the public interest), and include certain provisions, such as a procedure for settling disputes arising under the agreement. Under s 170LU, an agreement may not be certified if any provision contravenes certain sections of the Act, for example, is inconsistent with the termination provisions in Div 3 of Pt VIA of the Act[111], is discriminatory[112] or permits conduct that would contravene Pt XA (the freedom of association provisions)[113]. With one exception, each of the matters identified in ss 170LT and 170LU pertains to the employment relationship between the employer and the employees[114]. The focus of Pt VIB is therefore on matters pertaining to the employment relationship.

102 There is nothing in the statutory scheme which suggests that a certified agreement should not be considered as a whole. Indeed, the Commission is expressly required to characterise the overall effect of the agreement when applying the "no-disadvantage test" in s 170LT(2)[115]. Section 170LU requires the Commission to have regard to each of the provisions of the agreement. The agreement "as a whole" may pertain to the requisite relationship, but if it contains a single proscribed provision, then, absent an undertaking given under s 170LV, the entire agreement must not be certified.

103 To the extent that the parties agree that non-compliant terms of an agreement are to have legal effect, the efficacy of those provisions depends on the general law[116], not the Act. The Commission may certify such an agreement only if the non-compliant terms may be made the subject of undertakings under s 170LV(1) or if the non-compliant terms are deleted.

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110 Sections 170LT(1) and 170LU.

111 Section 170LU(2).

112 Section 170LU(5), (6).

113 Section 170LU(3).

114 Section 170LT(9). The exception relates to the circumstances in which the agreement is made: the Commission must refuse to certify an agreement made under s 170LK if the employer coerced or attempted to coerce any employee not to request or to withdraw a request that a union negotiate the agreement on the employee's behalf.

115 See also Pt VIE, especially s 170XA(2).

116 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31].

104 Thus, the scheme suggests that – ancillary, incidental and machinery provisions aside – the entire agreement must be "about matters pertaining to the [requisite] relationship". This is consistent with the Explanatory Memorandum to the Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) ("the Bill"), which states that the provisions of the new Pt VIB:

> "are intended to give employees and employers, particularly at the single business level, greater responsibility for developing *the terms and conditions of their employment relationship*, and to make agreements more accessible, more easily made, and clearly distinct from awards."[117]

The emphasised phrase supports the conclusion that an agreement under Pt VIB is concerned with the employment relationship between employers and employees and not matters extraneous to the employment relationship.

105 The above construction of s 170LI is also consistent with the principal object of the Act expressed in s 3. The Act has the purpose of providing a framework for co-operative workplace relations by:

> "(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; and
>
> (c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for [under the] Act"[118].

The reference in s 3(b) to matters "affecting the relationship between employers and employees" impliedly supports the contention that the focus of the Act and, by analogy, Pt VIB of the Act, is that requisite relationship. Section 3(c) recognises that employers and employees may choose "the most appropriate form of agreement" and expressly acknowledges that such an agreement may be one for which the Act does not necessarily provide. This suggests that not all agreements between employers and employees will be covered by the Act. Such an inference is also supported by the Explanatory Memorandum to the Bill, which explains that the purpose of the Act is to provide[119]:

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117 Explanatory Memorandum at 60 (emphasis added).

118 Sub-sections 3(b) and (c).

119 Explanatory Memorandum at 6.

"• a more direct relationship between employers and employees and greater emphasis on wages and conditions being determined as far as possible by agreement at the enterprise or workplace level [paragraphs (b), (d), (h)]; [and]

• more effective choice and flexibility as to the appropriate form of agreement for parties reaching agreements, including forms not provided by the Act (such as unregistered over award agreements) [paragraph (c)]".

106 The following comments of the Full Bench of the Commission in *Atlas Steels* are pertinent[120]:

> "In the first place, it appears to us that an agreement which contains provisions some of which are about matters pertaining to the relationship and some of which are about matters which do not so pertain cannot be described, at least without straining language, as an agreement about matters pertaining to the relationship. Secondly, this construction 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. Thirdly, the construction contended for might lead to some irreconcilable results. Some agreements deal only with one or two matters. Others deal comprehensively with the terms and conditions of employment. An agreement containing one or two matters only, being matters which do not pertain to the relationship, could not be the subject of a valid application for certification. An agreement containing the same one or two matters, but also containing a large number of matters that do pertain to the relationship, could be the subject of a valid application for certification. The legislature is unlikely to have intended the section to operate in such a capricious way. All of these considerations tell against the submission."

107 The Full Federal Court said that[121]:

> "The only effect of certification is that prescribed by ss 170LY and 170LZ. Certification provides a statutory override of certain inconsistent awards and orders. A term dealing with matters outside the employer-employee relationship is unlikely to be inconsistent with, and therefore to override, any award or order".

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120 (2002) 114 IR 62 at 67.

121 *AMWU* (2002) 118 FCR 177 at 196.

108 With respect, certification *is* significant. Even if a term dealing with matters outside the employer-employee relationship is unlikely to be inconsistent with an award or order, certification confers other statutory privileges. The effects of certification include that the agreement:

- overrides awards and certain orders of the Commission to the extent of any inconsistency[122];
- may be varied only in certain circumstances[123];
- is available for enforcement by way of the penalty provisions[124];
- permits an employee to sue for payment of any amounts due to the employee under the agreement[125];
- gives a right of entry into the workplace for certain union officials[126] and third parties[127];
- comes within Part XA which contains certain prohibitions[128];
- binds a new employer in the case of a transmission of business[129];
- operates to restrict employers' common law rights of contract, tort and property; and
- prevails over terms and conditions of employment specified in certain prescribed Commonwealth laws[130] or in a State or Territory law, award or employment agreement to the extent of any

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122 Section 170LY.

123 Division 7 of Pt VIB.

124 Section 178.

125 Section 189.

126 Section 285B.

127 See, eg, s 86.

128 See, eg, ss 298K and 298L(1)(h).

129 Section 170MB.

130 Section 170LZ(4).

inconsistency[131], subject to certain exceptions. The exceptions relate to State and Territory occupational health and safety laws, workers' compensation laws, unfair dismissal laws and the like[132].

109 It would seem anomalous if the Act conferred such statutory privileges in relation to substantive matters that did not pertain to the requisite relationship. Moreover, while it is understandable that Parliament wishes to enforce penalties against those who breach certified agreements, it seems unlikely that Parliament would want to enforce, by way of penalties, breaches of other provisions which do not relate to the requisite relationship.

110 In addition, the Act does not provide any guidance as to the characterisation of individual provisions and the characterisation of agreements. For example, the Act does not specify when, or even stipulate any criteria to assess whether, a discrete and significant term or terms renders the agreement not an agreement that "as a whole" is about matters pertaining to the requisite relationship. The Act is also silent on the procedure for certifying an agreement which contains terms about matters that do not pertain to the requisite relationship, and on the effect of certification of such an agreement. Even if such a term would be effective under the general law[133], a question would remain as to whether the parties would have agreed to the term if it did not have legal operation as a term in a certified agreement.

111 Accordingly, when characterised as a whole, the agreement must be an agreement about matters pertaining to the requisite relationship. It may not include discrete and substantive matters that do not so pertain.

3. Whether industrial action in support of a proposed (non-certifiable) agreement is "protected action"

112 If a proposed agreement containing a bargaining agent's fee clause cannot be certified under Div 2, is industrial action taken by a negotiating party during a bargaining period in support of such a proposed agreement "protected action" within the meaning of s 170ML(2) with the result that such action attracts the legal immunity conferred by s 170MT? In the present case, each Union was a negotiating party and the bargaining period was the period for negotiating the proposed agreement in question. To determine this issue, it is necessary to construe s 170ML(2) in the context in which it appears and in light of the objects and purposes of Pt VIB and the Act.

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131 Section 170LZ(1).

132 Sections 170LZ(2) and (3).

133 See *CFMEU* (2001) 203 CLR 645 at 658 [34].

113 Section 170ML(2)(e) protects action for the purpose of supporting or advancing claims made in respect of the "proposed agreement". The "proposed agreement" is identified in s 170MI(1) as that which the initiating party "wants to negotiate", being "an agreement under Division 2". It is the agreement proposed to be certified under Div 2 that is the subject of negotiations[134]. The reference in s 170ML(2) to "the proposed agreement" is a reference to an agreement of the nature identified in s 170LI. In the context of Pt VIB, the term "under" must be understood to mean meeting the requirements or specifications set out in Div 2. This conclusion is reinforced by s 170LH, which provides that Div 2 "sets out requirements that must be satisfied for applications to be made to the Commission to certify certain agreements" between the relevant parties. The stated requirements are those that must be met for a certification application to be made to the Commission. Accordingly, the "proposed agreement" identified in s 170ML(2) must be an agreement which would satisfy the requirements for the making of an application to the Commission for certification. Those requirements include the nature of the agreement that is mandated by s 170LI(1).

114 The protection conferred by s 170ML(2) operates if the following two criteria are satisfied:

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.

115 This construction is consistent with the objects and purposes of Pt VIB and the Act. Section 170L identifies the object of Pt VIB as facilitating the making and certifying by the Commission of certain agreements, such as certified agreements. The Part also has the purpose of protecting certain industrial action taken in support of claims made in respect of a proposed agreement during the bargaining period. However, the legal immunity conferred by ss 170ML and 170MT is confined to industrial action taken in furtherance of the stated statutory purpose. Hence, the protection and immunity do not extend beyond action in support of a proposed agreement that would satisfy the requirements of s 170LI.

116 The immunity has two important consequences:

1. the Commission cannot make an order under s 127 to stop or prevent the action[135]; and

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134 Section 170MI.

135 Section 170MT(1).

2. subject to certain exceptions[136], no action lies under any law – whether written or unwritten – in force in a State or Territory in respect of that action[137].

117 The "no action" immunity precludes not only actions sought to be brought by the negotiating parties, but also by any third parties who may be affected by and suffer actionable damage as a result of the protected action. Thus, by conferring specific immunity from civil liability, ss 170ML(2) and 170MT effectively abrogate the common law rights both of participants to the negotiations and of third parties who may suffer actionable damage as a result of such action.

118 A basic principle of statutory construction is the presumption that legislatures do not intend to abrogate or curtail fundamental common law rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language[138]. Another basic principle of statutory construction is that, in the absence of express words or necessary implication, courts presume that legislatures do not intend to deprive persons of access to the courts[139]. Given that modern Parliaments routinely enact laws which adversely affect or modify common law rights, the application of each presumption varies according to its context. In *Gifford v Strang Patrick Stevedoring Pty Ltd*[140] I said:

> "There is a presumption – admittedly weak these days – that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so. In *Malika Holdings Pty Ltd v Stretton*, however, I warned of the need for caution in applying this

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136 The immunity does not apply if the industrial action has involved or is likely to involve personal injury, wilful or reckless destruction of, or damage to, property or the unlawful taking, keeping or use of property: s 170MT(2). In addition, the immunity does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action: s 170MT(3).

137 Section 170MT(2).

138 See *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ.

139 See *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ; *Plaintiff S157/2002* (2003) 211 CLR 476 at 492-493 [32] per Gleeson CJ.

140 (2003) 214 CLR 269 at 284 [36].

> presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced." (footnotes omitted)

119 In the present case, the natural and ordinary meaning of the legislation evinces an intention to curtail the common law rights of negotiating parties and third parties who suffer actionable damage as a result of certain industrial action to take civil action against the person who took the industrial action. However, the curtailment is not absolute. The protection conferred by ss 170ML(2) and 170MT operates only if the action has the genuine purpose of supporting or advancing claims the subject of a proposed agreement *and* the nature of the proposed agreement satisfies the requirements of s 170LI.

120 Given these limiting conditions, the natural and ordinary meaning of s 170ML is consistent with the two presumptions of statutory construction to which I have referred. Indeed, those presumptions support the proposition that the scope of "protected action" is limited and that industrial action is only protected if it is in support of a claim in a proposed agreement that is capable of being certified under Div 2 of Pt VIB.

