

**INFORMED CONSENT IN  
AGREEMENT MAKING UNDER  
THE WORKPLACE RELATIONS  
ACT 1996 (CTH)**

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# INFORMED CONSENT IN AGREEMENT MAKING UNDER THE *WORKPLACE RELATIONS ACT 1996 (CTH)*

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## INTRODUCTION

One of the principal objects of the *Workplace Relations Act 1996 (Cth)* (the *WR Act*) is to enable “employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by [the] Act.” (s.3(c)). For present purposes we are only concerned with agreements of the type contemplated by the *WR Act*, namely:

- certified agreements; and
- Australian Workplace Agreements (AWA’s).

A certified agreement can be made between an employer and a group of employees or between an employer and a union, while an AWA can be made between an employer and a single employee, or in the case of a collective AWA negotiated between an employer and a group of employees, provided they are signed by each individual employee.

## CERTIFIED AGREEMENTS

Two types of certified agreements may be made under the *WR Act*:

### *Division 3 agreements*

Certified agreements may be made between parties to an interstate industrial dispute or industrial situation<sup>1</sup> for the purpose of settling the dispute or preventing a dispute arising (see s.170LO and s.170LP). These provisions rely on the conciliation and arbitration power in the Constitution (s.51(xxxv)).

### *Division 2 agreements*

Division 2 of Part VIB of the *WR Act* provides for two forms of certified agreements - union agreements (ss.170LJ and 170LL) and non-union agreements (s.170LK). Each form of agreement can be made by employers who are constitutional corporations, or the Commonwealth, and their employees or their unions. These provisions rely on other heads of constitutional power including the corporations power (s.51(xx)), the territories power (s.122) and powers regarding employees of the Commonwealth (ss.52, 61 and 69) of the *Constitution*.

#### (i) **union agreements ss.170LJ and 170LL**

In the case s.170LJ an employer may make an agreement with one or more unions where each union, when the agreement is made:

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<sup>1</sup> For example see *Re: Department of Transport (Regency Park Workshops) (Federal) Enterprise Bargaining Agreement 1997*, Print Q1761, 12 June 1998 per Polites SDP, Harrison SDP and Smith C.

- has at least one member employed in the single business or part of it whose employment will be subject to the agreement; and

- is entitled to represent the industrial interests of the member in relation to work which will be subject to the agreement (s.170LJ(1)).<sup>2</sup>

However a s.170LJ agreement is not available (see s.170LJ(4)) if it may be made as a greenfields agreement under s.170LL. An employer proposing to establish a new business as a single business may make a s.170LL agreement with one or more unions:

- before the employment of any person necessary for the normal operation of the business or part and whose employment will be subject to the agreement (s.170LL(1)(b)); and
- where each union, when the agreement is made, is entitled to represent the industrial interests of at least one person whose employment is likely to be subject to the agreement in relation to work that will be subject to the agreement (s.170LL(2)).

Importantly, the requirement that persons subject to the agreement consent to it being made, does not apply in the case of a greenfield's agreement. See below.

A s.170LJ agreement and s.170LL agreement can only be between employers (of the types described) and organisations of employees (see s.170LH(a)). An "*organisation of employees*" means an organisation of employees registered under the *WR Act* (see s.4(1)). It follows that state registered unions cannot be party to ss.170LJ and 170LL agreements.<sup>3</sup>

(ii) **non-union agreements s.170LK**

In the case of a non-union agreement, that is an agreement made directly with the employees without the involvement of a union, the agreement must be "*made*" by a "*valid majority*" of employees employed at the time whose employment will be subject to the agreement.

## A QUESTION OF CONSENT

With the exception of a greenfield's agreement, each type of certified agreement requires the consent of a "*valid majority*" of the employees whose employment will be subject to the agreement. Section 170LT deals with the specific requirements for certification. If an application is made in accordance with Division 2 or 3, 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. The question of employee consent is dealt with in ss.170LT(5) and (6) in the following terms:

*"(5) If the agreement was made in accordance with section 170LJ or Division 3, a valid majority of persons employed at the time whose employment would be subject to the agreement must have genuinely approved the agreement.*

*(6) If the agreement was made in accordance with section 170LK, a valid majority of persons employed at the time whose employment would be subject to the agreement must have genuinely made the agreement."*

<sup>2</sup> See *McConnell Dowell Constructors (Aust) Pty Ltd v Construction, Forestry, Mining and Energy Union*, (1997) 42 AILR 3-559. (Print No?)

<sup>3</sup> *Australian Municipal, Administrative, Clerical and Services Union Central and Southern Queensland Clerical and Administrative Branch Union of Employees v Qualifyer Group Customer Care Centres GMBH*, PR900017, 5 January 2001 per McIntyre VP, Drake SDP and Hoffman C.

There is an obvious difference in the language used in these two subsections. Section 170LT(5) refers to an agreement being “*genuinely approved*” by a valid majority of the relevant employees, as the employees are not party to the agreement. Section 170LT(6) refers to the agreement having been “*genuinely made*”. This difference simply reflects the fact that agreements made in accordance with s.170LJ and Division 3 are between employers and unions - hence they are “*approved*” by the relevant employees. By contrast non-union agreements are made by employers and their employees; it is the consent of a “*valid majority*” of the employees which “*makes*” the agreement.

