Provide your views to the IR Working Group process

Name (and Organisation, if applicable):	NECA
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Working Group/s to consider your submission:	Enterprise Agreement Making

NECA's concerns and views with respect to the Enterprise Agreement process

The National Electrical and Communications Association (NECA) is the peak industry body for Australia's electrical and communications contracting industry, which employs some 170,000 workers and delivers an annual turnover in excess of $23 billion. We represent the interests of over 5,500 contracting businesses and our members make an integral contribution to the Australian economy, encouraging investment, improving reliability and security across the energy system and delivering greater environmentally sustainable and affordable outcomes for the community.

NECA has a number of concerns with the current industrial relations system relating to Enterprise Agreements and the impact that this system has on the economic viability and sustainability of electrical contracting businesses.

General Comments

Of particular concern to NECA is the viability of having an industrial relations system (i.e. the *Fair Work Act*) that allows for Enterprise Agreements to be made. NECA is concerned that the current system provides far too many opportunities for the unions to frustrate the process and this in turn places economic pressures on electrical contracting businesses. Some examples are:

- using section 180(5) of the *Fair Work Act*, the Union's reliance on "*One Key Workforce*[1]" is misplaced and is being used to frustrate the approval process by arguing that the employees have not genuinely agreed to the Enterprise Agreement. The amendments to the current Form F17 (as at 20 June 2020) at Part 3.4 should be sufficient proof that the employees have genuinely agreed.
- acting as a contradictor, by relying on section 590 of the *Fair Work Act*, at the approval stage, notwithstanding whether or not they have members working for that employer;
- the default rights of Unions to be bargaining representatives of members employed at the workplace has led to disputation about whether any such members (who have not nominated another or nominated themselves as bargaining reps) are intended to be covered by the Enterprise Agreement.
- attending employer sites (i.e. abusing right of entry laws and using protected industrial action) so as to coerce employers into entering the Union's Enterprise Agreement;
- Union's using strong-arm tactics against employers to push wage rates and allowances to such an inflated level that the Union Enterprise Agreement companies are not competitive in the market as compared to those non-Union Enterprise Agreement companies.
- These strong-arm tactics adopted by the Union, then allow the Union to push for inflated Greenfields Agreements, which then give the Union a further basis for negotiating the next 4 years' worth of Union Enterprise Agreement rates.

NECA would like to see the committee consider alternatives to Enterprise Agreements.

[1] *v CFMMEU* [2018[FCAFC 77.

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Existing Legislative Provisions

In regard to the existing legislative provisions, NECA would like to see amendments to the following sections of the *Fair Work Act*:

- Section 174 and the Notice of Employee Representational Rights issued under that section should be amended so that a person can only be an employee bargaining representative if they represent a registered employee organisation with at least one member covered by the proposed Enterprise Agreement AND they have been appointed in writing.
- Section 186(5) should be amended to allow for an Enterprise Agreement to have a nominal expiry of up to 5 years (instead of the current 4 years).
- Section 309 should be amended to give the Fair Work Commission discretion to order that the Enterprise Agreement of the old employer does not transfer to the new employer where that improves the prospects of the employees gaining employment with the new employer. This should also be added as a criteria to be taken into account in sections 318 and 319.
- Section 423(2) be amended so that the Fair Work Commission may suspend or terminate protected industrial action where it is causing, or threatening to cause, significant economic harm to either the employer or the employees who will be covered by the Enterprise Agreement, rather than harm to both parties as is currently the case.
- Section 492(3) be removed and if the permit holder and the occupier cannot agree on a room or area where the discussions are to be held, the occupier of the premises should be allowed to determine the most suitable room or area for the discussions to take place.
- Section 590(1) be reviewed to ensure that uninvited organisations that cannot prove standing are excluded from the process.

Better Off Overall Test

NECA also considers that the Better Off Overall Test should be replaced with a No Disadvantage Test:

- that allows the Fair Work Commission to approve an Enterprise Agreement if the majority of the employees would not be disadvantaged, thereby not having to refuse approval of an Enterprise Agreement where one employee out of hundreds may be disadvantaged.
- Where there is an Individual Flexibility Agreement, the No Disadvantage Test should be compared with the Award rather than the Enterprise Agreement.

Alternatively, NECA contends that the Better Off Overall Test should be amended so as to focus on each class of employee (rather than individual employees) to ensure that they will be better off overall. Additionally, prospective rosters that are unlikely to apply to that employer (such as continuous shift rosters) should not be considered by the Fair Work Commission when assessing the Enterprise Agreement against the Better Off Overall Test.

Access Period and Vote

NECA would also like to seek clarification as to whether workplace policies referred to in an Enterprise Agreement need to be provided to the employees during the access period.

Fair Work Commission

Finally, NECA is of the opinion that the Fair Work Commission should be more proactive in approving Enterprise Agreements. The objects of Part 2 – 4, at section 171 of the *Fair Work Act,* should guide the Fair Work Commission's consideration of Enterprise Agreement applications. In addition, the Fair Work Commission should be allowed a wider discretion to overlook minor procedural and technical errors when approving an Enterprise Agreement.