

NECA Submission

To the

Australian Government

Productivity Commission

Inquiry into Workplace Relations

Framework

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Contents

NECA Submission **Productivity Commission – Workplace Relations Framework**

1.	About NECA	3
2.	The Electrical Contracting Industry.....	4
3.	Background and Purpose.....	4
4.	Minimum Adult Wages.....	5
5.	Apprentice and youth employment and effects of minimum wages.....	5
6.	Enterprise Bargaining.....	15
7.	Unions as the default bargaining representative.....	17
8.	Greenfields Agreements.....	18
9.	Pattern Bargaining and Permitted Content in Enterprise Agreements.....	20
10.	Better Off Overall Test.....	24
11.	Unfair Dismissals / Adverse Action Claims.....	25
12.	Right of Entry.....	27
13.	Conclusion.....	28

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 4,000 members across Australia now recognise and enjoy the benefits of membership of NECA.
- 1.3 Across Australia, 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 and skills more than 4,000 apprentices across 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 Australian owned SMEs - the overwhelming majority are privately owned family businesses. The majority of employees are tradespeople 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 The Productivity Commission has requested submissions from interested parties in order to effectively assess the performance of the current workplace relations framework and its influence on wellbeing, productivity and competitiveness on the nation. This paper will explore a number of matters regulated under the current framework that influence these factors, particularly within the electrical contracting industry.

3.2 The objectives of the *Fair Work Act 2009* must firstly be highlighted as below as extracted from Section 3 of the Act:

Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for

Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

3.3 The question raised is whether the current *Fair Work Act* legislation is actually meeting its objectives. NECA's position is that some provisions in the *Fair Work Act* should be altered to better meet the objectives and encourage flexibility, productivity and job creation, particularly those provisions around minimum wages, enterprise bargaining, unfair dismissals and adverse action processes and entry rights.

3.4 NECA endorses and supports the Australian Chamber of Commerce and Industry (ACCI) Workplace Relations submission.

4. Minimum Adult Wages

4.1 In the electrical industry, the majority of the performance of work is underpinned by the minimum requirements of the *Electrical, Electronic and Communications Contracting Award 2010*. From our position as an industry association, we find that the minimum wage rates for Electrical Workers grades 1 to 4, ranging from \$17.83 to \$19.68 per hour and the Electrical Worker grade 5 (base grade qualified Electrician) hourly rate at \$21.55 (gross all-purpose hourly rate) do not appear to create barriers to employment, nor discourage individuals from participating in the industry. This can be evidenced by the *Labour Market Research - Electrotechnology and Telecommunications Workers* paper produced by the Australian Government in 2013. According to this paper, there is currently no shortage of general electricians in the general labour market.

5. Apprentice and youth employment and effects of minimum wage

5.1 However, the above is not observed for apprentice wages. Prior to 1 January 2014, minimum wages for apprentices under the *Electrical, Electronic and Communications Contracting Award 2010* were standard rates, regardless of the age of the apprentice, or the level of their education (with the exception of Queensland). When the pre-modern Award system was consolidated into a simplified Award system in 2009, the provisions for adult apprentices in Queensland were inserted into the new federal modern Award, originally designed to transition out of the Award in future.

5.2 In 2013, a full bench of the Fair Work Commission heard evidence relating to the two yearly Modern Award review (as stipulated under the Fair Work Act.) the review consisted of input from employer associations (including NECA, the Electrical Contractors Association and the Australian Chamber of Commerce and Industry) as well as employee organisations (including the Communications Electrical Plumbing Union (CEPU) and the Australian Council of Trade Unions).

5.3 In this case, NECA submitted some 18 witnesses and substantial evidence in supporting the case against the introduction of adult apprentice wages, concerned that the increased costs of employers engaging adult apprentices would be detrimental to the employment of adult apprentices and thus would have an adverse negative effect on the industry.

- 5.4 As previously submitted in the two yearly review, NECA confirm that there has been no increase to the work value of an apprentice and the level of productivity, especially in the first and second years of an apprenticeship. It is not until the third year that employers start to witness improvement to productivity and value to the business.
- 5.5 Concerns raised by NECA in the two yearly review regarding the potential reduction in adult apprentice engagement due to increased costs can also be evidenced in submissions provided to the full bench, supported by the CEPU.
- 5.6 Reasons for apprenticeship non completion were also explored and submitted in the review. These reasons consisted of non-monetary factors including unsuitability for the trade, difficulties with the schooling component of the apprenticeship and interpersonal / attitudinal matters.
- 5.7 Below are extracts from the Transcript of Proceedings (relating to NECA's submissions) from the hearing on 3 May 2013 by the full bench of the Commission:

PN12146

“Just finally going on to the impact of granting or not granting the applications, it's NECA's submission that the CEPU claims, if adopted, will have significant adverse ramifications for the future employment of apprentices. Employers will simply not be attracted to sustain any ongoing employment of apprentices due to the cost and regulatory burden on a business. All of the CEPU claims will result in a cost to employers and a very high cost to the apprentice employment levels.

PN12149

We would also rely on the evidence of Mr Reichmann, who was a CEPU witness. Under cross-examination, Mr Reichmann was telling us about group training schemes and how they worked. We were questioning him about the enterprise agreement for the group training scheme that he was familiar with, the wages, and he was telling the bench about a three per cent wage increase per year within that agreement. The question was asked, and it was asked by your Honour Justice Boulton:

PN12150

What is the justification for the three per cent? ---It's a union agreement that we negotiated as best day pay rate without pricing the enterprises out of the market.

PN12151

We take that as a very strong element of evidence that a CEPU witness would actually say to this commission that one must be very cautious that you don't put additional rates or additional increases of rates to the point where you price the enterprises out of the market. We say that's what the application of the union would do. It would have significant ramifications throughout the electrical contracting industry.

