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Accounting for and reducing greenhouse gas emissions is now a central concern for many companies. Much of the motivation is tied to simple business concerns relating to efficiency and cost-saving for the company. Employers may seek to improve employee performance by making employee bonuses subject to the meeting of the employer’s CO2 target or other relevant energy efficiency target. Progressive companies are already making employee performance subject to energy efficiency targets, and in years to come it is likely that this will be more widespread in industry. Including these obligations in enterprise agreements would ensure that the obligations are enforceable and make it more likely that the targets are achieved.

Employees may also want to encourage their employer to investigate ways of introducing more environmentally sound materials and technology into the company’s operations. Employees will gain advantages from the workforce development opportunities that will arise because of the new technology. Examples of such clauses can be found in the local government context and it is likely that in the future private companies will see advantages in agreeing to these clauses.

Although commitments like these, aimed at reducing greenhouse gas emissions, are performed in the context of the employment relationship, they also have an application to employees as citizens of the wider community. Employees and employers can contribute significantly to the reduction of greenhouse gas emissions and help Australian potential international commitments relating to climate change.

This article will discuss the potential incorporating such clauses in enterprise agreements by principally examining legality in the context of the Fair Work Act 2009 (Cth) (“the Act”).

Permitted matters
The Rudd government departed from the “Forward With Fairness” policy in retaining the content in enterprise agreements “permitted matters” in s172(1) of the Act. was criticised during the Senate inquiry, with the “matters pertaining” foration retained in s172(1)(a) attracting much criticism. The current provisions do
Australian companies can enhance their green credentials by greening workplaces through enterprise bargaining. By Victoria Lambropoulos

Union. The legal test for a "matter to pertain to the employment relationship" is that the matter must have a "direct and not merely consequential" impact on the employment relationship. The EM (at [672–673]) listed the sorts of terms that would come within the ambit of the rule and terms that would infringe the rule. The EM does not cover any new ground here, as the matters listed largely replicate existing case law. Terms considered to be outside the ambit of enterprise bargaining include trading decisions of businesses. While working hours relate to the employment relationship, trading hours are a matter for management, regardless of the practical pressure trading hours impose on working hours. General business decisions relating to investment or product development are also considered not to be permitted. In reality, decisions of this character do impact on employment conditions, but the courts have taken a narrow view of the employment relationship in applying the "matters pertaining" formulation.

Matters pertaining to employment relationship

The general formulation

Including the phrase "matters pertaining to the employment relationship" the Act essentially incorporated the "industrial jurisprudence developed under the previous industrial award system. It also incorporates the "matters pertaining" jurisprudence largely developed under the repealed Workplace Relations Act 1996 (Cth). This was heavily criticised in the submissions to the Senate inquiry. Jurisprudence was notably described as "chaotic, uncertain and downright incorrect. The majority Senate report to the noted this. However, the government opted to place faith in the judicial process the judicial pronouncements of the "industrial matters" and the "matters pertaining" phrase. As noted in the Explanatory Memorandum (EM): "The courts' interpretation of the formulation has evolved over line with changing community understandings and expectations about the matters that pertain to the employment relationship, and it is expected that this evolution will continue" (at [670]).

Workers will be aware of the technical and legalistic interpretation of the "matters pertaining" phrase, particularly in the High Court decision of Electrolux Products Pty Ltd v Australian Workers' Union. These comments indicate there is space given to parties to negotiate clauses or terms that relate to the implementation of an organisation's environmental or climate change strategy. Cases for certification of agreements from the Australian Industrial Relations Commission (AIRC) have indicated that "environmental efficiency" clauses which direct parties to "work together towards greater environmental efficiency" will likely satisfy the test in Electrolux. Specifically, the clauses directed parties to investigate ways of reducing waste and energy use and investigating the introduction of environmentally sound materials and technology.

As the cases show, there is often an artificial and technical line drawn between what is considered to be a direct or indirect impact on the employment relationship. The "environmental efficiency" clauses discussed in the AIRC decisions did not go as far as directing an employer to invest in green technologies. If they had, they would probably not be permitted. Essentially, if the term imposes on the employer a direct obligation to invest or introduce certain environmentally sound technologies or modes of production, this would not be permitted. This is because the term would be placing an obligation on the employer that does not relate to the relations between employer and employees. This is premised on a narrow understanding of the relations between employers and employees. On the other hand, if the term is phrased so that the "parties" together investigate these matters, then this would be permitted as it relates to the process of the decision and it does not impose a direct obligation on the employer.

Matters about relationship between employers and employee organisations

General formulation

Terms that would otherwise not be permitted under s172(1)(a) may, however, be permitted under the "matters pertaining to the relationship between employers and employee organisations". This is a new legislative provision. Before this, matters between employers and employee organisations were dealt with in the context of the "matters pertaining" formulation between employer and employees (now s172(1)(a)).
The Electrolux decision took a narrow view of the employment relationship, which excluded much of the traditional representational activity of trade unions in the workplace. As a consequence of Electrolux, many clauses in agreements that referred to trade union involvement were considered invalid. The new sub-section now permits these matters directly in a separate provision. The EM explained the operation of the sub-section: "For an agreement term to fall within paragraph 172(1)(b), the term needs to relate to the employee organisation's legitimate role in representing the employees to be covered by the agreement" (at [675]). It is unclear how much of the existing "matters pertaining" jurisprudence will infect the interpretation of this new provision, particularly whether it will be influenced by the same legalistic and technical approach. The EM does not give much guidance in this regard, except to list some matters that relate to trade unions' traditional activities in the workplace as being permitted (at [676]).

