

Submission to the Productivity Commission into the Workplace Relations Framework

Master Electricians Australia



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Introduction

Master Electricians Australia Ltd (MEA) is a not-for-profit industry association representing electrical contractors. Originating as the Electrical Contractors Association in 1937, MEA has been representing electrical contractors for more than 76 years, making it one of the longest-standing industry associations of its kind. MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate.

MEA currently has a membership base of approximately 3000 electrical contractors Australia-wide, the vast majority of which are small businesses with fewer than 20 employees.

Data Collection

MEA surveyed its members and returned a response rate consistent with the distribution of its member base:

How many employees does your business have, including electrical and office staff?	
Answer Options	Response Percent
1-5	49.5%
6-15	31.9%
Over 15	18.7%

The members responded to closed answer questions and free text questions. In the main the data has been presented in quantitative terms. Where a free text response has been sought a qualitative analysis of the most common themes has been presented.

Submissions

1. Barriers to Job Creation

As private enterprise features so prominently in job creation MEA surveyed members to rank aspects of the industrial framework that concerned them the most when creating jobs.

These aspects were:

- (a) The performance of the Fair Work Commission – that is, how they perceived the outcomes of the FWC in their decision making role favouring the employee over the employer,
- (b) The performance of the Fair Work Ombudsman – that is, how they perceived the outcomes of the FWO in their involvement in wage disputes and their general interpretation of the ‘grey’ aspects of awards, agreements and employment law.
- (c) Concerns regarding their ability to meet the cost of wages and award conditions for their employees given the complexities of the award structure and the uncertainty of business conditions.
- (d) The fear of dismissal claims against the business where it has terminated an employee.

It was clear from the respondents that the greatest concerns were the costs of employment conditions and the fear of dismissal claims against the business.

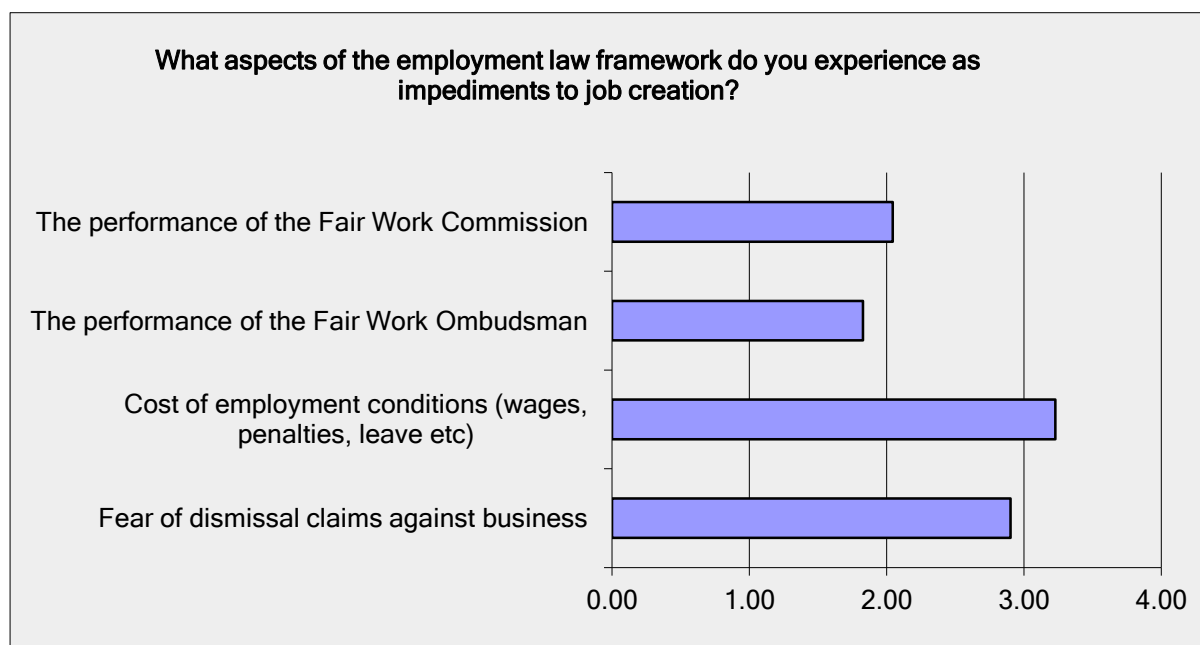


Figure 1 - Impediments to Job Creation (4-greatest concern; 1-least concern)

On further analysis of the members' responses it is evident that the concern around the cost of employment conditions is not limited simply to the standard set by the award but rather:

- the impact of on-costs/unproductive costs,
- the difficulties associated with funding leave in such a strongly competitive industry,
- inflexibilities within the award structure,
- the ability of employers to meet their employment obligations in fluctuating market conditions.

Precarious market conditions alongside easily accessible and rigid dismissal provisions create an overall reluctance for employers, particularly small businesses, to create jobs.

Largely because of this there is a longstanding trend, despite the time based eligibility criteria for making an unfair dismissal claim under the Fair Work Act, that businesses will elect to engage employees as casuals as a way of 'proving' to the business that they are viable as an employee. Firstly from a position of is there enough work for this person and then from a perspective of the perceived likelihood that they will be a productive employee who won't make an unfair dismissal claim if they no longer meet the standards.

2. Fair and Equitable Pay and Conditions Safety Net

The electrical contracting industry is a diverse area which includes a wide range of fields of expertise.

It is the case that areas of the industry are regularly considered 'hyper-competitive', for instance tendering for work on large scale construction projects, or sensitive to cyclical downturns, such as maintenance within the mining industry. These sensitivities and competitive pressures are felt close to home in the domestic and commercial sectors as well.

For these reasons we see that when members have been asked about the standard set by the modern and National Employment Standards (NES) that there has been a significant split between responses suggesting the safety net is 'just right' or 'too high'.

