THE LAST FRONTIER

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The Practical Consequences of the

'BARGAIN'

Key Trade Practices Aspects of Enterprise Bargaining in the Construction Sector of the New South Wales Electrical Contracting Industry 2002-2003

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neca

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> *"Why should anyone be treated as if he had made a bargain when he has not made one, especially if the practical consequence is that he is denied the price he would (notionally) have contracted to receive ?"* [1]

This question is the centre of gravity in this paper in that it identifies how a 'bargain' can never be a 'bargain' when the price negotiated may involve breaking the law.

Industrial relations legislation (Federal and State) and the Trade Practices Act 1974 (Cwlth) [the "TPA"] come into 'contact' with each other more often than many who practice in industrial relations may realise. What must be understood is that the TPA is in fact one of the most pervasive pieces of legislation around. There is not a single day that goes by that it doesn't touch everything and everyone in some way.[2]

The purpose of this paper is to examine NECA's journey over the last 12 months in respect of the 'contact' between industrial relations and the TPA concerning enterprise agreements in the construction sector of the electrical contracting industry of New South Wales.

ENTERPRISE BARGAINING – THE THEORY

Ask anyone in industrial relations what 'enterprise bargaining' means and you'll basically get the same answer, ie it means:-

- Determining matters affecting employers and employees at the workplace level.

[1] Harris JW (1997) 'Legal Philosophies', 2nd Edt, Butterworths, London, pp 48. The term "price" is defined here to include both monetary amounts (eg wages) and employment conditions generally.
[2] Industrial relations is no different in relation to the effects and implications of the TPA. The TPA should therefore be viewed as another 'menu tool' that can be used in industrial relations as required (ie in addition to the standard industrial relations remedies already available).

- Developing relationships between employers and employees at the workplace level.

- Making agreements on wages and other conditions of employment at the enterprise itself, specifically suited to that particular enterprise."[3]

Some may be even more specific and direct you to the objects of the Workplace Relations Act 1996[4] and state industrial legislation, eg the Industrial Relations Act 1996 (NSW)[5].

PATTERN BARGAINING – THE REALITY

None of the above responses however reflect what actually happens in the construction sector of the electrical contracting industry in New South Wales.

Everyone's heard about the construction sector when it comes to enterprise bargaining haven't they ? The NECA experience is that unions claim they have a fundamental right to 'pattern bargaining' and 'pattern enterprise agreements'. The result of this is the removal of the word 'enterprise' from 'enterprise bargaining' and the misrepresentation of the definition of 'bargain'. Essentially, the intention and operation of Federal and State industrial relations legislation is turned on its head.

Like many terms in industrial relations used to misdescribe certain issues and practices, the term 'pattern bargaining' doesn't reflect the reality[6]. The outcome of pattern bargaining is a pattern enterprise agreement. What we're talking about here is standard and identical enterprise agreements across the whole industry. How do you get a pattern enterprise agreement across a whole industry ? Answer: you don't bargain at all, you don't negotiate at all, the outcome here is that of take it or leave it.[7]

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[3] It is not about making all enterprise agreements different in every way. It is about ensuring that enterprise agreements are in fact true enterprise agreements and not attempts at de-facto industry awards for particular industry sectors. Pattern enterprise agreements are clearly a mutation on the original intention of enterprise bargaining.

[4] Section 3 'Principle Object of this Act' Workplace Relations Act 1996

[5] Section 3 'Objects' Industrial Relations Act 1996 (NSW)

[6] For example, "bargaining agents fees" are clearly a misrepresented term for 'indirect and illegitimate union recruitment provisions' and/ or 'compulsory unionism'. Bargaining agents fees have no parallels with "shouts of beers at the pub" and any such links are simply un-Australian to make.