In both cases it is clear that a “*valid majority*” of persons employed at the time, whose employment would be subject to the agreement, must have genuinely approved or made the agreement. The meaning of the expression “*valid majority*” is defined in s.170LE in the following terms:

- “For the purposes of this Part, a valid majority of persons employed at a particular time whose employment is or will be subject to an agreement:*
- (a) make or genuinely make the agreement; or*
  - (b) approve or genuinely approve:*
    - (i) the agreement; or*
    - (ii) the extension of the nominal expiry date of the agreement; or*
    - (iii) the variation or termination of the agreement;*
- if:*
- (c) the employer gives all of the persons so employed a reasonable opportunity to decide whether they want to make the agreement or give the approval; and*
  - (d) either:*
    - (i) if subparagraph (ii) does not apply - a majority of the persons; or*
    - (ii) if the decision is made by a vote - a majority of the persons who cast a valid vote; decide, or genuinely decide, that they want to make the agreement or give the approval.”*

The section provides two means of determining whether a valid majority of employees have genuinely made or approved the agreement, namely:

- by vote; or
- by some means other than by vote.

Agreements are usually made or approved by a vote of the relevant employees. There is no requirement for such a vote to be by secret ballot, but all of the employees whose employment will be subject to the agreement must be given an opportunity to decide whether they want to make the agreement or give their approval. It is not the method of voting that counts but the fact that each relevant employee is given an opportunity to cast a vote.<sup>4</sup>

If a vote is conducted, then a majority of the persons casting a valid vote will be sufficient to provide a “*valid majority*” (as opposed to a majority of all of the employees whose employment will be subject to the agreement).

If some means other than by vote is used, then a majority of *all* of the employees must genuinely decide that they wish to make the agreement or give their approval. For example, in *VHA Trading Company v Australian Municipal, Administrative, Clerical and Services Union*<sup>5</sup> individual employees were asked to indicate their approval of an agreement by signing a

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<sup>4</sup> *Coles Supermarkets Australia Pty Ltd v Shop, Distributive and Allied Employees Association*, Print T2319, 19 October 2000 per Ross VP, Williams SDP and Smith C.

<sup>5</sup> Print N9390, 7 March 1997 per Ross VP.

document. In those circumstances the Commission decided that the method used did not constitute a vote within the meaning of s.170LE(d)(ii) and hence a majority of all relevant employees was required.

What constitutes “*genuine approval*”, or a decision to “*genuinely make*” an agreement, is not defined. But these expressions have been the subject of some observations in decisions of the Federal Court and the Commission.

In *Mine Management Pty Ltd v CFMEU*<sup>6</sup> the Federal Court considered whether an agreement purporting to be made under s.170LK, made with employees who may, in the future, be employed in the relevant business but were not yet so employed, qualified as an agreement that could be certified under the *WR Act*. The Court held that it did not. At paragraph 126 of the judgment, Wilcox and Madgwick JJ deal with this issue in these terms:

“Section 170LT(6) requires that a “valid majority of persons employed at the time whose employment would be subject to the agreement must have genuinely made the agreement”. This plainly betokens a concern with the authenticity and, as it were, the moral authority of the agreement. It is perfectly understandable - indeed, one might reasonably think, plainly necessary - this be so. The principal object of the Act as a whole, as set out in s3, is “to provide a framework for cooperative workplace relations” by, among other things,

“(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them” (emphasis supplied)

There can hardly be fair agreement-making between employer and employees about wages and employment conditions in a workplace (a mine is a good example) before both sets of parties have actual experience of the work and its place of performance. Without that, cooperative workplace relations are unlikely to be achieved. An agreement prematurely made is unlikely to be effective; measuring effectiveness in this context by such matters as durability, aptness and comprehensiveness. Established “safety net” standards are less likely to be respected and maintained, because the range of conditions in relation to which such standards exist may not have been fully comprehended.” [emphasis added]

In *NUW v Qenos Pty Ltd No. 1*,<sup>7</sup> Finklestein J said that if the meaning of “*genuine approval*” in s.170LT(5) were free of authority: “I would have regarded the notion of *genuine approval* when compared with mere approval as permitting an inquiry into the mental element of approval so that the issue of approval is not confined to the objective outward manifestation of consent.”

The notion that the expression “*genuinely made*” or “*genuinely approved*” reflects a concern with the authenticity or “*moral authority*” of an agreement has not developed much momentum. Nor has the suggestion that the notion of *genuine approval* permits an inquiry into the mental element of the approval.

In the Commission the notion of “*genuine*” consent is generally taken to mean that the consent of the employees was *informed and uncoerced*.<sup>8</sup>

<sup>6</sup> (1999) 93 FCR 317; 164 ALR 73. The other member of the full court, Moore J, dissented in relation to the order that the court should make but not in relation to the nature of a certified agreement.

<sup>7</sup> [2000] FCA 1340, 21 December 2000 at paragraph 24.

<sup>8</sup> *Coles Supermarkets Australia Pty Ltd NSW Bakery Employees Agreement 1997*, Print P5521, 3 October 1997 per Cargill C; *Australian Protective Service National Central Monitoring Station Certified Agreement 2000-*

This approach is supported by the statutory context in which these expressions appear.<sup>9</sup>

In this regard it is important to bear in mind the one of the principal objects of the *WR Act* is to provide “*a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them.*” (s.3(e)).

The context in which s.170LE and ss.170LT(5) and (6) appear in Division 3 of Pt VIB of the *WR Act* also supports the view the notion of *genuine* consent being *informed* and *uncoerced*. This point is developed below.

### **INFORMED CONSENT?**

A number of provisions in the *WR Act* are directed at ensuring that before employees are asked to decide whether to make or approve an agreement they are provided with relevant information so that they may make an informed choice. Those requirements apply to Division 2 and Division 3 agreements. In particular, the employer must take reasonable steps to ensure that:

- at least 14 days’ before any agreement is made or approval is given, every person employed at the time whose employment will be subject to the agreement either has, or has ready access to, the agreement, in writing (ss.170LJ(3)(a); 170LK(3) and 170LR(2)(a)); and
- before the agreement is made or approved the terms of the agreement are explained to all the persons employed at the time whose employment will be subject to the agreement (ss.170LJ(3)(b); 170LK(7) and 170LR(2)(b)).