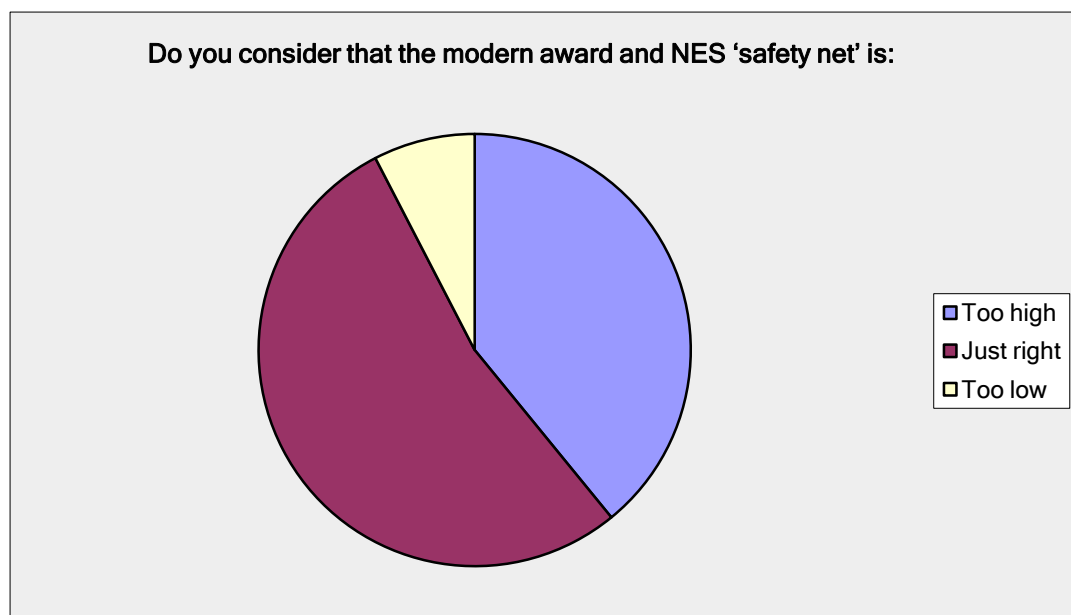


Figure 2 – Responses to Safety net standard

Do you consider that the modern award and NES 'safety net' is:	
Answer Options	Response Percent
Too high	39.1%
Just right	53.3%
Too low	7.6%

However, when considering this data it is important to point out that the vast majority of the industry pays licensed electricians in excess of the award minimum wage.

When reviewing this data it is important to consider the qualitative responses driving the polarisation of responses of 'too high' and 'just right'. There are two areas of the award that have placed increased pressure on businesses within the electrical contracting industry:

- a) The recent wage increases for apprentices in first and second year of their apprenticeship.

Small businesses make up over 90% of all employers engaging apprentices. It was the position of MEA during the 2012/2013 apprentice review of the modern awards that increasing cost of apprentices on these businesses will have a negative impact on employment of young people and negatively impact the businesses attempting to employ apprentices.

This is evident from those responses, including the qualitative responses, that this aspect of the modern award standard is too high.

MEA advocated strongly that apprentices are students being paid to learn and while important to the continuation of the industry and the economy; they are a cost for the organisation to bear which are largely not recoverable.

- b) Mismatch between client demand for when the work is to be performed and the inflexibilities in the modern award with regard to the arrangement of the hours of work.

In an increasingly 24/7 economy many contractors can only perform maintenance and service work during shut down or quiet periods of business. The arrangement of hours of work under the award limits the ability of contractors to tender for this work without the additional costs of penalty rates on top of the ordinary week of wages.

For example:

Coles and Woolworths grocery stores which consistently trade until 9:00pm most nights in many regions require their service, maintenance and installation work to be conducted outside these hours. This is to accommodate the safety requirements of electrical isolation, clear and uninterrupted work areas for tradesmen and for the safety of the general public.

It is submitted that while the safety net is accepted by employers as largely a reasonable minimum standard that there exist opportunities to improve the flexibility of the arrangement of work against the demands for when the work is sought.

Such improvements could be as simple as allowing ordinary hours to be worked Monday to Sunday **without** a change to the penalty rate structure. It would allow employers to more flexibly roster ordinary hours of work to meet demand.

The legislation would need to be amended to specifically achieve this goal as the Fair Work Commission (FWC) would not reach such a reform decision on its own without lengthy and costly hearings to reach a decision based on the ability of the various parties to present the most compelling argument. It is the preference of the FWC to reach distributive or compromise outcomes at best where applications have been made to vary awards in the past. The FWC is an establishment that has evolved from roots as an industrial conciliator and arbitrator to an organisation with the ability to significantly impact the economy of the country. The FWC, by admission of previous tribunal members, lacks the economic expertise to make decisions that are fundamental to productivity and viability of whole industries and occupations.

2.1. 4 Yearly Review of Modern Awards

The modern award review processes are a failure by virtue of the fact that employer groups spend their time and resources responding to the various unions wish list of increases, new entitlements and limitations that would impose increased productivity burdens on employers.

Modern award discussions should be focused on ensuring awards are:

- a genuine minimum safety net with economic and social standards
- that the award provisions reflect the expectations of all participants in the economy,
- are not based on draconian industrial principles that were established decades ago,
- are able to be easily applied by the small business who represent the vast majority of employers who rely on the award system.

These decisions should be made on an award basis at any time provided that the variation sought would meet the modern award objectives.

3. Measures to Support Small businesses

3.1. Effectiveness of small business fair dismissal code

The current framework includes the Small Business Fair Dismissal Code ('the code') to assist businesses with fewer than 15 employees to manage terminations initiated by the employer.

It is our submission that the code is an ineffective tool and rarely achieves its intent of reducing the potential burden of an unfair dismissal claim on a small business.

That is, an employer that has followed the code is:

- not protected from an unfair dismissal claim,
- still 79%¹ likely to agree to pay to have the matter settled for a sum of less than \$8000 in order to avoid lengthy and costly arbitration,

¹ Fair Work Commission – Results and Outcomes data 1 July 2013 to 30 June 2014
<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

- settlement amounts can have a significant impact on the viability of a small business particularly in the building, construction and electrical industries where cash flows are dependent on prompt progress payments,
- not required to prove how they have followed the code if the matter proceeds to arbitration,
 - the code is inadequate in this regard, it asks questions after the fact of the dismissal having taken place,
 - the code should be a prompt to employers to ensure they meet the obligations of the Act in terms of redundancy and the criteria for assessing the dismissal as provided for by section 387.

For example:

The code states that it should:

“It is in the interests of the employer to complete this checklist **at the time of dismissal** and to keep it in case of a future unfair dismissal claim.”

(emphasis added)

It is not helpful for a small business employer who has just made an employee's position redundant in order to stay viable to then be prompted by the Code:

3 (a):

Did you comply with any requirements to consult about the redundancy in the modern award, enterprise agreement or other industrial instrument that applied to the employment?”

This is a requirement that should have been undertaken prior to the dismissal taking effect.

It is also stated that the employer should understand the requirements of the code before proceeding with the dismissal however the above question does not prompt or imply that consultation ought to be anymore than a discussion about the position of the business prior to the dismissal coming into effect.

The case law of the FWC makes it clear that an employer cannot simply meet with an employee to outline the reasons that they need to be made redundant. Consultation in their view is at least a meeting prior to the decision to dismiss the person.

- still obliged to engaged costly advice to prosecute complicated jurisdictional objections or to assist them with the handling of the defence of the matter effectively,
- forced to sideline their business efforts for extended periods (commonly 6 to 12 months) while the unfair dismissal matter goes through the minutia of the FWC's processes.

When you consider that an unfair dismissal claim proceeds directly to conciliation with a Fair Work Commission conciliator, who has no capacity to consider the merits of the case, including the employer's attempts at complying with the code; there is no advantage to the parties, or the FWC, gained by the employer following the code.

Furthermore, as it is the conciliators primary goal to settle the matter regardless of the merits of the case the prevalence of 'go away' money in the unfair dismissal claims process is a blight on the concept of a 'fair go all round' that was the intention of the Act.