At present, the door is open for trade union consultation clauses relating to matters that are generally understood as not permitted under s172(1)(a) to be permitted under s172(1)(b). This is because consultation relates to the process of decision making rather than to the substance of the decision. Terms that allow for consultation on significant business decisions may be permitted as long as they are strictly confined to consultation.

**Legitimate role of trade unions/employee organisations**

There are limits to the legitimate role of trade unions and/or employee organisations in general. Their legitimate role is not clearly defined in the Act, but case law has indicated that trade unions' primary role is to further the interests of their members, subject to their internal rules of association. This basic principle applies to any incorporated association that has members. Trade unions enjoy significant benefits and privileges on registration. However, the legislature has generally curtailed the ability of trade unions to pursue wider causes that are not industrial in nature, within the context of the previous award system and now in the modern enterprise bargaining system. Under the *Fair Work Act 2009* (Cth), these powers are curtailed by the restrictions limiting the content of enterprise agreements to permitted matters as discussed above and the industrial action provisions in the Act. This does not mean that trade unions cannot lobby for wider causes outside the enterprise bargaining framework, as long as they are permitted to do this under their rules of association. The Rudd government has carried over most of the Registration and Accountability of Organisation Schedule (RAOS) from the previous Act, and re-enacted the provisions of the Schedule in a separate Act called the *Fair Work (Registered Organisations) Act 2009* (Cth). One of the main criteria for registration in this Act is that the organisation furthers and protects the interests of its members. Further, as noted, trade unions must act within the parameters of their internal rules of association and be accountable to their members, like other organisations. Other than this, it appears that the Rudd government reforms do not specifically limit organisations' legitimate role to the industrial arena alone, but the scope of their legitimate activity within the enterprise bargaining system is curtailed by implication, due to the permitted content rules in the Act discussed above.

**Mandatory consultation clause**

Most organisations and businesses are at the embryonic stage of working out serious climate change strategies. Consultation with
employees and employee organisations will help organisations be flexible as they iron out the difficulties in implementation.

Consultation rights are also strengthened through the introduction of the new mandatory consultation clause requirement in s205 of the Act. This section requires all enterprise agreements to include a consultation clause relating to major workplace changes that are likely to have a significant effect on employees. The consultation may occur directly with employees or through employee representatives such as trade unions. If the decisions made are so significant that they are a major workplace change, then the consultation will come within the ambit of s205. However, any other insignificant changes will not be covered by s205. If parties desire to negotiate general consultation clauses that are wider, the clause must be permitted by either s172(1) (a) or (b).

Conclusion

Because of the inconsistency of the "matters pertaining" jurisprudence, it would have been easier to abandon the "matters pertaining to the employment relationship" phrase altogether. It is open to the High Court to give the phrase a broad interpretation. The Court has done this in the past, but it has not alleviated the confusion surrounding the phrase as it did not overrule previous inconsistent applications of it. This has led to the problems surrounding interpretation. Unless the High Court overrules the previous case law it is unlikely that a broad interpretation of the phrase will help parties agree to effective and clear obligations in this area. For now, parties must navigate the difficult terrain with caution, subject to the parameters discussed above.

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1. Andrew Peterson, partner, PriceWaterhouseCoopers (PwC), presentation given at Climate Change & Work Conference: Creating the sustainable workplace, Workplace Research Centre, Hilton Hotel, Sydney, 3 April 2009. PwC is an example of a company with progressive strategies connecting employee performance to CO2 targets.
3. Professor Andrew Stewart, Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry to the Fair Work Bill 2008, Submission 98, 4.
6. For a recent case where the test was applied, see Australian Maritime Officers Union v Sydney Ferries Corporation [2009] FCA 231.
7. See R v Kelly, Ex parte Victoria (1950) 81 CLR 64, where decisions on trading hours were held not to be an "industrial matter".
9. See Unions Western Australia, Submission 70, 11; Dr John Buchanan, Submission 150, 4; Professor David Peetz, Submission 132, 14; Professor Andrew Stewart, Submission 98, 4–7, Department of Education, Employment and Workplace Relations, Submission 63, [3.83–3.85].
10. Senate report, note 4 above, at [4.65].
11. See enterprise agreements in note 2 above.
12. Creighton & Stewart, note 8 above, footnote 100 at [4.66].
15. See Stewart's comments, note 3 above, and compare with: John Terrence Ludeke, "Whatever happened to the prerogatives of management?" (1992) 66 Australian Law Journal, 11; Andrew Stewart, 'The Federated Clerks case: managerial prerogative in retreat?' (1985) 59 Australian Law Journal, 717–726. These papers were written in an era when the phrase was broadly interpreted.