PN12152

Finally, just in conclusion, we would also touch on the adult apprentices. This wording, 12.3, may be read a little bit differently by the unions but let me just make it very clear. We would submit to the commission we do have that issue of the jurisdiction, the case that was decided by her Honour Senior Deputy President Act to consider, but also with the other arguments that I put forward before about adult apprenticeships and the disincentive that employers would have to employ apprentices based on age and cost. We would submit that the commission should be very cautious, seriously cautious, about considering that proposition of adult apprenticeships to be placed into particularly our award.

PN12153

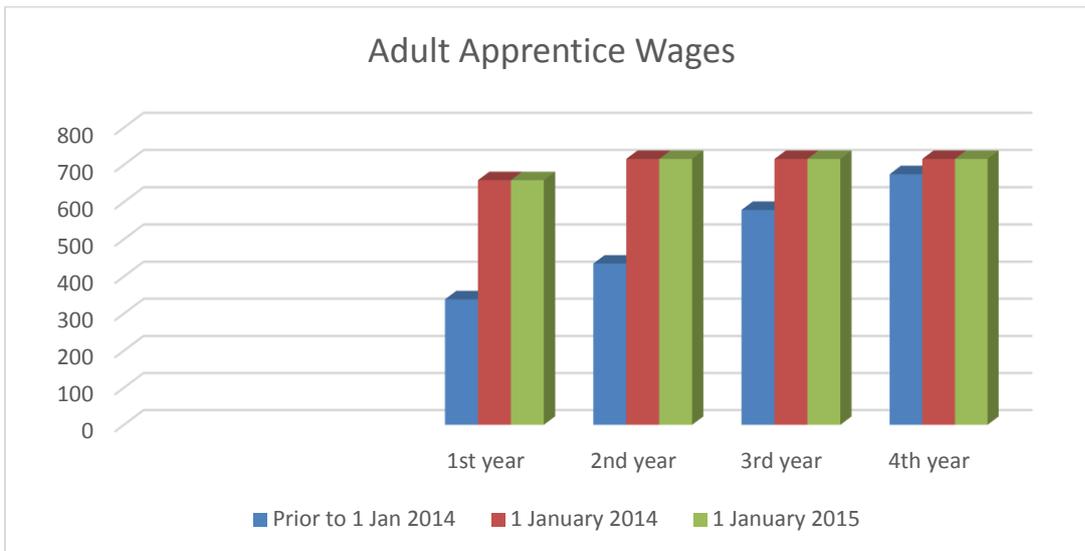
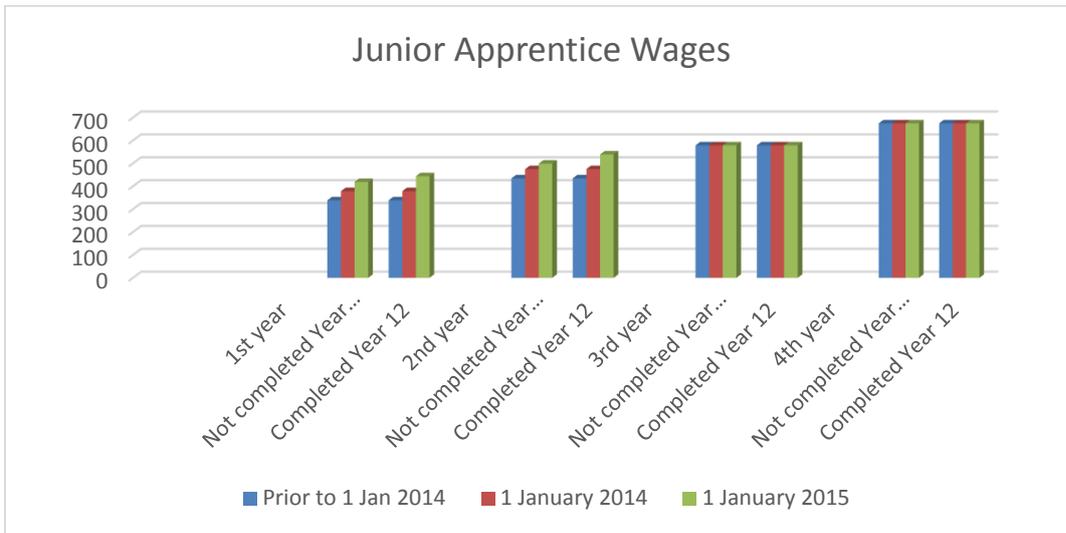
Finally, just to support all of our submissions in this area and all areas, we would draw upon not only the evidence that I have stated about witness testimony but also our national survey which supports what the individual witnesses are saying. Unless there's anything further, they're my submissions."

- 5.8 Despite the substantial evidence provided, on 22 August 2013, the Full Bench of the Fair Work Commission amended Apprentice conditions under the *Electrical, Electronic and Communications Contracting Award 2010*, introducing a higher adult wage rate (for those 21 years and older at the time of apprenticeship commencement) and a higher junior wage with a two-phased increase, scheduled to be introduced on 1 January 2014.

Wage-linked allowances such as the electrical licence allowance, industry allowance and travel time allowance were also increased proportionally for apprentices.

- 5.9 The increasing costs of employing apprentices along with economic factors including an increase in the unemployment rates and a current decrease in general construction work has made it financially difficult for many businesses

in the electrical industry to engage new apprentices, particularly adult apprentices.



5.10 The evidence of an Apprenticeship Mentor-Advisor (currently working in the E-Oz mentoring program provides an insight on the impact of the above changes on the electrical industry on March 6, 2015:

“From what I have seen with the 1st and 2nd years, the ones that have lost their jobs or have left is mainly due to the employer being short of work. Had contracts get cancelled etc. in most of these cases the apprentice has tried to get themselves another

apprenticeship. As part of the mentoring role we have been able to help with this process.