'Go away money' has become such a blight on the industrial disputation process between employees and employers that the Fair Work bullying jurisdiction needed to give assurances to parties that the FWC would not facilitate these remedies being sought.

Reliance on the code does not, in itself, reduce the likelihood of a claim or shorten the process by which claims are progressed.

Submission

MEA submits that the FWC could better support small business by:

- improving the code to afford an employer an opportunity to demonstrate how it has complied with the requirements of the code through documentation and other material,
- involving itself earlier in the dismissal claim process by giving genuine consideration of the material supplied with the code as part of the employer's response and making a determination 'on the papers' whether there is a case to be accepted,
 - this would include considering issues regarding the number of employees, the timing of the claim and the seriousness of the conduct/performance against the 'fairness of process' afforded to the employee
- if accepted the claim then proceeds through the usual FWC process of conciliation, then arbitration if unable to be settled,
- if the matter is accepted this would afford the parties a meaningful basis with which to agree to settle the matter or contest the matter,

This arrangement would reduce the prevalence of frivolous claims to garner out some 'go away money' where there is vexatious basis for a claim. It would also reduce the likelihood of employers persisting with the defence of a claim on a misconception that there is 'no case to answer' in their view.

The Productivity Commission could also consider whether it would better serve the Fair Work Act to include a genuine exemption to unfair dismissal claims for small businesses. Exclusions for businesses of a particular size have been utilised in the past by industrial legislation. This exemption would not reduce the ability for employees to make claims in relation to unlawful terminations.

3.2. View of Small Business

Our members were asked if it was their view whether there should be different arrangements for small businesses within the industrial relations framework. Overwhelmingly they supported this view.

Do you support that small business should have different employment conditions to 'larger' businesses?	
Answer Options	Response Percent
Yes	87.0%
No	13.0%

Given that the vast majority of the respondents were small businesses this was not a surprising result. However, the members were asked to identify areas in which small business should be provided with a different standard. These were:

Which of the following employment conditions do you think should apply? You can select multiple options.	
Answer Options	Response Percent
Unfair dismissal exemptions	66.3%
More flexibility to vary the award provisions (such as hours of work)	87.5%
Greater flexibility in directing employees to take leave	56.3%
Other (please specify)	12.5%

Award inflexibility is a common theme for members. As stated earlier in an increasingly '24/7' economy many contractors can only perform maintenance and service work during shut down or quiet periods of business. There is a mismatch between client demand for when the work is to be performed and the inflexibilities in the modern award with regard to the arrangement of the hours of work.

The penalties associated with work outside the spread of hours and shift arrangements are not peculiar or unique to the electrical industry. However, it is the case that the award minimum rates are significantly lower than the labour market expectations for employees working in the industry. On average members report to us that they pay qualified electricians between 50% - 60% above the award minimum rate. This includes the smallest 'micro businesses' with one or two employees. Anything less than this wage rate and the business would not attract a reasonable candidate to the role, if at all.

Members then apply the award conditions to this higher rate for work that falls outside their typical Monday to Friday arrangements. Accordingly, the net outcome of overtime rates in the award; for example \$43.10 per hour for double time, are not representative of the actual wage cost that members bear in relation to their business for this double time work. As such, the modern award minimums are not a reflection of the conditions of employment within the industry.

Awards, such as the Retail Industry Award State 2004 (AN140257), have previously included exceptions to award conditions for employees of a particular class where there rate of pay was a set percentage above the modern award rate. This excluded core entitlements to super, leave and public holidays. This type of mechanism would greatly serve small businesses who often try to rely on 'all inclusive' rates without developing specific contract arrangements.

Small businesses, which make up the majority of the employers within the industry, are most significantly impacted in this regard as they rely heavily on the modern award for their terms and conditions of employment. These members describe that they undertake jobs at a loss in order to win the work and as such have very limited margins on almost all types of work.

It is not the case that small businesses are seeking a reduction in award conditions that would result in a real loss of wages to employees. Rather, some reliable mechanism within the award that allows for employers to have their over award payments recognised by a reduction of the penalty rate aspects of the award commensurate to the fact that they are paying between 50%-60% above the award minimum rate.

Some might counter that the award already has a mechanism for this. The award mechanism for varying award conditions, the Individual Flexibility Agreement (IFA) is not reliable as it cannot be made a condition of employment and can be terminated by notice from one party to revert back to the award conditions.

Small businesses could develop Enterprise Agreements which would, by virtue of the Better Off Overall Test (BOOT), allow them to offset these higher rates against some of these award provisions. However, developing such an agreement requires a high degree of knowledge of the awards and the Act's agreement making rules in particular the BOOT assessment procedure; not to mention the negotiation skills to reach such a position with its employees. In addition, a business must employ at least 2 employees in order to make an agreement which would exclude the smallest businesses that need the greatest assistance.

Small businesses are often hard pressed complying with the award provisions; they would not have the skills to undertake this type of agreement drafting or negotiation. For a business to seek assistance to create such an agreement for them they would find the cost prohibitive in most cases.

4. Impacts on Productivity and Competitiveness

4.1. Responses to illegal industrial action

Too often unions in the construction industry ignore the provisions of the Fair Work Act, including specific orders of the FWC, in relation to organising employees to take illegal industrial action. These actions have more recently been dressed up as 'community protests'.

It is not uncommon for these actions to be taken in the pursuit of anti-competitive agreement provisions and practices such as the ADJ contracting Case.

Employers need a strong regulator within the construction industry to prosecute these kinds of actions. Fair Work Building and Construction (FWBC) has since June 2012 worked to 'provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry'. Current Director Nigel Hadgkiss has since improved the efforts of the FWBC to prosecute employees and employee organisations who seek to disrupt the sector.

However, the MEA submits that the efforts of the FWBC would be greatly improved with the reintroduction of the Australian Building Construction Commission (ABCC).

Broadly, the re-establishment of the ABCC will greatly enhance the productivity of the building and construction industry, benefiting not only the industry itself but the broader economy which relies on the effective and efficient functioning of this industry for continued growth and prosperity.

The re-established ABCC would achieve these ends through an enhanced workplace relations framework that will encourage genuine workplace bargaining and a means to investigate and enforce the Act, relevant building laws and the Building Code itself. Workers and employers alike will also benefit from the advice and support functions provided by the ABCC and an assurance that all building industry participants are accountable for unlawful conduct.

The availability of this kind of support for employers and workers is likely to result in increased employment levels and certainty within the sector.

In its previous incarnation the ABCC was an effective and efficient regulator, with a proven record of ensuring fairness and productivity in the building and construction industry. The impact of re-establishing the ABCC will return to industry to this standard. The current standard of conduct from particularly the construction unions cannot be accepted as the 'status quo'.

The need for a specialist industrial regulator in the building and construction industry was confirmed by the findings of the Cole Royal Commission into the Australian building and construction industry as far back as 2001. A key finding of the Royal Commission was the destructive culture of industrial lawlessness present in this industry that only a dedicated regulator could properly address.

