national electrical and communications association

Submission
Fair Work Act Review

Prepared by:
National Electrical and Communications Association (NECA)

17 February 2012

NATIONAL OFFICE
Level 4,
30 Atchison Street,
St Leonards NSW 2065
Locked Bag 1818,
St Leonards NSW 1590

T +61 2 9439 8523
F +61 2 9439 8525
E necanat@neca.asn.au
W www.neca.asn.au
ABN 78 319 016 742

NECA SUBMISSION
***FAIR WORK ACT* REVIEW**

1. About NECA

The National Electrical and Communications Association (NECA) is the national voice of the electrotechnology contracting industry. NECA is the only association that represents the interests of electrical and communications contracting businesses Australia-wide.

NECA's services are tailored to the unique needs of contractors working in the electrotechnology contracting industry. More than 5,000 members across Australia now recognise and enjoy the benefits of membership of NECA.

With offices in every state, NECA employs specialists in industrial relations, occupational health and safety, management, education and training, human resources and technology who are on-hand to offer advice on a range of topics and provide representation and support in industrial relations matters. NECA has representatives on many Standards Australia technical committees and is also a registered organisation under the *Fair Work Act*.

The Association actively represents the contractors at all levels of government and industry, ensuring members' concerns and interests are heard. We regularly provide our national member base with up-to-date industry-relevant information including current training, occupational health and safety, industrial and legislative requirements.

NECA also employs more than 2,000 apprentices in its network of Group Training companies, making it the largest employer of electrical apprentices in the country.

2. ACCI and MBA Submissions

NECA is a member of the Australian Chamber of Commerce and Industry, Australia's largest and most representative employer group. NECA supports the ACCI submission to the *Fair Work Act* Review.

NECA has also had the opportunity to read the submission of Master Builders Australia and we also support that submission and the recommendations that it makes.

3. A Comment on the Review Methodology

The review background paper states that "it is essential that contentions and propositions in this submission are supported by evidence". However, while an evidence based approach is understandable, it is nonetheless often impossible to

present evidence which supports the experience of employers and employees. How for example, are the literally thousands of interactions that NECA Industrial Relations staff have had with members, their employees and unions since the commencement of the Act to be reduced to evidence?

Similarly the background paper contains a substantial amount of aggregated statistics relevant to the review. An example is the statistics presented with respect to unfair dismissal. These statistics show the number of applications settled at or prior to conciliation compared to the number of applications lodged. Such statistics tell you nothing about the reasons for settlement and the amount of "go away money" paid by employers adopting a commercial view that settlement is preferable to the time and cost involved in arbitration.

4. The Electrical and Communications Contracting Industry

Electrical and communications contracting businesses install, maintain and repair electrical and communications installations and infrastructure. As such these businesses can be found operating in almost every industry sector including the building and construction industry, industrial and manufacturing industry and the resources sector.

The majority of these businesses (95 per cent plus) are SMEs - the overwhelming majority are privately owned family businesses. The majority of employees are trades people and apprentices and the industry is reliant on a high skills base and a requirement for mobility and flexibility.

5. Issues Considered by NECA

NECA's submission does not consider every aspect of the Act nor all of the questions contained in the Background Paper. Rather the submission focuses on issues associated with enterprise bargaining and right of entry and is based on the experiences of NECA and its members with the Act and the environment in which our members operate.

6. Enterprise Bargaining, Agreement Making and Agreement Content

The *Fair Work Act* has fundamentally changed the agreement making system and has dramatically enhanced union power. Under WorkChoices, unions had the role of support players, whereas the *Fair Work Act* has re-instated them as lead actors at centre stage.

The *Fair Work Act* provides for new types of agreements, a requirement for good faith bargaining, new approval processes and new content rules. Unions have a central and protected role in the agreement making system and moreover there is no longer a distinction between non-union and union agreements.

NECA's experience is that in many cases the bargaining framework does not promote the discussion and uptake of measures to improve workplace productivity but rather entrenches an adversarial culture with a focus on industry outcomes rather than enterprise outcomes.

In many cases, unions seek to have content included in agreements which is not in the employees' interests, but rather to the union's political advantage.

To NECA's knowledge there have been no significant studies into the linkage between workplace relations legislation, enterprise bargaining and productivity in Australia. Certainly enterprise bargaining outcomes can contribute to productivity within an enterprise. In NECA's experience this is usually by way of the agreement providing sufficient operational flexibility and the capacity for direct employee engagement. However, for the reasons discussed below, NECA does not believe that the current bargaining framework facilitates those outcomes.

This is not to suggest that enterprise agreements by themselves drive productivity. Yes, they can facilitate productivity but management competency, skills and training, technology, organisational skills and employee engagement are all essential ingredients for productivity growth.