In terms of adult apprentices, I have found that since the increase in the adult pay rate, it is harder for them to get an apprenticeship.

I have been working with a few companies that would normally look at taking on an adult, but in the last couple of intakes they have done they only looked at junior apprentices. Simply because of the extra costs incurred by having an adult.

There are a lot of adults who are doing the electrical Pre-App course, these students are going to find it very difficult to gain an electrical apprenticeship because of the cost to the employers.

Quite often employers like to take on adult apprentices as they are usually more keener to learn, more willing to put in the hard work, they could have a family to support and/or house to pay off, so they will really work hard to get through their apprenticeship and gain an electrical licence.

With the increase in the rates for them, we could miss out on a lot of good quality apprentices moving forward.

Too many apprentices only think of the money they can make during their apprenticeship, not what they will learn. The apprenticeship is not about making big money, it's about learning the trade and gaining as much knowledge they can to become good qualified electricians.''

- 5.11 According to a recent report produced by NCVET (the National Centre for Vocational Education Research), approximately half of all apprenticeship contracts in trades are not completed. The NCVET report references the reasons that apprentices do not complete their apprenticeships, discovered through research, surveys, and studies including: difficulties with employers or colleagues, being made redundant, not enjoying the work and wanting to change careers. Further evidence to this effect has been provided in paragraph 5.6 of this submission.
- 5.12 Most studies show that low wages is not the most common reason that apprentices don't complete their apprenticeship, so an increase in wages is unlikely to provide a resolution for non-completion of apprenticeships. The

report recommended some measures to improve completion rates, including providing support to smaller and less experienced employers in particular and providing apprentices with mentoring support.

- 5.13 NCVER statistics (*Apprentice and Trainee Collection June Quarter 2014*) have shown that the numbers of new apprentices have reduced over the past four years, for example in 2009 there were 60,000 young individuals in Victoria (aged between 15-19 years) who commenced an apprenticeship or a traineeship. In 2013 that figure had reduced to 47,000 which shows a significant decrease.
- 5.14 At 30 June 2009 in Australia, there were approximately 137,800 youths (under 19 years of age) engaged in an apprenticeship or traineeship, but at 30 June 2014, that figure had dropped to 100,800.
- 5.15 The engagement of apprentices and trainees in Australia from 20 years and older at the end of June 2009 was 286,100 whereas the figures for the same group at the end of June 2014 was 250,200.
- 5.16 In the June quarter 2014, compared with the June quarter 2013, commencements in apprenticeships and traineeships throughout Australia decreased by 26.3%, to 45,400.
- 5.17 A summary of the most recent statistics available from NCEVER highlighted the below:
- *There were 341 300 apprentices and trainees in-training as at 30 September 2014, a decrease of 18.4% from 30 September 2013.*
 - *In the September quarter 2014, compared with the September quarter 2013:*
 - *Commencements decreased by 35.5%, to 46 100*
 - *Completions decreased by 14.4%, to 30 200*
 - *Cancellations and withdrawals decreased by 0.5%, to 28 900.*
- In the 12 months ending 30 September 2014, compared with the 12 months ending 30 September 2013:*
- *Commencements decreased by 23.9%, to 194 700*
 - *Completions decreased by 20.4%, to 163 400*
- 5.18 Below is an extract from the NCVER September Quarter 2014 Report for Apprentices and trainees:

Table 15 Commencements^{2,3} by selected training characteristics, 12 months ending 30 September, Australia, 2009–14 ('000)

		12 months ending 30 September					
		2009	2010	2011	2012	2013	2014
Age	19 years and under	99.9	113.4	114.0	110.2	88.2	80.4
	20 to 24 years	44.9	52.6	56.4	59.4	46.3	40.1
	25 to 44 years	84.9	96.3	103.8	122.7	84.8	56.4
	45 years and over	38.0	43.0	46.7	56.6	36.5	17.8

- 5.19 In Victoria, the number of commencements of new apprenticeships/traineeships has also reduced in the same four year period for most age groups.
- 5.20 A decline in commencements (not only in the number of individuals engaged in an apprenticeship or traineeship), would be consistent with a decrease in available opportunities, consistent with rising unemployment rates across Australia.
- 5.21 As the economic outlook does not look strong, incentives need to be provided for Employers in order to maintain apprenticeship engagement. Increasing costs involved with engaging an apprentice under the federal Award is becoming a deterrent for many businesses as they contend with increases in school fees and the obligation to reimburse the fees (with no assistance from the Government), the payment of higher wages and allowances and the time it takes to invest in training and supporting an apprentice.
- 5.22 The figures below come from an Apprentice Group Training organisation in the electrical industry, which engage apprentices according to the demand of their host clients. From the figures below, it is evident that there has been a decrease in the number of apprentices engaged particularly over the past 2 years (especially for adult apprentices), due to the costs involved with employing an apprentice.

Year	Intake Number	Number of Adult Apprentices
2009	45	12
2010	89	7
2011	38	0
2012	60	1
2013	82	7
2014	54	3

2015	15	1
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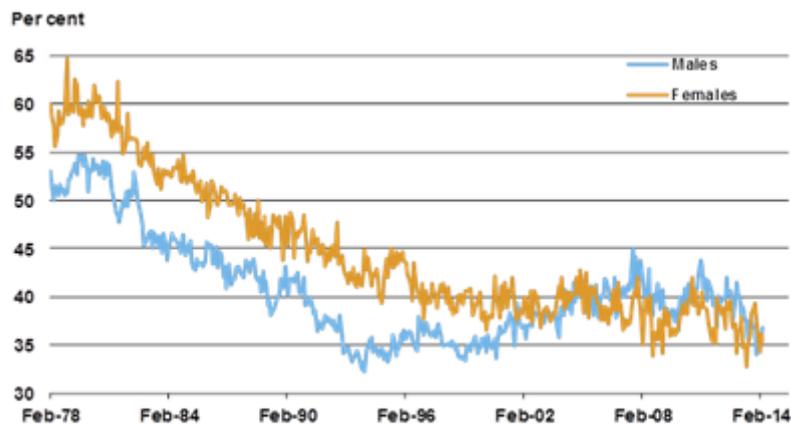
5.23 From the table below, it is also evident that there has been a decline in Electrical apprenticeship engagement, and show that the majority of businesses employ apprentices under the Federal *Electrical, Electronic and Communications Contracting Award 2010*. The table below was provided by the Department of Training and Workforce Development in Western Australia.

