SUBMISSION BY THE

NATIONAL ELECTRICAL AND COMMUNICATIONS ASSOCIATION

Senate Enquiry into the Fair Work Bill 2008

SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

9 January 2009

neca

national electrical and communications association

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OVERVIEW

The *Workplace Relations Amendment (Work Choices) Act 2005* substantially amended the *Workplace Relations Act 1996* ('the WR Act') and made sweeping and evolutionary changes to Australia's industrial relations landscape. Many of these reforms were supported and commended by the National Electrical and Communications Association ('NECA') on behalf of its employer members.

The reforms, however, were the subject of contested controversy and a central issue in the 2007 federal election. The Australian Labor Party ('Labor') won the election with a specific *"Forward With Fairness"* policy to wind-back Australia's workplace relations system. With the election now over, Labor has begun to translate its policy into legislation. Although some of the changes have already been implemented as part of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, further significant transformation of the current workplace relations regime will again occur in January 2010.

NECA's submission to this Senate Committee Inquiry identifies those areas of the translation, from Forward with Fairness to the 'Fair Work Bill 2008', that NECA considers, for good reasons, as either:

a) beyond the scope of Forward with Fairness and therefore must be removed; and/or

b) bad or reckless policy/outcomes that should never be sanctioned in workplace relations legislation or modern Australian workplaces, ie notwithstanding Labor's election policy.

WHO IS NECA?

NECA is the only national industry association representing contractors responsible for the delivery of electrical, voice and data communications systems in Australia. It has approximately 5,000 businesses as its members, which employ approximately 50,000 tradespeople.

NECA actively represents the needs and entitlements of contractors within the Australian Government and industry, ensuring members' needs are heard. NECA works to steer the future of the industry on critical issues such as licensing and regulations, training and education, skills shortages, workplace relations and occupational health and safety. Through membership on more than 30 Standards Australia Technical Committees and other relevant industry bodies, NECA represents its members' interests on important matters that affect their businesses.

NECA provides members with timely information and advice, and practical tools to make business more efficient, safe and cost-effective. With offices in every state, NECA employs specialists in industrial relations, occupational health and safety, management, education and training, human resources and technology. NECA expertise and the skills it is able to offer to members, form an integral component of member business operations.

NECA is a significant employer through Group Training Companies

NECA has a major interest and influence in the area of training and development of young and mature age workers in electrotechnology, through Group Training Companies and other industry development activities.

NECA Group Training Companies currently select and employ approximately 2,000 quality apprentices in electrotechnology. These apprentices are then hosted by NECA electrical and communications contractor members.

Networks and affiliations

NECA's network of contacts and affiliations is extensive. NECA is represented on or affiliated with the following organisations:

- Australian Construction Industry Forum (ACIF) Council
- EE-OZ Industry Skills Council
- Australian Chamber of Commerce and Industry, General Council
- Australian Chamber of Commerce and Industry, Employment and Workplace Relations Committee
- Australian Chamber of Commerce and Industry, OH&S Committee
- CONNECT Superannuation Fund
- NESS Superannuation Fund
- International Forum of Electrical Contractors (IFEC)
- International Association of Electrical Contractors (AIE)
- TRAA Central Trades Committee
- Copper Development Centre, Smart Wiring Project
- National ICT Industry Alliance
- Australian Cabler Registration Service Pty Ltd (ACRS)
- Standards Australia
- Australian Refrigeration Council (ARC)
- Federation of Asia and Pacific Electrical Contractors Associations (FAPECA).

SUMMARY OF NECA RECOMMENDATIONS

NECA's 'right of entry' recommendations

A. The objects under s.480 of the Bill should be replaced with s.736 of the current WR Act. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

B. Section 482(1)(c) of the Bill should be replaced with s.748(4) of the current WR Act. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

C. If the scope of a permit holder's powers of inspection is to expand from just *"records"* to encompass *"any record or document"* under s.482(1)(c) of the Bill, further protections are required within the Bill (itself) to deal with breaches of confidentiality and inappropriate disclosure. Such further protections need to include civil penalty provisions that are easy to understand, not onerous to prove and properly founded as express terms of the Bill, ie as opposed to a (essentially useless) reliance upon a throw-away reference to National Privacy Principle 2 in Schedule 3 to the *Privacy Act 1988*.

D. Section 484 of the Bill should be replaced with provisions similar to s.760 of the current WR Act. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

E. Prohibitions and civil penalty provisions under Part 15, Division 7 of the current WR Act, and the enforcement regime for same under Part 15, Division 8 of the current WR Act must be maintained in the Bill. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

NECA's 'agreement making' recommendations

F. Making a union the 'default' bargaining representative for a union member(s) at an enterprise/workplace (pursuant to s.176(1)(b) of the Bill) must be removed. Instead, each and every individual employee (whether a union member or not) should be obliged to expressly appoint his/her bargaining agent pursuant to s.176(1)(c) of the Bill. Only such an outcome is consistent with Labor's election policy that it will provide for a *"genuine non-union enterprise bargaining stream"*.

G. Unions should only be allowed to make application to be covered by an enterprise agreement where that union was a bargaining agent at the time the enterprise agreement was *"made"* (pursuant to s.182 of the Bill). Further, s.183 of the Bill must be amended to this effect. Only such an outcome is consistent with Labor's election policy that it will provide for a *"genuine non-union enterprise bargaining stream"*.