[7] Lipset (1963) states that the internal organisation and operation of most unions resembles that of one-party states (ie dictatorial or totalitarian states) as opposed to democratic organisations. Flowing from this resemblance is the requirement to maintain control mechanisms which prevent variations outside of those sanctioned by the incumbent leadership regime within the union. Variations in any form are considered dangerous as they have the potential to disrupt union organisational stability and the essentially permanent tenure of union office. Pattern agreements appear to be a mechanism used by some unions (eg construction unions) to justify their monopolisation of internal power and to articulate organisational needs and purposes, thereby preventing variations in local enterprises. Quite simply, a union leader who structures his power base in a particular industry around a pattern enterprise agreement can not permit a local organiser to reach an agreement that may be used as a precedent for similar or other variations in the future. The rhetoric here is that the "committed" union leader "knows" he is following the "right" cause via pursuing pattern agreements. See Lipset SM (1963) 'Political Man', Mercury Books, London. pp. 358 & 388

THE PROCESS OF PATTERN BARGAINING

What is most amazing is how everyone accepts the pattern enterprise agreement reached, despite the most illegitimate of processes in getting there. The process (more or less across the whole of the construction industry) is quite simple:–

1. The union issues a wish list of claims[8] and publicises them across the industry.

2. One or two major employers are singled out privately and threats to bleed them commercially are made unless they agree to the wish list.

3. A few sets of general negotiations occur whilst some companies get a "touch up" with some industrial action.

4. Everyone runs around for a couple of weeks mutually recriminating the other, eg "you're not bargaining in good faith" – "yes we are but you're not" – "no we are" – "are not" – "are to" – "are not" – "are so" - etc.

5. The union makes a few minor concessions to their wish list and then tells everyone there will be no more concessions. Usually the union will base this position on what "other unions have already got".

6. A major employer then tells the union it will accept all of the unions claims provided the union guarantees to:-

    a) Force all the other employers who compete in that sector of the market onto the same agreement (ie the "pattern"); and

    b) Protect the employer from competition from other employers who do not have pattern agreements with the union and/ or who are able to supply non-union and/ or non-pattern labour.

7. The union then tells all the other employers that a pattern agreement has been reached and that if they want to continue to work they will sign the pattern. Employees are told that if one employer can sign up then they can all afford it and any boss who doesn't sign the pattern is a "grub".

8. The employer association comes along and legitimises the pattern agreement by telling employers that negotiations are over and the pattern agreement is now the best they are going to get if they want to keep working.

[8] With pattern enterprise agreements and industry wide codes controlled from within the union, conflict over claims and policy increasingly moves away from union membership at the workplace to union leaders at a national level. Claims in pattern agreements in the construction sector are increasing reflective of what "other unions, in other trades and in other states" have received, ie as opposed to genuine claims based on measurable indicators. In this context, negotiations move from employer and employee needs to looking for ways to ensure the union is able to " look or do better" than the other unions and the so-called "win" can be taken back to the national level and flashed around amongst internal peers.

9. Everyone pretends to forget about everything that has just occurred and for the next two or three years hang their hat on the nonsense that the industry needs a "level playing field" and that it doesn't matter what you agree to, as long as everyone gets on the level playing field (ie the pattern).

THE PURPOSE OF PATTERN ENTERPRISE AGREEMENTS

As can be seen, the pattern enterprise agreement is a tool that is used in industrial relations to collude to fix the price of labour.[9] Rational terms like "level playing field" and "equal pay for equal work" are attempts to mask the real intent of these pattern agreements.[10] But it is not my purpose here to talk about how this type of behaviour is allowed to occur under industrial relations legislation and the s.51(2)(a) exemption of the TPA.