121 An honest and reasonable, but mistaken, belief that a proposed agreement satisfies the requirements of s 170LI is a mistake as to the operation of the Act. If a person takes industrial action in respect of such a proposed agreement, it does not assist the person who makes the mistake that he or she believed that the proposed agreement was one which fell within the meaning of Div 2 of Pt VIB and was capable of being certified under Div 4 of Pt VIB. The Act does not refer to a "purported" proposed agreement; nor does it refer to an "honest and reasonable, but mistaken, belief" that a proposed agreement under Div 2 is an agreement capable of certification under Div 4. On the contrary, the nature of the proposed agreement is expressed as an element of the protection conferred by s 170ML.

122 Accordingly, industrial action in support of a claim for the inclusion of a bargaining agent's fee clause in a proposed agreement that does not meet the requirements for certification "under Div 2" is not "protected action" within the meaning of s 170ML(2).

4. Whether the industrial action taken by the Unions in the present case amounted to a breach of s 170NC

123 If industrial action does not constitute "protected action" when taken in support of a proposed agreement that is not capable of certification as a "certified agreement" under Div 4, did the industrial action taken by the Unions in the present case breach s 170NC? Section 170NC prohibits coercion in respect of certified agreements but does not apply to protected action.

124 Section 170NC relevantly provides:

"(1) A person must not:

(a) take or threaten to take any industrial action or other action; or

(b) refrain or threaten to refrain from taking any action;

with intent to coerce another person to agree, or not to agree, to:

(c) making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3; or

(d) approving any of the things mentioned in paragraph (c).

(2) Subsection (1) does not apply to action, or industrial action, that is protected action (within the meaning of Division 8)."

125 In the present context, the following elements must exist for a contravention of s 170NC(1) to occur:

1. the taking of or threatening to take industrial action, or the refraining or threatening to refrain from taking any action;

2. with an intention to coerce another person to agree, or not to agree, to;

3. the making of;

4. an agreement under Div 2 of Pt VIB.

126 It is erroneous to construe the expression "an agreement under Division 2" in s 170NC(1)(c) as applying only in relation to an agreement that meets the requirements of Div 2 of Pt VIB and is an agreement that is capable of certification. If such a construction were accepted, s 170NC would not be contravened by the taking of industrial action by a person who has the intent to coerce another person to agree or not to agree to the making of an agreement that

was not capable of certification. Such a result would be anomalous. The Full Federal Court said it would be a lacuna in the law[141]:

> "Section 170NC points up the undesirability of narrowly reading s 170ML(2). We think counsel for the appellants are correct in submitting that, on their opponent's argument, there would be a lacuna in the operation of this section. If the making of a claim about a matter that did not pertain to the employment relationship was enough to take a proposed agreement outside the description 'an agreement under Division 2', coercive action in support of such a claim, that was undertaken outside a formal bargaining period, or without a valid s 170MO(2) notice, would not be a contravention of a 'penalty provision'. It would not attract a penalty under s 170NF or injunctive relief under s 170NG."

127 Although such a construction is possible on a literal reading of the section, it is inconsistent with the legislative objective of the section and the mischief at which the section is directed. The Explanatory Memorandum states that the section "prohibits coercion in relation to making, varying, extending or terminating an agreement [subsection (1)]. *An agreement does not have to be made or certified for this to apply*."[142] This indicates that the mischief at which the section is directed is the taking of industrial action with the intent to coerce another person to agree to (or not to agree to) a proposed Div 2 agreement. The fact that the agreement may not be capable of certification is not relevant: if an agreement does not have to be made or certified for s 170NC(1) to apply, the inference may be drawn that the section applies notwithstanding that the agreement is not capable of being certified. For the penalty provision to operate, it is sufficient if it can be shown that the person regards the proposed agreement as an agreement of the type which satisfies the requirements of s 170LI for an application for certification under Div 2 of Pt VIB. The requirement that the agreement actually be capable of certification is not a necessary element of the offence.

128 Accordingly, the industrial action in which the Unions engaged was not "protected action" within the meaning of s 170ML of the Act with the result that such action amounted to a contravention of s 170NC(1).

Order

129 Because the decision of Merkel J was correct, the appeals must be allowed. As a result, the orders of the Full Court of the Federal Court should be

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141 *AMWU* (2002) 118 FCR 177 at 195.

142 Explanatory Memorandum at 92 (emphasis added).

set aside. In their place should be substituted an order that the appeals to that Court be dismissed.

GUMMOW, HAYNE AND HEYDON JJ.

The certified agreement provisions

130 These appeals (which were heard together) concern the construction of provisions in Pt VIB (ss 170L-170NI) of the *Workplace Relations Act* 1996 (Cth) ("the Act")[143] relating to certified agreements and the inclusion therein of what have been called "bargaining service fees". Whilst in operation (and with some qualifications), agreements certified by the Australian Industrial Relations Commission ("the AIRC") prevail over inconsistent federal awards (s 170LY), and State laws, awards and employment agreements (s 170LZ). This emphasises the importance for industrial law of the certified agreement provisions of the Act.

131 The previous provisions made with respect to certified agreements and what then were called enterprise flexibility agreements by the *Industrial Relations Act* 1988 (Cth) ("the 1988 Act") were considered in the *Industrial Relations Act Case*[144].

132 The principal object of the Act, stated in s 3, is the provision of "a framework for cooperative workplace relations" by, among other things:

> "(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; and
>
> (c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act".

The term "employee" includes any person whose usual occupation is that of employee (s 4(1)).

133 Division 2 (ss 170LH-170LM) of Pt VIB deals with the requirements for applications for certification by the AIRC of agreements in writing "*about matters pertaining to the relationship*" between certain employees and an employer such as the appellant ("Electrolux"), which is a constitutional corporation (an expression defined in terms reflecting, but not limited to, those of

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143 The Act is in the form of Reprint 4.

144 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 533-542.

s 51(xx) of the Constitution). The construction of the phrase just emphasised (which appears in s 170LI) is critical for this case.

134 Division 3 (ss 170LN-170LS) of Pt VIB is headed "Making agreements about industrial disputes and industrial situations". The provisions of Div 3 are not of central importance for present purposes but in argument were compared with and contrasted to those of Div 2.

135 Division 4 (ss 170LT-170LW) sets out the powers and responsibilities of the AIRC in certifying the two species of agreement. There are requirements in s 170LU(1), (2) which apply only to Div 3 agreements. Division 5 (ss 170LX-170LZ) details the effect of certified agreements. Reference has been made above to the primacy given over inconsistent awards, State and federal, and State laws and employment agreements. Division 6 (ss 170M-170MB) identifies the persons bound by certified agreements. A certified Div 2 agreement binds all persons whose employment, at any time whilst the agreement is in operation, is subject to that agreement (s 170M(1)(b)).

136 Division 8 (ss 170MI-170NB) provides for the initiation by written notice of bargaining periods for the negotiation of proposed agreements and protects certain industrial action, taken after the giving of notice and during bargaining periods, against what otherwise would be actions lying at common law or State or Territory law. The present immunity provision (s 170MT) is in terms resembling those of s 170PM(3) of the 1988 Act. The validity of the provision was upheld in the *Industrial Relations Act Case*[145].

137 On one view of the case, that to which the parties directed much of their submissions, the ultimate issue is whether the immunity in respect of protected industrial action is attracted where a bone of contention between the parties is the inclusion in a proposed Div 2 agreement of a provision which is not about matters pertaining to the relationship between employer and employee. The "bargaining service fee", to the inclusion of which Electrolux objected, is said by it to be outside the particular class of matters. However, as will appear, the issues in this litigation cannot be resolved at that level of generality. Particular attention is required to various statutory provisions, notably those identified in the declaratory relief granted by the primary judge, s 170ML and s 170NC.

138 The Act since amendments made by the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* 2003 (Cth) ("the 2003 Act") now specifies as an "objectionable provision" a provision (however described) of a

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145 (1996) 187 CLR 416 at 558-560.

certified agreement that requires payment of a "bargaining services fee" (s 298Z(5)(b)). The AIRC now must refuse to certify an agreement that contains an objectionable provision (s 170LU(2A)). The AIRC is obliged to act in this way even if the application to it for certification was made before the commencement of the 2003 Act[146]. However, these appeals concern declarations made by the Federal Court in respect of the Act as it stood before the 2003 Act. If the appeals are upheld, one consequence thereof may be to confirm that the changes made by the 2003 Act with respect to bargaining service fees reflected what, upon its true construction, already was the operation of the Act.

The facts

139 Electrolux is a corporation which manufactures whitegoods under the brand names "Westinghouse", "Simpson", "Chef" and "Kelvinator". It is a party to the Email National Manufacturing Agreement 1999 ("the 1999 Agreement") which was certified by the AIRC under the provisions of Pt VIB of the Act. The first, second and third respondents ("the AWU", "the AMWU" and "the CEPU" respectively) are organisations of employees who are registered pursuant to the Act and are collectively referred to as "the Unions". They are parties to the 1999 Agreement. The individuals who are the fourth, fifth and sixth respondents are officers respectively of the CEPU, the AWU and the AMWU. The eighth respondent ("the Minister") was added as a party by order of this Court in conformity with s 471 of the Act, and made submissions in support of the appeal.

140 The 1999 Agreement had a nominal expiry date of 30 June 2001 but, pursuant to s 170LX of the Act, did not cease to be in operation at the time of the events giving rise to this litigation. In April 2001, the parties to the 1999 Agreement commenced discussions for the conclusion of a new certified agreement and the negotiations continued until September 2001. Notices were given under s 170MI to initiate bargaining periods for the negotiation of a proposed Div 2 agreement. In the course of those negotiations, the AMWU presented a draft on its behalf and that of the other unions. The document included as cl 46, the following provisions under the heading "Bargaining Agents Fee":

> "46.1 The company shall advise employees prior to commencing work for the company that a 'Bargaining Agents' fee of $500.00 per annum is payable to the union.

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146 Sched 1, Pt 2, Item 13.

> 46.2 The relevant employee to which this clause shall apply shall pay the 'Bargaining Agents fee' to the union in advance ... on a pro rata basis for any time which the employee is employed by the company. By arrangement with the union this can be done in quarterly instalments throughout the year.
>
> 46.3 The employer will, at the request of the employee to whom this clause applies, provide a direct debit facility to pay the bargaining agents fee to the union."

141 The apparent rationale of such a fee was said in argument in this Court to include the fairness in contributions by non-union members to the Unions securing benefits which, as s 170M recognises, are enjoyed by all employees and the differential net wage receipts that otherwise would apply between those employees who pay and those who do not pay union dues. In the course of the negotiations, Electrolux made it clear that it would not negotiate about bargaining agents fees in any form.

The litigation

142 Following the issue of notices under s 170MO of the Act of their intention to take industrial action, the Unions threatened and purported to take industrial action allegedly protected under the Act in support of their claims concerning the terms of the proposed agreement. The term "industrial action" is the subject of a detailed definition in s 4(1) of the Act but nothing immediately turns upon those details for present purposes. However, the Unions contended, and Electrolux denied, that this industrial action was protected by the provisions of Div 8. Litigation was commenced by Electrolux in the Federal Court on 17 September 2001.

143 Section 412 of the Act confers jurisdiction on the Federal Court with respect to matters arising under the Act in relation to which applications may be made to it under that statute. The Federal Court (Merkel J)[147] granted declaratory relief in similar terms against each of the Unions. The declarations referred to the industrial action by the Unions on designated dates in September 2001 and to the notices previously issued by them and declared that the action:

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147 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600; [2001] FCA 1840.

"(a) was not protected action within the terms of s 170ML of the [Act]; and

(b) breached s 170NC(1) of that Act."

Section 170ML(2) classifies as "protected action" activity identified as follows:

"During *the bargaining period*:

(a) an organisation of employees that is a negotiating party; or

(b) a member of such an organisation who is employed by the employer; or

(c) an officer or employee of such an organisation acting in that capacity; or

(d) an employee who is a negotiating party;

is entitled, *for the purpose of*:

(e) *supporting or advancing claims made in respect of the proposed agreement*; or

(f) responding to a lockout by the employer of employees whose employment will be subject to the 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, that industrial action is protected action." (emphasis added)

144 The reference in s 170ML(2) to "the bargaining period" directs attention to s 170MI(1). This states:

"If:

(a) an employer; or

(b) an organisation of employees; or

(c) an employee acting on his or her own behalf and on behalf of other employees;

wants to negotiate an agreement under Division 2 or 3 in relation to employees who are employed in a single business or a part of a single

business, the employer, organisation or employee (the ***initiating party***) may initiate a period (the ***bargaining period***) for negotiating the proposed agreement."