The ABCC as it was in place was an effective specialist regulator that must be re-established with urgency.

The Wilcox report released in 2009 details ample evidence of the improvements to productivity that can result from a specialist industrial regulator for the building and construction industry being in place. It is not necessary to list all of the examples cited in this report which included a drastic drop in industrial disputes at the sites of construction company, Grocon and improved industrial relations records at two sites of resource company, Woodside Energy. With far fewer days "off the job" and an improvement in workplace culture, employers can have renewed faith in the continued productivity and competitiveness of the building and construction industry that contributes so much to the growth of the Australian economy.

The re-establishment of a specialist regulator for the building and construction industry has been opposed by many union groups. However, it has never been the intention of the ABCC to see an end to the valuable representation provided by trade unions. The priority of the ABCC has always been to ensure lawful behaviour workplace equality and freedom of association for all concerned, which will continue to include the right for trade unions to represent their members in workplace matters but equally enforce the right of an individual not to join a representative organisation. The only trigger for ABCC intervention will be unlawful actions by the parties involved. Those abiding by the law will only stand to benefit from the ABCC being restored as a regulator.

While the enforcement powers outlined in the Bill are comprehensive, they are necessary measures in light of the secretive and ultimately destructive culture of the building and construction industry. They are also powers designed to protect parties from known tactics of intimidation and coercion from third parties seeking to avoid compliance with established laws. The proposed enforcement powers of the ABCC are in clear proportion to the unlawful actions that would trigger the ABCC into action.

MEA supports the proposed bills re-instatement of the former *Building and Construction Industry Improvement Act 2005* with respect to conspiracy to take unlawful action. This includes s.550 of the *Fair Work Act 2009*, s.256 of the *Model Work Health and Safety Bill* and s79 of the *Corporations Act 2001*. All of these laws, including those proposed in the Bill re-establishing the ABCC, apply equally to all parties involved, including employers.

Furthermore, employers should be able to make an adverse action claim against unions and employees who undertake these types of actions which cause significant costs. Currently FWC decisions clearly state that Employer do not have reciprocal workplace right remedies against Unions. There is no clear capacity for an employer to take response action under the Act in order to hold unions and employees who take illegal industrial action accountable. The construction unions in particular act as if the rule of law does not apply to them or that they have some moral high ground which gives their illegal industrial action some legitimacy; as they have done in their actions on the Queensland Children's Hospital and Grocon sites in recent times.

4.2. Construction Industry Redundancy Funds

Construction industry redundancy funds now control billions of dollars and the existing governance arrangements are not appropriate with disproportionate sums of money compared to the National Employment Standards.

In particular it has been the experience of our members that:

- through pressure from unions, primary contractors regularly will not accept subcontractors on construction site unless they contribute to an industry redundancy fund,
- redundancy funds will limit the ability for employers to contribute to their fund unless they have a redundancy trust term as part of their Enterprise Agreement that names them,
- that individual employee accounts within redundancy funds are not established solely for the contingency of employee's redundancy; that is, large funds are set up as default 'termination accounts' for employees which enables access to the funds for much broader reasons; including if they:
 - resign, have their employment terminated, their contract ends or they are made redundant,
 - leave the industry, become self employed, have a new employer which does not have an EBA obligation to pay into the fund,

- are promoted to an above-Award position (not on the tools) by a 'fund employer',
 - are leaving Australia for more than two years, or
 - retire and have reached preservation age (currently 55 years for people born before 1 July 1960).
- The funds, such as PROTECT and CIRT, become another personal savings account in which wages are paid; as such agreement claims to increase the value of fund payments represents an additional wage increase,
 - The actual cost to an employer under a typical union EBA is disproportionate to value of the retrenchment benefit under the NES and the payments do not 'cap' once the redundancy threshold has been reached.

The below is an example of how payments to the trust are disproportionate to the entitlement in a typical ETU agreement for an electrician over time using current agreement rates:

Period of Service	Weeks of Pay under the EBA	Value	Amount paid to Redundancy Fund
Less than 1 year	0	\$ -	\$ 4,680.00
1 year but not more than 2 years	4	\$ 5,713.92	\$ 9,360.00
More than 2 years but not more than 3 years	6	\$ 8,570.88	\$ 14,040.00
More than 3 years but not more than 4 years	7	\$ 9,999.36	\$ 18,720.00
More than 4 years but not more than 5 years	8	\$ 11,427.84	\$ 23,400.00
More than 5 years but not more than 6 years	10	\$ 14,284.80	\$ 28,080.00
More than 6 years but not more than 7 years	11	\$ 15,713.28	\$ 32,760.00
More than 7 years but not more than 8 years	13	\$ 18,570.24	\$ 37,440.00
More than 8 years but not more than 9 years	14	\$ 19,998.72	\$ 42,120.00
More than 9 years but not more than 10 years	16	\$ 22,855.68	\$ 46,800.00
More than 10 years but not more than 11 years	14	\$ 19,998.72	\$ 51,480.00
More than 11 years but not more than 12 years	15	\$ 21,427.20	\$ 56,160.00
More than 12 years	16	\$ 22,855.68	\$ 60,840.00

MEA supports proposed solutions including:

- specific legislation to implement and enforce appropriate governance, reporting and supervision arrangements for construction industry redundancy funds and other worker entitlement funds; and

- Bargaining claims and enterprise agreement provisions relating to redundancy funds which do not meet stringent governance, reporting and supervision standards should be prohibited.

5. Inflexible Enterprise Agreement System

The current agreement making framework under the Act does not allow business to appropriately respond to changing economic conditions. A major impediment identified by members with enterprise agreements, exclusively those with union agreements, is that many they are locked in to unproductive and costly provisions negotiated in more profitable times or by virtue of working on a specific project. When this work is unavailable they are left with employment conditions that are uncompetitive and the business is unable to implement the most efficient and productive work practices.

Furthermore, union agreements in particular are commonly so broad in scope that they will seek to cover all areas of the industry regardless of the fact that the employer may not work in those areas. This limits the ability for the employer to diversify its business to remain competitive.

At each round of bargaining many employers with unionised workforces had come to the view that the best approach through the negotiations was to find the 'path of least resistance' and negotiate as quickly as possible; largely by rolling over the previous agreement, negotiating wage increases as best they could, and conceding as few of the demands on the unions' log of claims as possible. However, this attempt to minimise damage, has simply resulted 'agreement creep' where over time the death of productivity improvements has shifted employment conditions further and further away from a balanced outcome of increases with 'trade-offs' to high cost structures with more time lost to unproductive provisions.

Employers have experienced significant impediments to terminating or varying agreements in response to changing economic conditions. Increasingly we are seeing larger members who have relied on major construction works and infrastructure projects go out of business. This trend has come about in part due to the inflexibility of the enterprise agreements to competitively tender for 'minor works' projects to sustain those leaner times. Since the last round of bargaining in December 2013 six members have had to close their doors.

Businesses often significantly reduce their workforces in order to keep the doors open but are hamstrung by the competitiveness of the agreement. It is the case that very few companies have succeeded with applications to the FWC or its predecessors to terminate expired agreements without the support of the employees and any relevant unions.