NECA's JOURNEY – AN OVERVIEW

It is in the context of pattern bargaining that I want to take you through NECA's journey over the last 12 or so months in relation to the negotiation of enterprise agreements in the construction sector of the electrical contracting industry in New South Wales with the Electrical Trades Union of Australia (NSW Branch) [the "ETU"]. This journey has seen:-

- On-going (on and off) negotiations between the ETU and NECA over the last nine months concerning enterprise agreements;
- NECA appearing[11] in some 23 enterprise agreement proceedings before the Industrial Relations Commission of NSW;
- Appeal proceedings being launched in the Industrial Relations Commission of NSW in the nature of a test case;

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[9] Union leaders are well aware that pattern enterprise agreements are an anti-competitive tool, but decreasing competition in a competitive market such as the construction sector is seen as essential to ensure the union is able to stabilise their own position in that sector via making all things more "predictable". Some management are able to identify mutual gain in the union's attempts to reduce competition within the market place and thus readily recognise and assist the union in its endeavours. Industry wide codes such as the 'Statement of Intent' in Queensland and Tasmania and the 'VBIA' in Victoria are prime examples of how construction unions have been successful in getting employers to set in place over-arching anti-competitive codes of practice to ensure this sort of predictable policy occurs. See also Lipset SM (1963) 'Political Man', Mercury Books, London. pp. 360 & 362

[10] See NECA's submission dated 14 November 2002 to the Cole Building Royal Commission on Discussion Paper 13 "Trade Practices Implications of Activity in the Building and Construction Industry" at www.royalcombci.gov.au. Particularly the following – "The term 'level playing field' is used within the building and construction industry to describe anti-competitive practices and arrangements in relation to wages and working conditions. This practice has a direct anti-competitive effect on tendering to Head Contractors and the use of subcontractors. In essence, the competitive field is reduced to only those contractors who subscribe to the union endorsed pattern enterprise agreement. In short, the provisions of the Workplace Relations Act are being used as tools against itself to thwart its own objectives. Instead of encouraging genuine enterprise bargaining and competition we see a destructive reverse occurring."

[11] By virtue of s.34(2)(b) of the Industrial Relations Act 1996 (NSW)

- Industrial disputes across the industry, as well as with employers individually;

- The on-going involvement of the Australian Competition and Consumer Commission [the "ACCC"]; and

- Break-away employers and employees from the pattern bargaining arrangements.

TRADE PRACTICES ACT CONCERNS RELATING TO EBA CLAUSES

In approaching the negotiations, NECA identified that certain ETU claims may breach certain laws, ie in addition to breaching industrial relations legislation. We are not talking about things like the 36 hour week or the 12% pay rise that formed the agreement. We are talking about provisions which affect the rights of other trading and financial corporations to legally contract in the market, legally trade in the market and legally compete for work in the market. We're talking about clauses in enterprise agreements that possibly breach the TPA.

The clauses I am referring to (the "offending clauses") are as follows:-

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

HOW THE TPA & IR LEGISLATION MAKE 'CONTACT'

These clauses may have a number of "purposes", for example, a union may claim that they are attempts to "secure the employment" of their members. Equally however, they may also have other purposes, purposes that potentially breach the TPA. The provisions of the TPA that raise concern are under Part IV, including sections s.45D, s.45E and s.45EA, but more specifically s.45E. I will not go through these provisions in any detail, but I will make the following points:-

- Part IV of the TPA is about "restrictive" trade practices as opposed to "deceptive" trade practices. Restrictive trade practices provisions relate to the reducing of competition, ie corporations organising themselves at the expense of the market (with or without the help of others, eg unions).

- s.45D was introduced by the Fraser government in 1977, whilst s.45E was introduced in 1980.[12] They have now continued to exist in one form or another for over 25 years.

- Section s.51(2)(a) of the TPA exempts any act done or arrangement made to the extent that it relates to remuneration, conditions of employment, hours of work or working conditions of employees. However, that sub-section specifically states that it does not apply to ss.45D, 45DA, 45DB, 45E, 45EA or 48. This is very important to note as many believe that a blanket prohibition exists under the TPA in relation to all industrial relations matters.

- s.45E provides:-

> **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, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, 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) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, …….