NECA's specific issues with the bargaining framework go to the following issues:

1. The position of unions as default bargaining representatives for union members.
2. Pattern bargaining, industrial action and the low threshold which applies for a Protected Action Ballot Order.
3. The permitted content of agreements.
4. The inadequacy of the statutory regime for flexibility terms.

7. Unions as the default bargaining representative

This central role for unions in the bargaining process is at odds with the fact that they represent only 14 per cent of the private sector workforce.

NECA has fundamental concerns with the fact that unions are the default bargaining representative for union members. Under Section 176 (1)(b) of the *Fair Work Act* a union will be the default bargaining representative for a proposed enterprise agreement for a union member except where another bargaining representative is specifically appointed by the employee in writing.

This default regime creates a number of concerns. Firstly, it privileges the union over other potential bargaining agents and essentially entrenches them in the bargaining process. This unfairness becomes quite apparent in workplaces where the minority of employees are union members.

Secondly, it discourages employees from making an "active" choice as to who might best represent their interests. NECA does not have a problem with employees being represented by their union - that is their right. However, it is NECA's position that this must be on the basis that the employee has made an active choice for union representation. In other words, an "active" appointment process should be required rather than the default regime which does not encourage employees to turn their minds as to who would best represent their interests.

NECA members in certain parts of Australia, that have largely non-union workforces, are advising us they are now extremely reluctant to initiate bargaining as they believe they will end up having to bargain with the union which will inevitably take the lead role in negotiations and whose bargaining position will inevitably be for a pattern agreement outcome (see below).

Whilst there are good faith bargaining obligations and other protections against pattern bargaining under the Act, these can be legalistic, time consuming and expensive to pursue and beyond the resources of most small to medium enterprises. Moreover, a number of decisions of Fair Work Australia have considerably lowered the bar for unions to gain access to protected action (see below).

Recommendation: That the Act be amended so that bargaining representatives must be appointed by employees making an active appointment rather than automatically on the basis of union membership.

8. Pattern Bargaining and Industrial Action

A number of unions have a stated policy of pattern bargaining. These unions include the construction industry unions in Victoria, among them the Electrical Trades Union. Their policy is to pursue pattern bargaining outcomes in certain industry sectors and they utilise a number of strategies and mechanisms to pursue this policy.

Industrial action based on achieving a pattern agreement was unlawful under WorkChoices and remains so under the *Fair Work Act*, albeit a union can side-step questions of pattern bargaining simply by demonstrating that they are generally trying to reach agreement.

However, the decision in *John Holland v AMWU*[1] is a major barrier to stopping the roll out of union pattern agreements. The Full Bench in that case highlighted the definition of the expression "genuinely trying to reach an agreement" under s.412 of the *Fair Work Act* and the fact that s.412 (5) states that the definition does not affect the meaning of the expression as used elsewhere in the Act. The Full Bench decided that there is no requirement for a union which applies for a protected action ballot order to satisfy Fair Work Australia that it is not pattern

[1] [2010] FWAFB 526

bargaining. This means that a union can seek and pursue a pattern agreement so long as the other means of establishing that the union is genuinely trying to reach an agreement are present.

An industry like construction is extremely vulnerable to industrial action – a central finding of the Cole Royal Commission and a matter recognised in the provisions of the *Building and Construction Industry Improvement Act*. The outcome of the decision in *John Holland Pty Ltd v AMWU* is that, instead of being able to pursue arguments about pattern bargaining at the point when a protection action ballot is applied for, employers must pursue their arguments about pattern bargaining at a later stage. In essence, the decision entrenches pattern bargaining in the building and construction industry.

In addition, the decision of the Full Bench of Fair Work Australia in the *JJ Richards*[2] case has the effect of setting a low bar for unions to satisfy FWA they are *"genuinely trying to reach an agreement"* for the purpose of taking protection industrial action.

It is likely that as a result of this decision, unions will be encouraged to apply for a Protection Action Ballot Order prematurely as a mechanism to compel an employer to negotiate through the threat of protected industrial action, rather than relying on other bargaining mechanisms expressly contained in the *Fair Work Act* to facilitate bargaining. In other words, employees are able to strike before bargaining has commenced and any proposed agreement will be negotiated under duress rather than in good faith. It is our view that industrial action should always be a last resort and that parties should speak and negotiate before any industrial action takes place.

Recommendation: That a union must convince Fair Work Australia that it is not pattern bargaining before a PABO can be granted.

Recommendation: Industrial action should only be available where a majority support determination has been issued by Fair Work Australia and where the parties have engaged in good faith bargaining.

