Electrolux uncertainty continues

Since the High Court's *Electrolux* decision (deciding that all clauses in a certified agreement must pertain or be incidental to the employment relationship), differing views are emerging from the Australian Industrial Relations Commission about the proper characterisation of particular clauses. Senior Associate Simon Dewberry reports on this issue.

**Electrolux**

*Electrolux* concerned the issue of whether industrial action enjoyed protected status if one or more matters supported by the action did not pertain to the employment relationship. As a result, the role of the Australian Industrial Relations Commission (*AIRC*) in certifying agreements has been brought into sharp focus. Additionally, the status of previously certified agreements that contain additional matters remains uncertain.

Two examples of the AIRC’s approach are *Ballantyne* and *Schefenacker*.

**Ballantyne**

The Commissioner in *Ballantyne* held that the following clauses pertained to the employment relationship, or were incidental or ancillary to the employment relationship:

- no extra claims;
- no contracting out;

---

1 *Electrolux Home Products Pty Ltd v The Australian Workers’ Union & Ors* [2004] HCA 40 (2 September 2004).

2 KL *Ballantyne and National Union of Workers (Laverton Site) Agreement 2004*, 22 October 2004, Vice President Ross, PR952656.

• guidelines for negotiating a new agreement;
• introduction of workplace change;
• employee liability for damages;
• ensuring casuals employed by third-party providers have no less favourable terms;
• substitution of prescribed public holidays with another day;
• trade union training leave;
• union notice boards;
• union delegate leave;
• on-site union meetings;
• union right of entry;
• access to time and wages records; and
• providing a copy of the agreement to employees.

The AIRC held that two clauses did not pertain to the employment relationship:
• leave for union delegates to discuss union matters with new workers; and
• deduction of union fees.

**Schefenacker**

In *Schefenacker*, the AIRC held that the following matters pertained to the employment relationship:
• commitment to collective bargaining;
• introduction of workplace change; and
• salary sacrifice arrangements.

**Electrolux** considered the issue of whether industrial action enjoyed protected status if one or more matters supported by the action did not pertain to the employment relationship.

The AIRC held that the following matters did not pertain to the employment relationship:
• ensuring labour hire companies pay equivalent rates (compare *Ballantyne*);
• deduction of union fees (following *Ballantyne*);
• shop steward training leave (compare *Ballantyne*);
• union right of entry (compare *Ballantyne*); and
• shop steward recognition and rights.

Although there have been a number of other certification applications since *Electrolux*, these decisions reflect the unclear delineation of the employment relationship and that, by including clauses that are borderline, parties risk the inconvenience of having to submit amended agreements for further employee approval.

It must be remembered that the wording of the specific provisions, although dealing with the same general subject matter, may account for different treatment in different cases. However, there is still no clear line to assist parties using certified agreements to set out all workplace issues, particularly those with a union impact.

**Agreements Validation Bill**

The Workplace Relations Amendment (Agreements Validation) Bill 2004 has been designed to validate agreements or Australian Workplace Agreements (AWAs) certified, approved or varied on or before the *Electrolux* decision (ie 2 September 2004), but which have non-complying clauses.

**Characterisation of particular clauses remains the task of the AIRC and the courts.**

Importantly, the Bill does not validate those parts of an agreement or AWA that do not pertain to the employment relationship; it merely avoids the conclusion that all such agreements are inoperative, even to the extent of the legitimate clauses. Characterisation of particular clauses remains the task of the AIRC and the courts, and it is likely that any non-complying clauses in those earlier agreements will be unenforceable.

**Service of employer’s notice of lockout**

The Federal Court has found that an employer’s lockout was protected action, despite notice of the lockout being served on some employees after the lockout started. Lawyer Stacey Kelly reports.

**Background**

In response to industrial action by its employees, Henry Walker Eltin Contracting Pty Ltd (*HWE*) decided to lock out its employees. The two unions concerned brought an action against *HWE* alleging that its lockout was in breach of the *Workplace Relations Act 1996* (Cth) (the *Act*) because *HWE* did not comply with the notice requirements in the *Act*.4

4 *AFMEPKIU v Henry Walker Eltin Contracting Pty Ltd* [2004] FCA 1274.
**Notice requirements under the Act**

According to Justice French, protected action requires the following notice requirements in section 170MO(3) to be met:

- written notice is to be given to the union; and
- written notice must be given to employees affected or other reasonable steps must be taken to notify them of the intended lockout.

Notices of the proposed lockout were fixed to the doors of the unions’ offices at least half an hour before the lockout began and copies of the notices were faxed to the unions immediately before the lockout started.

Justice French held that a notice will meet the requirements of s170MO(3) if it is left at, or sent by pre-paid post, to the head of office, a registered office or a principal office of the union before the lockout starts. Justice French found that the notice to the unions met the Act’s requirements.