H. Appropriate and tailored restrictions, along the lines of those set out under Part 8, Division 7.1 of the *Workplace Relations Regulations* 2006, must be introduced to ensure that the content of enterprise bargaining agreements is not simply a matter of compliance with the disastrous scope of allowable enterprise agreement content under s.172(1) of the Bill.

I. Section 179 of the Bill should be amended to apply equally to bargaining representatives of employers and employees. Such an outcome is consistent with the Objects of the Bill and the Objects of Chapter 2, Part 2-4 of the Bill.

J. Sections 238 and 239 of the Bill (relating to scope orders) should be removed. They are unnecessary, problematic and inconsistent with the express provisions of Labor's election policies.

K. NECA's 'unfair dismissal' recommendations

L. Existing limitations in respect of the unfair dismissal jurisdiction, under s.638 and s.643 of the current WR Act, should be retained.

M. Section 389 of the Bill (relating to exemptions for *"genuine redundancy"*) should be removed and replaced with the existing *"operational reasons"* exemption contained within s.643(8) and (9) of the current WR Act.

N. The application of unfair dismissal protections should not encompass apprentices and trainees. The exemptions from unfair dismissal under s.638(1)(e) of the current WR Act should be maintained and specifically exclude both apprentices and trainees.

RIGHT OF ENTRY

Right of entry - Overview

1. Abuse of right of entry remains a significant concern for many NECA members. Evidence of abuse of right of entry was, for example, widely documented in the Cole Royal Commission (into the building and construction industry) and continues to be highlighted as an ongoing problem via recent proceedings before the Australian Industrial Relations Commission and prosecutorial actions by the Australian Building and Construction Commission.[1]

2. NECA considers various right of entry provisions contained in Chapter 3, Part 3-4 of the Bill as:

   a) inconsistent with Labor's election policy that it will *"maintain existing right of entry rules"*[2]; and/or

   b) bad policy.

3. In short, NECA favours the complete retention of Part 15 of the WR Act, absent any amendment. Further, only this outcome is consistent with Labor's express election policy that it will *"maintain existing right of entry rules"*. By reference to Labor's simple, unambiguous and unqualified right of entry election policy, reviewing right of entry laws by reference to the historical development of right of entry provisions (ie prior to Work

[1] See, for example, Hadgkiss v En Won Lee, 28 November 2007; CFMEU v BCG (Australia) Pty Ltd RE2007/2087 AIRC PR980446; Grant v Michael Lane, 28 November 2007, AIRCFB [2008] 898; Alfred v Quirk, 15 April 2008

[2] ALP *"Forward with Fairness Policy Implementation Plan"*, August 2007, p.23. See also ALP *"Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces"*, August 2007

Choices) is a 'fudge'[3]. In this regard, the only appropriate and relevant comparison to the Bill's right of entry laws are those in place under the current WR Act.

4. NECA submits that notwithstanding that the overall 'framework' for right of entry by union officials has been maintained under the Bill, it is unarguable that the 'rules' have **not** been maintained. They have changed. Right of entry provisions under the Bill are of a different and expanded kind to those under the WR Act.

Right of entry - Background

5. Case law and other related documentary evidence highlights that the inappropriate and strategic use of right of entry privileges has been a brazen tactic in the securing of industrial outcomes, including in regard to bargaining and wage claims. In some cases, right of entry privileges have been used as a vehicle to disrupt commercial operations and to pursue outcomes at odds with harmonious workplace relations.

6. Right of entry laws must be recognised for what they are; legalised *"trespass"*[4], in circumstances where that trespass is considered justified as a matter of public policy. They overturn fundamental notions of private property which are central to our economic and legal systems. It is NECA's position that the legal presumption in favour of the protection of private property from interference should always inform all policy decisions regarding the scope of right of entry laws, and should be the foundation from which all thinking on right of entry issues proceeds. This presumption requires that right of entry provisions be restricted to the

[3] See, for example, the 'right of entry comparison table' provided to the Senate Committee by Mr Peter Cully, Branch Manager, Workplace Relations Legal Group, DEWR, *Committee Hansard*, 11 December 2008, p.23
[4] See also Explanatory Memorandum, p.298, paragraph 1948.

maximum extent possible, and to be based solely upon very solid policy justifications.

7. Underlying property rights, are also significant operational reasons which further support restrictions on right of entry to workplaces, including:

- serious occupational health and safety concerns in many workplaces, in particular, construction workplaces, meaning that access to those workplaces is tightly controlled and visitors must be monitored at all times;

- confidentiality concerns in respect of sensitive business information which must not be disclosed; and

- the privacy wishes of employees.

8. Statutory protection or privileges for the right of trade union officials to enter workplaces were first made in 1973 in amendments to the *Conciliation and Arbitration Act 1903*. However, despite various amendments over the years[5], the scheme continues to be open to abuse and many workplace participants complain that trade union officials, under the pretext of discussions or inspecting records, use right of entry provisions to embark upon a recruitment drive for members or just generally 'stir up trouble'. Many industrial disputes are often provoked by union visits to workplaces for reasons which are contrived and/or which are unwanted by affected employees.