In relation to the requirement to explain the terms of the agreement, s.170LT(7) is also relevant. It states:

“(7) *The explanation of the terms of the agreement to persons as mentioned in paragraph 170LJ(3)(b), subsection 170LK(7) or paragraph 170LR(2)(b) must have taken place in ways that were appropriate, having regard to the persons’ particular circumstances and needs. An example of such a case would be where the persons included:*

- (a) *women; or*
- (b) *persons from a non-English speaking background; or*
- (c) *young persons.*”

Although the terms of what were required in respect of the above matters were expressed differently in the pre-1996 legislation, their effect may not have been substantially different from the present provisions<sup>10</sup>

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2003, Print T0610, 8 September 2000 per Deegan C; *Re Coffs Harbour Challenge Inc.*, PR900645, 20 February 2001 per Drake SDP.

<sup>9</sup> *Metropolitan Gas Co. v Federated Gas Employees’ Industrial Union* (1924) 35 CLR 449 at 455 per Isaacs and Rich JJ; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 at 514 per Mason J.

<sup>10</sup> Section 170NC(1)(h) of the *Industrial Relations Act* 1988 required that “reasonable steps were taken ... to inform the employees ... about the terms of the agreement and ... to explain ... the effect of those terms ...”, whereas ss.170LJ(3)(b), 170LK(7) and 170LR(2)(b) require that “the employer must take reasonable steps to ensure that the terms of the agreement are explained ...” and s.170LT(7) requires that that “take place in ways that [are] appropriate having regard to the persons’ particular circumstances and needs”. That provision goes on to give the statutory example set out in the text above. Although a full bench of the Commission in

Under the former statutory regime relating to enterprise flexibility agreements (or EFA's), there is Commission authority for the proposition that what constitutes “reasonable steps” in explaining the terms of an agreement depends on the circumstances in a particular case. Two issues are particularly relevant:

- the composition of the workforce and the impact this may have on the capacity of the employees concerned to appreciate the effect of the proposed agreement on their terms and conditions of employment; and
- the extent of the changes being proposed.

This approach was adopted in *Re Toys ‘R’ Us (Australia) Pty Limited Enterprise Flexibility Agreement 1994*.<sup>11</sup> In that case the employees were predominantly young persons and the changes being proposed were substantial. In those circumstances the Commission refused to approve the agreement because the employer had failed to fully disclose the impact of the agreement vis-à-vis the existing award provisions.

Given the similarity in the relevant statutory provisions it seems likely that the Commission will adopt a similar approach under the *WR Act*.

Even if the employer takes “reasonable steps” to explain the terms of the agreement, that may not be enough. The relevant employees must have the capacity to understand the nature of the agreement when it is explained to them. In the absence of such understanding there can be no genuine consent.<sup>12</sup>

It is to be emphasised that each of the steps required by ss.170LJ, 170LK and 170LR, including those referred to above relating to the explanation of the terms of the agreement, are all prerequisites to the commission being satisfied whether or not the agreement has been genuinely approved or genuinely made (see s.170LT(6) and (7)). In making that evaluation the commission is not restricted to checking that each of the prerequisite steps have been taken. It must be satisfied of the genuineness of the approval or decision to make the agreement. That permits or requires “an enquiry into the mental element of approval ... not confined to the objective outward manifestation of consent”<sup>13</sup> or that “the consent of the employees was informed and there was an absence of coercion”.<sup>14</sup>

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*Construction, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Woodside Heating and Airconditioning Pty Ltd* (1997) 74 IR 10 at 17; Print P2244, 27 June 1997 per McIntyre VP, Marsh SDP and Merriman C at pp15-16 drew attention to the difference between the former legislative requirement that “the effect of the terms” be explained and the present requirement that “the terms” be explained, that was a step in the commission’s reasoning to the conclusion that there was no requirement under the *WR Act* that the employees be told that a preference clause in an agreement to be certified might have been invalid.

<sup>11</sup> Print L9066, 3 February 1995 per Ross VP.

<sup>12</sup> *Gibbons v Wright* (1954) 91 CLR 423.

<sup>13</sup> See per Finklestein J in *NUW v Qenos Pty Ltd (No.1)* [2000] FCA 1340, 21 December 2000 at para 24.

<sup>14</sup> *Re Toys ‘R’ Us (Australia) Pty Ltd Enterprise Flexibility Agreement 1994*, Print L9066, 3 February 1995 per Ross VP.



In *Australian Protective Service National Central Monitoring Station Certified Agreement 2000-2003*<sup>15</sup> Commissioner Deegan was not satisfied that the relevant employees fully understood the Agreement at the time they cast their votes. Hence the Commissioner concluded that the relevant employees had not genuinely made the Agreement in accordance with s.170LT(6) and the Agreement was not certified. In that case it was clear that the employees had not appreciated that their entitlement to public holidays was being reduced under the Agreement.