[12] Rawson DW (1986) 'Unions and Unionists in Australia', Allen & Unwin, Sydney, pp. 104. It is interesting to note that ss. 45D and 45E came about as a result of the Swanson Committee in 1976 which was partly set up to give attention to "anti-competitive conduct by employees, unions and employer associations".

NECA's concerns[13] are that the offending clauses in the enterprise agreements not only potentially breach the TPA, but in doing so also prevent or hinder NECA members from legally acquiring services from labour hire companies, subcontractors or group training companies unless those entities have an enterprise agreement with the ETU. We are not simply referring to the Company that signs the enterprise agreement with the ETU, but third parties (eg other companies like subcontractors and labour hire firms) who are outside of the enterprise agreement and who may not even be aware of it's obligations.

No one should be missing the point here simply because we are dealing with the TPA in the context of industrial relations. The TPA exists and has legislative effect. If we do not seek to ensure compliance with the TPA parliament may as well not have bothered legislating. We may as well forget about all the economic theory and competition policy that underpins the TPA and the whole market. The maintenance of the "market" is central to our whole society and our standard of living. The maintenance of the market is therefore also essential to the construction sector of the electrical contracting industry, like it is to any industry.

AGREEMENT IS ONLY A MATTER OF TIME

During the negotiations the ETU either refused to alter wording or they refused to alter the express intention and possible purposes of the clauses.

NECA recognised that it was only a matter of time before a company would agree to these "non-negotiable clauses"[14] being included in the pattern agreement. So the questions we then asked ourselves were:-

- "Is consent between the Company and the Union to these types of clauses capable of forming an agreement at all, let alone part of an enterprise agreement ?"

- "Does the industrial relations system (Federal or State) allow parties to agree to possibly break the law and provide for the endorsement of that agreement via approval of the enterprise or certified agreement ?"

- "Does the industrial relations system (Federal or State) allow for the approval of enterprise or certified agreements that create obligations and restrictions (either directly or indirectly) on third parties who are as yet unidentified (eg by requiring them to enter into an enterprise agreement with the union to gain work) ?"

[13] The arguments I advance here are obviously limited by the fact that proceedings are currently taking place before the Industrial Relations Commission of NSW.
[14] From the ETU perspective.

NECA's OWN ISSUES

As we made further inquiries into our TPA concerns and obtained legal advice, it occurred to us that in seeking to oppose these clauses we had two issues to resolve:-

1. The fact that our members were essentially "consenting" to these clauses in their enterprise agreements and we would be turning up to oppose their approval.

2. Over 100 pattern enterprise agreements had expired on 30 September 2002, meaning that NECA would be facing over 100 challenges when each of those enterprise agreements were sought to be renewed in the new pattern enterprise agreement format containing the offending clauses.

In relation to the first issue, NECA determined that part of its role as an industrial organisation of employers created obligations upon it as an "industry protector", which in turn carried the important burden of "integrity to our members as a whole" and ensuring the proper operation of legislation such as the Industrial Relations Act 1996 (NSW).[15] Hence, whilst NECA would never seek to intervene in the "deals" that individual members make in terms of their industrial relations, NECA will certainly seek to protect our broader membership from any flow-on effects of these deals if they are not in the interests of business, commerce, employers and employees within the overall industry. Most NECA members are aware that in many cases disputes and problems in the construction industry are settled on the basis of "commercial realities" and "trade-offs", ie as opposed to legal rights. Thus, in order to protect the broader membership from the potentially crippling effects of these trade-offs, NECA had to be the "battering-ram" of its broader membership and struggle where individual employers simply could not. I have not heard from one NECA member who does not accept NECA's position in this regard. I also note that in response to Recommendation 4 of the Cole Building Royal Commission, the peak employer body, the Australian Chamber of Commerce and Industry ["ACCI"], supports a role for the proposed Australian Building and Construction Commission in reviewing consent certified agreements between parties. They state - "Parties to an (unlawful) agreement cannot be expected to argue against its certification".[16]

