national electrical and communications association

Senate Education and Employment Legislation Committee

NECA Submission to the Inquiry into the Fair Work Amendment Bill 2014

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23 April 2014

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1. About NECA

1.1 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.

1.2 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.

1.3 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*.

1.4 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.

1.5 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. The Electrical and Communications Contracting Industry

2.1 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.

2.2 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.

3. Background and purpose

3.1 On 6 March 2014 the Senate referred the provisions of the Fair Work Amendment Bill 2014 (the Bill) for inquiry and report by 5 June 2014. The committee has agreed that submissions should be received by 24 April 2014.

3.2 The Bill makes amendments to the Fair Work Act 2009 (the Act) to implement various elements of Government policy. Specifically, the Bill responds to a number of outstanding recommendations from the June 2012 review into the operation of the Fair Work Act by the Fair Work Review Panel. The Bill proposes to amend the Fair Work Act to:

- Respond to Fair Work Review Panel Recommendations 2, 3, 6, 9, 11, 12, 24, 28, 31 and 43;
- Establish a new process for negotiation of single enterprise greenfields agreements;
- Amend the right of entry framework of the Fair Work Act; and
- Provide for the Fair Work Ombudsman to pay interest on unclaimed monies.

3.3 NECA is pleased to be given the opportunity to comment and provide submission on the proposed variations to the Fair Work Act.

3.4 NECA adopts, supports and relies on the submission made by the Australian Chamber of Commerce and Industry (ACCI) and submissions from other employer organizations in this Review where there is no conflict with these submissions.

4. Schedule 1 – Part 1 – Extension of paid Parental Leave

4.1 This proposed variation to the Act seeks to include the following:

'The employer must not refuse the request unless the employer has given the employee a reasonable opportunity to discuss the request.'

and, is designed to address the Fair Work Review Panel Recommendation No.3 which stated:

'The Panel recommends that s. 76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request.'

4.2 NECA opposes this amendment on the following basis.

4.3 Currently, section 76 of the Fair Work Act 2009 provides for an employee to request an extension to an initial 12 month unpaid parental leave by up to a further 12 months. This requires the employee to provide the request in writing 4 weeks from the end of the initial parental leave period.

4.4 Consequently, Section 76(4) of the Act provides that an employer may only refuse such a request on *'reasonable business grounds'.* Such a refusal must be in writing and must include the reasons for the refusal.

4.5 The Fair Work Review Panel highlighted in its report that this process was successful for employees and employers alike by having this to say:

'A number of submissions also proposed that 'reasonable business grounds' be defined or clarified for the purposes of refusing a request to extend unpaid parental leave for up to 12 months, and that such decisions should be subject to appeal. FWA conducted employee and employer surveys in 2011. These included questions about the requests for extending unpaid parental leave and the right to request flexible working arrangements under the NES. The surveys found that 2.5 per cent of employers had considered a request to extend unpaid parental leave and that less than 0.1 per cent of employees had made such a request. Of the employer respondents, 95 per cent that had received one such request granted it without variation, 2.7 per cent granted the request with variation and 2.7 per cent refused the request. Of the employers that had received more than one request, 93 per cent granted all requests without variation, 3.6 per cent granted some or all requests with variation and 3.6 per cent

were refused. Of the five employee respondents who requested extended unpaid leave under the NES, four reported that their request was granted, and one responded that their request was accepted with variation (although was uncertain whether the request was made under the NES).

FWA's statistics are currently the most authoritative available on the right to request provisions under the NES. While FWA's survey indicates that requests for additional unpaid parental leave are rare, the results demonstrate that the provisions have been used to good effect by employees, with most achieving their desired outcome. The results indicate that the provisions are allowing working parents to exercise their desire to care for their children in important formative years without having to resign their positions. For employers this means they are able to retain such staff, helping to ensure they have a skilled and experienced workforce. Agreeing to a request to extend unpaid parental leave may mean that an employer has to fill the position temporarily, resulting in recruitment and training costs; however, employers can decline such requests on reasonable business grounds.'

