

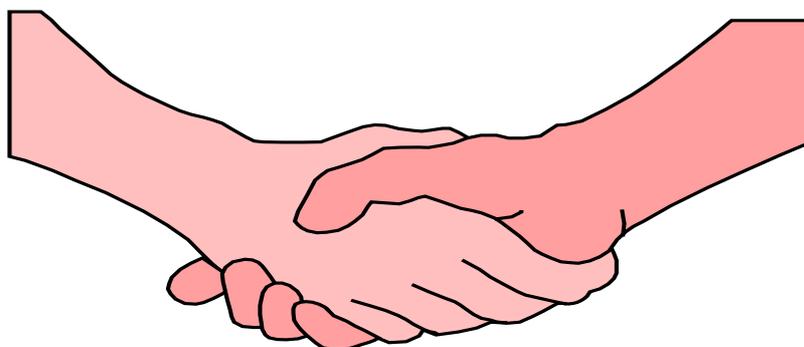


**TRADE PRACTICES VS INDUSTRIAL RELATIONS  
BALANCING THE ACTS**

*Melbourne, 28 July 2004*

**The Practical Consequences of the  
*'BARGAIN'*  
[Volume 2]**

***Dethroning Trade Practices To  
Industrial Relations Deal-Making***



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<sup>1</sup> This paper has been written in the author's personal and individual capacity. Any views, opinions and/or statements expressed are the author's own and not necessarily those of NECA.

# The Practical Consequences of the *'Bargain'* [Volume 2]

## Dethroning Trade Practices to Industrial Relations Deal-Making

### INTRODUCTION

On 2 December 2003 a Full Bench of the Industrial Relations Commission of New South Wales [the "Commission"] handed down its decision in the appeal case of *ECA v ETU & Anor*<sup>2</sup> [the "ECA case"].

In its 92 page decision, the Commission made some very interesting and concerning observations in relation to the industrial relations ["IR"] system in New South Wales and its status in the context of the Trade Practices Act 1974 [the "TPA"], the 'rule of law' and our 'public interest'. Far from resolving the central issue as to how the TPA and IR legislation<sup>3</sup> interact, the decision creates a series of cascading questions for the law and our broader community.

Whilst covering the glaring implications for the way the Commission may treat future potential TPA and IR conflicts that come before it, the focus of this paper will consider the extent to which deal-making in the form of anti-competitive IR arrangements can usurp competition laws, or the overall thrust of those laws, put in place as a "prerequisite for the efficient functioning of a deregulated market economy"<sup>4</sup>. In short, this paper will seek to answer the question as to whether IR deal-making has dethroned, or somehow appropriated, the TPA ?

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<sup>2</sup> *Electrical Contractors Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch and Anor* [2003] NSWIRComm 404. This paper intentionally limits itself to only those matters arising in the case connected to Trade Practices and/ or anti-competitive conduct.

<sup>3</sup> Whilst the decision in the ECA case is relevant only in respect of the statutory provisions contained in the Industrial Relations Act 1996 (NSW), my definition of industrial relations legislation in the context of this paper is broader and simply refers to industrial relations legislation generally, ie unless otherwise stated expressly.

## **BACKGROUND**

The ECA case is the first time that arguments in relation to the interaction of IR and the TPA have been formally run before an industrial tribunal.

Full background details in respect of the lead up to the case can be found in my previous paper entitled 'The Practical Consequences of the Bargain: Key Trade Practices Aspects of Enterprise Bargaining in the Construction Sector of the Electrical Contracting Industry 2002-2003'<sup>5</sup>.

In short, the ECA case was about the inclusion of anti-competitive clauses in enterprise bargaining agreements (arrived at with the Electrical Trades Union) and registered under the Industrial Relations Act 1996 (NSW). These anti-competitive clauses affect the rights of trading corporations to legally contract in the market, legally trade in the market and legally compete for work in the market.

The anti-competitive clauses are set out as follows:-

### ***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.*

### ***Subcontracting***

*The parties agree that when it becomes necessary to sub contract 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*

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<sup>4</sup> Fels A, Forward to the 2003 Miller's Annotated Trade Practices Act 1974, 24<sup>th</sup> Edit, Lawbook Co, Sydney, p iii.