Union statements (particularly by union leaders across the construction industry) that enterprise agreements between them and a Company are simply "consent arrangements"[17] and thus no one should be concerned or interfere, are just absolute 'fiddlestick'. We have all seen, particularly in recent

[15] Here we are talking specifically about the approval of enterprise agreements under the Industrial Relations Act 1996 (NSW) but the concept also extends to any part of this legislation. NECA is also obviously unable to support members who 'break the law', eg pay "strike pay".
[16] 'ACCI Submission in Response to Royal Commission Recommendations (May 2003)' is available at www.acci.asn.au pp. 9-10. See also ACCI's 'Modern Workplace: Modern Future – A Blueprint for the Australian Workplace Relations System 2002-2010', in particular Chapter 3 'Instruments/ Standards'.
[17] Let's not for one minute accept that these so-called "consent arrangements" espoused by unions aren't a mask to the illegitimate nature of some of their gains (eg bargaining agents fees). There can be no precedent or flow-on from these illegitimate gains to other industries whatsoever. These gains are essentially the result of commercial pressure and employer acquiescence during industrial action, not genuine agreement.

years, the many union interventions in direct employee and employer enterprise agreements with and without the consent of employees and/ or the union's own members. Well on that logic (in many cases discretionary determinations by members of industrial tribunals), it's also ripe for employer associations to get involved in union and employer enterprise agreements with and without the consent of employers and/ or the employer association's own members. The notion that an employer association has to agree to something simply because its own member(s) have is nonsense. It is issues like this that show that the hard fought privileges obtained by unions are a double edge sword in the context of the whole industrial relations system, especially when it comes to other entities and/ or individuals.[18]

In relation to the second issue, 'eternal vigilance' was considered the only option to obtain our desired outcome. If we oppose one agreement containing these clauses, then due to the nature of the clauses and their potential effect and purpose (and to ensure consistency), we had to oppose all enterprise agreements that contained these clauses.

A MOVING (BUT PAINTED) TARGET

Since 13 December 2002 NECA has appeared in twenty-three ETU enterprise agreement proceedings before the Industrial Relations Commission of NSW relating to the offending clauses.

On the first occasion that NECA appeared in relation to a single enterprise agreement between the ETU and a NECA member, arbitration proceedings were set down by the Commission for mid-February 2003 for argument to be had on the offending clauses.

Prior to the arbitration hearing, the ETU sought to remove the three offending clauses and replace them with one clause, as follows:-

> "**31. Outsourcing**
>
> For the purpose of protecting the security of employment of employees of the employer party to this agreement, and to secure their terms and conditions, the parties agree to the following:
>
> - Where the employer finds it necessary due to peak period of work requirements to engage additional labour on a short term basis, the employer will ensure that any labour hire company or other contractor from whom it obtains this additional labour for this purpose will be a party to the current Enterprise Agreement.
> - The employer will endeavour to ensure that its requirements for labour will be met by its engaging employees as and when required, and will only engage sub-contractors:
>   (a) Where it is unable to promptly meet its labour requirements by the engagement of additional employees.

[18] Many have argued that declining union membership may in fact be based upon an extension of legislative privileges, which were once only available to unions, but have now extended to individual claimants, lawyers and "industrial relations agents".

(b) Any subcontractor engaged by the employer is a party to a current Enterprise Agreement with the union

- The employer shall not hire apprentices or trainees from a group training company unless that group training company is a party to a current Enterprise Agreement with the union
- When hiring apprentices or trainees through a group training company the employer shall, before hiring any such person advise the training company as follows:
  - (i) Apprentices and Trainees hired by the employer will be afforded terms and conditions of employment no less favourable than the conditions of this agreement
  - (ii) The Group Training Company should be party to the current Enterprise Agreement with the Union
  - (iii) Details as to any site/project allowance payable in respect of the apprentices or trainees to be hired by the employer
- The Union undertakes that any Enterprise Agreement which it negotiates with any labour hire company, sub contractor or group training company, as contemplated by this clause will prescribe terms and conditions no less favourable than those provided for by this agreement.
- In this clause the expression 'Enterprise Agreement' includes an enterprise Agreement approved under the Industrial relations Act 1996, or an award of the New South Wales Industrial Relations Commission confined in its application to a single enterprise, or a certified agreement made pursuant to the Workplace Relations Act 1996. Furthermore, in this clause the expression 'current' means the nominal term of the relevant industrial instrument which has not expired."[19]