Age / Agreement type	2010	2011	2012	2013	2014 (up to 30 Sept)
20 yrs & under	1 060	1 051	998	925	766
Federal Award	729	711	608	578	468
Certified Agreement	15	16	12	70	134
State Award	244	139	146	147	92
Australian Workplace Agreement	13	111	158	7	8
Other*	59	74	74	123	64
21 & over	558	600	644	527	454
Federal Award	330	380	358	322	299
State Award	128	94	70	75	59
Certified Agreement	24	8	18	26	39
Australian Workplace Agreement	18	65	103	5	5
Other*	58	53	95	99	52
Total	1,618	1,651	1,642	1,452	1,220

Youth Unemployment and Ageing Population

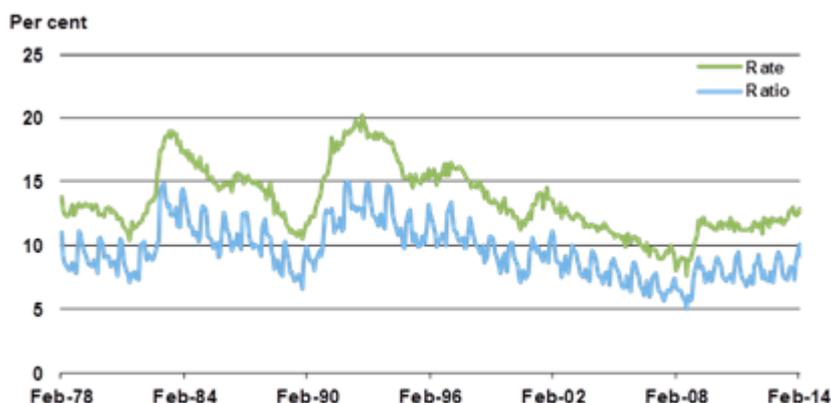
5.24 Youth unemployment (defined as those individuals between the ages of 19-24 looking for work) has been declining for the past 30 years, according to the Australia Bureau of Statistics, [Labour force, March 2014](#), Cat. no. 6202.0.

3. Unemployed youth (15 to 24 years) as a proportion of total unemployed – seasonally adjusted



The ratio of unemployed youths compared with the general population is also higher, as below:

2. Unemployment rate and ratio for people aged 15 to 24 years – original



5.25 Youth unemployment is concerning over the longer term, because as less youths are employed, skilled and trained, there will be a smaller participation rate of skilled workers to support Australia’s ageing population.

5.26 It is estimated that over the next 40 years, the proportion of Australia’s population aged over 65 years will increase to approximately 25% (double the percentage increase from 2002), while the growth of the population of traditional workforce age is expected to decrease to around zero. In 2002

there were in excess of five people of working age to support each individual over 65 years of age, though it is expected that in 2042 the proportion will decrease by 2.5 people of working age, as per the *Australian Treasury Report 2004*. What this demonstrates is a significant decrease in the nation's ability to support an ageing population and why it is imperative that today's youth have opportunities for employment and training.

Conclusion

- 5.27 The evidence demonstrating the matters of an ageing population, increasing youth unemployment, a growth in demand for skilled tradespersons, a slowing economy and decreasing apprentice engagement rates due to higher costs will lead to significant skills challenges in the future.
- 5.28 It is important that youths be provided with the opportunity to obtain quality training and development so they may support the demands for a skilled workforce into the future and contribute to enhancing Australia's productivity and prosperity.
- 5.29 Taking into consideration the key reasons that apprentices do not complete their training as evidenced (including changing careers, interpersonal conflicts), it appears that low wages are not the most significant factor in determining successful completions.
- 5.30 Although there is insufficient evidence at this stage to show the correlation between higher minimum wages for apprentices and completion rates, the preliminary evidence shows that higher apprentice wages and costs of engagement have resulted in a reduction of apprentice opportunities.

Recommendations

Recommendation 1:

NECA would recommend the reduction of minimum wages for apprentices, (particularly for adult apprentices). Having a lower minimum wage for apprentices and allowing market forces to dictate increases above and beyond the minimum would promote the provision of opportunities for apprentices. The appropriate minimum wage should be determined by another body with sufficient economic expertise to make an effective decision in that area. This recommendation is in line with Mr Brendan McCarthy's comments as described in the Financial Review on 10 March 2015.

Recommendation 2:

Should the primary recommendation be disregarded, secondary recommendations are made to increase the level of incentives for employers, to enhance opportunities for apprenticeships.