145 Section 170NC, the other provision to which the declarations were directed, comprises the whole of Div 9 of Pt VIB. The Division is headed "Prohibition of coercion in relation to agreements". Section 170NC(1), the primary provision, does not apply to protected action within the meaning of Div 8. Sub-section (2) of s 170NC so provides. Accordingly, if the Unions be correct that the industrial action was for the purpose of advancing their claims made in respect of the proposed Div 2 agreement, within the meaning of s 170ML(2)(e), then s 170NC could have no application.

146 Sub-sections (1) and (2) of s 170NC state:

"(1) A person must not:

(a) take or threaten to take any industrial action or other action; or

(b) refrain or threaten to refrain from taking any action;

with intent to coerce another person to agree, or not to agree, to:

(c) making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3; or

(d) approving any of the things mentioned in paragraph (c).

(2) Subsection (1) does not apply to action, or industrial action, that is protected action (within the meaning of Division 8)."

Section 170NC is a "penalty provision" for the enforcement provisions of Div 10 (ss 170ND-170NH), but contravention of s 170NC is not an offence (s 170NF(1)). An injunction may be granted to restrain contravention of a penalty provision (s 170NG). No relief was given by Merkel J under Div 10; rather, reliance was placed upon the declaratory remedy provided by the general terms of s 21 of the *Federal Court of Australia Act* 1976 (Cth).

The Full Court

147 The declarations made by Merkel J were set aside by the Full Court of the Federal Court (Wilcox, Branson and Marshall JJ)[148]. The Full Court had before it three appeals, the principal appellant in each of which was respectively the AWU, the AMWU and the CEPU. Electrolux then took, by special leave, three appeals to this Court, seeking the reinstatement of the relief granted by Merkel J.

148 The Full Court doubted, but did not find it necessary to decide, the correctness of two propositions advanced by Electrolux. These their Honours identified as follows[149]:

> "[F]irst, that each individual term of an agreement presented to the [AIRC] for certification must concern matters pertaining to the relationship between the employer and the employer's employees from time to time; and, second, that a term along the lines of the [Unions'] bargaining fee claim would not concern such a matter."

The Full Court decided that, even if Electrolux be correct in these respects, the industrial action necessarily was protected by s 170ML(2). This was because, in terms of that sub-section, the action was "for the purpose of: (e) supporting or advancing claims made in respect of the proposed agreement". The reasoning of the Full Court may be seen in two passages. The first is[150]:

> "Electrolux does not suggest the industrial action organised by the Unions in September 2001 was organised otherwise than for the support or advancement of the claims they were making against the company, including the bargaining fee claim. And Electrolux accepts that all the claims were genuinely made, in the sense that the Unions genuinely wished the substance of these claims to be included, in some form or other, in one or more certified agreements with the company. That being so, it seems to us the purpose of the industrial action clearly fell within the terms of par (e) of s 170ML(2); it does not matter whether or not the insertion of a provision along the lines of the bargaining fee claim would give rise to a certification difficulty under s 170LI(1)."

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148 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177.

149 (2002) 118 FCR 177 at 196.

150 (2002) 118 FCR 177 at 195.

The reference to "a certification difficulty under s 170LI(1)", as will appear, indicates misunderstanding of the interrelation between the provisions mentioned. The above passage was preceded by the other passage[151]:

> "Provided the claims are genuinely made, it does not matter that others may think them unrealistic. In the industrial relations area, as in other spheres of life, extravagant claims are often made. Mostly, an extravagant claim is unsuccessful; but sometimes it is conceded, perhaps in a modified form.
>
> There are sound policy reasons for reading par (e) literally. *Fundamental to Pt VIB of the Act is the notion that, within strict and objectively definable limits, organisations, employees and employers are entitled to engage in industrial warfare.*" (emphasis added)

The scope and purpose of Pt VIB

149 The reference by the Full Court to engagement in industrial warfare is to be deprecated. Insofar as Pt VIB (particularly Div 3) is supported by the power conferred by s 51(xxxv) of the Constitution, the constitutional purpose in terms is the prevention and settlement of certain industrial disputes by means of conciliation and arbitration. The power with respect to trading and financial corporations (important for Div 2 agreements) is differently cast. But the evident purpose of Pt VIB as a whole is to further the objective stated in s 3 of the Act of providing "a framework for cooperative workplace relations" by enabling employers and employees "to choose the most appropriate form of agreement for their particular circumstances".

150 It is to that end that Div 8 specifies the steps necessary for the initiation of a bargaining period for the negotiation of a Div 2 or Div 3 agreement, and confers certain legal immunity on protected action during the bargaining period. The legislatively favoured objective of a certified agreement has been taken by the Parliament to justify the conferral of the immunity at the expense of loss or injury suffered by parties to the negotiation in the bargaining period and third parties.

Construction of s 170ML

151 With these matters in mind, it is convenient to turn to the first declaration made by the primary judge, that the industrial action by the Unions was not

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151 (2002) 118 FCR 177 at 195.

protected action within the terms of s 170ML. Paragraph (e) of s 170ML(2) identifies the purpose of advancing or supporting particular claims, namely those made "in respect of" what is "the proposed agreement". Claims made for the inclusion of particular terms therein are made "in respect of" the proposed agreement. But what is conveyed by the phrase "the proposed agreement"?

152 The "proposed agreement" is identified in s 170MI(1) as that which the initiating party, in this case the Unions, "wants to negotiate", being "an agreement under Division 2 or 3". What then for the present case is indicated by the phrase "an agreement under Division 2"? The term "under" is employed in the sense of meeting the specifications laid down in Div 2. That usage is consistent with the terms of the first provision in Div 2, s 170LH. That states:

> "This Division sets out requirements that must be satisfied for applications to be made to the [AIRC] to certify certain agreements between employers who are constitutional corporations or the Commonwealth and:
>
> (a) organisations of employees; or
>
> (b) employees."

The requirements are those to be met for a certification application to the AIRC. If the application be in order then the exercise by the AIRC of its power (or duty) of certification of a Div 2 agreement, which is provided in Div 4 (ss 170LT-170LW), is enlivened. It is true that one of the provisions in Div 4, namely s 170LV, empowers the AIRC to certify an agreement in respect of which it has grounds to refuse certification if undertakings are accepted as to the operation of the agreement. But otherwise the power or duty of certification may be exercised only if the requirements of s 170LT are met. That section specifies two matters which the agreement must include. One is procedures for the promotion and settlement of disputes about matters arising under the agreement (s 170LT(8)). The other (in s 170LT(10)) is the specification of a nominal expiry date for s 170LX(2).

153 The AIRC is obliged to refuse certification if the agreement contains certain provisions. The proscribed categories include provisions permitting or requiring conduct that would contravene, in some respects, Pt XA (dealing with freedom of association) (s 170LU(2A)), and provisions discriminating in certain respects against an employee whose employment will be subject to the agreement (s 170LU(5), (6)). Section 170LU thus distinguishes between the agreement as a whole, which may or may not be certified, and particular provisions thereof. It is drafted in a way which is in contrast with s 170LI, the critical provision for this case. The text of s 170LI is set out below.

154 What is of further importance is that these requirements of inclusion and exclusion of provisions for the discharge by the AIRC of its certification function are with respect to subject-matters which pertain to the relationship between employer and employee. Those provisions answer the jurisdictional requirements of s 170LI as to the nature of the agreement put before the AIRC. But that is not the end of the matter because the provisions are then to be dealt with by the AIRC as the Act requires. If provisions are included but objectionable, then an agreement with those provisions may not be certified. Its efficacy will be no more than that given it by the general law[152].

155 The exercise by the AIRC of its authority under Div 4 to certify is conditioned upon satisfaction of s 170LI. That appears from the terms of s 170LI(1). This states:

> "For an application to be made to the [AIRC] under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:
>
> (a) an employer who is a constitutional corporation or the Commonwealth; and
>
> (b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement."

The phrase "about matters pertaining to the relationship between" also appears in s 5AA(2), (3). These give additional operation to Div 2 in circumstances reflecting legislative reliance on the Territories power (s 5AA(2)), and the commerce power and the Territories power (s 5AA(3)).

156 In the present case, "the proposed agreement" identified in s 170ML(2) is not simply that which the Unions wished to negotiate. There must be an agreement which would, as indicated in s 170LH, satisfy the requirements for the making of an application to the AIRC for certification. Those requirements, to attract the jurisdiction or authority of the AIRC, include the nature of the agreement mandated by s 170LI(1). Hence the critical nature for this case of the phrase "about matters pertaining to the relationship" between Electrolux and its employees whose employment is subject to the proferred agreement.

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152 cf *Ryan v Textile Clothing & Footwear Union of Australia* [1996] 2 VR 235.

"Matters pertaining"

157 This phrase has a long history in the industrial relations law of this country, and in the decisions of this Court, including *Australian Tramway Employés Association v Prahan and Malvern Tramway Trust*[153]; *R v Portus; Ex parte ANZ Banking Group Ltd*[154]; and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[155]. All of these decisions predate the enactment of Pt VIB of the Act.

158 It is true that the definition of "Industrial matters" in s 4(1) of the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act"), which stated that the defined term:

> "means all matters pertaining to the relations of employers and employees",

was a cognate definition to that of "Industrial dispute" and this was so drawn as to reflect reliance by the Parliament on the head of power in s 51(xxxv) of the Constitution. The provisions of Pt VIB respecting Div 2 agreements are not so based. However, in the judgment of the whole Court in *Alcan*, their Honours said[156]:

> "The question is not one involving s 51(xxxv); it is simply a question of the meaning of the definition of 'industrial dispute' in s 4(1). And although there are some minor differences between that definition and the relevant definitions previously found in [the 1904 Act], the requisite nature of the subject matter of a dispute remains precisely the same, namely, that it pertain to the employment relationship involving employers, as such, and employees, as such."

159 Earlier, in *Portus*, the Court had held that a demand by a union that an employer make deductions and payments from salaries due and payable to its employees in accordance with authorities provided by them did not affect the industrial relationship of employers and employees. Walsh J said[157]:

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153 (1913) 17 CLR 680.

154 (1972) 127 CLR 353.

155 (1994) 181 CLR 96.

156 (1994) 181 CLR 96 at 105.

157 (1972) 127 CLR 353 at 364.

> "The payment of subscriptions is a matter pertaining to the relationship between the employees and their union. In my opinion it is not a matter with which the employer, as such, has any concern and it does not become an 'industrial matter' merely because the association makes a demand upon the employers to which they are not willing to accede."

Stephen J, after observing that the present demand was sought to be attached to the regular cycles of work and payment therefor, continued[158]:

> "If, in the existing circumstances of employment, it was demanded of the employer that it accept back from employees a part of the remuneration paid, retain it for a period of time and then pay it over to a third party, the association, such a demand would be seeking to create a new, distinct relationship between the employer and its employees, having no connexion with the pre-existing employer-employee relationship. The fact that the present demand is made to operate at a slightly earlier stage, before salary is in fact paid over to employees, thereby obviating one step in the imaginary demand I have postulated, that of the acceptance of money back from employees, does not appear to me to convert a transaction foreign to the relationship of employer and employee into one which pertains to that relationship."

160 In *Alcan*, the Court held that a demand made by a union that an employer deduct union dues from the wages of its employees and remit the deductions to the union did not pertain to the relationship between employer and employees. The Court emphasised[159] that a dispute as to the deduction of union dues pertained to a relationship involving "employees as union members and not at all as employees".

161 That reasoning is applicable to the phrase "about matters pertaining to the relationship between" the employers and employees identified in s 170LI. Moreover, there are the powerful considerations which were adverted to in *Alcan* when dealing with the significance to be attached to *Portus* in the light of supervening legislation and judicial decisions. Their Honours in *Alcan* referred to two matters telling against reconsideration of *Portus* as follows[160]:

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158 (1972) 127 CLR 353 at 372.

159 (1994) 181 CLR 96 at 107.

160 (1994) 181 CLR 96 at 106.