4.6 NECA agrees with the proposition that an extension to an employee's unpaid parental leave period will result in additional costs for employers in temporarily filling positions, however such costs will be variable based on the individual circumstances. NECA further agrees that an employer may currently avoid such costs by refusing requests on *'reasonable business grounds'*.

4.7 The variation to the Act as proposed removes the ability for an employer to refuse a request on reasonable business grounds, and effectively places an automatically requirement for an employer to accept a request unless a discussion is held. There is a withdrawal of any grounds which may be considered reasonable should an employer elect to refuse a request to extend unpaid parental leave, which in NECA's view is taking a backward step from the current arrangement.

4.8 In NECA's view the current arrangement is well balanced for both the employee and the employer. The proposed variation is erroneous and unnecessary given the success of the current arrangements as outlined in the Fair Work Review Panels Report.

5. Schedule 1- Part 2 - Payment for Annual Leave

5.1 This proposed variation to the Act seeks to repeal section 90(2) and replace it with the following:

*'(2) If, at the time (the **termination time**) when the employment of an employee ends, the employee has a period of untaken paid annual leave:*

(a) the employer must pay the employee a rate for each hour of the employee's untaken paid annual leave; and

(b) that rate must not be less than the rate that, immediately before the termination time, is the employee's base rate of pay (expressed as an hourly rate).'

and, is designed to address the Fair Work Review Panel Recommendation No.6 which stated:

'The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.'

5.2 NECA strongly supports this amendment on the following basis

5.3 The Fair Work Review Panel introduced its recommendation by the following statement:

'Backed with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s. 90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees.'

The past practice upon which the Panel referred is the historic reason for the payment of annual leave loading, that is, to compensate employees for the loss of overtime whilst on annual leave.

5.4 The statement that the recommendation should be adopted is rightfully suggested to *'provide certainty on the issue'.* The Electrical Contracting Industry relies upon the Electrical, Electronic and Communications Contracting Award 2010 (the Award) as its minimum wages and conditions instrument. Clause 28.3(c) of the award provides for the payment of annual leave loading upon termination, but not where the termination is a summary dismissal:

'Annual leave loading on termination
The leave loading prescribed will also apply to proportionate leave on termination but will not apply where an employee is dismissed by the employer for reasons of malingering, inefficiency, neglect of duty, misconduct or refusing duty.'

5.5 Notwithstanding the above provision, a large number of enterprise agreements in the Electrical Contracting Industry have been submitted to the Fair Work Commission for approval with the above terminology included verbatim and have subsequently required a letter of understanding from the employer that section 90(2) would prevail.

5.6 The result of the course of action taken by the Fair Work Commission is that an employer who employs under the Award would not be required to pay annual leave loading in the case where an employee who is terminated by summary dismissal, and yet an employer who employees under an enterprise agreement would have to pay loading to an employee terminated by summary dismissal.

5.7 NECA would argue that to embellish the principal of the Fair Work Act to encourage collective bargaining, it is a discouragement to employers for the award provisions not to maintain relativity as minimum provision in enterprise agreements. Why would an employer seek to bargain a collective enterprise agreement where annual leave loading must be paid on all terminations and by remaining on the award it is not required to be paid on summary dismissals?

5.8 NECA also supports the proposed amendment on the basis that there is a maintenance of the status quo pertaining to existing award provisions. As stated in the Fair Work Review Panel Report, it is a feature of some modern awards that the payment of annual leave loading on termination and in others it is not.

6. Schedule 1- Part 3 - Taking or accruing leave while receiving workers' compensation

6.1 This proposed variation to the Act seeks to repeal section 130(2) and, is designed to address the Fair Work Review Panel Recommendation No.2 which stated:

'The Panel recommends that s. 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.'

6.2 NECA strongly supports this amendment on the following basis

6.3 The Fair Work Review Panel correctly identified that the majority of state and territory based legislation did not provide for the accumulation of annual leave for an employee in receipt of workers compensation.