NECA reviewed this new clause and advised the ETU that this version (of the same thing) would also be opposed for the same reasons. The ETU then asked "if we drop this version of the clause and go back to the old three clauses will you stop your opposition ?" Our response was not only "NO" but that we would not be negotiating about potentially breaking the law and/ or condoning anti-competitive contracts, arrangements or understandings.

As we got closer to the arbitration date, the ETU completely withdrew all the offending clauses and sought approval of the enterprise agreement without them, which NECA did not oppose.

ETU ATTEMPTS TO BY-PASS THE NSW IR COMMISSION

On around six occasions a similar process of the ETU advancing enterprise agreements with the offending clauses and then withdrawing them occurred. The ETU then got fed-up and sought to by-pass the Industrial Relations Commission by seeking a Memorandum of Understanding with Companies reflecting the offending clauses and a bargaining agents fee. Entering into this Memorandum became a pre-requisite to obtaining an enterprise agreement with the ETU (ie entering into one contract became a pre-requisite for entering into the other).[20]

[19] Errors in wording and punctuation were as they appear in the clause supplied by ETU.
[20] Some may even argue that this constitutes "third line forcing" under the Trade Practices Act.

The memorandum read as follows:-

> ***ETU - Power In Unity***
> ***Memorandum of Understanding***
>
> *The parties agree to the enforcement of the following clauses under this Memorandum from 10 December 2002 to remain in force until 30 October 2003. This memorandum is to operate in conjunction with the Company enterprise agreement registered in the NSW Industrial Relations Commission and the Electrical, Electronic and Communications Contracting Industry (State) Award.*
>
> *…….. It is not the purpose of this document to bind any third party or to attempt to breach section 45D or section 45E of the Trade Practices Act……*
>
> *[Offending clauses on page 6 of this paper replicated]*

Therefore the ETU went from not acknowledging or accepting any of our TPA arguments in negotiations, to withdrawing the clauses during proceedings for approval of enterprise agreements, to seeking a Memorandum of Understanding with companies which crosses over everything we were arguing.

WHAT WERE NECA MEMBERS DOING ?

NECA members were in a bind for a few reasons. However, one thing is for certain, they weren't signing enterprise agreements or Memorandums of understanding with the ETU.

Whilst our members did not oppose what NECA was doing, they would lose credibility with the ETU and obviously be subject to recriminations (of one form or another) if they openly supported our position.

Negotiations commenced between NECA and the ETU in August 2002, but come March 2003, the ETU only had six agreements registered and all the offending clauses were absent. Despite these six agreements registered without the offending clauses, the ETU continued to insist to electrical contracting companies that the pattern enterprise agreement was to contain the offending clauses by approval of the Industrial Relations Commission of NSW or via the Memorandum of Understanding.

It is worthwhile drawing to your attention to the fact that electrical contractors were not signing enterprise agreements with the ETU because they didn't accept the rates of pay or other conditions such as the 36 hour week. They were not signing because entering into arrangements that potentially breached the TPA is commercial suicide given that fines under the TPA range up to $10,000,000 for corporations and $500,000 for individuals.