> "The first is that the principle on which it proceeds, namely, that for a matter to 'pertain to the relations of employers and employees' it must affect them in their capacity as such, has been accepted as correct in a number of subsequent cases[161], with no question ever arising as to whether the principle was correctly applied in the case. The second is that Parliament re-enacted, in s 4(1) of the [1988] Act, words which are almost identical with those considered in *R v Portus*."

162 The phrase "about matters pertaining to the relationship" appears not only in s 170LI and with respect to Div 2 agreements. The provisions respecting Div 3 agreements (in particular s 170LN) draw in the definition of "industrial dispute" in s 4(1). This still contains the phrase "about matters pertaining to the relationship between employers and employees". The inference that, in this respect, Div 2 and Div 3 share a basic precept is very strong, and the weight of authority construing the definition of industrial dispute is considerable. The field of industrial relations legislation in Australia is not one where the Parliament may readily be taken to have legislated without awareness of the interpretation placed by this Court on pivotal definitions[162]. Nor can it be said that to apply to the terms of Div 2 (and Div 3) the reasoning in *Portus* and *Alcan* is merely to perpetuate an erroneous construction[163].

163 Finally, the phrase in question contains no words of severance to permit a distributive operation. The text does not read "including or containing matters pertaining". Yet, to succeed, the submissions for the Unions must have it so and displace the qualifier "about" by such an explanation. The word "about" by itself does not perform that work.

Conclusions respecting s 170ML

164 The chain of provisions in Pt VIB, from the phrase "wants to negotiate an agreement under Division 2" in s 170MI(1) to the requirements of Div 2 (in

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161 See, eg, in relation to *R v Portus*: *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153 at 162, 163-164; *Federated Clerks' Union (Aust) v Victorian Employers' Federation* (1984) 154 CLR 472 at 482, 488; *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 352-353. See also *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 at 363 and the cases there cited.

162 cf *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 328-329.

163 cf *Flaherty v Girgis* (1987) 162 CLR 574 at 594.

s 170LH and s 170LI) for the making of certification applications to the AIRC, produces the result that the protected action afforded by s 170ML will not exist where the agreement the initiating party seeks to negotiate is not of a nature that meets the criterion in s 170LI that it be about matters pertaining to the relationship between employer and employees. The reference by the Full Court[164] to "a certification difficulty under s 170LI(1)" as something beside the point thus misconceived the point.

165 The reasoning why, on that footing, the proposed agreement in question here failed that criterion appears sufficiently in the following passage in the judgment of Merkel J[165]:

> "The claim [in respect of the bargaining agents fee], implicitly if not explicitly, is that Electrolux is to act as the [Unions'] agent in entering into a contract with new employees which *requires* the employees, who are not union members, to employ the [U]nions as their bargaining agent to reflect the [U]nions' service in negotiating agreements with Electrolux under the Act.
>
> The relationship between the employer and the employee that would be created were the claim acceded to is, essentially, one of agency; Electrolux is to contract with its employees on behalf of the relevant union, as its agent. The agency so created is for the benefit of the union, rather than for the benefit of the employee upon whom the contractual liability is to be involuntarily imposed. The resulting involuntary 'bargaining' agency is, as a matter of substance, if not form, a 'no free ride for non-unionists' claim, rather than one by which the union is undertaking its traditional role of representing the interests of union members in respect of the terms of employment of employees. Although the claim was argued as if it were a claim for future services, it may also be characterised as a claim for payment for the [U]nions' services in securing the new employee's terms and conditions of employment in the proposed certified agreement, notwithstanding that the new employee will only have commenced employment after the date of the agreement." (original emphasis)

166 It follows that the declaration as to contravention of s 170ML was properly made.

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164 (2002) 118 FCR 177 at 195.

165 [2001] FCA 1600 at [40]-[41].

Conclusions respecting s 170NC

167 There remains for consideration the declaration respecting s 170NC(1). The denial to the industrial action in question of the character of protected actions under s 170ML(2) removes the barrier to the operation of the section imposed by s 170NC(2). But, that being allowed, was there a contravention of the terms of s 170NC(1)?

168 In that respect, the Full Court gave to this provision a construction which it said supported the reading of s 170ML(2) urged by the Unions. Their Honours said[166]:

> "Section 170NC points up the undesirability of narrowly reading s 170ML(2). We think counsel for [the Unions] are correct in submitting that, on their opponent's argument, there would be a lacuna in the operation of this section. If the making of a claim about a matter that did not pertain to the employment relationship was enough to take a proposed agreement outside the description 'an agreement under Division 2', coercive action in support of such a claim, that was undertaken outside a formal bargaining period, or without a valid s 170MO(2) notice, would not be a contravention of a 'penalty provision'. It would not attract a penalty under s 170NF or injunctive relief under s 170NG."

169 There is no lacuna of the nature identified by the Full Court. Section 170NC(1) falls into two parts. The first forbids the taking or threatening to take action, whether industrial action or otherwise, and forbids the refraining or threatening to refrain from taking any action. The second part is governed by the phrase "with intent"; the text, as a whole, identifies the mental element with which the person takes or refrains from the action indicated in the first part of the sub-section. In the Federal Court, differing views have been expressed as to what is involved in proving the presence of the necessary intent for s 170NC[167], but it is unnecessary for this appeal to discuss them.

170 An intention to coerce another to agree (or not to agree) to the making of what the actor regards as an agreement of the nature required by s 170LI for an application for certification of a Div 2 agreement will meet the criterion specified

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166 (2002) 118 FCR 177 at 195.

167 See *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 at 386-388.

in the second part of s 170NC(1). If the action identified in the first part of that provision meets the requirements for it to be protected action for Div 8, then s 170NC(2) takes the action outside s 170NC(1).

171 If the action not be protected action, because, for example, of failure to comply with the notice provisions, then s 170NC(1) may apply even though the proposed agreement is otherwise of the nature required for Div 2 agreements by s 170LI. If the proposed agreement, as is this case, does not have that requisite nature, then s 170NC(1) may apply, if there be the necessary intent described above. The declaration respecting contravention of this provision was properly made.

Orders

172 The appeals should be allowed, the orders made by the Full Court of the Federal Court on 21 June 2002 set aside and in place thereof it should be ordered that each of the appeals to the Full Court Nos S6/2002, S11/2002 and N18/2002 be dismissed. There should be no order for costs in this Court or the Full Court.

173 KIRBY J. These three appeals from orders of the Full Court of the Federal Court of Australia[168], setting aside declarations made in that Court at first instance by Merkel J[169], concern primarily the meaning and operation of provisions of the *Workplace Relations Act* 1996 (Cth) ("the Act") relating to "protected action" on the part of industrial organisations of employees under the Act.

174 As a secondary issue, the appeals concern whether an agreement propounded by the respondent Unions[170], presented to the Australian Industrial Relations Commission ("the Commission"), was certifiable under the Act, on the basis that it contained terms[171] "about matters pertaining to the relationship between ... an employer ... and ... all persons who, at any time, are employed in a single business ... of the employer and whose employment is subject to the agreement." Because all three appeals involve a consideration of the same points, they were heard together in this Court.

175 The facts giving rise to the dispute between the Unions and the appellant, Electrolux Home Products Pty Ltd ("Electrolux"), are set out in other reasons[172]. So are the applicable provisions of the Act[173] and of earlier federal legislation on the relevant powers of the Commission and its predecessor[174]. Also set out there are the details of the history of the dispute between the parties and of their litigation[175] and extracts from the respective reasons of the primary judge[176] and

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168 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 (Wilcox, Branson and Marshall JJ).

169 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600; [2001] FCA 1840.

170 The same short descriptions are adopted as in the reasons of Gummow, Hayne and Heydon JJ ("joint reasons").

171 The Act, s 170LI(1). See joint reasons at [155].

172 Reasons of McHugh J at [32]-[39]; joint reasons at [139]-[141]; reasons of Callinan J at [225]-[230].

173 Reasons of Gleeson CJ at [12]; reasons of McHugh J at [40]-[52]; joint reasons at [130]-[138]; reasons of Callinan J at [236]-[239].

174 Joint reasons at [152]-[156].

175 Reasons of McHugh J at [34]-[39]; joint reasons at [142]-[148]; reasons of Callinan J at [225]-[230].

of the Full Court[177]. The reader of these reasons will not want these details repeated for a fourth time.

176 It will be necessary to refer in a little more detail to the reasons of the Full Court in order to understand the considerations that led that Court to its conclusions, different from those of the primary judge. However, it is unnecessary to repeat any of the foregoing material. Incorporating it by reference in these reasons allows me to go directly to the essential points that need to be decided. In my view, the Full Court was correct in respect of each of them. The appeals to this Court should be dismissed.

The Unions' industrial action was within s 170ML(2)(e)

177 *The context of this dispute*: The first issue is whether the Unions' industrial action in September 2001 was "protected action" within s 170ML(2) of the Act. In April 2001 the Unions had commenced discussions with Electrolux concerning a new agreement which the Unions proposed should be certified by the Commission under the Act. Those discussions were not fruitful. This led, in September 2001, to the Unions' notifying Electrolux of their intention to commence industrial action in support of their claims. The Unions clearly intended, and contemplated, that such industrial action would be "protected action" within the meaning of s 170ML of the Act. Industrial action was thereafter taken by the Unions, purportedly in reliance upon their notice and their claim to protection in accordance with the terms of the Act. The primary judge and the Full Court accepted that the Unions' claims (and by inference the proposed agreement) were genuine in the relevant sense[178].

178 On the face of things, therefore, the Unions undertook the industrial action "for the purpose of supporting or advancing claims made in respect of the proposed agreement"[179], namely the agreement propounded by the Unions to Electrolux. However, the latter contended that the industrial action was not "protected" because it argued that a term of the proposed agreement, presented by the Unions to Electrolux, for what was described as a "Bargaining Agent's

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176 Joint reasons at [165]; reasons of Callinan J at [233]-[234].

177 Joint reasons at [147]-[148] citing *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177.

178 cf *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 190-191; *Attorney-General (Q) v Riordan* (1997) 192 CLR 1 at 45, 60.

179 The Act, s 170ML(2).

Fee"[180] ("the Fee"), contaminated the "proposed agreement" and took it outside the Act.

179 The Fee was intended to be applicable to each future employee of Electrolux who was not a member of an applicable union. According to Electrolux, the inclusion of the demand for the Fee took the "proposed agreement" outside the protection otherwise afforded to the Unions by s 170ML of the Act. It meant that the "proposed agreement" was not about a matter pertaining to the relationship between Electrolux and its employees. Accordingly, the inclusion of the term in the proposed agreement meant that the "proposed agreement" did not satisfy the requirements of s 170LI of the Act, was not capable of being certified and therefore was not a "proposed agreement" of the kind that attracted the protection to which s 170ML(2)(e) of the Act referred.

180 According to Electrolux, it followed that the industrial action taken by the Unions, purportedly in respect of the "proposed agreement", was not "protected" industrial action. In law, it was unprotected. On that footing the declaration to such effect made by the primary judge (or other appropriate remedies) were available to Electrolux to give effect to that conclusion. Electrolux could, as it purported to do, refuse to negotiate on the "proposed agreement". The industrial action of the Unions, being outside of the Act's protection, was unlawful. The Unions, by inference, were liable to Electrolux accordingly.

181 The other members of this Court find these arguments persuasive. I do not. I will shortly say why.

182 *A purposive interpretation*: First, as in the interpretation of any legislation, including federal legislation, it is important to give meaning to the contested provision so as to give effect to the implied purpose of the Parliament derived from the language in which it has expressed that purpose.

183 The context states, or suggests, the first purpose. This was to restore the capacity of employees and employers, with or without the interposition of arbitrated awards, freely to negotiate employment conditions to govern employment relationships. They were to be able to do so largely on an enterprise basis, without all of the constraints of arbitrated industry-wide awards that had been such a feature of the regulation of Australian industrial conditions virtually from federation and until recent years[181].

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180 See the terms of this provision of the proposed agreement set out in the joint reasons at [140].