6.4 NECA would submit that the accumulation of annual leave under section 87(2) is calculated progressively and is based *on 'a year of service according to the employee's ordinary hours of work'*.

6.5 The reliance on the *'ordinary hours worked by the employee'* for the calculation of annual leave is also explained in section 57 of the Fair Work Act 2009 Explanatory Memorandum where it is stated:

*'The NES will not change the coverage or quantum of the annual leave entitlement. However, the NES will replace complex formulae in the current Standard about the accrual and crediting of paid annual leave with a simplified system - **paid annual leave simply accrues and is taken on the basis of an employee's 'ordinary hours of work'**. The NES enables modern awards to make provision for additional leave for shift workers and for cashing out of annual leave with appropriate safeguards. (emphasis added)'*

6.6 Whilst the Fair Work Review Panel highlighted that there is some conjecture about the operation of section 22 of the Act in relation to 'continuous service', there is no disputation with the Fair Work Act Regulation 1.11 which deals with the meaning of 'ordinary hours' for award/agreement free employees. In Regulation 1.11, the calculation of 'ordinary hours' for an employee is based solely of hours worked during prescribed periods.

6.7 It is NECA's submission that where an employee is in receipt of workers compensation payments from a third party then no 'ordinary hours' are being

worked in exchanged for such payments and therefore, no annual leave should be accrued nor taken during such periods.

7. Schedule 1 – Part 4 – Individual Flexibility Agreements

7.1 The draft legislation at Schedule 1 – Part 4 (Items 6 to 18) provides amendments designed to address the following recommendations made by the Fair Work Review Panel

Recommendation 9: *The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.*

Recommendation 10: *The Panel recommends that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.*

Recommendation 11: *The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.*

Recommendation 12: *The Panel recommends that s. 144(4)(d) and s. 203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.*

Recommendation 24: *The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties.*

7.2 NECA is supportive of Individual Flexibility Agreements (IFA's) and any propositions that are advanced to improve their flexibility and application in the

workplace. However, NECA holds the view that the low take up of IFA's as demonstrated by the Fair Work Review Panel is due to the overregulation by way of the Fair Work Act.

7.3 In the true sense, an IFA should be about an employee(s) and the employer agreeing about any particular arrangement that pertains to the employment relationship. In reality the regulation imposed by the current legislation means that an IFA is something completely different. For example, the model clause in itself is restrictive the elements that an IFA may include, whether or not the extent of such matters goes to the satisfaction of the employee and employer. The IFA is further regulated by the requirement to meet a better off test when compared to the relevant underpinning award or enterprise agreement, once again, whether or not this goes to the satisfaction of the employee and employer.

7.4 NECA believes that truly flexible IFA's are important for the workplace due to the fact that awards are not made by individual employees, but by a third party chartered with the authority to establish, review and alter awards as it deems necessary. Under the current legislation this can be done even without the input from various organizations that represent the interest of employees and employers. Enterprise Agreements can be made with a simple majority (50% plus 1) of the workforce, which could mean that up to 49% of the workforce can be seemly unhappy with their enterprise agreement arrangements. NECA does not advocate to remove or to amend in any way the majority acceptance model for Enterprise Agreements. However, in the case when not all employees are supportive of an Enterprise Agreement, it is only common sense that a truly flexible IFA may be the solution to achieving satisfaction for employees who are disenchanted with the enterprise agreement. To resolve the employee disenchantment with an IFA, it seems ludicrous to apply the enterprise agreement wages and conditions as the basis for an IFA.

7.5 In light of the above, NECA is supportive of the proposition to to confer a non-monetary benefit on an employee in exchange for a monetary benefit,

however, we are perplexed as to why the value of the offset must be such that the monetary benefit must be relatively insignificant and the non-monetary benefit must be proportionate. NECA would submit that the relative value of monetary and non-monetary offsets should be determined by the employee and the employer and not regulated via the legislation, or indeed an unrelated third party. Should an employee not value any offset arrangement be it monetary or non-monetary then it is doubtful that an IFA will be entered into.