This issue has proven to be a particular problem in the case of intellectually disabled employees, as was the case in *Re Coffs Harbour Challenge*.<sup>16</sup> The employer in that matter was a business which employed persons with an intellectual disability. Senior Deputy President Drake decided that despite the reasonable steps taken by the employer to explain the terms of the agreement:

*“...these employees did not appreciate the effect of the Agreement on their terms and conditions of employment or the extent of the changes being proposed. ... After considering the particular application before me and the considerable efforts of CHC to reach an understanding with their employees I remained convinced that these employees did not have any understanding of the Agreement as it affected them and I do not believe that they were capable of achieving such an understanding.”*<sup>17</sup>

On one view of it the case simply reflected an illustration of the general law of incapacity. The agreement in question was complex. Different considerations may arise in the case of a relatively straightforward agreement which was generally beneficial (to the employees) in its terms. As the High Court observed in *Gibbons v Wright*:

*“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. ... the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.”*<sup>18</sup>

In summary then, consent of the employees must be informed - they must have understood the terms of the agreement at the time they decided whether to make or approve the agreement.<sup>19</sup>

### **Effect of failure to comply with prerequisites for certification**

A question arises as to whether a failure to comply with one of the provisions concerned with the provision of information about an agreement renders an application for certification invalid. The consideration of this issue no longer turns on whether the provisions are construed as mandatory or directory. As four members of the High Court observed in *Project Blue Sky Inc and Others v Australian Broadcasting Authority*:<sup>20</sup>

*“In our opinion, the Court of Appeal of New South Wales was correct in Tasker v Fullwood*<sup>21</sup> *in criticising the continued use of the "elusive distinction between directory*

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<sup>15</sup> Print T0610, 8 September 2000 per Deegan C.

<sup>16</sup> PR900645, 20 February 2001 per Drake SDP.

<sup>17</sup> Ibid at paragraphs 232-233.

<sup>18</sup> (1954) 91 CLR 423 at 437-438.

<sup>19</sup> For example, *Re Australian Protective Service National Central Monitoring Station Certified Agreement 2000-2003*, Print T0610, 8 September 2000 per Deegan C.

<sup>20</sup> (1998) 194 CLR 355; 153 ALR 490 at paragraph 93.

<sup>21</sup> [[1978] 1 NSWLR 20 at 23-24. See also *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 161-162 per Gibbs J.]

*and mandatory requirements*<sup>22</sup> and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning.<sup>23</sup> That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales.<sup>24</sup> In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".<sup>25</sup><sup>26</sup>

The relevant statutory intention is to be ascertained from the language of the relevant provisions, the objects of the statute as a whole and the objective of the relevant section. This approach was applied to the requirements in s.170LK by a Full Bench of the Commission in *Re Mobile Food Vans Enterprise Agreement*.<sup>27</sup> In that matter the Commission concluded in these terms:

*"Section 170LH states that the requirements of the Division "must be satisfied" for applications to be made to the Commission for certification of agreements.*

*Section 170LK at subsections (2), (3), (4), (5), (6), (7) and (8) provides a series of steps and requirements designed to protect the interests of employees and provide fairness in the process where an employer seeks to make an agreement with a valid majority of employees.*

*Throughout s.170LK the Parliament, in setting out the requirements in the various subsections, has done so by stating that the obligations placed on the employer "must" be undertaken. We consider that having regard to the objects of the Act and the language used in ss.170LH and 170LK, there is a statutory intention that each of the subsections of s.170LK must be complied with to ensure, as the objects states "fair and effective agreement-making" and failure to meet any one of them will render an application for certification invalid.*

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<sup>22</sup> [Australian Capital Television Pty Ltd v Minister for Transport and Communications (1989) 86 ALR 119 at 146 per Gummow J.]

<sup>23</sup> [McRae v Coulton (1986) 7 NSWLR 644 at 661; Australian Capital Television (1989) 86 ALR 119 at 147.]

<sup>24</sup> [Hatton v Beaumont [1977] 2 NSWLR 211 at 213, 226; Attorney-General (NSW); Ex Rel Franklins Stores Pty Ltd v Lizelle Pty Ltd [1977] 2 NSWLR 955 at 965; Tasker v Fullwood [1978] 1 NSWLR 20 at 24; National Mutual Fire Insurance Co Ltd v Commonwealth of Australia [1981] 1 NSWLR 400 at 408; TVW Enterprises Ltd v Duffy (No 3) (1985) 8 FCR 93 at 102; 62 ALR 63 at 71; McRae v Coulton (1986) 7 NSWLR 644 at 661 and see Australian Broadcasting Corporation v Redmore Pty Ltd (1989) 166 CLR 454 at 457-460; Yates Security Services Pty Ltd v Keating (1990) 25 FCR 1 at 24-26; 98 ALR 68 at 90-92. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: Johnston v Paspaley Pearls Pty Ltd (1996) 110 NTR 1 at 5; Collins Radio Constructions Inc v Day (1997) 116 NTR 14 at 17; and Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377.]

<sup>25</sup> [Tasker v Fullwood [1978] 1 NSWLR 20 at 24.]

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<sup>27</sup> Print R4468, 6 May 1999 per MacBean SDP, Harrison SDP and Redmond C.

*The Commissioner in that part of his decision we have cited earlier, concluded that the requirements of ss.170LK(2), (3) and (7) had been satisfied on the ground that “sufficient efforts” had been made by the employer to meet those subsections and the employees understood the terms of the agreement.*

*In respect of s.170LK(4) and (5), the Commissioner concluded that the intent of those subsections had been met on the ground that “the union was in some form or other involved up to a certain stage with the process”.*

*Compliance with the subsections of s.170LK, for the reasons we have stated, may only be satisfied where an employer has met the requirements as they are expressed in the section.*

*In this matter s.170LK(2) has not been complied with by the omission from the notice given of the requirements set out under s.170LK(4), nor has s.170LK(3) been complied with. Accordingly, there was no valid application upon which the Commission had jurisdiction to certify the agreement.”<sup>28</sup>*

Access to a written copy of the agreement and the provision of an explanation of its terms are central to the agreement making process as they enable employees to be fully informed. Failure to comply with these requirements will mean that there is no valid application hence the Commission has no jurisdiction to certify the agreement.<sup>29</sup>

In relation to “*non-union certified agreements*” there are additional requirements. At least 14 days prior to the making of an agreement the employer must take reasonable steps to ensure that every person employed at the time whose employment will be subject to the agreement is provided with a notice in writing stating that the employer intends to make the agreement (s.170LK(2)). A copy of the agreement (or ready access to a copy) in writing must be provided at or before the notice is issued (s.170LK(3)).