181 Until the amendments to the *Industrial Relations Act* 1988 (Cth) inserted by the *Industrial Relations Reform Act* 1993 (Cth) incorporating Pt VIB ("Promoting Bargaining and Facilitating Agreements") in its original form. Further amendments

(Footnote continues on next page)

184 Much was made in argument of the use in the Full Court's reasons of the entitlement of organisations, employees and employers to engage in *industrial warfare* within strict and objectively definable limits. That expression is to be deprecated[182]. A better phrase might have been chosen, certainly one less provocative to the faint-hearted who recoil from the playing out of market forces in economic conflict at an enterprise level untamed, as in the recent past, by the interposition of representative bodies of employers and employees and the processes of dialogue, rational argument and formal decision-making by the Commission and its predecessors.

185 However, the purposes of the new arrangements, inserted by Pt VIB of the Act, undoubtedly included a restoration of economic bargaining in which raw economic power at an enterprise level will, in some cases at least, replace the previous procedures of compulsory arbitration. This fact, and the apparent purposes of Pt VIB of the Act, make it correct, as the Full Court remarked, to say as North J did in *Australian Paper Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[183]:

> "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."

186 This is the starting point for the understanding of s 170ML(2) of the Act and the ascertainment of its meaning. The sub-section is to be construed in a context of a revival of robust enterprise bargaining, initiated by demands on employers, including by industrial organisations of employees on behalf of employees.

187 *Avoiding disproportionate interpretations*: Secondly, the provisions of Pt VIB of the Act, in which s 170ML appears, are written to introduce a significantly new industrial relations regime. The Act, and even the words of the critical section[184], pick up language with a long history and repeat its words in

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were inserted by the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth).

182 Joint reasons at [148].

183 (1998) 81 IR 15 at 18. See also the terms of s 3 of the Act and the objectives there set out, contained in the joint reasons at [132].

184 cf joint reasons at [157]-[158] with reference to the definition of "industrial matters" in s 4(1) of the *Conciliation and Arbitration Act* 1904 (Cth).

this new context. It should not, therefore, be entirely surprising that the Act would contemplate, in an Australian industrial relations setting, that a "proposed agreement" would, or might, include claims for terms that exceed the more sober expectations of the party making such claims.

188 This has been a feature of proposals for industrial benefits since virtually the earliest days of federal legislative participation in industrial relations regulation. For constitutional reasons, it gave rise to the "log of claims" procedures and ambit claims[185]. But even placing that peculiar feature of the award system to one side in the new context of the Act, the very nature of industrial or employment bargaining, aiming to reach an "agreement" about employment conditions, contemplates (and virtually demands) that one side will make claims for industrial conditions that it may, or may not, expect to secure. Thus benefits may be sought by unions that may be watered down, modified or deleted as the negotiations proceed. This is part and parcel of the reality of employment bargaining, as of other forms of negotiation. It is unsurprising that it should exist in the contemporary Australian industrial relations context.

189 Realism on the part of this Court requires it to face this reality. It suggests that it would be odd in the extreme that the mere inclusion in a "proposed agreement", propounded by a union to an employer, of a clause that was excessive to the more modest expectations (or that might even be outside the ambit of those that would, or could, later be certified by the Commission) would deprive the entire "proposed agreement" and the industrial organisation propounding it of protection from unlawfulness in the statutory scheme introduced by Pt VIB of the Act. That would be such a disproportionate and excessive consequence that it naturally sends the rational mind looking for another interpretation of s 170ML, if such be available in the language of the section[186].

190 *The practical needs of industrial negotiations*: Thirdly, the search for a rational and practical meaning to the language of the Act is made the more urgent by the dramatic consequences of denying protection to a union for industrial action taken following a "proposed agreement" as provided by the Act. The union might scrupulously go through all of the formalities contemplated by the Act: preparation and service within time of the "proposed agreement"; genuine negotiation; recognition of the failure of negotiations; notice to the employer of intended industrial actions and so forth. Yet all such precautions could be set at

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185 *Attorney-General (Q) v Riordan* (1997) 192 CLR 1 at 37-46.

186 Rational decision-making is a characteristic normally to be attributed to the legal process: *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1619-1621 [116]-[126]; 200 ALR 447 at 477-479.

nought by a subsequent judicial declaration, perhaps months or even years later in contested legal procedings (such as the present), to the effect that a particular clause (possibly minor) fell outside the permissible subjects of an entirely separate and later process committed to others – namely certification of the "proposed agreement" by the Commission. As the Full Court correctly said, "a high degree of certainty is essential"[187] as to whether industrial action can be taken lawfully and is protected or not protected. Their Honours went on, in words that I would endorse[188]:

> "If parties are to make rational and confident decisions about their courses of conduct, they need to know where they stand. It would be inimical to the intended operation of Pt VIB to interpret s 170ML(2)(e) in such a way as to make the question whether particular industrial action is 'protected action', and therefore immune from legal liability, depend upon a conclusion concerning a technical matter of law: whether a particular claim, if conceded, would cause any resultant agreement to fall outside s 170LI(1). As this case demonstrates, that may be a matter about which well-informed people have different views."

191 The present point has even more telling persuasiveness in this Court. In this case the industrial action was taken as long ago as September 2001. By the time this Court's decision is announced, three years will have expired before the issue is finally determined with reference to this particular "proposed agreement". This Court should remember that industrial disputes often involve highly dramatic and urgent matters. The Parliament, at least, is to be taken to know that. The history of this country, going back to inter-colonial conflicts that first led to the inclusion in the Constitution of a relevant head of legislative power in respect of individual conciliation and arbitration, grew out of the recognition that, in this field, time is often of the essence. In construing Pt VIB of the Act, this Court should therefore prefer a construction that gives effect to that awareness; not one that inflicts delay, uncertainty and inordinate risk upon the industrial process.

192 *Realistic liability of industrial negotiations*: Fourthly, the importance of securing protection against civil liability is not a minor matter. In the past, it might have been contemplated that institutional liability on the part of organisations of employees for unprotected industrial action might not be enforced. Such could not be assumed in current industrial circumstances. The

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187 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 at 195 [93].

188 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 at 195 [93].

provision of legal protection against liability for such industrial action is now a highly practical and important consideration for individual organisations, especially one might say for an organisation of employees that is party to negotiations under the Act[189]. The Parliament would also have known this fact. It can be assumed that the Act was drafted on the basis of this reality.

193 To expose an industrial organisation of employees to grave, even crippling, civil liability for industrial action, determined years later to have been "unprotected", is to introduce a serious chilling effect into the negotiations that such organisations can undertake on behalf of their members. It would be a chilling effect inimical to the process of collective bargaining, including by such organisations on behalf of their members, as contemplated by the Act. These features of the industrial realities, against the background of which the scope of "protected action" is to be defined in accordance with the Act, lend support to the construction of the Act preferred by the Full Court. At least without very clear language – much clearer than appears in the Act – I would, like the Full Court, not be persuaded to interpret the Act so as to narrow the scope of legal protection for the bargaining actions of such organisations. At least, I would require very clear statutory language to drive me to such an artificial, inconvenient, unrealistic and potentially discriminatory result.

194 *The generality of words of the Act*: Fifthly, the text of the Act itself must be analysed. I will set out the relevant provisions of s 170ML(2) with the appropriate emphasis to permit my point to be made more clearly:

> "During the bargaining period:
>
> (a) an organisation of employees that is a negotiating party;
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> …
>
> is entitled, *for the purpose of*:
>
> (e) supporting or advancing claims made *in respect of the proposed agreement*;
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> …
>
> to organise or engage in industrial action directly against the employer and, if the organisation … does so … that industrial action is *protected action*."

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189 The Act, s 170ML(2).

Most of the qualifying requirements necessary to render the Unions' industrial action in the present case a "protected action" are unquestionably established. The critical words that require attention concern whether the action is "for the purpose of … supporting or advancing claims made in respect of the proposed agreement."

195 The very generality of the words of connection ("for the purpose of" and "in respect of") support an interpretation of s 170ML(2) that would read the sub-section in a broad way and not narrowly. The sub-section does not provide explicitly for a loss of protection if there is later found a disqualifying demand in the "proposed agreement". Still less does it restrict the protection provided to a case where the industrial action is taken in order to enforce each and every demand made in the "proposed agreement". On the contrary, the words of connection oblige the reader to characterise the general nature of the industrial action – its purpose and what it is done "in respect of". In accordance with the terms of s 170ML(2), this necessitates characterising the industrial action as a whole. The context reinforces such a reading.

196 In my view, it is a serious mistake of interpretation to read the scope of the protection offered by the Act in the way favoured by the majority in this Court. Not only is that an impractical and narrow construction incompatible with the context and with the Parliament's language and purpose. It is one that has the effect of defeating a specific remedial protection against civil liability afforded by the Parliament to industrial organisations, such as the Unions. As the interpretation upholding that protection conforms to the statutory text and purpose, and sustains the effectiveness of the important right of collective bargaining about employment conditions, it is the one that this Court should prefer.

197 *Confirmation by later amendment*: Sixthly, if the Parliament intended to adopt a narrower protection with respect to industrial action "for the purposes of" and "in respect of" the "proposed agreement", it would have said so. Indeed, the Parliament later did say so in terms of the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* 2003 (Cth)[190]. The terms of the last-mentioned Act do the work that the Act, as it stood at the time relevant to the present industrial action, did not.

198 In former times, it might have been argued that the passage through the Parliament of reformatory and amending legislation amounted to an acceptance and endorsement of the interpretation of the Act adopted by the Full Court which this Court should not therefore change upon the assumption that the supervening

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190 The terms are explained in the joint reasons at [138].

legislation was unnecessary or redundant[191]. We now live in more enlightened and realistic times. Such interpretative myths are not now endorsed. Their assumptions are not attributed to the legislature[192]. In advance of an appellate outcome, the Parliament is normally entitled to make its will perfectly plain. Subject to any constitutional limitations, it may later correct the outcome of a judicial decision of which it disapproves, leaving it to appellate courts to declare later whether that decision was, or was not, correct in the particular case.

199 Nevertheless, the supervening legislation is at least available to a court reviewing the earlier decision to demonstrate how it was possible to remove doubt that was found to exist in the legislation as it previously stood. Such is the case here. Where the Parliament intended to cut back important protections, safeguarding valuable rights of protected collective bargaining, it should say so clearly – as it has now done and could have done earlier if that had been its earlier purpose.

200 *Confirmation of the specialist court*: Seventhly, although this Court has its own constitutional and appellate functions to discharge in relation to the interpretation of the Act, it is sensible for it to give proper weight to the opinions and approaches of the bodies having the relevant expertise in the interpretation of such specialised legislation. In this case, this means the Federal Court, in whose Full Court disputes of this kind do, and should, normally finish[193], and in the Commission. Although the Commission has expressed different views over time concerning the effects of the law canvassed in these appeals, its last word in respect of a contest, arising before the statutory amendment took effect, analysed past decisions of Full Benches of the Commissions. It confirmed the approach that the *totality* of the proposed agreement had to be considered in assigning a character to it as required by the Act[194]. This supports the general approach of the Full Court. Where experts in the field adopt an interpretation of the legislation, this Court will usually anchor a differing approach in very clear

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191 cf the mode of reasoning in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107 cited by the joint reasons at [161].

192 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 328-329, 349-351 where *R v Reynhoudt* (1962) 107 CLR 381 at 388 per Dixon CJ is cited.

193 cf *Federal Commissioner of Taxation v Westfield Ltd* (1991) 22 ATR 400 at 402. See Hill, "What Do We Expect from Judges in Tax Cases?", (1995) 69 *Australian Law Journal* 992 at 999.

194 *Automotive, Food, Metals, Printing, and Kindred Industries Union v Unilever Australia Ltd*, Australian Industrial Relations Commission, Full Bench (Munro J, Drake SDP, Larkin C) at [142]-[148], [155]-[173].

statutory provisions. Yet such clear provisions are absent in this case. On the contrary, the statutory text supports the views adopted by the Full Court, as I have demonstrated. Those views take full account of industrial realities and the practical way in which the legislative protection of industrial organisations engaged in collective bargaining was to be taken as intended by the Parliament in the form in which the Act previously stood.