9. NECA submits that the 30 or more years of right of entry provisions, prior to the March 2006 amendments to the WR Act, reflect a distant and

[5] See, for example, the repeal of s.286 of the former Industrial Relations Act 1988, where any trade union official, authorised by his/her Union Secretary, could gain access to a workplace.

entirely different world of industrial relations. They reflect the era of the 'closed shop' and/or the peculiar relationship enjoyed by unions in the processes of industrial relations, whereby right of entry was one of the vehicles used to illegitimately protect the involvement of unions in the workplace and in employment arrangements more generally. In this regard, the March 2006 amendments to the WR Act were a recognition of Australia's changed workforce reality, including historically low levels of union membership[6].

10. The following NECA recommendations provide no risk that right of entry provisions will penalise the majority of unions who exercise their statutory rights responsibly and lawfully. Instead, NECA's recommendations are aimed squarely at a small number of militant unions and rambunctious union officials who have a record of abusing the system.

Right of entry - Objects

11. Section 736 of the WR Act reads:

> ***"736 Objects of this Part***
>
> *In addition to the object set out in section 3, this Part has the following objects:*
>
> *(a) to establish a framework that balances:*
>
> *(i) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial laws, industrial instruments and OHS laws; and*

[6] Currently less than 15% in the private sector. Source: ABS Employee Earnings, Benefits and Trade Union Membership, Australia, Released 14/4/08, Cat: 6310.0

*(ii) the right of occupiers of premises and employers to conduct their businesses **without undue interference or harassment**;*

*(b) **to ensure** that permits to enter premises and inspect records are only held by persons who understand their rights and obligations under this Part and who are fit and proper persons to exercise those rights;*

*(c) **to ensure** that occupiers of premises and employers understand their rights and obligations under this Part;*

*(d) **to ensure** that permits are suspended or revoked where rights granted under this Part are misused."*

(***our emphasis***)

12. Section 480 of the Bill reads:

"480 Object of this Part

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 or Territory OHS laws; and

(b) the right of employees to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience."

13. Having regard to the differences between these two sets of objects, the public aims of the Bill's right of entry provisions, including its scope and purpose, disclose an intention that is different to that contained in the WR Act. Further, whilst these intentions will not over-ride the Bill's express right of entry provisions, they do underpin their statutory force and will no doubt extend to colouring and/or flavouring interpretations of

Part 3-4 provisions, including the powers of Fair Work Australia ('FWA') when dealing with disputes about right of entry and/or any orders made by FWA concerning right of entry.

14. As the Senate Committee will be well aware, giving meaning to legislation is an inherently disputable activity. It is not uncommon for differences of judicial opinion to emerge during a litigious journey. Sometimes such differences can be explained by different responses to statutory language or to the context or the purpose discerned in the legislation. Intuitive judgments, often difficult to explain in words, are involved in the task. Different judicial values sometimes inform the resolution of the problem.

15. NECA submits that the Bill's objects are inconsistent with Labor's election policy that it will *"maintain existing right of entry rules"*. They have the ability to water down interpretations of right of entry limitations and penalties, absent the current clear legislative intention of balancing the rights of occupiers and/or employers to conduct their businesses *"without undue interference and harassment"*. The inclusion of *"undue inconvenience"* will not do. It is not the same. It is not to the point, especially when one considers the legal presumption in favour of the protection of private property.

NECA Recommendation: The objects under s.480 of the Bill should be replaced with s.736 of the current WR Act. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

Right of entry – disclosure, privacy and access to non-member records

16. Section 748(4) of the WR Act reads:

> *"(4) While on the premises, the permit holder may, for the purpose of investigating the suspected breach, require an affected employer to allow the permit holder, during working hours, to inspect and make copies of, **any records** relevant to the suspected breach (**other than non-member records**) that:*
>
> *(a) are kept on the premises by the employer; or*
>
> *(b) are accessible from a computer that is kept on the premises by the employer."*
>
> (***our emphasis***)

17. Section 482(1)(c) of the Bill reads:

> *"(1) While on the premises, the permit holder may do the following:*
>
> *(a) ……..*
> *(b) …….*
> *(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, **any record or document** relevant to the suspected contravention that:*
>
> *(i) is kept on the premises; or*
>
> *(ii) is accessible from a computer that is kept on the premises."*
>
> (***our emphasis***)

18. NECA submits that s.482 of the Bill is inconsistent with Labor's election policy that it will *"maintain existing right of entry rules"*. In this regard, s.482:

a) empowers permit holders to inspect not only records, but *"any record or document"*; and

b) empowers permit holders to inspect 'records or documents' of non-union members, albeit whilst maintaining historical and existing limitations of *"relevance to the suspected breach/contravention"*.

19. Of further concern is the fact that the Bill itself provides:

a) **only limited protection** as to inappropriate disclosure or confidential maintenance of 'employee records' (including non-union member records), ie per the civil remedy provisions based upon a proven breach of National Privacy Principle 2 in Schedule 3 to the *Privacy Act 1988*[7]; and

b) **no protection** as to inappropriate disclosure or confidential maintenance of 'documents' obtained during such an inspection[8] (for any employee)[9].

20. NECA submits that an obligation upon an occupier or employer, in relation to unauthorised use or disclosure of employee records, to prove a breach of National Privacy Principle 2 in Schedule 3 to the *Privacy Act 1988* is extremely onerous, with many threshold matters required to be proven/determined in any such cause of action, and up to 15 or more exemptions/defences available to the person/organisation defending such an action. It is unworkable and unlikely to be used. Further, the fact

[7] See s.504 of the Bill

[8] It is noted that s.510(1)(b) and s.510(1)(c) are no protection whatsoever in relation to 'documents', ie they apply only to 'employee records'. Further, it cannot be said that s.505 is relevant to this issue. Section 505 is not a protective provision, it is a consequential provision in that it requires there to be a 'dispute' in the first instance. Indeed, nowhere in the Bill is there anything to do with actual penalties for inappropriate disclosure of 'documents'.