9. Permitted Content of Agreements

The *Fair Work Act* has expanded the matters which may be bargained over (and hence which can be contained in an enterprise agreement) beyond matters that pertain to the employment relationship to include matters that pertain to the relationship between the employer and a union(s). In addition, various matters which were prohibited content under WorkChoices no longer exist - in particular, there are no longer the prohibited content restrictions with respect to the engagement of independent contractors and labour hire workers and any requirements relating to the conditions of their engagement.

[2] JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia [2011] FWAFB3377

This has given rise to a large number of claims for so called “pay parity” or “security of employment” clauses to be placed in agreements and these have inevitably worked their way into pattern agreements.

The *Fair Work Act* provides that terms in an enterprise agreement cannot contain a general prohibition on an employer engaging contractors or labour hire employees – they are not within the scope of matters permitted to be in agreements. However, the explanatory memorandum to the Fair Work Bill contains an example of the terms that are intended to be within the scope of matters which can lawfully be placed in an enterprise agreement including a term which relates to:

“Conditions or requirements about employing casual employees or engaging labour hire or contractors if these terms sufficiently relate to employees job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement”.

Fair Work Australia has considered such provisions in a number of cases including *Asurco Contracting Pty Ltd v CFMEU*[3] and in the *Australian Industry Group v ADJ Contracting Pty Ltd*[4]*.*

A Full Bench of Fair Work Australia has upheld the validity of such clauses in both cases. This has a number of consequences.

Firstly, it further promotes and entrenches union pattern agreements. Under such agreements the employer is obliged to engage contractors and their employees on no less favourable terms than the pattern agreement and this inevitably forces the employer to use contractors who are also party to a pattern agreement or requires the contractors to either enter into a pattern agreement or walk away from the contract. In essence, this discourages true bargaining at the enterprise level.

The second consequence is that the Act now provides a “back door” method of regulation of contractors and intrudes into commercial arrangements.

The union’s justification for such clauses is that contract labour or the contracting out of packages of work to other businesses is a risk to employee job security. However, we are not aware of any consideration by Fair Work Australia of how the facts in each of these particular cases show that such contracting out affects job security.

The expansion of the permitted content of agreements to include matters that pertain to the relationship between an employer and a union(s) has had other consequences. The watering down of the Federal Government’s *Implementation Guidelines for the National Code of Practice for the Construction Industry* has

[3] [2010] FWAFB6180
[4] [2011] FWAFB6684

also contributed to these consequences within the building and construction industry by also removing most of the previous restrictions on agreement content.

Unions have used this expansion to broaden their bargaining claims – in particular to embed themselves in either a consultative or decision-making role within critical agreement provisions such as changes to start and finish times, rostering arrangements and the engagement of contractors. The unions' objective is to become a gate keeper and to intrude further into areas of management prerogative.

The Victorian electrical contracting pattern agreement contains the word "union" 78 times, "ETU" 48 times, "employee representative" 65 times and "shop steward" 22 times.

This is not to say that there is never a role for a union or union delegates. However, the breadth of permitted content in our submission is far too broad and in our experience results in the most difficult and protracted bargaining negotiations being over the rights and role of the union and their intrusion into decision making, rather than the wages and conditions of the employees.

Recommendation: That the matters that can be bargained over and included in enterprise agreements be limited to matters that pertain to the employment relationship.

Recommendation: That restrictions on the engagement of independent contractors and labour hire workers and any requirements relating to the conditions of their engagement under enterprise agreements be expressly prohibited.

10. Individual Flexibility Arrangements

Individual Flexibility Arrangements (IFAs) are designed to provide employees and employers with the option of varying the terms of the applicable modern award or enterprise agreement in order to meet the "genuine needs of the employee and employer".

The Government's *Forward with Fairness Policy Implementation Plan* stated that the "aim of the flexibility clause is to enable individual arrangements which are genuinely agreed by the employer and an individual employee".

The Government in the lead up to its victory in the 2007 Federal election, promised employers that IFAs would be an adequate alternative to statutory individual agreements. Labor's policy being to abolish the ability to make new Australian Workplace Agreements (AWAs).

IFAs were promoted by the Government as the alternative vehicle by which employers could negotiate flexible workplace arrangements with their employees

on an individual basis. It appears that the Government was committed to fostering flexibility in all types of workplace arrangements given that a flexibility term had to be included in all modern awards and enterprise agreements.

In essence, IFAs were introduced as a concession to employers who were led to believe they would be able to use them to achieve the individual flexibility they required without undermining the safety net.

Enterprise agreements are required to include a flexibility term (s202). If an enterprise agreement does not include a flexibility term then the model flexibility term is taken to be a term of the agreement.