NECA TELLS MEMBERS – THIS IS A 'BAD DEAL'

It was also on this basis that NECA was telling its members that the ETU enterprise agreement containing the offending clauses was a "bad deal". From my observations in relation to pattern agreements, it appears that the "sign-off"[21] by the relevant employer association is a very important factor which determines how many and how quickly employers in that industry are willing to accept the pattern outcome with a union. It is very disappointing to see employer associations come out and essentially endorse a pattern outcome irrespective of its "legitimacy" or the "deal" it represents, either in terms of the negotiation process arriving at the outcome or the outcome itself. If anything, this process has shown that unions who seek pattern enterprise agreements very much need employer associations to roll-over on the final deal to ensure it's speedy flow-on to other employers. Without the employer association roll-over, union threats of "catch and kill" become their own logistical nightmare as weeks and months simply roll on by and union resources become further and further drained. [22]

NECA MEMBERS CARRY ON REGARDLESS

In all the delay and confusion, NECA members started to take things into their own hands:-

a) Some started paying the first and then the second instalment of the wages increases as over-Award or over-EBA (nominal term expired) payments.

b) Some started to enter into enterprise agreements directly with their employees with a whole range of variations to the so-called pattern agreement (least of which was the exclusion of the offending clauses).

c) Some decided to just "wait and see" where things went and come to their own unregistered arrangement with their employees.

Employers were not signing the enterprise agreement containing the offending clauses and they were not signing the Memorandum. In fact, employers were even more wary of signing a Memorandum than they were of signing the enterprise agreement. But despite all of this going on, employers were not

[21] By "sign-off" I do not necessarily mean total acquiescence, but I do mean telling member employers that the inevitable has come (ie despite the fact the employer association may not agree with the outcome). Basically, it is never over until all the employer and employees are both satisfied at each enterprise and employer associations who tell their members that "pattern has now been formed" may help to legitimise the pattern but they do not help individual member employers to continue to pursue their own enterprise goals. Statements about "commercial reality" whilst relevant, also tend to become convenient excuses.

[22] The failure of an employer association to roll-over on the pattern outcome becomes very perplexing for the union. Lipset (1963) argues that union leaders will often, in the face of changing behaviour, seek agendas that appear "bizarre" to ensure they are seen within the union and amongst their own peers to be "doing something" against these changing behaviours. ETU moves in NSW to seek the movement of their members out of one superannuation and redundancy fund into another appear to fit this "bizarre" union behaviour contortion. See Lipset SM (1963) 'Political Man', Mercury Books, London.

letting their employees miss out on any of the wages they would have received if it wasn't for the ETU pursuing these offending clauses. What was in fact occurring during this process was employers were getting closer to their own employees, communicating with them and coming to proper enterprise arrangements. Who would have thought that after nine months of protracted and on-going delays, employers and employees were suddenly realising that they had always had the ability to make their own company and workplace specific arrangements.[23]

A LUCKY BREAK

On 26 April 2003 the ETU got a lucky break. Justice Kavanagh of the Industrial Relations Commission of NSW totally denied NECA the right to appear in proceedings for the approval of an enterprise agreement. Her Honour then approved the enterprise agreement containing the offending clauses without hearing NECA's arguments.

The ETU immediately ran out to another 13 companies and said "one has been approved so they can all now be approved containing the offending clauses – sign the pattern here".

In between the ETU getting the signatures and filing them in the Industrial Relations Commission, NECA filed proceedings to appeal the decision to approve the enterprise agreement with the offending clauses. On 30 April 2003 NECA was successful in gaining leave to appeal. The matter is now awaiting hearing before a Full Bench of the Industrial Relations Commission of NSW.

ACCC GETS INTERESTED

Given the obligations of the ACCC in relation to the TPA, NECA considered it appropriate to let the ACCC know about these offending clauses.