7.6 NECA supports the proposition that employers when they in good faith enter into IFA's believing them to meet a better off over all test will be provided with a defence to an alleged contravention of a flexibility term. By the removal of such penalty provisions, there will be a lower disincentive for employers to enter into IFA's with employees. Once again, NECA values this proposition in the strongly held view that IFA's should be flexible for employees and employers and removed from regulatory burden.

7.7 NECA supports any proposition that will maintain as a requirement of enterprise agreements the minimum flexibility terms as found in the model clause. It is a matter of fact that enterprise agreement that are negotiated with unions tend to have the number and type of allowable flexibility terms reduced considerably. One example is the Victorian Electrical Contracting Agreement 2010-2014 which only provides the opportunity for an IFA to cover substitution of Rostered Days Off. All other flexibility terms as found in the model clause have been removed at the initiation of the union.

7.8 NECA supports the proposition to extend the notice period to 13 weeks for the termination of IFA's. This amendment will address the concerns of employers highlighted in the Fair Work Panel Report that shorter periods of time for termination of IFA's was a disincentive to employers to enter into IFA's in the first place. For this reason, the extension to 13 week notice for the termination of an IFA is strongly supported.

7.9 Further, and in light of the above, NECA does not support the proposition to the amendment that if an IFA is made under an enterprise agreement flexibility term, but does not meet the requirements of section 203 of the act that it can be terminated with 28 days' notice.

8. Schedule 1 – Part 5 – Greenfield Agreements

8.1 The draft legislation at Schedule 1 – Part 5 (Items 19 to 55) provides amendments designed to address the following recommendation made by the Fair Work Review Panel, and, to introduce a new process for the negotiation of single enterprise greenfields agreements.

Recommendation 28: *The Panel recommends that the FW Act be amended to require employers intending to negotiate a s. 172(2)(b) greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.*

8.2 NECA would submit that the process applied in the negotiation of Greenfields Agreements is fatally flawed due to the fact that it is prone to being high jacked by trade unions pursuing unrealistic demands and causing significant delay and cost.

8.3 Greenfield agreements are a significant issue for the building and construction industry, and this was supported by the Fair Work Review Panel which stated:

'Greenfields agreements currently make up 6.4 per cent of all agreements and are most prevalent in the construction industry (where over 67 per cent of agreements are greenfields agreements), administrative and support services (6.4 per cent), manufacturing (5.3 per cent) and mining (5.2 per cent).'

8.4 The Fair Work Panel Review Report also satisfactorily summarises the concerns held by NECA with respect to the process where it stated:

'Many employers argued that the provisions enabling greenfields agreements under the FW Act are not working efficiently. The MBA, for example, submits that unions are using their position of power to seek leverage on matters not related to development of the agreement, and that start-up agreements on major projects are non-existent without union consent. VECCI submits that unions 'hijack' the agreement making process. The Minerals Council of Australia submits that negotiations with unions are lengthy, tortuous and onerous. Business SA submits that unions make inflated claims in greenfields negotiations. The Institute of

Public Affairs submits that requiring negotiations with unions is inconsistent with other agreements under the FW Act, and jeopardises projects'

and,

'*We were provided with a number of case studies in submissions and in consultations that suggested the current system of greenfields agreements is not operating efficiently. Employers and their representatives claimed that, in light of the requirement to bargain with a union in order to secure certainty about terms and conditions to apply on a project, they are required to agree to terms that are economically unsustainable. They also claimed that unions withhold agreement to address issues unrelated to the project, which puts projects in jeopardy. Employers say the requirement to negotiate with the union or unions that have majority coverage is partially to blame because it has reduced competition between unions and therefore reduced the likelihood of reaching agreement on satisfactory terms.'*

8.5 NECA would submit that the most viable way to rectify the shortcomings of the current process is a return to non-union greenfield agreements that were available under earlier legislation.

8.6 The extension of good faith bargaining principals to unions in the negotiation of greenfield's agreements will have little, if any, impact on the currently flawed process.