201 *Conclusion: the objection fails*: For these reasons, the appeals to this Court from the substantive issue decided by the Full Court of the Federal Court fail. The orders of that Court, which rested upon its decision on this point, are sustained. The other matters argued are either premature and not the proper subject of relief by way of declaration or hypothetical in the state of the proceedings as they stood when the challenge was before the Federal Court. Especially because of the supervening amendment of the legislation, it is unnecessary to decide them. No costs orders turn on the resolution of the remaining points. It was common ground that no costs orders should be made by this Court. It follows that the appeals should be dismissed.

The Unions' claim was within s 170LI(1) of the Act

202 *The context of the dispute*: Because the majority of this Court reaches a different conclusion about the disposition of the argument concerning the operation of s 170LI(1), and because that question was fully debated before this Court and is the subject of the reasoned opinions of others[195], I will deal with it briefly.

203 The critical question is whether the proposed agreement, if it contained the "Bargaining Agents Fee" at the time it was propounded, would have been "an agreement … about matters pertaining to the relationship between … an employer … and ... all persons … employed in a … business … whose employment is subject to the agreement."

204 It may be accepted that this question is to be determined according to the *substance* not simply the *form* of the "proposed agreement". It may be accepted that the mere demand by the Unions upon an employer concerning the terms of employment of future employees does not make the subject of the demand a "matter pertaining to" the employment relationship. It may also be accepted that a task of classification is involved which, once again, requires characterisation by the Court of the "matters" contained in the "proposed agreement" the subject of the application.

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195 Reasons of Gleeson CJ at [13]-[17]; reasons of McHugh J at [78]-[79]; joint reasons at [153]-[163]; reasons of Callinan J at [238]-[253].

205 The argument of Electrolux, supported in this Court by the Minister for Employment and Workplace Relations who intervened in the interest of Electrolux, was that the applicable "matter" involved a "matter" solely between future employees of Electrolux and the Unions. In short, the Unions had sought to make Electrolux a "collecting agent" for a new fee between the Unions and non-members who happened to be employees of Electrolux. This was not therefore a "matter" pertaining to the "relationship" between such an employee and the employer. The relevant "relationship" was between the employee and the union.

206 I accept, focussing solely on the text of the Act read narrowly, that this is an arguable construction. The fact that the primary judge accepted it[196], and that others in this Court now have done so, shows that it is one way of looking at the statutory language. By the time contested questions of statutory construction reach this Court, it is rare indeed, if ever, that one can say that only one interpretation is arguable[197]. Differences of interpretation suggest, or demonstrate, differing starting points or values that influence the decision-maker, consciously or unconsciously. A reading of earlier decisions of this Court concerned with award provisions for deductions of union dues from employment salaries appears at first blush to lend support to the proposition advanced by Electrolux: *R v Portus; Ex parte ANZ Banking Group Ltd*[198] and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[199]. However, this case is yet another illustration of the danger of reading judicial observations out of context. It demonstrates the need, in matters of statutory construction and characterisation, to focus on the language used by the Parliament, not the language used by judges in other contexts.

207 *Changing constitutional connection*: First, the background to the problem concerning this Court in *Portus* and *Re Alcan* can be traced to the constitutional necessity of preventing the then Conciliation and Arbitration Commission from exceeding its constitutional mandate. At the time of those decisions, that mandate was relevantly confined to the provisions of s 51(xxxv) of the Constitution. The constitutional text continued therefore to take the Court back to the words "industrial dispute" in that paragraph of s 51(xxxv) as elaborated by

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196 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600 at [40]-[41]. See joint reasons at [165].

197 *News Ltd v South Sydney Football Club* (2003) 77 ALJR 1515 at 1524 [42]; 200 ALR 157 at 168.

198 (1972) 127 CLR 353.

199 (1994) 181 CLR 96.

the then provisions of the *Conciliation and Arbitration Act* 1904 (Cth)[200] ("the 1904 Act") necessarily drawn with the provisions of the Constitution in mind. The Act in its present form operates in a considerably wider constitutional context. This is because of the utilization by the Federal Parliament of other relevant heads of constitutional power, including that derived from the corporations power[201] and the external affairs power[202] – the latter concerned with giving effect in federal law to certain Conventions of the International Labour Organisation to which Australia is a party. In these circumstances, to read down the provision of s 170LI(1) by reference to earlier judicial dicta, written in a significantly different constitutional and statutory context, invites error. It is an error which this Court should avoid by adhering closely to the statutory words, read now in a larger constitutional context, without the same implication that it is necessary to read down the supposed restriction on "matters pertaining to" the identified relationship in order to avoid exceeding the constitutional bounds understood to exist in s 51(xxxv) of the Constitution.

208 *Developing constitutional understanding*: Secondly, even within that former context, it needs to be borne in mind that this Court's decisions were not always entirely consistent with each other over the course of the century during which the Court described the ambit of what could constitute an "industrial dispute" within the Constitution and the statute. Thus, originally, this Court took a comparatively broad view of what could constitute an "industry" and could be subject to an "industrial dispute"[203]. But then a majority restricted that notion by reference to supposed constitutional limitations that necessarily cut back the understanding of the statutory language[204]. The result, for many years, was a restricted view of the Constitution and of the statute[205]. This lasted until a wider

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200 s 4(1) definition of "industrial dispute" and see joint reasons at [158] and the definition of "industrial matters".

201 Constitution, s 51(xx).

202 Constitution, s 51(xxix). See Kirby, "Human Rights and Industrial Relations", (2002) 44 *Journal of Industrial Relations* 562 at 566-568.

203 *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 365, 370; *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508 at 575; cf at 584.

204 *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569 at 575; cf at 588 per Isaacs J dissenting.

205 See eg *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488; *Pitfield v Franki* (1970) 123 CLR 448; *R v Holmes; Ex parte Public Service Association (NSW)* (1977) 140 CLR 63 and *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57.

view was adopted befitting the constitutional context and the larger statutory function envisaged[206].

209 A similar course of decisional history can be found in the cases concerned with the meaning of an "industrial dispute". In its earliest years, this Court was highly protective of what came to be described as the "management prerogatives" of employers. Despite union demands made on employers in the industrial and employment context, so-called "management prerogatives" were commonly deemed to fall outside the scope of the constitutional power and hence of the applicable legislation[207]. One of the strongest proponents of restriction upon interference in such "management prerogatives" was Barwick CJ. In *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board (Tramways No 2)* his Honour put it thus[208]:

> "Whilst it is a truism that both industrial disputes and awards made in their settlement may consequentially have an impact upon the management of an enterprise and upon otherwise unfettered managerial discretions, the management of the enterprise is not itself a subject matter of industrial dispute."

210 With respect, there are reflections of similar views in some of the reasons now offered in disposing of these appeals. Yet gradually this Court reformulated its view of what constituted an "industrial dispute" for constitutional purposes so that implications of industrial demands upon "management prerogatives" came to be seen, in some cases, as legitimate subjects of "industrial disputes", lawfully giving rise to the facility of conciliation and arbitration under the Constitution and the statute[209]. It was inevitable that this process would occur because, in a sense, at the outset of Australia's industrial arbitration system, *all* decisions of the applicable tribunals constituted interferences to some degree in what had earlier been regarded as "management prerogatives". It was during this process of

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206 See *Professional Engineers' Case* (1959) 107 CLR 208; Creighton, Ford and Mitchell, *Labour Law: Text and Materials*, 2nd ed (1993), ch 17 especially at 443; Williams, *Labour Law and the Constitution* (1998) at 68-78.

207 See eg *Clancy v Butchers' Shop Employés Union* (1904) 1 CLR 181 at 207; cf *Australian Tramway Employés Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 702; *Federated Clothing Trades of the Commonwealth of Australia v Archer* (1919) 27 CLR 207.

208 (1966) 115 CLR 443 at 451; cf *R v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots* (1971) 127 CLR 11 at 20.

209 See eg *R v Gallagher; Ex parte Commonwealth Steamship Owners' Association* (1968) 121 CLR 330 at 335.

evolution in the perception by this Court of what "matters" did, and did not, sufficiently "pertain to the relationship between" employers and employees that a broader range of subjects came to be seen as within the ambit of industrial conflict and employment disputation.

211 By the late 1970s, following a period of generally restrictive decisions[210], this Court began to evince a broader and, I should say, more industrially realistic, approach to the permissible subject matters of "industrial disputes" within the Constitution and the statute. The turning point was probably *R v Coldham; Ex parte Australian Social Welfare Union*[211]. In that decision, this Court returned to the broad view of an "industrial dispute" originally contemplated by O'Connor J in *Jumbunna*[212] and by Higgins J in *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation*[213]. In a unanimous opinion in the *Australian Social Welfare Union* case, this Court said[214]:

> "The words ['industrial disputes'] are not a technical or legal expression. They have to be given their popular meaning – what they convey to the man in the street. And that is essentially a question of fact.
>
> …
>
> It is, we think, beyond question that the popular meaning of 'industrial disputes' includes disputes between employees and employers about the terms of employment and the conditions of work."

212 The rejection of the implied notion of a restriction on "interference" in so called "managerial prerogatives" began in this Court with *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of*

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210 Such as *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64 (shop trading hours); *R v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association* (1952) 86 CLR 283 (leave); *Australian Federation of Airline Pilots v Flight Crew Officers Industrial Tribunal* (1968) 119 CLR 16 (manning levels); *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313 (use of outworkers); *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 (deduction of union dues).

211 (1983) 153 CLR 297.

212 (1908) 6 CLR 309 at 365-368.

213 (1919) 26 CLR 508 at 572.

214 (1983) 153 CLR 297 at 312. See also *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 453-454.

Manufactures[215]. It gathered force in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*[216]. The decision in *Re Alcan*[217], upon which Electrolux relied so heavily in these appeals, must be read in the context of this evolution in this Court's doctrine concerning the industrial tribunals and hence the matters that were to be taken, within those powers, as pertaining to the relationship between an employer and employee.

213 The Court in *Re Alcan* there emphasised the words of the applicable legislation. It rejected the importation of artificial constitutional impediments concerning direct deduction of union dues as outside the scope of constitutional and statutory notions of an "industrial dispute". Given the language of the Constitution s 51(xxxv), the history of its development on this topic, the growth of compulsory arbitration and its dependence in practice upon registered organisations such as unions, this was a natural development in the Court's thinking. In the result, this Court applied the meaning it attributed to the parliamentary language unchanged since the Court's earlier decision in *Portus* but came to a different conclusion. It would be a great misfortune if this Court were now to reverse this beneficial and well established line of doctrine and returned to a narrow view of the ambit of an industrial dispute and employment relationship and what could be the subject of an award or agreement concerning this. There is no warrant in *Re Alcan* to do so. At least without a clear and valid statutory warrant to do so, this Court should resist the temptation to turn the clock back, effectively severing the history of decisional authority in this Court in recent years.

214 *Changing statutory connections*: Thirdly, when the course adopted by the Court in *Re Alcan* is considered here, there are two very important changes to the applicable legislative language, since *Re Alcan* was decided, that affect the usefulness of that decision as an authority. They are critical for the outcome of this point in the present appeals. The first is the insertion of the word "about" in the statutory definition in s 170LI of the Act. It is enough that the "agreement" propounded to the Commission, under the Division, is "about" a matter "pertaining to the [specified] relationship". There are thus two words of connection. Each broadens and deepens the ambit of the linkage that would render the "agreement" one to which the Act applies. "Pertaining to" is already a very wide phrase of connection; but it also appeared in the 1904 Act. What was not in the 1904 Act was the preposition "about".

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215 (1986) 160 CLR 341 at 353.

216 (1987) 163 CLR 117.

217 (1994) 181 CLR 96.

215 At the time of the events relevant to the present case, it was enough that the agreement should be *about* matters *pertaining to* the relationship. It was not even necessary, as such, that the agreement should actually "pertain to" the relationship itself. Quite clearly, this parliamentary expansion of the ambit of the connection between the claim and the employment relationship was deliberate. It was designed to enhance the permissible scope of the agreement and the connection between its subject matter and the employment relationship. This, then, is the first textual reason for distinguishing the holding in *Re Alcan* and for declining in this case to follow the same approach on the basis that such a course was mandated there because the Parliament had persisted with the use of the same statutory language. Here, it has not.