[9] The absence of any protections in the Bill in relation to 'documents' is contrary to the Minister for Education, Minister for Employment and Workplace Relations and Minister for Social Inclusion, Ms Gillard's comments in her Second Reading Speech where she states *"We are also introducing very strict requirements on the use that can be made of any such documents. Privacy Act requirements apply and any misuse results in a significant fine and the cancellation of the permit."* (Parliamentary Hansard, 4/12/08, p.12646)

that an occupier or employer must turn, not to the Bill itself, but to the general law if confidentiality or unauthorised disclosure of 'documents' by a permit holder occurs is wholly unacceptable. Indeed, it goes without saying that in nearly all workplaces, there are issues concerning confidentiality, either in respect of sensitive business information, or of particular production methods, which are private, commercially sensitive and should not be disclosed under any circumstances, let alone by a reckless, industrially motivated, recalcitrant or negligent union or permit holder.[10]

21. Furthermore, one cannot discard issues concerning the privacy wishes of employees. Employees may not wish their employment records or documents to be disturbed or reviewed by (trade union) permit holders where that is not their wish, particularly in circumstances where the vast majority of employees have chosen either not to be a member of a trade union or not to be 'formally' represented by a trade union in the workplace[11]. In contemporary Australian society, employees are increasingly competent at finding and selecting the services they wish for themselves, and may resent, rightly, the intrusion of an external service provider (such as a trade union official) in their workplace going through their employment records or other documents without their express knowledge and consent.

NECA Recommendation: Section 482(1)(c) of the Bill should be replaced with s.748(4) of the current WR Act. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

[10] In terms of the general law, it needs to be noted that the *Privacy Act 1988* itself provides no protection in terms of prohibitions or civil penalties, ie it is simply about the reporting of breaches. It does little else in terms of actual deterrence or security.
[11] See footnote 6 above

NECA Recommendation: If the scope of a permit holder's powers of inspection is to expand from just *"records"* to encompass *"any record or document"* under s.482(1)(c) of the Bill, further protections are required within the Bill (itself) to deal with breaches of confidentiality and inappropriate disclosure. Such further protections need to include civil penalty provisions that are easy to understand, not onerous to prove and properly founded as express terms of the Bill, ie as opposed to a (essentially useless) reliance upon a throw-away reference to National Privacy Principle 2 in Schedule 3 to the *Privacy Act 1988*.

Right of entry – entry for discussion purposes

22. Section 760 of the WR Act reads:

> ***"760 Right of entry to hold discussions with employees***
>
> *A permit holder for an organisation may enter premises for the purposes of holding discussions with any eligible employees who wish to participate in those discussions. For this purpose,*
>
> ***eligible employee** means any employee who:*
>
> *(a) on the premises, carries out work that is **covered by an award or collective agreement that is binding on the permit holder's organisation**; and*
>
> *(b) is a member of the permit holder's organisation or is eligible to become a member of that organisation."*
>
> *(**our emphasis**)*

23. Section 484 of the Bill reads:

> ***"484 Entry to hold discussions***
>
> *A permit holder may enter premises to hold discussions with one or more persons:*

(a) who perform work on the premises; and

(b) ***whose industrial interests the permit holder's organisation is entitled to represent****; and*

(c) who wish to participate in those discussions."

*(****our emphasis****)*

24. NECA submits that s.484 of the Bill is inconsistent with Labor's election policy that it will *"maintain existing right of entry rules"*. In this regard, s.484 (by reference to s.760 of the current WR Act):

a) rewrites existing right of entry (for discussion purposes) rules that have been in place since March 2006 and continue to work efficiently and effectively;

b) dramatically expands the number of workplaces a union official may now enter for discussion purposes, ie to include any workplace where a particular union official has constitutional rule coverage;

c) removes any requirement for an employee or union official to be bound by the relevant award or workplace agreement applying in the workplace[12]; and

d) is a recipe for mistrust, misuse, misunderstanding and/or demarcation dispute.

NECA Recommendation: Section 484 of the Bill should be replaced with provisions similar to s.760 of the current WR Act. This outcome is

[12] The fact that the award modernisation process may result in modern federal awards not specifying organisations 'bound' does not mean that s.484 of the Bill has any justification in its current terms. In other words (at least) the concept that a collective agreement in place in a workplace is binding upon a permit holders union should be maintained.

consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

Right of entry – lack of civil penalty provisions for permit holders that breach their right of entry obligations

25. NECA notes that the 'prohibitions' under Part 15, Division 7 of the WR Act apply to permit holders. They are civil penalty provisions.

26. However, of concern to NECA is the fact that Chapter 3, Part 3-4, Division 2, Subdivision C of the Bill does not provide for any civil penalty provisions to be applied against permit holders that engage in conduct that contravenes their obligations. Indeed, it appears that the Bill only sanction contemplated is that permit holders will have their right of entry permits suspended or revoked after application to FWA. Such a situation is unbalanced and unacceptable. It is inconsistent with Labor's election policy that it will *"maintain existing right of entry rules"*. Civil penalty provisions must be maintained in the Bill so that they may be applied to permit holders who fail to abide by, comply with, or abuse their statutory right of entry obligations. This is a fundamental area in which the application of the rule of law, via civil penalty regime, must occur.