9. Schedule 1 – Part 6 – Transfer of Business

9.1 The draft legislation at Schedule 1 – Part 6 (Items 53 to 55) provides amendments designed to address the following recommendation made by the Fair Work Review Panel:

Recommendation 38: *The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.*

9.2 NECA supports these amendments on the basis that it makes sense to conclude that when an employee on their own initiative decides to transfer employment to an employers related entity that they are doing so on the basis

that they agree to accept the terms and conditions of employment of the new employer.

9.3 NECA would submit that the amendments would lead to a greater propensity for employers to entertain the willing transfer of employees to an associated entity, given that such a transfer will not involve a transfer of existing wages and conditions of employment where such wages and conditions may be different to those pertaining to the new employer.

10. Schedule 1 - Part 7 – Protected Action Ballot Orders

10.1 The draft legislation at Schedule 1 – Part 7 (Item 56) provides amendments designed to address the following recommendation made by the Fair Work Review Panel:

> ***Recommendation 31:*** *The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.*

10.2 NECA supports the amendments on the basis that in the building and construction industry various forms on unprotected industrial action are used by unions to force employers into bargaining or to sign up to union friendly agreements. It is not appropriate for this behaviour to continue. Whilst the Review Panel was correct in saying that there is minimal data available to demonstrate how widely practiced this unprotected industrial action is, there is no doubt according to the reports from the Fair Work Building and Construction, that in the building and construction industry it is significantly widespread.

10.3 The Fair Work Review Panel rightfully points out that protected industrial action should only occur after good faith bargaining has commenced:

Forward with Fairness stated that protected industrial action would be 'available during good faith collective bargaining' and that 'industrial action outside good faith bargaining processes' would not be protected. The Press Club Speech of the then Deputy Prime Minister foreshadowed that protected industrial action would be allowed 'in the course of bargaining'. The EM contained similar statements suggesting industrial action was to be limited to circumstances when bargaining had commenced.

10.3 NECA also endorses the view that the adoption of the amendments will negate an enticement for unions to adopt a strike before bargaining principal that was established in the *JJ Richards* case.

11. Schedule 1 - Part 8 – Right of Entry

11.1 The draft legislation at Schedule 1 – Part 8 (Items 57 to 71) provides amendments designed to address a number of issues associated with Right of Entry for union officials which include the narrowing of circumstances for entry, dealing with excessive entry requests, restoring pre-existing arrangements for interviews and discussions, and, a requirement for photographs on entry permits.

11.2 NECA supports the proposed amendments as a step forward, however would submit that further reform should occur.

11.3 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.

11.4 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.

11.5 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.

11.6 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.

11.7 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."

11.8 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.

12. Schedule 1 - Part 9 – FWC Hearings and Conferences

12.1 The draft legislation at Schedule 1 – Part 9 (Items 72 to 78) provides amendments designed to address the following recommendation made by the Fair Work Review Panel:

Recommendation 43: *The Panel recommends that the FW Act be amended to provide that FWA is not required to hold a hearing when exercising powers to dismiss an application under s. 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the*

applicant and the employer to provide further information before making a decision to dismiss the application or not.

12.2 NECA supports the proposed amendments on the basis that the Fair Work Commission will be empowered to dismiss unfair dismissal applications without the need for employers and other parties to incur the costs associated with conferences and hearings.

13. Schedule 1 - Part 10 – Unclaimed Money

13.1 The draft legislation at Schedule 1 – Part 10 (Item 79 to 80) provides amendments designed to have the Fair Work Ombudsman pay interest on monies it has collected from an employer but not dispersed.

13.2 NECA supports these amendments.

14. Conclusion

14.1 As highlighted above a majority of the proposed amendments outlined in the Fair Work Amendment Bill 2014. Of those amendments that NECA supports we recommend their adoption. In respect to the adoption, it is noted that in many cases the amendments will not take effect until after 6 months of being given royal consent. NECA would suggest that such a delay would be unreasonable and that consideration should be given to a more timely application.

For further information, please contact:

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