Some businesses have been able to secure variations to their union agreements to create a separate agreement that will allow them to tender for small scale works. These arrangements rarely come about; when they do they are often characterised by organisations which have all of the following conditions:

- experienced sudden and rapid workforce reductions,
- an understanding and technical industrial ability of the parties to apply the 'two step' process as described in the "Toyota decision"²
- are consulting with employees from a 'backs against the wall' position,
- relying on the employees to concede the need to reduce wages and conditions,
- no involvement from the relevant unions during variation negotiations, and

² *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84 (18 July 2014)

- the relevant unions do not seek to challenge the variation process by relying on the 'no extra claims clause'

The above set of circumstances happens rarely and the opportunities do not present themselves for long. A business is negotiating from a position with its heels against the precipice.

The Fair Work Act has set an extremely high bar for the terminations of agreements and subsequently decisions where the FWC have applied these stringent criteria on applications to terminate after the nominal expiry date are rare. Further, there is no capacity for the FWC to consider a unilateral application by the employer to vary an agreement in the face of challenging economic conditions or shifts in the market.

MEA submits that there should be the ability for an employer to unilaterally apply to the FWC to vary an agreement in order to remain competitive in changing economic conditions. The approval of any such application would still be subject to the Better Off Overall Test against the NES and relevant modern award.

This would allow employers to make the necessary changes to the agreement to sustain their business, and as such their workforce. This would in turn result in less workforce reductions or companies going out of business altogether.

6. The Ability to Flexibly Manage and Engage Employees

6.1. Limitations of the IFA system

It is submitted that the Individual Flexibility Arrangement (IFA) system has not achieved the former Labor Government's desire to provide necessary flexibility given the abolition of AWAs which had been in operation under the *Workplace Relations Act 1996*.

The IFA system fails for a number of reasons:

- An employer cannot make an IFA a condition of employment despite the protection of the Better Off Overall Test (BOOT). An employer will often seek to implement specific conditions to apply to a work group or department that operates in a particular way. It is not operationally feasible for these work groups or crews to work under different arrangements of their employment. There is no flexibility or productivity gained from this.
- The BOOT provisions inserted into the award do not acknowledge that non-monetary benefits can be taken into account despite this feature being highlighted by the Explanatory Memorandum to the *Fair Work Bill*.
- The IFA system cannot be utilised to improve the flexibility of part-time provisions in the award system. The part-time terms require operationally restrictive limitations on the engagement of part-time employees. The IFA system could be utilised to help employers and employees to agree to varying arrangements and rosters.

It was a common feature of the pre-reform award structure that part-time provisions would require the parties to agree to the number of hours of work per week with flexibility to arrange those hours based on operational demand each week. Nothing within the current system prevents the employee from requesting flexible work arrangements where there are caring responsibilities that require them to have a specific work pattern.

Currently, the IFA system does not allow the parties to agree to terms that vary the part-time arrangement of work. The rigidity of the part-time provisions in the award system perpetuates the polarisation of engagement in casual and full-time forms of employment.

The 'casualisation' of the employment has long been a criticism of the labour market landscape and the Fair Work Act and award structure should do more to support the permanency of workforces against the operational requirement for flexibility.

- Flexibility regarding the taking of leave is commonly sought by employers and employees; particularly the capacity to direct employees to take leave in quiet times. Greater flexibility to direct employees to take accrued leave entitlements enables the employer to ensure the sustainability of the workforce.

Furthermore, flexibility regarding the use of leave entitlements is a common feature of enterprise agreements.

- In bargaining for enterprise agreements a major problem since the introduction of the requirement to include a flexibility term is that unions are routinely refusing any meaningful flexibility terms. The unions typically satisfy the mandatory requirement to have a flexibility term by narrowing the areas of flexibility to very limited circumstances.

For example, a typical union agreement within the electrical industry would include the following limited areas within its flexibility term:

2.3.1 The terms that may be varied are:

- *Parental leave. (For example, the employer and the employee may agree that the maximum period of unpaid parental leave be increased);*
- *Long service leave. (For example, where the employee has an entitlement to a period of long service leave, the employer and the employee may agree that the employee can take twice that period of long service leave at half pay);*

It was only through rank and file (employee) member intervention that improvements to this clause to include flexibility on the taking of RDOs and breaks in limited circumstances were achieved. The Union movement often take a paternalistic view in negotiations that Members cannot decide to what they should agree.

Extending the maximum notice period for terminating an IFA from 28 days to 90 days would give employers the ability to assess the operational impact of the termination of an agreement and manage any adjustments that would be needed as a result. Nothing about this increase prevents the parties from agreeing to an early time.

7. Barriers to bargaining

7.1. Industry Pattern Bargaining

The Industry-wide pattern agreements typically negotiated between construction unions and large contractors or some employer groups have damaged the productivity, flexibility and competitiveness of the industry. With each bargaining round, the construction unions provide a fresh log of claims with new costly, inflexible, unproductive and uncompetitive provisions for their pattern agreements which they seek to implement across the industry. This is typically done through unions leveraging off employers' commercial exposure, leaning on the primary contractors or just coercion through fear to sign.

It is common practice for unions to rely the disproportionate Liquidated Damages clauses in construction contracts to force employers to agree to their terms when taking protected 'stop work' actions. Often times it is sufficient to simply threaten this type of action as the contractor cannot bear the cost.

Their argument in favour of pattern agreements is that they create a level playing field for the employers and workers covered by the agreements. This playing field benefits unions first (usually through increased payments into redundancy trusts) and those employers who are unable or unwilling to negotiate. The playing field operates very unfairly for employers and employees by stifling opportunities to negotiate more flexible and competitive provisions aligned to the needs of their enterprise, their employees and their customers. Ultimately it is the customer who suffers as they must pay the higher prices and suffer the reduced service levels which result from these agreements.

In Victoria this pattern agreement has traditionally been the first of the major construction industry pattern agreements to be negotiated each bargaining round. This agreement sets the agenda for the rest of the construction industry. Many of our Victorian electrical contracting members have adopted the pattern agreement directly.

Major barriers to productivity, efficiency and competitiveness in typical union agreements include:

- Use of subcontractors and labour hire - requiring that contractors pay 'site rates' and/or requiring 'consultation' agreement with the union on which contractors will be used;
- Restriction on the engagement of casual employees – limited to 6 weeks in common electrical union based agreements;
- Excessive union rights to interfere in management decision-making processes;
- Excessive costs and loss of productivity for union delegates conducting the union's work within the workplace for various purposes;
- Excessive redundancy provisions which impede restructuring – including the inappropriate establishment of accounts at these types of trust funds to allow employees to access these funds for reasons other than redundancy including if they resign;
- Restrictive working hours arrangements which result in high overtime payments – including recent increases to overtime penalties to double time for all overtime;
- No extra claims clauses which the unions argue have the effect of preventing management introducing changes.