NECA Recommendation: Prohibitions and civil penalty provisions under Part 15, Division 7 of the current WR Act, and the enforcement regime for same under Part 15, Division 8 of the current WR Act must be maintained in the Bill. This outcome is consistent with Labor's election policy that it will *"maintain existing right of entry rules"*.

AGREEMENT MAKING

Agreement making - Overview

27. NECA notes the following components of Labor's election policy[13] in respect of 'agreement making':

a) **Non-Union Collective Agreements**

"In a workplace, where an employer and employees who are not union members voluntarily agree to collectively bargain together they will be free to do so"[14]

b) **Agreement Content**

"A Rudd Labor Government will also remove the Government's onerous, complex and legalistic restrictions on agreement content. Under Labor's system, bargaining participants will be free to reach agreement on whatever matters suit them"[15]

"Labor's system frees employers and employees from having to resort to side agreements and other deals to set out their arrangements…."[16]

[13] ALP *"Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces"*, August 2007
[14] Ibid, p.13
[15] Ibid, p.14
[16] Ibid, p.15

28. NECA considers various enterprise agreement making provisions contained in Chapter 2, Part 2-4 of the Bill as:

    a) inconsistent with Labor's election policy that it will allow *"employees who are not union members to collectively bargain"* without union involvement; and/or

    b) bad and reckless policy.

29. NECA's concerns, along with other matters concerning enterprise agreement provisions under the Bill, will now be identified and discussed in turn.

Agreement making – Non-union collective agreements

30. In respect of the non-union enterprise agreement making provisions of the Bill, by reference to Chapter 2, Part 2-4, Divisions 3 and 4 of the Bill, NECA highlights the following barriers/concerns:

    a) a union is automatically (ie by default) a bargaining representative for an enterprise agreement if the union has only one (1) member in the workplace whose industrial interests it is entitled to represent[17];

    b) a union does not need to be involved in 'actual bargaining' over an enterprise agreement in order to be ultimately *"covered"* (ie bound by) the enterprise agreement[18].

[17] See s.176(1)(b)(i) of the Bill, *"unless an employee has appointed another person"*. See also comments in Explanatory Memorandum, p. 112, paragraphs 696 and 697.
[18] See s.183 of the Bill. Here, a union need only have been a bargaining representative, not actually bargaining, and notify its intention to be covered by the enterprise agreement to FWA. Noting, of course, that a union is always 'by default' a bargaining representative by

31. In NECA's submission, combined, the above provisions have the practical effect that non-union enterprise agreements are only possible where:

    a) the workplace has absolutely no union members; or

    b) a union chooses not to be covered by an agreement.

32. These outcomes are deplorable. They are wholly inconsistent with Labor's election policy that non-union member employees will be *"free"* to bargain collectively without union involvement. Instead, they provide for a non-union enterprise bargaining stream that:

    a) falsely masquerades itself on general principles of freedom to bargain on a non-union basis, but in reality is nothing other than a throw-back to bygone union representation privileges; and

    b) will be grossly under-utilised for fear of unwelcome union intervention (sanctioned by Statute) on behalf of one, or a small minority of, union member/s who may not have even formally or conscientiously 'engaged' the union to represent them.

33. By way of background and raw data, between 7 May 2007 and 28 March 2008, over 60% of collective agreements lodged with the Workplace Authority were employee (non-union) collective agreements[19]. Between 28 March 2008 and 30 June 2008, over 57% of collective agreements

virtue of s.176 of the Bill *"unless an employee has appointed another person"*. See also Explanatory Memorandum, pp. 119-120, paragraphs 753 to 755.

[19] Of a total of 7727 collective agreements lodged with the Workplace Authority in this period, 4641 were employee collective agreements and 3086 were union collective agreements. See: http://www.workplaceauthority.gov.au/docs/workplacerelations/factsheets/Revised_stats_templates_for_website_for_FT3.pdf

lodged with the Workplace Authority were employee (non-union) collective agreements[20]. Noting that these non-union collective agreements have been subject to the same fairness or no-disadvantage test under the WR Act, and will be subject to the same better-off-overall test under the Bill, this data flies in the face of the Bill's proposed non-union enterprise bargaining stream. Indeed, there appears to be absolutely no justification for it, other than an almost express intention on the part of the legislature to *"kill-off"* non-union collective bargaining unless such bargaining is sanctioned by a relevant union. Further, it is NECA's prediction that if these anti-non-union provisions become law, less than 15% of enterprise agreements lodged with FWA will be of a non-union character.

NECA Recommendation: Making a union the 'default' bargaining representative for a union member(s) at an enterprise/workplace (pursuant to s.176(1)(b) of the Bill) must be removed. Instead, each and every individual employee (whether a union member or not) should be obliged to expressly appoint his/her bargaining agent pursuant to s.176(1)(c) of the Bill. Only such an outcome is consistent with Labor's election policy that it will provide for a *"genuine non-union enterprise bargaining stream"*.