6. Enterprise Bargaining

- 6.1 Historically, the concept of enterprise bargaining was introduced to guarantee a higher standard of wages and conditions (and also security of employment) in exchange for gains in employee productivity and loyalty. Unions have traditionally been heavily involved in the bargaining process, which has resulted in significantly higher rates of pay with limited increases to productivity. This is particularly apparent in the Construction and associated industries (such as Electrical), where wage rates and conditions in some instances are more than double that of the relevant Awards. As a flow on effect, the costs of commercial, residential and infrastructure development have soared (particularly in Victoria) and the astronomical costs are being shouldered by businesses, home owners and tax payers alike. Value for money, particularly with government projects is a serious concern in the industry, leading to the development of the proposed federal government bill for the legislated *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014*.
- 6.2 The *Fair Work Act* has fundamentally changed the agreement making system and has dramatically enhanced union power. Under WorkChoices, unions had the role of support players, whereas the *Fair Work Act* has re-instated them as lead actors at centre stage.
- 6.3 The *Fair Work Act* provides for new types of agreements, a requirement for good faith bargaining, new approval processes and new content rules. Unions have a central and protected role in the agreement making system and moreover there is no longer a distinction between non-union and union agreements.
- 6.4 NECA's experience is that in many cases the bargaining framework does not promote the discussion and uptake of measures to improve workplace productivity but rather entrenches an adversarial culture with a focus on industry outcomes rather than enterprise outcomes.
- 6.5 In many cases, unions seek to have content included in agreements, this content is not in the employer's or the employees' interests, but rather goes to the union's political and industrial advantage.
- 6.6 To NECA's knowledge there have been no significant studies into the linkage between workplace relations legislation, enterprise bargaining and productivity in Australia. Certainly enterprise bargaining outcomes can contribute to

productivity within an enterprise. In NECA's experience this is usually by way of the agreement providing sufficient operational flexibility and the capacity for direct employee engagement. However, for the reasons discussed below, NECA does not believe that the current bargaining framework facilitates those outcomes.

- 6.7 This is not to suggest that enterprise agreements by themselves drive productivity. Yes, they can facilitate productivity but management competency, skills and training, technology, organisational skills and employee engagement are all essential ingredients for productivity growth.
- 6.8 NECA's specific issues with the bargaining framework go to the following issues:
1. The position of unions as default bargaining representatives for union members.
 2. Greenfields Agreements;
 3. Pattern bargaining and the permitted content of agreements.

7. Unions as the default bargaining representative

- 7.1 This central role for unions in the bargaining process is at odds with the fact that they represent only 14 per cent of the private sector workforce *Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2009*.
- 7.2 NECA has fundamental concerns with the fact that unions are the default bargaining representative for union members. Under Section 176 (1)(b) of the *Fair Work Act* a union will be the default bargaining representative for a proposed enterprise agreement for a union member except where another bargaining representative is specifically appointed by the employee in writing.
- 7.3 This default regime creates a number of concerns. Firstly, it privileges the union over other potential bargaining agents and essentially entrenches them in the bargaining process. This unfairness becomes quite apparent in workplaces where the minority of employees are union members.
- 7.4 Secondly, it discourages employees from making an "active" choice as to who might best represent their interests. NECA does not have a problem with employees being represented by their union - that is their right. However, it is NECA's position that this must be on the basis that the employee has made an active choice for union representation. In other words, an "active" appointment process should be required rather than the default regime which does not encourage employees to turn their minds as to who would best represent their interests.

- 7.5 NECA members in certain parts of Australia have given their employees the option of negotiating an agreement with their employer directly, a trend that is increasing significantly as it allows parties to negotiate the most appropriate agreement for the individual business and group of employees, as opposed to ‘pattern bargaining.’ For example, across Australia, our records show NECA has assisted with developing at least 262 employee-collective agreements – agreements negotiated directly between employers and employees, without union involvement. This figure is continually increasing, with NECA Victoria currently assisting 37 individual contractors with negotiating their own employee-collective enterprise agreements without union involvement.
- 7.6 Section 193 of the *Fair Work Act* requires that the Fair Work Commission apply the ‘Better Off Overall Test’ where approving an Enterprise Agreement, guaranteeing a ‘safety net’ of wages and conditions for all employees as below:

When a non-greenfields agreement passes the better off overall test:

- (1) *An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if FWA is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.*

Recommendations

Recommendation 3:

That the Act be amended so that bargaining representatives must be appointed by employees making an active appointment rather than automatically on the basis of union membership.

8. Greenfields Agreements

- 8.1 Section 172 of the Fair Work Act provides for the making of ‘Greenfields’ Enterprise Agreements as per the below extract:

Making an enterprise agreement

Enterprise agreements may be made about permitted matters

- (1) *An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:*

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

- 8.2 Greenfields agreements can exist where the company has won some work (generally on a new construction or development project) but does not yet have any employees, so a union can automatically ‘negotiate’ on behalf of any future employees.
- 8.3 Not only does this provision raise the question about freedom of association principles, but in a practical sense, it also generally leads to the employer (who has little or no bargaining power in this situation) being coerced into agreeing to an enterprise agreement with significantly higher than market wages and conditions.
- 8.4 Last year, NECA Victoria assisted a member with a greenfields enterprise agreement. The employer had won some specialist work on a construction project in far north Queensland and received almost crippling pressure to sign the site specific enterprise agreement. In this situation, they faced the threat of not being allowed to perform work onsite unless the agreement had been signed. Confronted with the realities of deadlines and penalties for not meeting deadlines, left the employer no other option but to relinquish any bargaining power they may have had and agree to an overly generous project-specific agreement.
- 8.5 The Victorian Desalination Project (completed in 2012) is also a prime example of how taxpayers have not received good value for money where funding infrastructure projects due to excessive rates and coercion on greenfields agreements. The plant has cost Victorian taxpayers multiple billions of dollars and no water has been required from the plant thus far. On 27 March 2014, the Victorian Age reported on the desalination plant, extracts are below:

“Victorians will pay \$613 million for the desalination plant this year, despite not a drop of water ever being ordered from the plant.

Water Minister Peter Walsh said a recent refinancing of the desalination plant would save Victorian families \$187 million on their water bills.

He announced on Thursday that for the third consecutive year, he would not order any water from the Wonthaggi plant, which was built under the former Brumby Labor government.

“Total contract costs, without ordering water, still stand at \$18.3 billion over 27 years but this is a \$1.2 billion improvement on the deal Labor signed – a deal they tried to hide from Melbourne households.”

He said Melbourne's water supplies were at 74 per cent and there was no need to order any water from the plant.