<sup>5</sup> <http://www.ipa.org.au/Units/Workreform/tpaseminar/boyce.pdf>

*companies within the industry. This clause will apply to all those sub contractors who are operating under the Parent Award.*

### ***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; and*
- 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.*

## **WHAT ARE WE TALKING ABOUT HERE ?**

The anti-competitive clauses outlined above are essentially restrictions that seek to hinder or prevent trade based upon whether an entity has a union enterprise agreement or not.

But enterprise agreements in the construction industry are not genuine workplace negotiated arrangements, they are pattern enterprise agreements.

## **PATTERN ENTERPRISE AGREEMENTS**

A pattern enterprise agreement is an industry wide enterprise agreement registered on an individual basis. All wages and conditions of employment are the same in each and every enterprise agreement. Individual enterprises are not able to negotiate anything different from that negotiated at the industry level.

Why is the issue of pattern enterprise agreements important here ? Because it is all about the “context” of the matter.

Whilst I am not suggesting that pattern bargaining is “illegal” in terms of federal or state industrial relations legislation, it would be a nonsense to defend it on this basis. The failure of industrial relations legislation to prohibit pattern bargaining is a failure of enormous proportion.<sup>6</sup> It marks a fatal glitch<sup>7</sup> in our industrial relations system and has sown seeds of invalidity into genuine enterprise bargaining at a workplace level. These seeds have grown luxuriantly to the point that we now have unions absurdly claiming that pattern bargaining is some sort of express collective right that cannot be taken away.

## **IR PRICE FIXING**

What occurs when a pattern agreement is formed is that the group of employers who initially sign up to the pattern enterprise agreement (generally at 70% or more above award rates of pay) are given undertakings by the union (in this case the ETU) that others competing for the same work will be required to sign the pattern as well, allegedly so as to create a “level playing field for labour”. But what is in fact occurring here is that a level playing field for ‘price’ is being created.

No one can escape what is occurring here. By fixing the price of ‘labour’ you are also fixing the ‘price’ for the ‘services supplied’. Across that you then insert these anti-competitive clauses in enterprise agreements and you have open anti-competitive conduct.

Those seeking to somehow justify this anti-competitive conduct put forward simple impotent arguments about the preservation of industrial relations deal-making and level playing fields for the price of labour extending to some form of tenuous link with job security. At the end of the day such arguments carry little weight, especially in the context of a public interest test.

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<sup>6</sup> I note that pattern bargaining forms part of the 2004 ALP industrial relations policy platform. It is one thing to have a legislative loophole or failure. It is quite another to adopt that failure as part of a policy platform.

<sup>7</sup> Boyce. G. “A Fatal Glitch in the IR Matrix”, IPA Review, Volume 55, No. 2, June 2003, pp.12

## SECTION 45E OF THE TRADE PRACTICES ACT

The ECA case was concerned with potential breaches of Section 45E of the TPA.

It is important to note early on that the so-called “employment exemption” under Section 51(2)(a) of the TPA does not apply to Section 45E of the TPA. In short, there is no exempting provision under the TPA that stops the operation or application of Section 45E of the TPA to employment conditions. I only make this point for absolute clarity as there are many who practice in industrial relations who mistakenly or falsely believe that all employment matters have a blanket exemption from the TPA.

A brief overview of the relevant parts of Section 45E is convenient to set out, as follows:-

***“45E. Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services***

(3) *In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees ..... if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose of:*

(a) *Preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or*

(b) *.....”*

## NECA's SUBMISSIONS

The submissions advanced by NECA as to why the anti-competitive clauses should not be endorsed by the Commission were essentially four-fold:

1. The anti-competitive clauses restrict the engagement of entities to only those corporations who hold a union enterprise agreement, thus creating the potential for a breach of Section 45E of the TPA.
2. The anti-competitive clauses are contrary to the "public interest". The public interest being offended in two ways:-
  - a) The implementation of the clauses creates the potential for Section 45E of the TPA to be breached; and
  - b) The nature of the IR legislative provisions concerning enterprise agreements are that they are 'consent arrangements'. Such consent arrangements should not be influenced in any way, legally or otherwise indirectly, by the IR deal-making of others. It simply cannot be in the public interest for anti-competitive clauses in one enterprise agreement to influence the enterprise agreements of others.
3. The 'pattern' nature of the enterprise agreements must be a significant consideration in terms of what it actually means to have a "union enterprise agreement".
4. The anti-competitive clauses are misleading in a practical way to the point that they are open manipulation of the IR system to allow the sanctioning of anti-competitive arrangements and conduct.

## ETU SUBMISSIONS

The submissions advanced by the ETU as to why the anti-competitive clauses should be endorsed by the Commission were essentially three-fold:

- a) The anti-competitive clauses are simply about protecting industrial standards across the industry.
- b) Preventing or hindering supply or acquisition of goods and services is not a purpose of the anti-competitive clauses but it may well be an “effect”<sup>8</sup>.
- c) The anti-competitive clauses in the enterprise agreement, even if approved, are unenforceable at law. Essentially the anti-competitive clauses are a deal done with the union (that the union will enforce without need for recourse to the Commission).<sup>9</sup>

## OBSTACLES FOR NECA

Given the nature of the proceedings before the Commission, NECA had a significant disadvantage in that we were not in a position to properly identify the “target” or “second person” to be affected by the anti-competitive clauses in order to properly ground a breach of Section 45E of the TPA.

Early on in the proceedings NECA sought to issue some thirty-eight summons’ against third parties so as to identify the target or second person affected by the operation or application of the anti-competitive clauses. Leave to issue these summons was declined by the Commission.

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<sup>8</sup> Whilst this was the submission from the bar table for the ETU, evidence from the Secretary of the ETU was that it was the “hope”, the “purpose” and/ or the “desire” for the anti-competitive clauses to restrict the competitive field to only those entities holding an enterprise agreement with the union.

<sup>9</sup> This submission is quite surprising given that we have just had a Royal Commission into the Building and Construction Industry and we are before a ‘specialist’ industrial tribunal.

Prior to the Commission declining leave to issue the summons, Senior Counsel for NECA is on record as stating:

*“If leave is refused to issue these Summons’, it would not be appropriate for the Commission to put it against us that we do not have the necessary evidence of second persons or targets affected by these clauses.”*

Despite this inability to issue summons’ on targets or second persons, it was agreed by all parties represented before the Commission that the Company regularly and currently acquired labour hire, subcontractors and group training companies.

## **ACCC GETS INTERESTED**

The Australian Competition and Consumer Commission [the “ACCC”] took an interest early on in the anti-competitive clauses.

Parallel to the proceedings in the Industrial Commission, the ACCC was conducting it’s own investigations into the anti-competitive clauses. This included interviewing various electrical contractors and meeting with the ETU.

On 28 July 2003, in the middle of hearings before the Commission, the Director of NSW Enforcement & Compliance at the ACCC wrote to the Commission as follows:-

*“I am writing to you to inform you of the Australian Competition and Consumer Commissions investigation into the clauses contained in the ETU’s pattern enterprise bargaining agreement 2002-2005. The ACCC has not formed a view on whether the clauses will contravene the Trade Practices Act 1974. However, based on the information the ACCC has received in this matter, I am concerned that there may be contraventions of the Act and the matter is being investigated.”*

*.....as investigations are continuing I do not wish to say anything further as it may prejudice our investigations. I am also unable to provide an indication of how long the ACCC's investigation in this matter may take."*

The above letter from the ACCC never made it into evidence during the proceedings.