It is always preferable to provide clear written notice in advance of action intended to be protected.

HWE had also placed a notice at the muster point where its employees gathered before starting their shifts each morning, stating that there would be a meeting at 5.30am that day. At the meeting, each of the employees were provided with notices that stated that the lockout would begin at 5.30am.

While some of the notices were not physically handed to the employees before 5.30am, Justice French held that, in a practical sense, the notice to each particular employee signalled the beginning of the lockout for that employee. Justice French was satisfied that notices had been given in accordance with the Act and that the lockout was protected action.

**Conclusion**

It is always preferable to provide clear written notice in advance of action intended to be protected. However, this will not always be possible and a practical approach to the requirements of s170MO(3) will enable the employer to retain protection if it acts reasonably while trying to make sure all affected employees receive advance notice.

---

**To reinstate or not to reinstate?**

The status of 16 employees made redundant in 1998 is still uncertain after a Full Court overturned an AIRC Full Bench decision to award compensation instead of reinstatement. As Law Graduate Peter Beacroft reports, another AIRC decision is required before the redundancies can be finalised.

**Retrenchments unfair**

Regular readers of *Focus: Workplace Relations* may remember the long-running battle over the retrenchment of 16 Pacific Coal and Hail Creek Coal workers in 1998. Shortly after retrenchment, the former employees lodged proceedings in the Australian Industrial Relations Commission (AIRC).

In a decision handed down in April 2001, Commissioner Hodder found that the process of retrenchment was harsh, unjust and unreasonable (because of a flaw in the selection criteria) and ordered reinstatement of the employees. In October 2001, the employers obtained a stay of the order for reinstatement until an appeal was heard.

In December 2002, a Full Bench of the AIRC agreed that the process was unfair but felt that reinstatement was not appropriate. It said that the wages paid to the date of its decision represented sufficient compensation. Each party appealed.

In July 2003, a Full Bench of the AIRC ordered, as an exceptional matter, that Hail Creek Coal give preference in employment to the retrenched employees by employing them in any vacant positions for which the retrenched employees were reasonably qualified. Hail Creek Coal appealed this decision.

**Function on appeal**

Two years on, the situation remains unresolved. The Federal Court reminded the AIRC that its function on appeal is to check for appealable errors, and that it cannot vary a Commissioner’s order unless, as a first
step, it finds such an error in the decision under review. The AIRC’s failure to identify an error before changing Commissioner Hodder’s order left the Federal Court with no choice but to quash the decision, and to send the question of remedy back to the AIRC Full Bench to be decided properly.

The Federal Court did not deliver judgment on Hail Creek’s appeal against the July 2003 order but noted that, depending on the outcome of the AIRC’s reconsideration, it may be no longer necessary to deal with Hail Creek’s appeal. In the meantime, the order remains in place.

Directors personally fined over workplace bullying

Senior Associate Andrew Cardell-Ree reports on a NSW Industrial Relations Commission decision that is a clear warning that token fines in workplace bullying cases are not adequate penalties for a director.

The Chief Industrial Magistrate’s decision

As reported in Focus: Workplace Relations, May 2004, WorkCover prosecuted a company and two of its four directors for breach of the Occupational Health and Safety Act 2000 (NSW) (the Act) arising from an ‘initiation’ of a 16-year-old labourer. This was the first occupational health and safety prosecution of directors arising from workplace bullying in NSW.

The Chief Industrial Magistrate convicted the company and fined it $24,000 (almost half of the $55,000 maximum penalty available), in recognition of the seriousness of the offence. He found both directors guilty and imposed on each a $1,000 fine. WorkCover appealed against the leniency of the directors’ fines and the directors also appealed on the ground that no conviction should have been recorded.

The NSW IRC decision

A Full Bench of the NSW Industrial Relations Commission found that the $1,000 fines imposed were insufficient to deter anyone from failing to take the positive steps required by the Act to prevent bullying in the workplace.

In a lengthy decision, the Commission found that high range penalties are needed to force directors to give workplace bullying the attention it deserves. The fines were increased to $9,000 and $12,000.

Having fun at the expense of another person

In a statement sure to be the focus of future prosecutions and much debate about whether the Commission intended to give workplace bullying so broad a scope, the Commission stated that an employer and its directors have a duty to prevent employees from ‘having fun at the expense of another person’. Regardless of where the courts draw that line, they are unlikely to have sympathy for a defence that claims that the acts in question are ‘harmless pranks or workplace high-jinks’.