The multi-billion dollar desalination plant was commissioned by the Labor government in 2007 and has been criticised for being too expensive.

In 2013-14 the plant cost taxpayers about \$632 million.”

Conclusion

- 8.6 Greenfields agreement promote significantly higher wages and conditions compared with market rates and with the union as the representative for future employees, employers have little to no bargaining power in reality. Should the employer want to work on the site, they would receive significant pressure to sign the enterprise agreement. This arrangement goes over and above negotiating for productivity for fair wages and conditions. It also increases the costs to the general public and taxpayer for construction and infrastructure projects, reducing value for money and productivity.

Recommendations

Recommendation 4:

That the provisions for Greenfields agreements do not include provisions to require employers to negotiate with unions for these types of agreements and to be able to lodge it with the Fair Work Commission themselves, so the agreement may be approved subject to the ‘Better Off Overall Test.’

9. Pattern Bargaining and Permitted Content in Enterprise Agreements

- 9.1 A number of unions have a stated policy of pattern bargaining. These unions include the construction industry unions in Victoria, among them the Electrical Trades Union. Their policy is to pursue pattern bargaining outcomes in certain industry sectors and they utilise a number of strategies and mechanisms to pursue this policy.
- 9.2 The *Fair Work Act* has expanded the matters which may be bargained over (and hence which can be contained in an enterprise agreement) beyond matters that pertain to the employment relationship to include matters that pertain to the relationship between the employer and a union(s). There are no prohibited content restrictions with respect to the engagement of independent contractors and labour hire workers and any requirements relating to the conditions of their engagement.

- 9.3 This has given rise to a large number of claims for so called “pay parity” or “security of employment” clauses to be placed in agreements and these have inevitably worked their way into pattern agreements.
- 9.4 The *Fair Work Act* provides that terms in an enterprise agreement cannot contain a general prohibition on an employer engaging contractors or labour hire employees – they are not within the scope of matters permitted to be in agreements. In addition, inserting these terms into an Enterprise Agreement may in practice violate competition and consumer law by setting a rate which all contractors to that Enterprise Agreement covered Company must pay their employees. However, the explanatory memorandum to the Fair Work Bill contains an example of the terms that are intended to be within the scope of matters which can lawfully be placed in an enterprise agreement including a term which relates to:
- “Conditions or requirements about employing casual employees or engaging labour hire or contractors if these terms sufficiently relate to employees job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement”.*
- 9.5 The Fair Work Commission has considered such provisions in a number of cases including *Asurco Contracting Pty Ltd v CFMEU* and in the *Australian Industry Group v ADJ Contracting Pty Ltd*.
- 9.6 A Full Bench of the Fair Work Commission has upheld the validity of such clauses in both cases. This has a number of consequences.
- 9.7 Firstly, it further promotes and entrenches union pattern agreements. Under such agreements the employer is obliged to engage contractors and their employees on no less favourable terms than the pattern agreement and this inevitably forces the employer to use contractors who are also party to a pattern agreement or requires the contractors to either enter into a pattern agreement or walk away from the contract. In essence, this discourages true bargaining at the enterprise level.
- 9.8 The second consequence is that the Act now provides a “back door” method of regulation of contractors and intrudes into commercial arrangements.
- 9.9 The union’s justification for such clauses is that contract labour or the contracting out of packages of work to other businesses is a risk to employee job security. However, we are not aware of any consideration by Fair Work Commission of how the facts in each of these particular cases show that such contracting out affects job security.

- 9.10 The expansion of the permitted content of agreements to include matters that pertain to the relationship between an employer and a union(s) has had other consequences. The watering down of the Federal Government’s *Implementation Guidelines for the National Code of Practice for the Construction Industry* has also contributed to these consequences within the building and construction industry by also removing most of the previous restrictions on agreement content.
- 9.11 Unions have used this expansion to broaden their bargaining claims – in particular to embed themselves in either a consultative or decision-making role within critical agreement provisions such as changes to start and finish times, rostering arrangements and the engagement of contractors. The unions’ objective is to become a gate keeper and to intrude further into areas of management prerogative.
- 9.12 The Victorian electrical contracting pattern agreement contains the word “union” 78 times, “ETU” 48 times, “employee representative” 65 times and “shop steward” 22 times.
- 9.13 The pattern agreement in Victoria (2010 – 2014) also contains provisions requiring employers to gain ‘agreement’ with the union to alter the most basic parts of employee engagement, which should only require the agreement of the employee(s) effected and the employer. For instance:
- Clause 10.1 Introduction of Shift Work**
- (a) An existing employee shall not be placed on to a permanent, ongoing and/or long term shift unless agreement is reached between the Employer, Union and employee concerned.
- 9.14 Agreements that contain similar terms to the above in reality can impose significant restrictions on both employers and employees and can lead to situations where the employer and an employee may reach mutual agreement on a change, but the union is not in agreement, therefore it may not be permitted to go ahead.
- 9.15 This is not to say that there is never a role for a union or union delegates. However, the breadth of permitted content in our submission is far too broad and in our experience results in the most difficult and protracted bargaining negotiations being over the rights and role of the union and their intrusion into decision making, rather than the wages and conditions of the employees.
- 9.16 Enterprise Bargaining in the Queensland Electrical Contracting Construction Industry is also delivering abnormally high outcomes for workers and unions (in particular, the ETU) due to the following factors:

- Contractors are exposed to exorbitant delay penalties and costs when industrial action (legal, semi legal and illegal) stops work on project construction sites;
- Electrical workers are last in the Enterprise Agreement cycle of all workers in the construction Industry making them vulnerable to high Enterprise Agreement outcomes in other trades negotiated for future periods of work on these sites;
- Union coercion over the signing of Greenfield Agreements which may prevent Contractors winning tenders;
- The mindset that Electrical Workers are of a higher skill set than other workers on site and therefore should be paid more than those workers;
- The competitive nature of the Electrical Contracting Industry in pricing jobs to undercut competitors between union Enterprise Agreement contractors and with non-union Enterprise Agreement contractors; and
- The relative strength and persuasiveness of the ETU over workers on site.