## **THE COMMISSION'S DECISION**

The decision of the Commission is most conveniently summarised by splitting it into three parts:

### PART 1 – The TPA does apply to 'IR deal-making'.

- a) Section 45E of the TPA cannot be dismissed as having application to the anti-competitive clauses.
- b) The anti-competitive clauses in the enterprise agreement represent a "contract, arrangement or understanding" for the purposes of Section 45E of the TPA.
- c) An "organisation of employees" can be identified in the union (ie the ETU).
- d) Whilst not being a 'dominant purpose' the requisite "purpose" for the satisfaction of Section 45E is satisfied.
- e) Labour hire, subcontracting and supply of apprentices from a group training company satisfy the definition of "services" in section 45E of the TPA.
- f) The Company (being the "first person") regularly and currently acquires services from labour hire companies, subcontractors and group training companies.

- g) Whilst the anti-competitive clauses may not prevent acquisition or supply, they could certainly “hinder”.<sup>10</sup>

PART 2 – The Commission intentionally limits itself to simply approving IR deals.

- h) The Commission has doubts that the TPA needs to be considered as a “relevant statutory requirement” to be complied with when approving an enterprise agreement.
- i) As the enterprise agreement is only being approved and is thus yet to be implemented, we are talking about a “hypothetical” situation yet to arise.<sup>11</sup>
- j) The Commission is inclined to “read down” the wording of the anti-competitive clauses.
- k) The Commission approves “words” not “conduct” in certifying an enterprise agreement.
- l) There has been no “second person” or target identified during the proceedings.
- m) As a question of law (and on the ETU’s own evidence) the clauses are “unenforceable”.

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<sup>10</sup> See paragraph 194 of the decision where the Commission states: “It would appear that a condition that required the labour hire company to have an enterprise agreement 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*”.

<sup>11</sup> The ‘Profumo Scandal’ of 1963 arose after John Profumo, Secretary of the State for War, lied to the House of Commons and was forced to resign over an affair with Christine Keeler, a call-girl who was simultaneously involved with a Russian naval attache (whom MI5 considered to be a Russian spy). Harold Macmillan, the then Prime Minister, conducted himself throughout the scandal as naive and out of touch. Early on, Macmillan had sought to defend Profumo suggesting that the affair was somewhat of a ‘hypothetical’. When the truth finally surfaced, it also led to the fall of Macmillan who resigned only two months after Profumo. Nigel Birch, who had previously resigned from Macmillan’s government in 1958 in protest at increases to government spending, delivered an attack on Macmillan before the House of Commons on 17 June 1963. In an extract of that speech entitled “Never glad confident morning again” Birch stated “On the question of conscience and good sense I cannot think that the verdict can be favourable”.

### PART 3 – What about the public interest ?

- n) As the anti-competitive clauses are within the “jurisdiction” of the Commission to approve, there is no basis to consider the “public policy” issues.
- o) The Commission is not required to consider the “merits” of the arguments advanced before it in this case.
- p) It is up to the parties to determine the terms of their enterprise agreement, not other third parties (ie despite the fact that third parties are directly or indirectly affected by the terms of the anti-competitive clauses in the enterprise agreement)<sup>12</sup>.

#### **A FUNNY ‘PUBLIC INTEREST’**

Given the Commission’s decision intentionally narrows itself on the question of ‘public interest’ to just approving IR deal-making in the context of enterprise bargaining, the question that must be asked at this point is: Has our public interest been misrepresented by such an approach in the context of a potential breach of the TPA ? In posing this question, the following commentary from Millers’ 2003<sup>13</sup> becomes relevant:

*“No presumption arises, for the purposes of the Trade Practices Act, that particular State legislation necessarily represents the public interest: Re Tooth & Co Ltd; Re Tooheys Ltd (1979) 39 FLR 1.*

*In identifying the relevant public benefit it is necessary to compare the position which would apply in the future were the proposed arrangement not entered into, or given effect, with the position in the future which would arise if the arrangement were entered into or given effect. All of the circumstances relating to public benefit must be considered, including how the proposed arrangement is likely to operate in practice so as to give rise to a public*

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<sup>12</sup> I resort here to the words of Isaacs J of the High Court who states: “It is not good public policy to restrict freedom of trade on the basis of freedom of contract. Such an argument uses freedom of contract the wrong way.”