The notice must also state that if:

- (a) any person whose employment will be subject to the agreement is a member of an organisation of employees; and
- (b) the organisation is entitled to represent the person’s industrial interests in relation to work that will be subject to the agreement;

the person may request the organisation to represent the person in meeting and conferring with the employer about the agreement (s.170LK(4)).

If an organisation is so requested then the employer is obliged to give the organisation a reasonable opportunity to meet and confer about the agreement before it is made.

## **COERCION**

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<sup>28</sup> Ibid at paragraphs 29-35.

<sup>29</sup> *Transport Workers’ Union of Australia v K & S Freighters Pty Ltd*, Print P8417, 6 February 1998 per Giudice P, McIntyre VP and Bacon C; *Re Mobile Food Vans Enterprise Agreement*, Print R4468, 6 May 1999 per MacBean SDP, Harrison SDP and Redmond C.

The general thrust of the *WR Act* is to encourage the making of agreements free from coercion and victimisation. This is reflected in the fact that a range of conduct is prohibited, for example:

1. *Industrial action during the term of an agreement.* No industrial action may be taken from the date that a certified agreement comes into force and its nominal expiry date, by, an employee or a union (s.170MN(1)) nor may an employer lock out an employee (s.170MN)(4)).
2. *Coercion of persons to make, vary or terminate a certified agreement.* Taking or threatening to take industrial action, or refraining or threatening to refrain from taking industrial action, with the aim of coercing another person to make, vary or terminate a certified agreement except during a bargaining period (s.170NC(1)). (The prohibition does not apply to protected action (s.170NC(2)).
3. *Employer coercion of an employee regarding union representation.* An employer must not coerce or attempt to coerce an employee not to make a request for union representation in regards to the negotiation of a certified agreement (s.170NC(3)). In addition to the requirement in s.170LT(6) that the Commission must be satisfied that an agreement with employees under s.170LK was genuinely made, the Commission must be satisfied that coercion in those respects has not occurred (s.170LT(9)).

A consideration of what coercion involves may throw some light on what matters may arise for consideration by the commission in satisfying itself that an agreement was genuinely made or genuinely approved.

### **Coercion generally in relation to certified agreements**

For present purposes we intend to focus on s.170NC. It states:

- “(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).
- Note: The Court has certain remedial powers in relation to a contravention of this section: see Division 10.*
- (2) Subsection (1) does not apply to action, or industrial action, that is protected action (within the meaning of Division 8).
  - (3) An employer must not coerce, or attempt to coerce, an employee of the employer:
    - (a) not to make a request as mentioned in subsection 170LK(4) in relation to an agreement that the employer proposes to make; or
    - (b) to withdraw such a request.”

A contravention exposes a person to a penalty (s.170ND). That penalty may be up to \$10,000 in the case of a body corporate and up to \$2,000 in other cases (s.170NG(2)). A court can issue an injunction to restrain a contravention (s.170NF and s.170NG). An employee dismissed because of involvement or potential involvement in protected action can be reinstated and compensated by a court (s.170NH).

Section 170NC(1) provides that “a person” must not “take or threaten to refrain from taking any action” or “refrain or threaten to refrain from taking any action” with the intention of coercing another person to agree or not agree to or approve “making varying or terminating, or extending the nominal expiry date of” a certified agreement. The prohibited behaviour is not limited to the parties negotiating an agreement; it can be the behaviour of “any person” acting with a prohibited purpose. However, the prohibition does not apply to protected action (s.170NC(2)). Section 170NC(3) renders conduct referred to in s.170LT(9) liable to a penalty.

The section prohibits threatening conduct (other than protected action during a bargaining period – see s.170ML) that may affect the making or failure to make an agreement which is not the product of free bargaining.<sup>30</sup>

The intent of the provision seems to be to prevent employers coercing employees into voting for or against an agreement by means of threats of dismissal or demotion. As well, it also aims to prevent unions using forms of coercion such as industrial action to force employers to make agreements, or to force employees to approve or not approve an agreement.

The meaning of “coercion” in the context of s.170NC(1) has been considered in a number of relatively recent cases although its scope may not be capable of precise description. In *Cadbury Schweppes Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers’ Union*, Finklestein J suggested that coercion in an industrial context usually involves the exercise of illegitimate economic pressure that induces the other party to act. Such pressure would be illegitimate if it involved unlawful action (e.g. breach of contract or commission of a tort) or the threat of unlawful action. In that case an interlocutory injunction was granted, pending the trial, restraining the union from organising or being involved in a picket during a bargaining period, the picket not being protected industrial action as defined in the *WR Act*.<sup>31</sup>

In *Finance Sector Union of Australia v Commonwealth Bank of Australia, (Finance Sector Union)*<sup>32</sup>, Gyles J held<sup>33</sup> that proceedings by the union for an interpretation of a certified agreement were brought by it with the intention of influencing the outcome of negotiations during a bargaining period for a new agreement. However, the judge also held that that was not action of the kind prohibited by s.170NC(1)(a) and was not coercion. He concluded that for the purposes of s.170NC(1) coercion requires conduct that is:

- compulsive in the sense that the pressure brought to bear, in a practical sense, negates choice; and is
- unlawful, illegitimate or unconscionable.<sup>34</sup>

Unlawful conduct is readily identified. However, what is illegitimate or unconscionable is more difficult to determine. Gyles J held<sup>35</sup> that the evidence did not establish that the union intended to put the bank in a position where it had no other practical choice open to it but to accept aspects of the negotiation more favourable to the union than would otherwise have

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<sup>30</sup> See *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530; 102 IR 359.