In March 2014 many Victorian members who have adopted the ETU pattern agreement, which expired in October 2014, commented that they are \$13 to \$15 an hour over the expectations of the market. As a result many companies have had to reduce their workforce by around two thirds.

The ETU stated quite publicly that they were seeking an increase of 18% over three years plus additional on-costs, expense improvements and policy inclusions for the next pattern agreement. This was despite not having commenced bargaining with any contractors.

The wage increase flagged by the unions would add close to \$27,000 to the cost of employing an electrical worker on a construction project over the three years of the proposed deal; without a single productivity initiative.

Much of the current 197 page ETU pattern agreement is contrary to the Victorian Code and the proposed Federal Construction Industry Code. Furthermore, the document compels a company who might only operate in one area of the industry, such as service and maintenance, to adopt the provisions of “construction” and “cottage” industry terms that form part of the agreement.

The ETU reached an impasse with other groups last year as they will not negotiate for Code compliant terms in the agreement. This is an important issue for many members within the industry.

Rather than achieve a negotiated outcome the ETU sought to get some of the smaller contractors to the ‘bargaining table’ for their replacement enterprise agreement. The major factor holding the ETU back from its pursuit is the market conditions and lack of major projects from which to leverage employers.

Many union agreements have been subject to disputation regarding the inclusion of certain provisions that are not ‘matters pertaining’ to the employment relationship. After a number of high profile cases, including the ‘ADJ Contracting Case’³ and the ‘Brookfield Multiplex Contractors Case’⁴, the net result of these cases is a situation in which terms that are not matters pertaining to the employment relationship can be agreed and enforceable but that industrial action cannot be taken in pursuit of such a provision.

Such a situation is paradoxical and the Fair Work Act needs clearer terms on what are permissible bargaining matters. Specifically, that terms relating to conditions of third parties should not be permitted matters.

We submit that agreements should be not approved by FWC where these types of terms are contained in the agreement. Currently, clauses as challenged in the ADJ Contracting Case are passed and would require lengthy and costly litigations to test their validity further. As such, they are becoming entrenched in agreements.

³ Australian Industry Group v Fair Work Australia [2012] FCAFC 108 (“The ADJ Contracting Case”)

⁴ CFMEU v Brookfield Multiplex Australasia Pty Ltd [2012] FWA 4051

MEA supports the proposal in the *Fair Work Amendment (Bargaining Processes) Bill 2014* that bargaining parties be required to discuss productivity improvements during enterprise agreement negotiations. Particularly, productivity measures should be mandatory where additional wages and conditions costs are sought over and above a relevant CPI measure.

7.2. Union EBA terms would mean losing work and redundancies

It was the experience of one member who provided services to a client on a large site with various trades. The electrical contractor did not have a contract for works with the client but rather received a purchase order on a monthly basis outlining the number of hours of labour required for the next 4 week period. The electrical contractor had been working on this basis for a number of years, providing up to three employees on a full-time basis consistently during this period.

The electrical contractor was approached by a representative of a union from a completely different industry claiming that the union had coverage of, and the right to represent, the employees of the contractor working on that site.

The union sought an enterprise agreement to cover the workers under their coverage. The employer negotiated in good faith in response to the union's demands to increase wages initially by 20% with yearly wage increases on top of this; with further unproductive costs as part of the agreement.

The employer identified to the union that such an increase in the service based contracts would clearly result in a definite and immediate loss of work for that contractor as the client would not continue to purchase services based on that cost. The union was also advised that the company already had very tight margins on the work at this particular site. The client had already made it clear in previous discussions that there was no scope for increased charges. A loss of purchase order would result in a loss of employment for the employees whose sole source of work was out of this site. The union refused to accept the position of the employer and subsequently no agreement could be reached.

The client later reduced the purchase orders for labour. This brought about an end to the agreement negotiations as there was only one employee remaining.

Following this, that particular union contacted the employer claiming that the three employees had in fact been underpaid against an existing agreement for the entire period of their employment, in accordance with the employer's enterprise agreement that covered its electrical workers; this was in spite the months prior they had argued would not apply in seeking a specific enterprise agreement to cover these workers.

Based on their classification, the employer determined that there had been no underpayment of wages.

This demonstrates a union's unwavering approach with enterprise agreement negotiations of seeking exorbitant increases to conditions of employment, with a complete disregard of whether it places the employees' ongoing work opportunities and financial risk it places on companies.

It also shows the unions practice of picking and choosing what conditions should apply in an attempt to seek a payout for their members.

7.3. Greenfields Agreements

Since the inception of the Fair Work Act the forced negotiation of greenfields agreements with Unions has given these employee groups an unreasonable bargaining position.

Under the Fair Work Act it has become a practice of unions to utilise greenfields agreements as industrial leverage on employers. Greenfields agreements are not able to be approved by the Fair Work Commission until they have been approved by the union.

The relevant union has no obligation or imperative to sign this agreement under the Act. As such, unions have been known to refuse to sign greenfields agreement in order to pursue other agreements, force other ratified agreements to be terminated so that their preferred agreements can be negotiated instead or to pursue other claims. A classic example in the Electrical Industry includes one Major Contractor which had 5 greenfields agreements with one State Branch of the ETU held up until such time as the 2012 state based pattern agreement was signed. The Union is very open about the fact that they employ this tactic regularly as there is no legal obligation in place.

Unions have also been known to threaten employers who have gotten 'off side' with the union to refuse to agree to any future greenfields agreements in retaliation to an employer. Anecdotal evidence from contractors relayed to MEA includes Union officials clearly saying that they will give contractors a "kicking" or that they will come after them at the next round of negotiations.

This level of disparity in negotiation cannot be a 'balanced' industrial playing field. The Productivity Commission should investigate these types of instances and recommend amendments to the Fair Work Act to stamp out this practice.

This continues to be the case despite the Fair Work Act Review Panel considering this aspect of the legislation in 2012.

In their final report ***Towards More Productive and Equitable Workplaces - An Evaluation of the Fair Work Legislation*** they considered that:

4.6.6 Greenfields agreements

Written and oral submissions to the Panel argued that the requirement for unions to be involved when a greenfields agreement is made is a major impediment of the FW Act compared to the immediately preceding legislation, which permitted the employer to unilaterally propose pay and conditions under which future employees would work. These unilateral 'agreements', which could cover employees and also deny recourse to protected action, were explicitly rejected in Labor's industrial relations reforms proposed for the 2007 federal election.