*benefit. Consideration of the matter should not be confined to some narrow or rigid examination of the documents lodged for authorisation: Re Media Council of Australia (No 2) (1987) 88 FLR 1.*<sup>14</sup>

## **CONCLUSION**

Given the fact that the dividing line between the TPA and industrial law remains blurred, those of us who seek to abide by the rule of law and/ or uphold the public interest are presented with significant difficulties.

Parties who enter into pattern enterprise agreements with the ETU that contain the anti-competitive clauses continue to expose themselves to potential breaches of Section 45E of the TPA.

With the Commission's decision failing to resolve concerns about the application of the TPA to anti-competitive clauses in ETU pattern enterprise agreements, NECA has continued to intervene in further pattern enterprise agreements and make submissions in respect of potential breaches of Section 45E of the TPA.

The decision reached by the Commission seems to indicate that anti-competitive conduct, or serious market misconduct, is not really an issue provided the arrangement is capable of approval under industrial laws. But such an approach seems a deficient measure of the seriousness of the central issues. Whether the Commission approves the terms of, or clauses in, an enterprise or certified agreement is clearly irrelevant to the TPA.

If the New South Wales IR system lets the Commission play an important, and essentially the only role in defining the limits of its own jurisdiction, then the Commission can not escape debate beset by the exercise of that jurisdiction.

Whether or not you agree with the decision of the NSW IRC to limit itself to the statutory approval process of approving IR deal-making in the form of

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<sup>13</sup> 2003 Miller's Annotated Trade Practices Act 1974, 24<sup>th</sup> Edit, Lawbook Co, Sydney.

<sup>14</sup> Ibid, pp. 807.

enterprise agreements and thus disregard the TPA is not the issue – the issue is that there is clearly room for another view.<sup>15</sup>

The failure of the Commission's decision to attach appropriate significance to the trade practices, and its related public interest issues, in the context of IR deal-making is very concerning. We are all the poorer if this type of approach becomes our legal heritage.

Arguments about the maintenance of current industrial relations arrangements over any extensions of the TPA for the sake of “good industrial relations and dispute resolution” are in my view too easily made and too rarely justified in the current day and age. The public interest has clearly “moved on” or evolved from “collective class wars” towards placing a greater emphasis on the maintenance of proper competition in our deregulated market economy.

Freedom to contract, such as the rights of parties to enter into enterprise agreements on the terms they determine, should never be mistaken as a general right to over-ride the ability of others to freely trade in the market. There can be no doubts in this regard.

The question I posed at the beginning of this paper as to whether IR deal-making is usurping competition laws or the overall thrust of those laws is perhaps best answered in two ways:

1. IR deal-making does not usurp or dethrone the anti-competitive provisions in the TPA (such as Section 45E).

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<sup>15</sup> See in particular the judgement dated 25 June 1986 of Smithers J in *Gibbins v Australasian Meat Industry Employees Union (1986) 12 FCR 450*. Of particular significance is a passage from the decision summarised in the following terms: “It may be observed that although the agreement had some element of propriety, there was grave risk that the resolution was made in contravention of s.45D or s.45E of the Trade Practices Act. The agreement [reached by consent as settlement of a dispute before the Industrial Commission] represented a complete surrender to the union demand..... That surrender was made at the expense of absent persons affected thereby and one can only wonder how that aspect of the matter could be proper. The reference to persons subject to the agreement as persons who may benefit from the resolution is a description of persons who are to suffer in their livelihood by being directly excluded from the ordinary exercise of aspects of their lawful occupation. It is contended by the Respondent that the institution and resolution of the conciliation agreement operated to discharge or relieve the persons who made it from liability that may have otherwise attached to them under s.45D or s.45E of the Trade Practices Act. I am unable to accept such a submission. It would be surprising and hardly in accordance with justice if it did. It would require clear words to support the existence of an intention in Parliament to bring about that result. There are no such words.”

2. The Commission's decision raises significant concerns with the way the TPA, including its principles and related public interest matters, are to be applied into the future by the Commission and/ or other industrial tribunals. These concerns are troubling enough to require legislative reform so as to ensure our public interest is appropriately safeguarded and our competitive markets are not interfered with via anti-competitive IR deals sanctioned by industrial tribunals.

**To be continued .....**