9.17 Outcomes of bargaining with the ETU in 2012 resulted in a wage increase of 4% in 2013, 6% in 2014 and 7% in 2015. This results in an electrician's wage going to above \$42.00 an hour in 2015. Other increases negotiated included:

- Term Agreed % Increase
- Double Time on Saturdays up from Time and Half (12.5% increase based on 8 hours of Saturday work)
- Increased Site Allowance to a maximum \$8 per hour (33% to the maximum site allowance)
- Increased Boot Allowance to \$120 (26% increase in the boot allowance)
- Increased Uniform Allowance, now 5 sets of uniforms (Up from 3 sets 40% increase)
- Increased CIRT \$90, \$95, \$100, \$105 (Achieves 40% increase over the life of the agreement)
- Increased Super Benefits \$170, \$182, \$191, \$200 (Achieves 38% increase over the life of the agreement)
- Inclement Weather Provisions at 32 hours (Increased from 24 hours or an increase of 33%).
- Increased Tool Allowance Percentage Rate and (As per wage offer)
- Most Other Union Consultation Arrangements
- Casual loading increased from 23% to 25% and a 6 weeks maximum engagement (9% Increase)
- Fares and Travel \$39, \$41, \$43, \$45 (Achieves 40% increase)

9.18 This occurred during a time where the economic outlook was poor and did not support these increases. Specific economic data at the time was as follows:

Conditions in the Commercial Sector

- Conditions remain very weak and have been weakening since March 2010.
- This is due to low demand and consumer confidence.
- Problems remain with financing due to global economic issues particularly in Europe.
- There has been a reduction in public spending due to Government at state and federal level reigning in spending to regain AAA rating post the Nation Building Economic Stimulus Plan which has now at the end of its spend.
- Queensland accounted for 20.1% of the national building activity in 2010-11, however year to date figures this is down by -5.6% on the previous 12 month period to March 2012.

Conclusion

9.19 It is evident from the above that unions utilise ‘pattern’ bargaining to an extent that transcends the employee and employer relationship. Unions also use these agreements to enhance their power, influence and reach and also to discourage industry competition and productivity.

Recommendations

Recommendation 5:

That the matters that can be bargained over and included in enterprise agreements be limited to matters that pertain to the employment relationship (exclusive of third parties).

Recommendation 6:

That restrictions on the engagement of independent contractors and labour hire workers and any requirements relating to the conditions of their engagement under enterprise agreements be expressly prohibited.

Recommendation 7:

That productivity measures and improvements in Enterprise Agreements be demonstrated to the Commission (in the Agreement approval process) to justify higher wages and conditions, where a union is involved in the agreement making process.

10 Better Off Overall Test

- 10.1 The 'Better off Overall Test' (BOOT) is utilised by the Commission for a benchmark against which to approve or reject an Application for an Enterprise Agreement. This test generally works well, is fair and reasonable to both employees and employers and allows for a certain amount of flexibility contained within Enterprise Agreements that can't be achieved through Awards.
- 10.2 However the subjectivity demonstrated by some members of the Fair Work Commission mean the BOOT test is not always appropriately applied and that some members use their powers to exert their personal views. Some use their jurisdictional influence over and above the BOOT test which can limit the effectiveness of it and restrict flexibility in Enterprise Agreements, where the arrangements suit both employers and employees.

Recommendations

Recommendation 8:

To tighten and limit the 'BOOT' test in line with the provisions of the NES in order to enhance flexibility and effectiveness of Enterprise Agreements.

11 Unfair Dismissals and Adverse Action

- 11.1 Many of our members are affected by Unfair Dismissal claims, many of which arise from disgruntled (and not always unfairly dismissed) employees.
- 11.2 In some instances, underperformance is often the issue and the perception that employers have about the administration burden involved with performance management can lead to difficulties when dismissing an employee.
- 11.3 In Australia, we not only have a cumbersome Workplace Relations system especially when it comes to unfair dismissals and adverse action, but protections are certainly in favour of the employee.
- 11.4 Even in situations where employers follow the correct procedures when it comes to dismissing an employee, applications for relief from unfair dismissals can still be lodged against them. This results in time away from their business, additional costs and evidently the payment of 'go away' money to avoid further costs and time being spent.
- 11.5 NECA Victoria represented a member recently to defend an unfair dismissal claim. The employee was underperforming and had been for a significant time. Despite being provided with warnings and provided with training, the employee didn't improve. When the employee was dismissed, the employee lodged an unfair dismissal claim, on the basis that the employee wasn't

provided with a chance to fix their mistake before being dismissed (despite the generality of the task being undertaken, a reasonable expectation for a worker of that level). Not only did the business have to suffer the costs of amending that mistake (and many others made by the employee) in both materials and labour but the company's reputation with a key client was impacted. By the time conciliation occurred, the company had already incurred significant costs. They had spent hours gathering evidence in order to prepare responses and had managers out of the office to participate in the conciliation.. To avoid the matter going further and costing additional time and money, the company settled on some 'go away' money. Should the matter have been arbitrated, it would be unlikely the matter would have been found in favour of the applicant.