216 Even more important is the signal given in s 170LI(1) that the relationship in question is one between an employee and an "employer who is a constitutional corporation". This makes it clear that the Parliament had decided to cut the Act loose from the controversies arising in the past from implied limitations considered as inherent in the notions of an "industrial dispute", as that phrase is used in s 51 (xxxv) of the Constitution, and to substitute new and additional reliance on the relationships of an employee with a corporation qualifying as envisaged by s 51(xx) of the Constitution. In a stroke, a new constitutional foundation for federal regulation is created. It is no longer necessary to read into the resulting employment "relationship" limitations, broad or narrow, adopted for constitutional reasons in past cases such as *Portus* and *Re Alcan*. The Parliament has thus embraced a new constitutional paradigm. It behoves this Court to approach it without the blinkers apt to the old thinking reflected in *Portus* and continued in *Re Alcan* for narrow textual reasons of commonality of statutory language. We now have to apply different statutory language. We should re-focus our eyes on the present statutory words, freed from the earlier constitutional thinking.

217 *The correct interpretation of the Act*: Fourthly, when this approach is taken, who could doubt that a claim for a "Bargaining Agent's Fee" is at least *about* matters *pertaining to* the relationship between Electrolux and its future employees, when those words are considered as words of ordinary language, presenting a question of fact to be decided? The future employees concerned are by definition parties to the employment relationship with *Re Alcan*. Those to whom the Fee would apply are those who have not joined a relevant union but have stood to gain from the collective bargaining by the union on behalf of employees of Electrolux.

218 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. The only impediment, suggesting that the claim pertains *only* to the "relationship" between the employees and the unions, is one

that derives from old thinking. It is based on the suggested restrictions traced ultimately to discarded constitutional notions of the permissible ambit of an "industrial dispute" as that expression then stood in the statute and was there understood in terms of s 51(xxxv) of the Constitution.

219 The statute has been changed. The understanding of the Constitution has advanced. A new and different constitutional head of legislative power has been invoked. It is therefore a serious error for this Court, and especially at this stage, to inflict on the interpretation of s 170LI(1) of the Act notions drawn from discarded constitutional doctrines expressed in a significantly different legal context. The real work of s 170LI(1), as it stood at the relevant time, was to exclude from such proposed agreements wholly extraneous demands – such as those concerned with purely political issues, overseas conflicts or matters having no relevant connection to the particular Australian employment relationship. Unions have made such employment demands in the past, concerned with foreign policy, overseas wrongs and international solidarity. This demand was not of that kind. Section 170LI should be read as responding to demands of that *extraneous kind*. The present demand was on no view such an extraneous "non-employment" demand. It is completely unconvincing to me to say that the Unions' demand for the Fee pertained solely to the relationship between employees and the Unions. Least of all is it convincing to say that it was not *about* the matters *pertaining to* the employment relationship. Anyone who thinks otherwise, in my respectful opinion, must have paid no attention to employment controversies in Australia over the past two decades.

220 *Conclusion: claim valid and protected*: Applying, therefore, the ordinary meaning of the English language to the words used in s 170LI(1), I have no doubt that the claim for the "Bargaining Agents Fee", made in the context, was *about* a matter *pertaining to* the relationship of Electrolux as a "constitutional corporation" and its future employees to whom the Fee was to apply. If there could have been any doubt about this under the former definition of "industrial dispute" in the 1904 Act, it is removed by the addition of the word "about", by the inclusion of a double formula for connection and by the substitution of a different foundation for the employment relationship in question (that with a "constitutional corporation").

221 It follows that, in the Act as it then stood, the claim made by the Unions was not one which would render the agreement propounded by them incompetent in an application to the Commission with the serious and disproportionate consequences that would follow under the Act. The agreement was therefore protected, as the Full Court found. The contrary view does not make practical sense in an Australian industrial context.

222 The other issues argued in the appeals do not therefore arise for decision by me. The declarations made by the primary judge should not have been made. The Full Court was correct to set them aside.

Order

223 The appeals should be dismissed.

224 CALLINAN J. It is necessary in order to resolve these appeals to construe the following statutory language "matters pertaining to the relationship between an employer [and an employee]" contained in s 170LI(1) of the *Workplace Relations Act* 1996 (Cth) ("the Act").

Facts

225 The appellant is a manufacturer carrying on business and employing workers in New South Wales and South Australia. It is bound by the Metal Engineering and Associated Industries Award 1998 ("the Award") made by the Australian Industrial Relations Commission ("the Commission"), and the Email National Manufacturing Agreement 1999 ("the Agreement"), an agreement certified by the Commission pursuant to s 170LT of the Act. The Award and the Agreement apply to the appellant's employees. The Agreement was certified by the Commission on 8 October 1999 and was to expire on 30 June 2001. It continued in operation after that date pursuant to s 170LX of the Act. The first, second and third respondents ("the Unions") are organisations registered pursuant to the Act and each is a party to the Award and the Agreement. Members of the Unions are employed by the appellant. Others who are not members of the Unions are also employed by it.

226 Between April and September 2001, the appellant and the Unions negotiated for a fresh certified agreement to replace the Agreement. In June and July 2001, each of the Unions issued and served "Notices of Initiation of Bargaining Period" under s 170MI(2) of the Act. Each notice stated that the Unions intended to try to reach an agreement with the appellant under Div 2 of Pt VIB of the Act and to have the agreement certified under Div 4 of Pt VIB of the Act. Further notices were issued and served in early September 2001 to the same effect. The second set of notices stated, in accordance with s 170MJ(c), various matters proposed to be covered by such an agreement including the currently contentious matter of payment of a bargaining agent's fee. The matter was one of contention in both of the States in which the appellant employed workers.

227 During negotiations between April and September 2001, the claim for such a fee was made by the Unions in these terms:

> "[T]he Unions claim that the employer should advise new employees that an Agent's fee of $500 is payable to the Union by non Union members to the Unions to reflect the service obtained by those non members from the Unions in negotiating agreements, and that those employees should pay the amount and that the employer should provide a direct debit facility for the payments."

228 The negotiations did not lead to a concluded agreement. One of the matters upon which the parties could not agree was the claim for the bargaining

agent's fee. The fee was claimed on the asserted basis that the non-unionists were the beneficiaries of the services of the respondents in negotiating agreements under the Act.

229 In September 2001, the Unions gave "Notices of Intention to take Industrial Action" to the appellant under s 170MO of the Act: that the Unions and their members intended to organise and engage in industrial action in accordance with the provisions applying to "protected action" set out in s 170ML of the Act. The industrial action was to consist of a series of rolling stoppages of work for two hours.

230 Industrial action in accordance with the notices was taken on 14, 21 and 22 September 2001. The stoppages were for the purpose of supporting and advancing a number of claims including the bargaining agent's fee, which was held by Merkel J at first instance to be a substantive, discrete and significant claim[218].

Previous proceedings

231 On 17 September 2001 the appellant applied to the Federal Court for various orders and declarations to establish that the industrial action, the stoppages, were not protected action attracting immunity on the basis, relevantly to these appeals, that the claim for the bargaining agent's fee did not pertain to the relationship of employer and employee as required by s 170LI of the Act.

232 On 20 December 2001 Merkel J made declarations to the effect that the industrial action taken was not protected and that there had been breaches of s 170NC(1) of the Act.

233 In discussing the bargaining agent's fee his Honour drew attention to the true nature of it[219]:

> "The claim, implicitly if not explicitly, is that [the appellant] is to act as the union's agent in entering into a contract with new employees which *requires* the employees, who are not union members, to employ the unions as their bargaining agent to reflect the unions' service in negotiating agreements with [the appellant] under the Act.

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218 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600 at [52].

219 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600 at [40]-[45].

The relationship between the employer and the employee that would be created were the claim acceded to is, essentially, one of agency; [the appellant] is to contract with its employees on behalf of the relevant union, as its agent. The agency so created is for the benefit of the union, rather than for the benefit of the employee upon whom the contractual liability is to be involuntarily imposed. The resulting involuntary 'bargaining' agency is, as a matter of substance, if not form, a 'no free ride for non-unionists' claim, rather than one by which the union is undertaking its traditional role of representing the interests of union members in respect of the terms of employment of employees. Although the claim was argued as if it were a claim for future services, it may also be characterised as a claim for payment for the unions' services in securing the new employee's terms and conditions of employment in the proposed certified agreement, notwithstanding that the new employee will only have commenced employment after the date of the agreement. In that regard, it is relevant to note that the proposed draft agreement is to remain in force until 31 March 2003 (cl 7.0) and, in the meantime, no extra claims are to be pursued by the unions in relation to matters dealt with by the agreement except where consistent with the agreement or national wage case decisions (cl 47.0). Thus, payments claimed for bargaining 'services' prior to re-negotiation of a new agreement would appear to relate, primarily, to bargaining services rendered prior to the non-union member having commenced employment.

The other aspect of the claim, the bargaining fee debit facility, is analogous to a demand by unions that an employer pay its employees' union dues by making deductions and payments from salary due and payable to employees in accordance with authorities provided by them. Such a claim has been held to not be within the requisite employment relationship. In *Portus*, Menzies J observed that such a claim[220]:

> '[involved] the same critical question, namely, whether the imposition upon an employer of an obligation to make deductions and payments from salary in accordance with the authority of the employee to whom the salary has become due and payable affects the industrial relationship of employers and employees. The identity of the payee does not seem to me to be significant in determining the character of such a dispute, unless, of course, the payment relates to an incident of the employment such as a deduction for and payment to a superannuation fund. In my opinion, the relationship that would be affected by such an obligation is a financial relationship of debtor and creditor arising

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220 *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 at 360.

> from the earning of salary, not the industrial relationship in which the salary has been earned and has become payable. What is sought, in reality, is to make the employer the financial agent of the employee for the benefit of the association.'

Walsh J observed[221] that the benefit of offering an employee the payment facility was 'not a benefit or privilege of a kind which has any relevant connexion with the relationship of employer and employee'. His Honour also observed[222] that recognising the importance of the functions of unions 'does not warrant a conclusion that anything which serves to benefit one of them and to give it additional strength, by increasing its financial stability or otherwise, is to be regarded as an industrial matter within the meaning of the Act'. Stephen J observed[223]:

> 'If, in the existing circumstances of employment, it was demanded of the employer that it accept back from employees a part of the remuneration paid, retain it for a period of time and then pay it over to a third party, the association, such a demand would be seeking to create a new, distinct relationship between the employer and its employees, having no connexion with the pre-existing employer-employee relationship. The fact that the present demand is made to operate at a slightly earlier stage, before salary is in fact paid over to employees, thereby obviating one step in the imaginary demand I have postulated, that of the acceptance of money back from employees, does not appear to me to convert a transaction foreign to the relationship of employer and employee into one which pertains to that relationship.'

Portus was applied by the High Court in *Alcan*[224]. In *Alcan* the High Court confirmed that a demand in respect of payment of union dues did not pertain to the relationship between employers and employees as such.

Although the payment of the bargaining agent's fee purports to relate to the unions' bargaining activities for employees, I do not see that as relating to an 'incident of the employment' any more than payment of

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221 (1972) 127 CLR 353 at 365.

222 (1972) 127 CLR 353 at 369.

223 (1972) 127 CLR 353 at 372.

224 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96.

union dues for a union representing its members at the workplace relates to an incident of employment (see Menzies J in *Portus*[225]). The involuntary aspect of the claim confirms that, in pursuing the claim, the unions are acting in their own interest and not that of their members or of non-union employees: cf *Alcan*[226]. Further, although a union claim that relates to services provided by a union to non-members might fall within the requisite employment relationship there are difficulties with such a claim: see *Financial Sector Union*[227]. Even if the unions' contention that the claim that payment of the fee by the employer providing a direct debit facility can form the subject matter of an industrial dispute were to be accepted, as was held in *Alcan*[228], that does not assist in making it one that pertains to the requisite employment relationship. I would add that, although I have treated the claim as one relating to employees who are non-members I would have arrived at the same conclusion had the claim applied to all employees. For the reasons explained above neither claim would pertain to the requisite relationship."