<sup>31</sup> [2000] FCA 1793, 8 December 2000 at paragraph 19.

<sup>32</sup> [2000] FCA 1468, 17 October 2000.

<sup>33</sup> At paragraph 9.

<sup>34</sup> [2000] FCA 1468, 17 October 2000 at paragraphs 18-38.

<sup>35</sup> At paragraph 38 (see also paragraph 13).

been the case. “To do so would fly in the face of reality. The bank is one of Australia’s largest corporation, not likely easily to be coerced.” In those circumstances it was unnecessary for the judge to go on and decide whether the means intended to be utilised by the union were unlawful or otherwise illegitimate<sup>36</sup>.

More recently, in *National Union of Workers v Qenos*<sup>37</sup> and *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*<sup>38</sup> Weinberg J and Merkel J, respectively, accepted that the analysis of the term “coerce” by Gyles J in *Finance Section Union* correctly stated the reach of s.170NC(1).

The above cases establish that two elements must be shown to exist to prove “*intent to coerce*” under s.170NC(1):

1. It was intended that pressure be exerted which, in a practical sense, will negate choice.
2. The exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable.

The second requirement must be considered in the context of the scheme of the *WR Act*. Subject to the immunity in respect of protected industrial action under s.170MT, many forms of industrial action are unlawful.

These provisions have been used to restrain a range of conduct including:

- picketing (*Cadbury Schweppes; ACI Operations Pty Ltd v AFM EPKIU*;<sup>39</sup> and
- a party taking any further steps in a proceeding which they had commenced in the Supreme Court of Victoria to restrain protected action being taken by a union (*CFMEU v Multiplex Constructions Pty Ltd*<sup>40</sup>).

In *ACI* Merkel J said<sup>41</sup>:

“... save for protected action, no other action (whether industrial or otherwise) is to be taken by any person “with intent to coerce” persons to make, vary or terminate certified agreements. These related aspects are critical to protecting and maintaining the integrity of the bargaining process provided for under the Act. The carefully prescribed limitations on the use of industrial, or other action that is not protected action, for the purposes of supporting or advancing each party’s position as part of the process reflects a legislative policy that, in general, the freedom of the parties to negotiate may be fettered by protected action but not by any other coercive action.”

In *Multiplex Constructions* an interlocutory injunction, pending the trial, was granted because there was an arguable case that the litigation in the Supreme Court was intended to coerce the union negotiating for a new agreement.

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<sup>36</sup> See paragraph 40.

<sup>37</sup> [2001] FCA 178, 6 March 2001.

<sup>38</sup> [2001] FCA 456, 26 April 2001.

<sup>39</sup> (2000) 173 ALR 109.

<sup>40</sup> (2000) 95 IR 225.

<sup>41</sup> At paragraph 33

## **Conclusion – genuine approval or agreement genuinely made**

Except to the limited extent required by s.170LT(9),<sup>42</sup> coercion, as such, is not a matter that the *WR Act* requires the Commission to have regard to in satisfying itself that a certified agreement has been genuinely approved or genuinely made. However, very much the same considerations are involved in evaluating conduct to determine whether there has been coercion, on the one hand, and whether an agreement has been genuinely made or genuinely approved, on the other. In performing its functions in certifying an agreement it is likely that the Commission will be influenced by the Court’s approach to the question of coercion within the meaning of s.170NC.

## **Australian Workplace Agreements**

Whether made by an employee and a single employee or with a group of employees, an AWA will only have effect if either:

- the employer is a constitutional corporation, the Commonwealth or a waterside employer; or
- the employee’s primary workplace is in a Territory or the employee is a maritime employee or a flight crew officer and in either case whose employment is in connection with interstate or overseas trade and commerce.

See s.170VC. The terms “waterside employer”, “maritime employee” and “flight crew officer” are defined in s.4(1), Sch.1 cl.1. The limitations on the circumstances in which an AWA may be made identify the constitutional power in the *Constitution* upon which the AWA provisions rely, including the corporations power (s.51(xx)), powers regarding employees of the Commonwealth (ss.52, 61 and 69), the territories power (s.122) and the trade and commerce power (s.51(1)) of the *Constitution*. It is significant that no reliance is placed upon the conciliation and arbitration power (s.51(xxxv)), no doubt because that power relates to the settlement of collective interstate industrial disputes and an AWA typically deals with matters pertaining to the relationship between an employer and a single employee.

The Commission has a limited role in relation to the approval of an AWA. That function is conferred primarily upon the Employment Advocate unless that official has concerns about whether the AWA passes the no disadvantage test, in which case, it may become necessary to refer the approval of the AWA to the Commission (see s.170VPB).

The circumstances in which an AWA is made affect the date upon which it starts operating. There are two distinct circumstances:

### ***AWA by a new employee***

An AWA signed by a person before commencing employment (a new employee – s.170VA definition) can commence operating before the Employment Advocate approves the AWA but not before the employment commences (see s.170VJ). If the Employment Advocate subsequently refuses to approve the AWA it stops operating at the end of the day on which a

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<sup>42</sup> That provision requires the Commission to be satisfied that the employer did not coerce a member of a union not to request representation by that person’s union or to withdraw any request already made.

refusal notice is issued (s.170VJ(1)(d) and see s.170VPF(2)) and the employee may recover the difference (if any) between amounts payable under the AWA, for the time it operated, and the relevant designated award with which it was compared for the purposes of the no disadvantage test (s.170VX and see ss.170X, 170XE and 170XF).