- 11.6 Examples like the above also have a personal impact on employers and affect their views and methods when hiring additional employees and could be an incentive for employers to outsource certain kinds of work to subcontractors. This also acts as a disincentive for employers to grow their business, take on additional risk and responsibility and employ additional staff on an ongoing basis. It may have the potential to impact on job security for employees moving forward.
- 11.7 In the economic times of late, there are more employees than ever facing redundancy and according to Section 389 of the *Fair Work Act*, a dismissal is not a genuine redundancy unless:
- (b) the [employer](#) has complied with any obligation in a [modern award](#) or [enterprise agreement](#) that applied to the employment to consult about the redundancy.*
- 11.8 The above poses a real technicality on businesses, recently a decision was made via arbitration (*K Mihos v Multipipe Pty Ltd U2014/11083*) where an employee was made redundant and because of a technicality (consultation was not provided in writing) the consultation process in the Company's Enterprise Agreement was not deemed to be followed, which also rendered the dismissal 'unfair, unjust and unreasonable' in the view of the Commission.
- 11.9 The Company had notified all staff members at numerous meetings about losing the renewal of the contract and how that would impact on staff, but it appeared that action did not go far enough.
- 11.10 In this case, the union made known that should they have become aware of the impending redundancy, they would have abused the Dispute Resolution process in the Enterprise Agreement to extend the process.
- 11.11 Although there must be some protection from unfair dismissals for employees, the legislation is not balanced and poses an unnecessary regulative and financial burden on employers.

- 11.12 General Protections provisions under part 3-1 of the *Fair Work Act* in addition to unfair dismissal provisions add further regulatory burdens on employers. Where an employee lodges an application for a General Protections (Adverse Action) claim, the burden of proof lies on the Employer to disprove the allegation.
- 11.13 Should the claim not be resolved at conciliation, under the current system the claim escalates to the Federal Court. In reality, this practice usually results in the Employer having little option but to pay ‘go away’ money, in order to settle the matter before extensive costs impact on the business, despite the strength of the merits of the claims.

Conclusion

- 11.14 Withstanding that there must be a need for protections for employees against being unfairly dismissed and having adverse action taken against them, the system should be more balanced, more fair and reasonable and not so heavy-handed. It should not just act as a mechanism in which the employee can gain access to additional monies, especially in times where their claims may not have strong merit.

Recommendations

Recommendation 9:

Section 389 of the Fair Work Act should focus on consultation being broadly provided, it should not be so tightly worded that it will allow employees to be successful in winning a claim based on a technicality (and the employer’s intent and actions).

Recommendation 10:

The General Protections provisions should not constitute such a heavy-handed approach. Instead of matters escalating to the Federal Court where settlement is not reached in conciliation (which can open up the risk of unlimited costs being awarded), matters should be able to be arbitrated in the Fair Work Commission as a final resolution.

Recommendation 11:

The Commission should have jurisdiction to dismiss at application following the conciliation stage, where both parties have an opportunity to stipulate their versions of events, before a sum for the settlement of the matter is discussed. Due to the decline in union density, there is a need for a more informal approach to settling disputes.

12 Right of Entry

12.1 NECA seeks amendment to the Right of Entry provisions contained within the *Fair Work Act*. To this end we highlight the objects of Part 3-4 of the *Fair Work Act* which states as follows:

‘The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

(a) The right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:

(i) This Act and fair work instruments; and

(ii) State and Territory OHS Laws; and

(b) ...

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

12.2 NECA seeks to emphasise the requirement to balance an organisation’s right of entry with the inconvenience experienced by employers as opposed to the occupiers of premises.

12.3 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.

12.4 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.

12.5 This issue is further exacerbated when the Occupier does not require the official to restrict their access to meal breaks and provides access to employees 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.

12.6 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.”

- 12.7 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.

Recommendation 12:

That s487 be amended to require notification of the Employer in circumstances where an Organisation seeks entry to premises that are not controlled by the Employer.

13. Conclusion

In summary of the above issues highlighted, the current workplace relations system has some positive merits and offers protections, however some changes and refinements are recommended to enact a more balanced and simplified system conducive to both the protection of rights and encouragement of employment. These changes would assist the industrial relations framework to better meet the objectives of the *Fair Work Act*.

In order to achieve the objectives of the Fair Work Act, NECA would urge the below recommendations be adopted.

Recommendation 1:

NECA would recommend the reduction of minimum wages for apprentices, (particularly for adult apprentices). Having a lower minimum wage for apprentices and allowing market forces to dictate increases above and beyond the minimum would promote the provision of opportunities for apprentices. The appropriate minimum wage should be determined by another body with sufficient economic expertise to make an effective decision in that area. This recommendation is in line with Mr Brendan McCarthy’s comments as described in the Financial Review on 10 March 2015.

Recommendation 2:

Should the primary recommendation be disregarded, secondary recommendations are made to increase the level of incentives for employers, to enhance opportunities for apprenticeships.

Recommendation 3:

That the Act be amended so that bargaining representatives must be appointed by employees making an active appointment rather than automatically on the basis of union membership.

Recommendation 4:

That the provisions for Greenfields agreements do not include provisions to require employers to negotiate with unions for these types of agreements and to be able to lodge it with the Fair Work Commission themselves, so the agreement may be approved subject to the ‘Better Off Overall Test.’

Recommendation 5:

That the matters which can be bargained over and included in enterprise agreements be limited to matters that pertain to the employment relationship.

Recommendation 6:

That restrictions on the engagement of independent contractors and labour hire workers and any requirements relating to the conditions of their engagement under enterprise agreements be expressly prohibited.

Recommendation 7:

That productivity measures and improvements in Enterprise Agreements be demonstrated to the Commission (in the Agreement approval process) to justify higher wages and conditions, where a union is involved in the agreement making process.

Recommendation 8:

To tighten and limit the ‘BOOT’ test in line with the provisions of the NES in order to enhance flexibility and effectiveness of Enterprise Agreements.

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successful in winning a claim based on a technicality (and the employer’s intent and actions).

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The Commission should have jurisdiction to dismiss at application following the conciliation stage, where both parties have an opportunity to stipulate their versions of events, before a sum for the settlement of the matter is discussed. Due to the decline in union density, there is a need for a more informal approach to settling disputes.

Recommendation 12:

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For further information about this paper, please contact NECA Victoria on 03 9645 5533