NECA Recommendation: Unions should only be allowed to make application to be covered by an enterprise agreement where that union was a bargaining agent at the time the enterprise agreement was *"made"* (pursuant to s.182 of the Bill). Further, s.183 of the Bill must be amended to this effect. Only such an outcome is consistent with Labor's election

[20] Of a total of 1481 collective agreements lodged with the Workplace Authority in this period, 849 were employee collective agreements and 632 were union collective agreements. See: http://www.workplaceauthority.gov.au/docs/workplacerelations/factsheets/Revised_stats_templates_for_website_for_NDT3.pdf

policy that it will provide for a *"genuine non-union enterprise bargaining stream"*.

Agreement making – Agreement content

34. Section 172(1) of the Bill reads:

> ***"172 Making an enterprise agreement***
>
> *Enterprise agreements may be made about permitted matters*
>
> *(1) An agreement (an **enterprise agreement**) that is about one or more of the following matters (the **permitted matters**) may be made in accordance with this Part:*
>
> *(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;*
>
> *(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;*
>
> *(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;*
>
> *(d) how the agreement will operate."*

35. Prior to the amendments to the WR in March 2006, there was a requirement that all matters contained in a workplace agreement be about *"matters pertaining to the relationship between employers and employees"*[21]. NECA rejects the implication within the Explanatory Memorandum that s.172(1) is somehow in line with the "formula"

[21] *Electrolux Home Products v Australian Workers' Union* (2004) 209 ALR 116; Appeals in *Rural City of Murray Bridge, Schefenacker Vision Systems Australia Pty Ltd and La Trobe University Children's Centre*, PR 956575, 18/3/05, Guidice P, Lawler VP, Simmonds C); see also *Otis Elevator Company Pty Ltd – Northern Territory Construction and Service Employees Certified Agreement 2004*, PR 9/5/05 957876 Richards C).

adopted between 1904 and 2006[22]. Section 172(1) of the Bill does not simply adopt historical *"jurisprudence"* on *"matters pertaining"*[23], rather, consistent with Labor's election policy, s.172(1) dramatically expands the scope of what can be included in enterprise agreements, however, NECA submits that such an outcome is **bad and reckless policy** for the following reasons:

a) the precise terms of each particular clause of an enterprise agreement will still need to be carefully scrutinised to determine whether or not each provision satisfies s.172(1) of the Bill[24]. Employers and employees at a workplace cannot be expected to have an intricate knowledge of this law. Any view that s.172(1) of the Bill will remove *"onerous, complex and legalistic restrictions on agreement content"* is plainly wrong; and

b) appropriate restrictions as to content within enterprise agreements, beyond the limited *"unlawful terms"* set out in Chapter 2, Part 2-4, Division 4 of the Bill, can only improve agreement making and the workplace environment.

36. Further to paragraph (b) above, the Bill should contain items similar to the list of *"prohibited content"* set out under Part 8, Division 7.1 of the *Workplace Relations Regulations 2006*[25] for reason that certain items arising in a bargaining process are, or may be, in practice/implementation:

a) a recipe for more strikes on more issues[26];

[22] See Explanatory Memorandum, p.107, paragraph 669.
[23] See Explanatory Memorandum, p.107, paragraph 670.
[24] See also Explanatory Memorandum, p.107, paragraph 671.
[25] By reference back to s.356 of the WR Act.
[26] See, for example, matters identified in Explanatory Memorandum at p.108, paragraph 672 and p.109, paragraph 676.

b) inconsistent with the Bill's vision of bargaining at individual workplaces;

c) place unacceptable burdens on business operating conditions;

d) are matters that are simply inappropriate to be regulated via enterprise agreements from a legislative, contemporary society and/or competition/trade practices perspective;

e) prolong/expand bargaining and/or industrial action where all wages and conditions (ie as they were generally understood prior to s.172(1) of the Bill) are agreed by the parties, and the only issues outstanding are, for want of better terms, *"union political provisions, union financial benefits and/or union privileges"*[27]; and

f) inappropriately regulate business relations with third parties for ulterior purposes, including for union control, illegitimate mandate and/or financial gain.

37. In the case of *Electrical Contractors Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch and Anor*[28], a Full Bench of the New South Wales Industrial Relations Commission ('NSW IRC') approved the following clauses in an enterprise

[27] Including, for example, claims for use of specific insurance policies (whereby commissions flow to the relevant union), superannuation or entitlements funds (whereby interest or other payments flow to the relevant union), and goody-goody/public relations social or environmental provisions that have more to do with union politics than the genuine industrial interests of their members.
[28] [2003] NSWIRComm 404 (2 December 2003). Found at: http://www.austlii.edu.au/au/cases/nsw/NSWIRComm/2003/404.html

agreement sought by the Electrical Trades Union:

"31. Supplementary Labour

The parties agree that when necessary to meet short term peak work requirements ***additional labour resources will be sourced from Labour Hire Companies who have an enterprise agreement with the union signatory to this agreement****.*

32. Subcontracting

The parties agree that when it becomes necessary to subcontract work, due to high demands within the industry, ***the company will endeavour to ensure that the sub contractor has a registered Enterprise Agreement with the Union. The Union commits to only sign an agreement with the same rates of pay contained in this agreement, so as to maintain a level playing field for all companies within the industry.***

33. Group Training Companies

The company when hiring apprentices or trainees from a Group Training Company shall advise the Group Training Company in writing before hiring that:

- ***they need to have an Enterprise Agreement with the union****;*
- *the apprentices and trainees hired to the company shall be paid at least the rates and conditions of this agreement; and*
- *the Group Training Company shall be notified if a site/project allowance is payable."*

(***our emphasis***)

38. In relation to Clause 31 'Supplementary Labour' above, the NSW IRC Full Bench stated (at [194] in relation to s.45E of the *Trade Practices Act 1977*):

> *"It would appear that a condition that required the labour hire company to have an EBA with a specific union is capable of hindering the relevant acquisition situation, having regard to the meaning of "hinder" discussed by Mason CJ in Devenish v Jewel Food Stores Pty Ltd."*

39. NECA submits that notwithstanding that the above anti-competitive and restrictive clauses (which mandate a union relationship with third parties engaged by the employer) were approved by the NSW IRC under a statutory regime different to that of the WR Act and the Bill, these same clauses will now be capable of forming part of an enterprise agreement pursuant to s.172(1) of the Bill[29]. They are the *"thin edge of the wedge"* in terms of enterprise bargaining outcomes flowing from s.172(1). Further, allowing for content such as this to be included in enterprise agreements, by consent of the parties to the enterprise agreement or otherwise, is nothing other than bad or reckless policy with implications for commerce and the economy far beyond the realm of workplace relations. They are unnecessary distractions in times of economic uncertainty. Reconsideration must occur immediately.

NECA Recommendation: Appropriate and tailored restrictions, along the lines of those set out under Part 8, Division 7.1 of the *Workplace Relations Regulations* 2006, must be introduced to ensure that the content of enterprise bargaining agreements is not simply a matter of compliance with the disastrous scope of allowable enterprise agreement content under s.172(1) of the Bill.

[29] See footnote 27 above. See also *Reg. v. Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313

Agreement making – Recognition of bargaining representatives

40. Section 179 of the Bill reads:

> ***"179 Employer etc. must not refuse to recognise or bargain with other bargaining representatives***
>
> *(1) An employer that will be covered by a proposed enterprise agreement, or a bargaining representative of such an employer, must not refuse to recognise or bargain with another bargaining representative for the agreement.*
>
> *Note: This subsection is a civil remedy provision (see Part 4-1).*
>
> *(2) Subsection (1) does not apply if the employer or the bargaining representative does not know, or could not reasonably be expected to know, that the other person is a bargaining representative for the agreement."*

41. The effect of s.179 is that there is an obligation upon an employer to recognise an employees bargaining agent but not a corresponding obligation upon an employee or an employee's bargaining representative to recognise the employer or the employer's bargaining representative[30]. Such a situation is unbalanced, asymmetrical and without justification.

42. NECA is aware of many instances where bargaining representatives of employers, be they industry associations or legal representatives, are routinely ignored by unions in order to gain an advantage over the employer in the bargaining process and/or in bargaining outcomes. Such behaviour is contrary to the Objects of the Bill[31] and the Objects of Chapter 2, Part 2-4[32] of the Bill, including its so-called *"good faith"* bargaining regime.

[30] See Explanatory Memorandum, p.116, paragraphs 725 to 727.
[31] See in particular Objects 3(e) and 3(f)
[32] See s.171(a)

NECA Recommendation: Section 179 of the Bill should be amended to apply equally to bargaining representatives of employers and employees. Such an outcome is consistent with the Objects of the Bill and the Objects of Chapter 2, Part 2-4 of the Bill.

Agreement making – FWA scope orders

43. Section 238 of the Bill reads:

> ***"238 Scope orders***
>
> *Bargaining representatives may apply for scope orders*
>
> *(1) A bargaining representative for a proposed single-enterprise agreement may apply to FWA for an order (a **scope order**) under this section if:*
>
> *(a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and*
>
> *(b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover."*

44. NECA can find no reference to this provision (or policy position) in any of Labor's election policy materials. Further, NECA has concerns that the above provisions will enable application for a 'scope order' to be made in circumstances where:

a) particular employees or classes of employees have historically not been covered by a collective agreement (eg supervisory employees); or

b) an employer only seeks to have an enterprise agreement made in a geographically distinct part of its business, but a union insists that

such an enterprise agreement must in fact cover the whole of that employer's State or Australia wide operations[33].

45. In effect, scope orders are inconsistent with Labor's election policy and have the potential to remove the fundamental right of an employer to determine what employees will be covered by a workplace agreement and/or what parts of the employer's business will or will not be covered by an enterprise agreement. Further, notwithstanding that a breach of a scope order is not a civil penalty provision, it will have an effect on any bargaining orders made by FWA under Chapter 2, Part 2-4, Division 8, Subdivision A of the Bill and/or creates uncertainty as to ultimate approval of an enterprise agreement by virtue of s.187 of the Bill[34].

NECA Recommendation: Sections 238 and 239 of the Bill (relating to scope orders) should be removed. They are unnecessary, problematic and inconsistent with the express provisions of Labor's election policies.

UNFAIR DISMISSAL

46. NECA submits that notwithstanding Labor's election policy in respect of unfair dismissals, the Bill's unfair dismissal amendments are:

- bad law;
- will reduce the incentives for employers to employ workers[35];
- will reduce the number of apprentices and trainees that will be engaged or utilised by employers; and

should be removed.