### ***AWA by existing employee***

An AWA signed by an employee during employment (an existing employee – s.170VA definition) cannot start operating before it is approved by the Employment Advocate (s.170VJ(2))

## **A QUESTION OF CONSENT**

Section 170VO(1) deals with the specific requirements for filing an AWA. The Employment Advocate must be satisfied that they have been complied with before issuing a filing certificate (s.170VN(2)). Thereafter the Employment Advocate must approve an AWA where satisfied that the AWA has passed the no disadvantage test and that it meets what are described as the additional approval requirements (s.170VB(1)) which include s.170VPA(1)(d), namely that:

“the employee genuinely consented to making the AWA.”

That requirement is, in terms, substantially the same as the requirement that applies in the case of a certified agreement except that in the case of a certified agreement it is the Commission that must be satisfied that there has been genuine consent.

What constitutes genuine consent by an employee to making an AWA is not defined but what Finkelstein J said in *NUW v Qenos Pty Ltd (No.1)*<sup>43</sup> in relation to certified agreements is also applicable, namely, the requirement permits an enquiry into the mental element of approval so that the issue of approval is not confined to the objective outward manifestation of consent.

Again the context in which s.170VPA(1)(d) appears in Part VID also supports the view that the notion of genuine consent as being informed and without duress. This point is developed below.

## **INFORMED CONSENT?**

A number of provisions in the *WR Act* are directed at ensuring that before a new employee or an existing employee signs an AWA they are provided with relevant information so that they may make an informed choice. In particular:

- before signing the AWA, a new employee at least 5 days before signing it, and an existing employee, at least 14 days before signing it, must receive a copy of the AWA (s.170VPA(1)(a)); and
- the employer must explain the effect of the AWA between the time the employee receives a copy of it and the time when the employee signs it (s.170VP(a)(1)(c)); and
- before the employee signs the AWA, the employer must give the employee a copy of an Information Statement prepared by the Employment Advocate including

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<sup>43</sup> [2000] FCA 1340, 21 December 2000 at paragraph 24.



information about, amongst other things, services provided by the Employment Advocate and bargaining agents (s.170VO(1)(b)(ii), (2))<sup>44</sup>

The requirement in s.170VPA(1)(c) to explain the effect of an AWA to the employee is a similar obligation to that which applied in relation to a certified agreement submitted to the Commission for certification under the pre-1996 legislation.<sup>45</sup>

The extent of the employer's obligation to "explain the effect" of an agreement was considered by the Commission in the *Toys 'R' Us* decision referred to above<sup>46</sup> in relation to a pre-1996 enterprise flexibility agreement. That obligation under the pre-1996 legislation was linked to a further obligation, namely, that the employer was required to inform the employees about the consequences of the agreement being approved by the Commission. The Commission held in the case just mentioned that together those obligations required the employer "to fully disclose the impact of the agreement vis a vis the existing award provisions" and because that had not been done in that case the Commission did not approve the enterprise flexibility agreement.

It is difficult to see how the obligation to explain the effect of an AWA adequately to an employee could be satisfied without comparing the terms and conditions of employment to be contained in it with those under which the employee was already employed even though there is no additional obligation to inform the employee about the consequence of the AWA being approved by the Employment Advocate. Indeed the Employment Advocate takes that view. In *A How-to Guide*<sup>47</sup> issued by the Employment Advocate stated in that connection:

"You need to explain to employees how the AWA would change their existing wages and conditions. If an award covers your employees, you should explain to them that the AWA would displace the award. If the AWA involves a trade-off of some conditions in return for increased pay, it is important that this is clearly explained to your employees."

## **DURESS**

The general thrust of Pt VID of the *WR Act* is to encourage the making of AWAs free from duress and victimisation. This is reflected in the fact that a range of conduct is prohibited, for example:

1. *industrial action during the term of an agreement.* No industrial action may be taken from the date that the AWA comes into operation and its nominal expiry date by the employee (s.170VU(1)) nor may an employee lock out the employee (s.170VU(2));

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<sup>44</sup> Section 170VO(1)(c) requires the employer to provide any other information that the Employment Advocate requires, by notice published in the Gazette, for the purposes of performing his or her functions. The Information Statement is available on the Employment Advocate's website at [www.oea.gov.au](http://www.oea.gov.au).

<sup>45</sup> See footnote 10 above. Note however, to some extent the obligation in relation to an AWA in this respect is stricter because it requires its effect to be explained whereas an employer was required to take reasonable steps to explain the effect of a pre-1996 certified agreement.

<sup>46</sup> See footnote 13.

<sup>47</sup> December 1999. That statement does not seem to be in the material at present on the Employment Advocate's website at [www.oea.gov.au](http://www.oea.gov.au). However, in the Information Statement to Employees, referred to in footnote 14 above, the Employment Advocate states:

"You should be told about the terms and conditions of the proposed AWA and any proposed changes to your current working conditions and entitlements should be explained to you. Your employer should also give you the opportunity to ask questions about the proposed AWA."

2. *duress of employer or employee in connection with an AWA or ancillary document (s170WG(1)).*
3. *employer or employee coercion regarding union representation.* An employer or employee must not coerce or attempt to coerce the other party to a point or not a point a bargaining agent or to terminate the appointment of a bargaining agent (s.170VK(4)).

A consideration of what duress involves may throw some light on what matters may arise for consideration by the Employment Advocate in being satisfied that the employee genuinely consented to making the AWA.

## Duress generally in relation to AWAs

Section 170WG(1) deals with “*duress*” in relation to an AWA or “*ancillary document*”. The section says:

“(1) A person must not apply duress to an employer or employee in connection with an AWA or ancillary document.”