The unfortunate reality is that many unions oppose the inclusion of broad flexibility terms in enterprise agreements and insist on limiting their scope so as to make them meaningless and virtually nonsensical. During negotiations with the Electrical Trades Union, NECA and the members it was representing were told by senior union officials that the union "doesn't trust employers and doesn't trust its (own) members" when it comes to flexibility terms.

The union in that case was only prepared to agree to a clause which limited the matters about which IFAs may be agreed to "single day annual leave absences". This is hardly the flexibility that the Government had promoted when selling its policy and legislation.

There are other legislative inadequacies with the regime of IFAs. Firstly, there is the ability for employers to make IFAs a condition of employment. This is specifically prohibited by the *Fair Work Act*. In NECA's view the inclusion of statutory protections under s144 and s203 of the Act ensuring that IFAs must leave workers "better off overall" in comparison with an award or enterprise agreement is more than sufficient to satisfy any genuine concerns about the exploitation of prospective employees.

Secondly there is the ability of parties to terminate an IFA with 28 days notice. In some situations the fact that IFAs maybe terminated at 28 days notice by one party unilaterally will not be a major issue, however in other situations the unilateral termination at short notice of an IFA will have more serious consequences. Employers need certainty of flexible work practices in order to plan their operations and forecast expenditures. Employees also need certainty about their conditions of employment, pay and rosters.

NECA believes that if IFAs are to be a real alternative to individual statutory agreements they must not allow unilateral termination by an employee with only 28 days notice. They should operate for a set period - perhaps a minimum of one year and a maximum of three years unless terminated by mutual agreement. This would give both parties certainty that the arrangements would continue for a minimum period and would allow IFAs to operate with more certainty than arrangements that can be terminated on very short notice.

Thirdly, there is the limited scope of the model IFA clause. Where the model clause is adopted, it only allows an IFA to vary the affect of terms related to:

- Arrangements about when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Leave loading

The model clause is of course only intended as a guide to bargaining parties and does not prevent the negotiation of broader or lesser flexibility terms for inclusion in enterprise agreements - subject to the requirement that flexibility terms must relate to "permitted" matters. However, given the total opposition to the model clause by a number of unions as outlined above, it is NECA's view that the model clause should be broadened to open up the possibilities for greater flexibility in the bulk of awards and enterprise agreements and that the model clause be mandated in all enterprise agreements.

Recommendation: That the model flexibility clause is broadened to include any matter pertaining to the employment relationship (except the NES) and that the model clause is mandated in all enterprise agreements.

Recommendation: IFAs should operate for an agreed period of up to 4 years unless otherwise terminated by mutual agreement.

11. Right of Entry

NECA seeks amendment to the Right of Entry provisions contained within the *Fair Work Act*. To this end we highlight the objects of Part 3-4 of the *Fair Work Act* which states as follows
:

> *'The object of this Part is to establish a framework for officials of organisations to enter premises that balances:*
>
> *(a) The right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:*
>
> *(i) This Act and fair work instruments; and*
>
> *(ii) State and Territory OHS Laws; and*
>
> *(b) ...*
>
> *(c) the right of occupiers of premises and employers to go about their business without undue inconvenience."*

NECA seeks to emphasis the requirement to balance an organisation's right of entry with the inconvenience experienced by employers as opposed to the occupiers of premises.

The practical reality of the Construction Industry is that the industrial interests of an occupier of premises (the Builder) and those of an employer (the Subcontractor) will differ significantly. More importantly it is often in the Occupier's interest to allow union officials access to their premises (sites) without requiring the organisation to comply with the rigours of the right of entry requirements outlined in the *Fair Work Act*. This relaxation of the legislation is granted for the purposes of maintain industrial harmony on site.

The employer often does not become aware that union officials are having discussions with their employees until after the discussions have taken place, resulting in disruption to work and undue inconvenience.

This issue is further exacerbated when the Occupier does not require the official to restrict their access to meal breaks and provides access to employee during working hours. The Employer is then forced to deal with the ramifications associated with prohibitions on the payment for lost time for industrial action, ie strike pay.

This issue is not only isolated to circumstances where the Occupier willingly permits access to unions. In this regard we refer to the construction of s487(1)(b), which relevantly states:

> *"...the permit holder must:*
> *(a)...*
> *(b) before entering premises under Subdivision B – give the occupier of the premises an entry notice for the entry."*

It is often the case that the Occupier will receive the correct notification, but fail to notify the Employer. The same issues and inconvenience flow from the failure to notify as previously highlighted.

Recommendation: That s487 be amended to require notification of the Employer in circumstances where an Organisation seeks entry to premises that are not controlled by the Employer.