[33] See Explanatory Memorandum, pp.154-157, paragraphs 980 to 988.
[34] See comments in Explanatory Memorandum, p.124, paragraph 788.
[35] So much so is acknowledged in the Explanatory Memorandum at page xlix, paragraph r232

47. In this regard, prior to the 2006 amendments, the consistent feedback to NECA from its members was that:

    a) the threat of unfair dismissal claims was a real one. Many employers feared unfair dismissal claims and this influenced their hiring behaviours. The threat of dismissal claims was also taken into account in decisions on whether or not to create new jobs;

    b) employers made conscious decisions to engage trainees (and arguably apprentices) on the basis that they were not covered by unfair dismissal laws throughout the term of their training contract;

    c) employers perceived that they could act in accordance with their life experiences of a fair go and take professional advice, and still suffer damaging adverse outcomes from dismissal claims; and

    d) some employers (quite correctly) feared that they could be sued and lose their houses and assets, purely for exercising their best judgements in their interpersonal relationships with staff.

48. NECA has been constant in terms of its support for proposals to improve the operation and balance of Australia's unfair dismissal laws. Further, there is academic and econometric understanding that relative imposts of employment protection laws in workplace relations legislation do impact upon employment and employment opportunities. From NECA's point of view, it is clear that Australia's employment performance has improved markedly (now approximately 4.3%) as a result of the 2006 amendments, especially from the period in which the initial (very prejudicial) versions of dismissal redress were introduced (ie close to 10% unemployment in the early 1990s).

49. The Commonwealth unfair dismissal system was first established in 1993. In general terms, the 1993 laws have been subject to various subsequent amendments, in 1996, 2001, 2003 and 2006. Despite these amendments, there has been almost continuous debate at a public, industry, political and legislative level over the operation of these laws.

50. The key to NECA's support for the 2006 unfair dismissal amendments was the fact that they were primarily directed at the 'jurisdiction' for employees to make a claim in the first instance, as opposed to the rules that formally operate within the jurisdiction. By reference to unfair dismissal jurisdictional limitations currently in the WR Act, the Bill's unfair dismissal provisions go backwards. They re-expand the unfair dismissal jurisdiction and increase the number of business exposed to their wrath[36]. This is done in Part Chapter 3, Part 3-2 of the Bill in the following ways:

    a) protections are available to **all** employees, including casual employees, providing such employees have served the relevant qualifying period.[37] The *"100 employee or fewer"* exemption is abolished and **small business** is back on the chopping block. It appears that protections even extend to **apprentices and trainees**, unless the apprentice or trainee is being terminated at the **end** of their training arrangement[38];

    b) there is a renewed emphasis on 'reinstatement' as the primary remedy for dismissals found to be unfair[39]; and

[36] This is confirmed in the Explanatory Memorandum at p.xlviii, paragraph r228
[37] See Chapter 3, Part 3-2, Division 2 of the Bill, ss.382-384
[38] See s.386(2)(b) of the Bill
[39] See s.391 of the Bill

c) the exemption in respect of redundancy for *"genuine operational reasons"* is vastly narrowed in scope[40].

51. At one level the amendments appear to ignore the lengths to which employers are forced to go to manage out unsuitable and ill performing employees, including the associated advisory and management costs, along with the payments of *"go-away money"*. At another level, the amendments highlight the likely disturbing effects of *"decision paralysis"* on a business' operations, custom, efficiency, productivity and reputation, whereby employers are forced to retain staff who are unsuitable or ill performing[41]. Of particular concern to those NECA members who operate within the building and construction industry (which is cyclical by nature) are the operational and economic constraints of being able to reasonably redeploy employees from one building project to another, particularly as such projects are always in various stages of construction and so have ever changing requirements in terms of determining the number of employees to be engaged.

52. As stated earlier in these submissions, NECA has a major interest in the area of training and development of young and mature age workers in the electrotechnology industry, through Group Training Companies and other industry development activities. NECA Group Training Companies currently select and employ approximately 2,000 quality apprentices across the industry. These apprentices are then hosted by electrical and communications contractors.

[40] See s.398 of the Bill
[41] Otherwise known as "decision paralysis".

53. NECA, and its members who employ apprentices and trainees, view the apparent introduction of unfair dismissal protections to apprentices and trainees (unless the apprentice or trainee is being terminated at the end of their training arrangement) with significant concern. Such protections, for this class of worker, appear to be unprecedented in Commonwealth unfair dismissal law. Further, they are contrary to the Federal Government's new skills and training agenda, including as enacted in the recent *Skill Australia Act 2008*. The provisions can only be judged against Australia's public interests, including the common well-being and general welfare of training arrangements in Australian society, and the economy. They fail. They are without any common sense.

54. For all of the above reasons, the Bill's unfair dismissal amendments are bad law, will reduce the incentives for employers to employ workers, will reduce the number of apprentices and trainees that will be engaged or utilised by employers and should be removed.

NECA Recommendation: Existing limitations in respect of the unfair dismissal jurisdiction, under s.638 and s.643 of the current WR Act, should be retained.

NECA Recommendation: Section 389 of the Bill (relating to exemptions for *"genuine redundancy"*) should be removed and replaced with the existing *"operational reasons"* exemption contained within s.643(8) and (9) of the current WR Act.

NECA Recommendation: The application of unfair dismissal protections should not encompass apprentices and trainees. It is not only bad policy, it is contrary to the public interest generally. The exemptions from unfair dismissal under s.638(1)(e) of the current WR Act should be maintained and specifically exclude both apprentices and trainees.

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