Contravention of the provision exposes a person to a penalty of up to \$10,000 in the case of a body corporate and up to \$2,000 in other cases (s.170VV). Injunctive relief is also available (s.170VZ).

An “*ancillary document*” is defined in s.170VA to mean any of the following: a variation agreement, an extension agreement, a termination agreement and a termination notice.

The references to an “employer” and an “employee” in s.170WG(1) are wide enough to include persons who will become an employer and an employee respectively when the AWA commences to operate (ss.170VA, 170VB(2)).

In *Schanka v Employment National (Administration) Pty Limited*<sup>48</sup> a full court of the Federal Court held that a person, not an employee of the company, who had been offered an AWA and declined it and did not become an employee, had standing to bring proceedings for duress under s.170WG(1).

Section 170WG(1) has a wide operation. First, in relation to existing employees it prohibits threatening conduct (with an important exception) that may affect the making or failure to make an AWA which is not the product of free bargaining. The exception is this: although there is no statutory bargaining period in relation to an AWA there is a limited immunity in respect of industrial action or a lock out after the nominal expiry date of the AWA (ss.170VU, 170WB – 170WD). Provided the appropriate statutory notice is given an employee may take industrial action against an employer to compel or induce the employer to make an AWA on particular terms and conditions and the employer can lock out the employee for a similar reason. Secondly, in relation to a person seeking, or being offered, employment with a prospective employer a refusal to negotiate in relation to whether the employment should be regulated by an AWA may constitute duress.

In *Schanka* the full court cited with apparent approval<sup>49</sup> what McHugh JA said about general law duress in *Crescendo Management Pty Ltd v Westpac Banking Corporation*.<sup>50</sup> McHugh JA said:

“...A person who is the subject of duress usually knows only too well what he is doing. But chooses to submit to the demands or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not constitute economic duress.

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<sup>48</sup> 97 FCR 186; 170 ALR 42; 96 IR 449.

<sup>49</sup> At paragraph 10. See also Gyles J in *Finance Sector Union* [2000] FCA 1468 at paragraph 22.

<sup>50</sup> (1988) 19 NSWLR 40 at 45-46.

*In their dissenting advice in Barton v Armstrong [1973] 2 NSWLR 598; [1976] QB 104, Lord Wilberforce and Lord Simon of Glaisdale pointed out (at 634; 121): ‘... in life, including life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that he actor had no choice but to act. Absence of choice in this sense does not negate consent at law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, one of the various means by which consent may be obtained – advice persuasion, influence, inducement, representation, commercial pressure – the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion.’*

In relation to the construction of s.170WG(1) the full court in *Schanka* said:<sup>51</sup>

*“In our view the answers given by his Honour [Moore J] to the questions which he identified involved his discerning, from s.170WG in the context of Pt.VID as a whole, an intention [of s.170WG] that an employer should not, in an endeavour to induce an existing or prospective employee to enter an AWA containing particular terms, apply pressure which, in the circumstances, is illegitimate.”*

The full court’s decision was given on a preliminary question. Before it went to trial the Federal Court dealt with another case in which it was claimed that persons seeking employment suffered duress at the hands of the prospective employer. In *MUA v Burnie Port Corporation Pty Limited*<sup>52</sup> Ryan J held that the Burnie Port Corporation had not committed duress where it was only prepared to engage two persons as employees if they were made an AWA with the Corporation. The judge rejected the argument that there had been duress because employment was sought in circumstances where there were limited employment opportunities in the Burnie region and the corporation’s motive was to increase productivity by requiring new employees to sign AWAs. It had been argued that in the circumstances the Corporation had taken unfair advantage of the job applicants and had committed duress. On appeal a full court of the Federal Court held<sup>53</sup> that:

*“Where an employer offers a prospective employee employment under an AWA as its preferred mode of industrial regulation under the Act, rather than under other forms of industrial regulations under the Act that are operative at the employer’s workplace, it seems to us that an employer is exercising a choice afforded to it under the Act.”*

*Schanka* arose out of the privatisation of the Commonwealth Employment Service. At trial<sup>54</sup> Moore J held that Employment National had contravened s.170WG(1) by making jobs conditional upon each employee signing an AWA. The circumstances concerned a number of officers of the CES who were each offered employment by Employment National on the condition that they sign an AWA. One refused an AWA and was ultimately made redundant from the Australian Public Service while the other three signed AWAs and started employment with Employment National. Moore J concluded:<sup>55</sup>

*“... the question of whether duress was applied as alleged turns fundamentally on the question of whether ENA, in conducting itself in the way it did, was requiring each member of the group to sign an AWA when it knew that the individual wanted to negotiate or bargain about the terms and conditions contained in the standard AWA or about whether the terms and conditions of his or her employment should be prescribed by an AWA. Or, at the least, it was known to ENA this was the likely position.”*

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<sup>51</sup> At paragraph 23.

<sup>52</sup> (2000) 101 IR 435.

<sup>53</sup> (2000) 104 FCR 440 at paragraph 26.

<sup>54</sup> [2001] FCA 579 (18 May 2001).

<sup>55</sup> At paragraph 117.

Whether or not the conduct of Employment National contravened s.170WG(1) depended upon whether the company was informed that an individual was opposed to entering an AWA.

**Conclusion – employee genuinely consenting to making an AWA**

Duress, as such, is not a matter that the *WR Act* requires the Employment Advocate to have regard to in being satisfied that an employee genuinely consented to making an AWA. However, very much the same considerations are involved in evaluating conduct to determine whether there has been duress, on the one hand, and whether an employee genuinely consented to making the AWA, on the other. In approving an AWA it is likely that the Employment Advocate will be influenced by the Court’s approach to the question of duress within the meaning of s.170WG(1).