WorkCover’s willingness to prosecute individuals

Putting aside the significant fines to which directors might be exposed, workplace bullying is a more serious matter in NSW since this decision for all involved, given WorkCover’s greater willingness to prosecute anyone implicated. As the Commission notes in this case, WorkCover prosecuted all of the employees involved in the initiation. All were convicted and one was fined $500. None of those employees had any significant managerial responsibilities or any prior occupational health and safety convictions. WorkCover’s willingness to prosecute individuals could not be clearer.

Police your anti-bullying policies or face a bigger penalty

The courts view workplace bullying as an easily preventable and unacceptable feature of working life. As with any other safety issue, directors and managers that do not publish and enforce a workplace bullying policy risk a significantly greater fine, even for a single incident of workplace bullying, than those who can demonstrate that they monitor the efficacy and appropriateness of an anti-bullying policy.

---

Vicarious liability for unauthorised acts of employees

Employers may be held vicariously liable for unauthorised acts of an employee, as long as the acts could be regarded as a mode (although an improper one) of performing the normal tasks of the employment. Partner Julian Riekert and Lawyer Dana Wintermantel report on a recent review of vicarious liability.

Background

Mr Starks, a patron at the Bondi Hotel, was requested to leave the premises by a security guard. When he challenged the security guard’s request, he was head-butted.

Mr Starks took exception to this treatment and subsequently claimed damages for his injuries against the security guard, the security guard’s employer, the owner/occupier of the hotel and the hotel’s licensee.

At first instance, the trial judge found that the security guard was liable, but rejected the claims against the employer, the owner/occupier of the hotel, and the hotel’s licensee.

Decision on appeal

On appeal, a Full Court of the New South Wales Supreme Court held that the employer was vicariously liable for the security guard’s actions, but that the owner/occupier of the hotel and the hotel’s licensee were not.

Liability of the employer

The Full Court accepted the principle that an employer is vicariously liable only for the security guard’s actions, but that the owner/occupier of the hotel and the hotel’s licensee were not.

Liability of the hotel and the licensee

The court accepted that the owner/occupier of the Bondi Hotel was not liable on the basis that:

- they were not the employer of the security guard, but had engaged the employer of the security guard as an independent contractor;
- they could be not liable for the actions of the security guard unless they had directly authorised the wrongful act; and
- they could not have been said to have exercised a significant degree of control and direction over the actions of the security guard.

As there was no basis upon which the hotel could be made liable for the wrongful act of the security guard, the court found it unnecessary to consider whether the liability of the hotel and the licensee should be considered separately.

Implications

Employers should be aware that the fact that they have not authorised a particular act does not necessarily mean that they will be able to avoid vicarious liability for it. Vicarious liability may still arise if the unauthorised act is closely related to the tasks performed by the employee during the course of his or her regular employment.

---

Get the latest legal news online

Allens Arthur Robinson’s publications are available online. When a new publication is issued, we’ll keep you up-to-date by emailing you a short summary of the legal issue we are focusing on, together with the link. If it’s relevant to your business, you can click on the link to read online, or print a version from our website.

If you prefer to receive publications electronically, please send your email address to: publications@aar.com.au

Tell us your name, title and company, and indicate your areas of interest:

- Banking & Finance
- Biotech & Health
- Capital Markets
- Commercial Litigation
- Construction
- Energy & Resources
- Environment
- Funds Management
- Insurance
- Insolvency & Restructuring
- Intellectual Property
- Media & Technology
- Mergers & Acquisitions
- Privacy
- Product Liability
- Property
- Tax
- Telecommunications
- Trade Practices/Competition Law
- Workplace Relations
- Any other areas

You can view our full range of publications at: www.aar.com.au/pubs/

Allens Arthur Robinson

Clear Thinking

For further information, please contact:

- **Jamie Wells**
  Partner, Brisbane
  Ph: +61 7 3334 3268
  Jamie.Wells@aar.com.au

- **Tim Frost**
  Partner, Sydney
  Ph: +61 2 9230 4995
  Tim.Frost@aar.com.au

- **Peter Arthur**
  Partner, Sydney
  Ph: +61 2 9230 4728
  Peter.Arthur@aar.com.au

- **David Cross**
  Partner, Sydney
  Ph: +61 2 9230 4394
  David.Cross@aar.com.au

- **Julian Riekert**
  Partner, Melbourne
  Ph: +61 3 9613 8672
  Julian.Riekert@aar.com.au

- **Gavin MacLaren**
  Partner, Singapore
  Ph: +65 6535 6622
  Gavin.MacLaren@aar.com.au

- **Steven Cole**
  Partner, Perth
  Ph: +61 8 9488 3743
  Steven.Cole@aar.com.au

Have your details changed?

If your details have changed or you would like to subscribe or unsubscribe to this publication or others, please go to www.aar.com.au/general/subscribe.htm or email Publications@aar.com.au.

www.aar.com.au