The Panel accepts that the Work Choices framework conferred greater freedom on employers to unilaterally determine wages and conditions. It is less clear that the economically relevant outcomes are very different. For example, the Panel was not presented with evidence that any significant project had not proceeded for want of an agreement. There is evidence that the gap between wage outcomes under greenfields agreements and the average wage in all agreements has widened, though the average wage increase under greenfields agreements remains under 5 per cent.⁵ The somewhat wider gap

⁵ In 2004–05, under the WR Act, the greenfields average annualised wage increase (AAWI) was 4.5 per cent, compared to 4.4 per cent for all agreements. They made up 5.4 per cent of all agreements. In the period 2006–08, 57 per cent of greenfields agreements were employer greenfields agreements and 43 per cent were union greenfields agreements. The AAWI for non-union greenfields agreements was 4.1 per cent and for union greenfields was 4 per cent, compared with all agreements, which were 4.1 per cent and 3.8 per cent union/non-union respectively. Greenfields

may reflect the increasing number of remote minerals and energy construction projects in recent years. From the beginning of 2009 to the end of 2011 the volume of engineering construction completions rose by over 40 per cent. Over the same period the value of engineering construction work yet to be done by the private sector rose two and a half times. These were much greater increases than in previous years.

The Panel is concerned, however, that the existing provisions confer on a union (or unions) with coverage of the majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way. While the Panel was not presented with evidence that this power is abused, it concluded that the potential risk to projects of national significance should be mitigated. The Panel's recommendations are detailed in 6.5.

It was the Review Panel's finding that:

6.5.3 Measures to address deficiencies with greenfields agreements

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

BCA provided evidence of the critical importance of the major projects pipeline for the Australian economy. They submit that economic growth in Australia is driven by major investment projects funded by strong multinational corporations with funding access. They submit that the pipeline of capital projects either underway, under consideration or in planning is worth \$912.8 billion.⁶ This is concentrated in the infrastructure and resources sectors. These projects are not assured, and potential investors continually review risks associated with them. BCA submits that Australia's capacity to deliver these projects is critical to economic growth.⁷ The evidence provided by BCA demonstrates the value to the Australian economy of the investment pipeline and, importantly, the risks to that pipeline associated with industrial relations uncertainty or instability.

In April 2012, the value of major project investment in Australia in minerals and energy was estimated to be as follows:

- Ninety-eight projects at an advanced stage of development involved record capital expenditure of \$260.8 billion, a 34 per cent increase from April 2011.

made up 9.2 per cent of all agreements. In 2009–11, under the FW Act, greenfields AAWI was 4.7 per cent compared to 3.9 per cent of all agreements and 4.0 per cent for all agreements that cover a union. They made up 6.4 per cent of all agreements. Source: DEEWR Workplace Agreements Database.

⁶ Deloitte Access Economics, *Investment Monitor*, December 2011, p. 1.

⁷ BCA, p. 19.

- Exploration expenditure in Australia's minerals and energy sector for 2010–11 totalled \$6.4 billion and was 6 per cent higher than for 2010–11.
- New capital expenditure in the mining industry for 2010–11 totalled \$52 billion, 29 per cent higher than for 2009–10, and may be greater than \$80 billion in 2011–12.⁸

The FW Act addressed a key problem identified by the Government with Work Choices, namely the capacity for an employer proposing to establish a new business, project or undertaking to unilaterally determine the content of the instrument that would apply to its future employees.⁹ We accept that the Work Choices framework conferred greater freedom on employers to unilaterally determine wages and conditions. As we note in Chapter 4, we are not convinced that, currently, the economically relevant outcomes are significantly different.

However, based on the evidence we have received in submissions and consultations, and a review of the data associated with greenfields agreements above, we consider that there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia. This is because the existing provisions effectively confer on a union (or unions) with coverage of a majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way. Unions in this position are able to withhold agreement and effectively prevent the determination of terms and conditions in advance of a project commencing. In light of the evidence we were presented about the need for certainty over the labour costs associated with major projects, we are concerned at the risk of delays in greenfields agreement making that this entails. We have considered a range of mechanisms to address these concerns. We do not consider that a return to employer greenfields agreements is appropriate. A central object of the FW Act in addressing the problem with Work Choices was to ensure greenfields agreements were 'true agreements negotiated between the relevant bargaining representatives and made by more than one party'.¹⁰ Further, we consider that changes to greenfields agreements can be made within the scope of this objective.

It appears to us that a very straightforward way of addressing the claims made about the capricious bargaining conduct of unions during greenfields negotiations is to extend the application of the good faith bargaining provisions to negotiations for greenfields agreements. We are unable to discern a cogent policy basis for the creation of an exception for greenfields agreements in this respect. We note that the Fair Work Bill originally made provision to this effect, and in doing so provides a potential model for doing so.

Recommendation 27: The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to the negotiation of an s. 172(2)(b) greenfields agreement, with any necessary modifications.

⁸ Australian Government, Bureau of Resources and Energy Economics, *Mining industry major projects* (Commonwealth of Australia, May 2012), p. 1.

⁹ Work Choices, s. 330.

¹⁰ DEEWR submission to the FW Bill inquiry, p. 21.

Consistent with enlivening the obligations to bargain in good faith, it will be necessary to provide a mechanism for taking all reasonable steps to notify relevant unions—namely those with eligibility to represent the future employees to be covered by the proposed agreement—of an employer’s intention to bargain. Again, the Fair Work Bill provides a model for such an obligation. The rationale for this notification obligation, as it was in the Bill, is to ‘make sure that unions with relevant coverage are aware that bargaining is going on’ and to require the employer to bargain in good faith with ‘all relevant unions who seek to bargain’.¹¹

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

In conjunction with the extension of good faith bargaining provisions, we consider that the powers of FWA under s. 240 of the FW Act, along with our proposed ‘own motion’ dispute resolution power, should extend to disputes over greenfields agreement negotiations. This presently does not occur in light of the requirement that an applicant under s. 240 be a bargaining representative for an agreement, a term that does not apply to greenfields negotiations.

Recommendation 29: The Panel recommends that the FW Act be amended so that s. 240 (as with our Recommendation 22) applies to the negotiation of a s. 172(2)(b) greenfields agreement.

As summarised above, there are a range of views on the appropriateness of arbitration for resolving impasses in greenfields bargaining. After much thought and deliberation, the Panel is of the view that, where an impasse in negotiations is not resolved within a specified time and where conciliation by FWA has failed, FWA should have the power, either on its own motion or via a request from one of the parties, to resolve the impasse by a limited form of arbitration. While the Panel does not possess hard and fast views, FWA could be empowered to resolve the remaining outstanding issues between the parties by a process of arbitration, which is colloquially known as ‘last offer’ arbitration. In other words, FWA would examine the positions taken by the parties on the remaining outstanding issues and would be empowered to choose the position either of the employer or of the trade union or trade unions. It is the Panel’s expectation that the ultimate availability of this type of final offer arbitration will ensure that the parties adopt realistic approaches to issues in their negotiations with one another.

Recommendation 30: The Panel recommends that the FW Act be amended to provide that, when negotiations for a s. 172(2)(b) greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party, conduct a limited form of arbitration, including ‘last offer’ arbitration, to determine the content of the agreement.

¹¹ DEEWR submission to the FW Bill inquiry, p. 22.

To date many proposals have been submitted in this regard including as part of the Fair Work Amendment Bill 2014 (Bills Digest no. 52 2013–14) however, provisions addressing the bargaining disparity for greenfields agreements did not become legislation.