234 His Honour determined that the action was not protected for reasons which he expressed in this way[229]:

> "The claim by the unions for payment of a bargaining agent's fee is substantive, discrete and significant (ie, in the sense that it is substantial). The evidence of the parties shows that it was treated by them as such. The industrial action pursued by the unions in September 2001 was for the purpose of advancing claims that included that claim. It follows that that action was pursued for the purpose of supporting or advancing claims made in respect of an agreement about matters that did, and a substantive, discrete, and substantial matter that did not, pertain to the requisite relationship. Accordingly, the agreement proposed by the unions is not an agreement about matters pertaining to the requisite employment relationship.

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225 (1972) 127 CLR 353 at 360.

226 (1994) 181 CLR 96 at 104.

227 *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 at 361-363 per Mason CJ, Deane, Toohey and Gaudron JJ.

228 (1994) 181 CLR 96 at 103-104.

229 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600 at [53]-[55].

> My decision in the present case is on the basis that the claim in question relates to a substantive, discrete, and significant matter that does not pertain to the employment relationship. While I entertain some doubt as to whether a proper characterisation of an agreement for the purposes of s 170LI involves questions of degree, I leave for another case the question of whether a claim in respect of a matter that does not pertain to the employment relationship, but is not of significance, may be included in a certified agreement.
>
> **Conclusion**
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> The industrial action taken in September 2001 by the unions, pursuant to the notices issued under s 170MO, was action for the purpose of supporting or advancing claims made in respect of a proposed agreement that was not an agreement about matters that pertained to the relationship between [the appellant] and its employees, as such. Consequently, the industrial action was not protected action under the Act."

235 The Unions then successfully appealed to the Full Court of the Federal Court (Wilcox, Branson and Marshall JJ) which concluded that it did not matter whether a particular claim could or could not ultimately be included in an agreement complying with s 170LI: that it was sufficient for the Unions genuinely to want provision for the fee to be contained in an agreement it wished to have certified[230]. Their Honours went on to say that for the purposes of s 170LI of the Act, the presence of terms in the agreement not pertaining to a relevant relationship did not mean that the agreement itself did not so pertain: further, and in any event, the claim for the bargaining agent's fee might well give rise to a matter pertaining to the relationship between the appellant and its employees[231].

The appeals to this Court

236 In order to obtain immunity from sanctions against industrial action under s 170MT of the Act, a negotiating party must satisfy a number of conditions. First, the party needs to be seeking an agreement under s 170LI. Secondly, it must have given a valid bargaining notice for the purpose of defining a bargaining period (ss 170MI and 170MJ). Thirdly, a valid notice of industrial action must have been given pursuant to s 170MO. Fourthly, there is a negative

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230 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 at 195 [95]-[96].

231 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 at 196-197 [99]-[102].

requirement, of absence of conduct in concert with other (unprotected) persons or organisations (s 170MN). Fifthly, the industrial action must have awaited the expiration of relevant awards and agreements (s 170MN). Sixthly, there may be no industrial action without prior negotiation (s 170MP). Seventhly, authorization of the industrial action proposed must have been given (s 170MR). And last, there must be an application to the Commission for certification of an agreement within 21 days after the day when the agreement with respect to which the industrial action is taken is made (s 170MS).

237 Section 170ML(2) should be set out:

"**Protected action**

…

(2) During the bargaining period:

(a) an organisation of employees that is a negotiating party; or

(b) a member of such an organisation who is employed by the employer; or

(c) an officer or employee of such an organisation acting in that capacity; or

(d) an employee who is a negotiating party;

is entitled, for the purpose of:

(e) supporting or advancing claims made in respect of the proposed agreement; or

(f) responding to a lockout by the employer of employees whose employment will be subject to the 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, that industrial action is protected action."

238 Section 170LI is as follows:

"**Nature of agreement**

(1) For an application to be made to the Commission under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:

(a) an employer who is a constitutional corporation or the Commonwealth; and

(b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement.

(2) The agreement must be made in accordance with section 170LJ, 170LK or 170LL."

239 In my opinion the approach and conclusion of the primary judge is to be preferred to that of the Full Court for these reasons. The reasoning of the Full Court involves the implication of the words "wholly or partly" before the word "about" in s 170LI. In general, statutory implications should only be made in cases of necessity of which this is not one. Furthermore, it can be seen that when some partial criterion is intended for the application of the Act, it generally says so in terms. Several examples of this may be given. In order to identify employees who may be excluded by regulation from the operation of Div 3 of Pt VIA of the Act, s 170CC(3)(a) refers to an employee whose remuneration was not wholly or *partly* determined on the basis of commission or piece rates. Section 170CM(6) makes like provision. Section 170CP makes provision for an application if the applicant has received a certificate with respect to an application made wholly or *partly* on the ground of the alleged contravention. And, pursuant to s 170MU, an employer must not dismiss an employee wholly or *partly* because the employee is proposing to engage in protected industrial action.

240 A party's desire for the inclusion of a particular term of agreement, no matter how genuinely and dearly wished, cannot, absent express words so saying, be determinative of the true nature of the term. Nor can the fact that it may use words such as "employee" or "employer" or refer to the use and application of remuneration or any part of it receivable by the employee, be determinative of its true character.

241 Whether the agreement pertains to the relationship between an employer and employee is to be objectively determined by the Court. The term providing for a bargaining fee may appropriately be described as one which seeks to impose upon an employer an obligation to act as collecting agent for the union to deduct from an employee's remuneration, an involuntary payment to the union for a "service" which the employee has not sought and which may have been of no benefit to him or her. Such a term pertains to, because it seeks to impose, an involuntary financial relationship between a union and a person who is not a member of it, rather than to a relationship between employer and employee. The only relevant relationship as far as the fee is concerned, between the employer and the non-unionist employee, is of an involuntary contract for the payment of an exaction sought to be made by a third party on the latter.

242 Section 170MD of the earlier enactment, the *Industrial Relations Act* 1988 (Cth), provides no assistance in construing s 170LI of the Act. Section 170MD(1) of the former dealt with the Commission's powers to refuse to certify an agreement. The structure and wording of s 170MD(1) are quite different from s 170LI.

243 Upon the termination of a bargaining period under s 170MW of the Act, if the Commission proceed to exercise its powers of arbitration under ss 170MX(3) and 170MY, it must make an award that deals with the matters that were in contention during the bargaining period. The power to arbitrate conferred on the Commission by s 170MY of the Act contemplates that the matters in contention during the bargaining period be matters which pertain to the relationship of employer and employee.

244 It is right, as the Minister, who became a party to the appeals, submits, that there is no distinction between awards and certified agreements for the purposes of the enforcement of instruments under s 178 of the Act. An award can only be made in settlement of an industrial dispute with respect to matters which relate to both employers and employees as such[232].

245 The conclusion that I have reached is consistent with other cases in which the Court has held that the rejection of demands of an academic, political, social or managerial nature will not generate an industrial dispute capable of being settled by the making of an award[233].

246 In *R v Coldham; Ex parte Fitzsimons*[234], Stephen J approved what was said by Menzies J in *R v Portus; Ex parte ANZ Banking Group Ltd*[235], that the creation of a role of financial agent on the part of an employer did not constitute a relationship between employer and employee.

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232 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 105-107; *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 353.

233 *Australian Tramway Employes Association v Prahran and Malvern Tramway Trust (Union Badge Case)* (1913) 17 CLR 680 at 705 per Higgins J and 718 per Powers J; *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 at 371 per Stephen J; *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153 at 164 per Stephen J.

234 (1976) 137 CLR 153 at 164.

235 (1972) 127 CLR 353 at 360.

247 The latter of those cases heavily influenced, and correctly so, the reasoning of Merkel J[236]. It was not referred to at all in the reasons of the Full Court. The union there had demanded that an employer deduct and pay from its employees' wages sums of money in accordance with authorities provided by them. It was held that the demand did not give rise to an industrial matter. Barwick CJ, as well as agreeing with Menzies J, said this[237]:

> "In my opinion, the demand that the employer should pay out of earned wages some amounts to persons nominated by the employee is not a matter affecting the relations of employer and employee. It does not seem to me to advance the matter that the intended payee is the organization registered under the Act of which the employee is a member."

248 Menzies J (with whom McTiernan J also agreed) said this[238]:

> "Each contention, it seems to me, involves the same critical question, namely, whether the imposition upon an employer of an obligation to make deductions and payments from salary in accordance with the authority of the employee to whom the salary has become due and payable affects the industrial relationship of employers and employees. The identity of the payee does not seem to me to be significant in determining the character of such a dispute, unless, of course, the payment relates to an incident of the employment such as a deduction for and payment to a superannuation fund. In my opinion, the relationship that would be affected by such an obligation is a financial relationship of debtor and creditor arising from the earning of salary, not the industrial relationship in which the salary has been earned and has become payable. What is sought, in reality, is to make the employer the financial agent of the employee for the benefit of the association."

249 Walsh J made observations to a similar effect[239]:

> "The making of the deductions depends upon an authority given by an employee, who is free to withdraw the authority if he wishes to do so. The system should, therefore, be regarded, in my opinion, as pertaining

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236 *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600 at [42]-[44].

237 *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 at 357.

238 (1972) 127 CLR 353 at 360.

239 (1972) 127 CLR 353 at 368.

> primarily to the relationship between an employee and his own union, from which relationship arises the obligation which is discharged by the payment made to the union by the employer. In so far as the practice also involves any relationship between an employee and his employer, this is not, in my opinion, a relationship between the employer as employer and the employee as employee, but is one in which the employer acts as agent for an employee in the making of a payment at his request and on his behalf from money to which he has become entitled."

250 And Stephen J said this[240]:

> "[t]he demand does not seek to operate within the sphere of [the employment] relationship but instead would create a new relationship between the parties, in which the employer is agent or debtor and the employee is principal or creditor."

251 The present case, as well as factually bearing much similarity to *Portus*, falls within the principle for which it stands and which is stated generally in unanimous terms in the passages that I have quoted. It is also a principle applied fairly recently by this Court in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[241]. It is unlikely that a legislature in enacting the Act would have intended to depart from a meaning settled by a series of cases in this Court the most recent of which was decided only two years earlier. The principle governs this case and provides sufficient and necessary reason to allow the appeals. Neither it nor the other reasons which I have given however exhaust the reasons why the appeals must succeed.

252 The statutory conferral of an immunity from suit, specifically the sorts of suits which might otherwise be brought in respect of industrial action, for example, inducement of breach of contract and breach of contract, interferes with or takes away fundamental rights to sue. Another consequence would be that an employee's right to receive his or her remuneration in full from an employer would be seriously reduced. Either of those consequences provides reason to read the relevant sections of the Act as intending to interfere with such rights only to the extent and in respects clearly stated. It certainly provides no reason to import into the statutory language words not actually used and capable of embracing matters beyond the relationship of employer and employee.

253 If s 170LI were to be read as capable of going beyond the relationship between a particular employee and its present and future employer so that an agreement might be certified which contains matters which pertain to the

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240 (1972) 127 CLR 353 at 372.

241 (1994) 181 CLR 96.

relationship between specified parties, but not in their respective capacities as employer and employee, there would be little effective limit upon the terms that could be included in an agreement brought for certification under Div 2 of Pt VIB of the Act.

254 The appeals should be allowed. The declarations made by the primary judge on 20 December 2001 as follows should be restored:

> "1. The industrial action of the First Respondent on 14, 21 and 22 September 2001, being action threatened in notices issued by the First Respondent dated 5, 11, 13 and 14 September 2001:
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> (a) was not protected action within the terms of s 170ML of the *Workplace Relations Act 1996* (Cth) and;
>
> (b) breached s 170NC(1) of that Act.
>
> 2. The industrial action of the Second Respondent on 14, 21 and 22 September 2001, being action threatened in notices issued by the Second Respondent dated 5 and 14 September 2001:
>
> (a) was not protected action within the terms of s 170ML of the *Workplace Relations Act 1996* (Cth) and;
>
> (b) breached s 170NC(1) of that Act.
>
> 3. The industrial action of the Third Respondent on 14, 21 and 22 September 2001, being action threatened in notices issued by the Third Respondent dated 6, 11, 13 and 14 September 2001:
>
> (a) was not protected action within the terms of s 170ML of the *Workplace Relations Act 1996* (Cth) and;
>
> (b) breached s 170NC(1) of that Act."

255 Because no party contended that orders for costs be made, there should be no such orders.