Since 1998, seven unions have been successfully prosecuted by the ACCC for breaching sections of the TPA, at an average fine rate of $21,000. Since 1996, 22 companies have been prosecuted under the TPA with penalties averaging more than $2 million.[24]

Some have said to me, "hang-on, what if the ACCC takes action against your own members for entering into these agreements". Whilst we have had no assurances from the ACCC that this will not occur (nor would we want any), the ACCC may also recognise that where a union insists upon the inclusion of potentially offending clauses with the threat of industrial action, then

[23] See Way N (April 3-9 2003) Business Review Weekly – 'Workplace Reform Lacks Zeal' at pp. 75. Here it is argued that the slow take up of AWAs and direct employer and employee certified agreements is due to an uninterested and lazy Australian management culture who want the gain but without the hard work or pain.
[24] Robinson P (16 May 2003) The Age - 'Unions Fined $300,000 for Delays'

companies may be essentially 'induced' or "coerced" into possibly breaching the TPA.

Officers of the ACCC have already attended proceedings relating to the approval of enterprise agreements containing the offending clauses. The role of the ACCC officers at these proceedings to date has been merely to observe. The offending clauses were subsequently withdrawn by the ETU during the course of proceedings.

The ACCC has now confirmed that it is undertaking a preliminary investigation concerning the offending clauses and NECA will be doing everything we can to assist them in their investigations. I consider this to be a real chance for the ACCC to respond to the criticisms[25] of them which were highlighted in the recommendations of the Cole Building Royal Commission. It may also be an eye opener for a similar role to be played by the proposed Australian Building and Construction Commission in these areas.

THE IPA'S 'CAPACITY TO MANAGE INDEX' IS ALREADY THERE

Similar types of clauses have already been identified in the IPA's 'Capacity To Manage Index'[26]. Without going into detail, the capacity to manage index is an assessment tool that rates how restrictive clauses in certified and enterprise agreements affect the ability of the management to legally and effectively run and manage their business on a day to day basis. The higher the negative score, the lower the "capacity to manage". It is interesting to note that the last pattern enterprise agreement with the ETU in NSW rated a score of –12, whilst the proposed pattern agreement has a score of –20.[27]

SUMMARY

Of the 23 enterprise agreement proceedings which NECA has appeared in to date, the following results have occurred:-

- Five enterprise agreements have been approved after the ETU agreed to withdraw the offending clauses;

- One enterprise agreement has been approved, with approval of the offending clauses stood over since 23 December 2002 indefinitely.

- One enterprise agreement has been approved containing the offending clauses. The decision to approve this enterprise agreement is on Appeal before a Full Bench of the Industrial Relations Commission.

[25] See Chapter 17 of the recommendations from the Cole Building Royal Commission entitled "Trade Practices Act 1974(Cwth) implications for activity in the Building and Construction Industry.
[26] Further details on the IPA's 'Capacity To Manage Index' can be found at www.ipa.org.au. It was launched by the Minister for Workplace Relations Tony Abbott in Sydney on 16 December 2002. This will become a hugely significant tool in the future negotiation and assessment of enterprise agreements.
[27] Assessment courtesy of IPA's Work Reform Unit.

- Thirteen enterprise agreements have been stood over pending the outcome of the Appeal proceedings before the Full Bench.

We look forward to having our concerns determined by the Full Bench of the Industrial Relations Commission of NSW[28]. We hope that this will be the only jurisdiction we need to go to in ensuring the offending clauses are removed.

THE INEVITABLE LESSONS

Some important lessons for others who may also come into contact with these types of issues are:-

1. Never negotiate when it comes to breaking the law. No matter what the commercial imperatives, agreeing to potentially unlawful provisions can not, and should not, ever be accepted.

2. Do not accept the "unofficial rules" and "customs" in industrial relations surrounding "deal making". You do not have to roll-over on a "dirty deal" simply because that is the way "deals are done around here and have been done in the past". Dirty deals shouldn't be done simply against a back-drop of buying short term industrial peace and harmony.

To be continued ……

[28] The NSW Labour Council has announced that it will run a secure employment test case in the Industrial Relations Commission of NSW. We presume that objects of this test case will not be to require that companies enter into enterprise agreements as part of fulfilling any requirements for "appropriate workplace, environmental and OH&S practices". See www.workplaceinfo.com.au "Secure Work Test Case for NSW" (16 May 2003).