7.4. Subjectivity in Agreement Approval

Subjectivity of tribunal members in relation to approving enterprise agreements results in an uneven playing field for industrial parties.

7.4.1. Notice of Employee Representational Rights

It is not uncommon for employers to make every genuine effort to comply with the requirements of the Fair Work Act, including long and rigorous bargaining with its employees to reach in-principle agreement prior to going to vote; only to have the agreement approval process rejected for an overly officious and technical reason.

Example:

In a recently submitted application to the FWC an agreement was rejected because the Notice of Employee Representational Rights (NERR) was not compliant with the Regulations.

The senior tribunal member's associate wrote to the employer stating:

Upon review of the application, it appears that the notice of employee representational rights contains content that is not prescribed in Schedule 2.1 of the Fair Work Regulations. **The content in the notice that is identified as not being prescribed is the website. The website prescribed by the regulations is www.fairwork.gov.au which is of the Fair Work Ombudsman.**

(Emphasis added)

Recently in *Peabody Moorvale v CFMEU* [2014] FWCFB 2042, a Full Bench of the Fair Work Commission said at paragraphs [46] - [47]:

“In our view s 174(1A) is clear and unambiguous. There is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity. We agree with the Minister's submissions on this point, that is:

A mandatory template is provided in the Regulations. The provisions make it clear that there is not scope to modify either the content or the form of the Notice other than as set out in the template.

Taking into account the considerations identified in Project Blue Sky we have concluded that the legislative purpose of s 174(1A) is to invalidate any Notice which modifies either the content or form of the Notice template provided in Sch 2.1 of the Regulations”.(Footnotes omitted)

It would appear that the notice does not comply as it modifies the content of the notice template in Schedule 2.1 of the Regulations and is therefore invalid. It seems to follow that as no valid notice of employee representational rights was given to employees, the Agreement cannot be approved.

The senior tribunal member was of course correct that the NERR was not consistent with the Regulations. However, his Honour failed to take into account that the employer had relied on a version of the document supplied by the FWC.

Further, the URL referred to on the NERR produced by the FWA/C on the original and later versions of the NERR was incorrect until late 2014 and widely accepted by the Commission.

More specifically the original version of the notice referred to the FWA website up until its name change (1 January 2013). Then some time after the name change the NERR was updated (incorrectly) to refer to the FWC website (as per the notice supplied in this case), then it was altered (by the FWC) to refer to www.fairwork.gov.au.

These changes have not been notified to users of the FWC's website, nor is there document control version on the notice to identify to a user that this is a new version of the notice as at a particular date.

When these points were raised with the FWC member he took the view that he had no choice but to fail the agreement because of this URL reference. However, MEA can produce no less than 20 occasions on which the FWC has accepted this incorrect URL reference for matters lodged by this office alone; including a decision by his Honour on 23/12/2013 – after the date of the Fair Work Amendment Act 2012.

The number of occasions on which approvals have been granted for incorrect URL references is evidence that it is not valid to state that an agreement simply cannot be approved; as they have been as recently as 13/1/2015 by another senior tribunal member.

Further, his Honour would not be drawn to comment on his implication of whether it is the case that no agreement with an incorrect notice can ever be approved or valid. A significant number of agreements have been approved where this error has unwittingly occurred; an error which the FWC has contributed to.

His Honour's position has either two effects:

- 1 Organisations have been relying on a decision of the FWC which was taken to be final which is not a valid decision,
- 2 If this is not the case and the agreement approval decisions can stand then as a result it is still open for his Honour to approve the agreement, as many agreements have been approved with this error in the NERR.

Ultimately the employer was left with the option of putting its arguments to the FWC member in a formal hearing and then, in the likely event he was unsuccessful, have to appeal the decision to the Full Bench. Or withdrawing the application and starting the agreement making process again with his employees.

Both outcomes are unacceptable in any common sense view of the situation. That the agreement was failed because of an incorrect reference to a website, an error that was a product of the FWC, is an unreasonably harsh outcome on the employer and the employees, especially considering that this view was taken in the face of the multitude of agreements that have been approved with this error for so long.

The Fair Work Commission must apply the principles and interpretation of the Fair Work Act consistently if it wishes participants to value its contribution to the industrial framework.

7.4.2. Union agreements waived through

The FWC's inconsistent rigour is again evident in its treatment of Union ratified agreements. The FWC has not rejected a single enterprise agreement that the union has been a party to despite the inclusion of terms that might ordinarily give rise to the FWC requiring further information or undertakings to address the interpretation of particular clauses.

The FWC rarely challenges terms that have the prospect of being considered objectionable content without an application by an employer; however, where agreements lodged where the employer and its employees are the only bargaining participants the FWC will regularly examine the detail of the agreements to seek out those terms that they view as problematic.

Again, the Fair Work Commission must apply the principles and interpretation of the Fair Work Act consistently to the industrial participants if it wishes to be considered as an impartial arbitrator in the industrial landscape.

8. Red tape and the compliance burden for employers

8.1. Preservation of pre-reform awards

Very narrow preservation provisions create compliance difficulties by roping in award-based transitional instruments to employees to whom a training arrangement applies. This provision has results in horrendously complicated outcomes and wages calculations with which businesses must contend.

Example – Electrical Apprentices

The Queensland State Order – Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003 ('the Order') is an award-based transitional instrument which continues to apply to by virtue of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

These possible wages and conditions outcomes are highlighted with reference to the Fair Work Ombudsman's decision trees, appendices 1 and 2. The decision trees differ depending on whether the business has been established as a constitutional corporation or sole trader/partnership.

Using this flowchart in the case of a business that is a constitutional corporation, operating prior to 27 March 2006 and employed an apprentice at 31 December 2009 the employment conditions from the Order will continue to apply to the apprentices engaged by the business.

This means is that the following industrial instruments will apply to this business:

Apprentices	<ol style="list-style-type: none">1. the Electrical Contracting Industry Award State – 2003 (the previous state award),2. the Order – Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003,3. the Apprentice Supply of Tools Order, and <p>The wages are then calculated by taking the "Federal" wage increases and applying them to the State award rates.</p>
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Tradespersons	4. the Electrical, Electronic and Communications Contracting Award 2010
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Determining the apprentice wage the employer would have to know to carry out the following calculation:

FWA/C Increases					
2009	2010	2011	2012	2013	2014
	\$ 26 p/wk	3.40%	2.90%	2.60%	3.0%

Then the employer must apply the relevant apprentice proportion to the rate of pay, include the travel and fares allowances.

This flow chart highlights the numerous and varied employment conditions that can apply to the same class of employee dependant on the business that engaged them.

This scenario is one of 3 separate outcomes possible dependant on the commencement of the business, the type of business (company or previous state employer) and whether they engaged apprentices at specific times.

In terms of wage outcomes to employees at the early years, when apprentices receive the lowest wage, the apprenticeship Order results in significantly reduced rates of pay when compared with the modern award.

MEA submits that this outcome is inconsistent with the award objectives. There is an opportunity for the Productivity Commission to consider the red tape compliance obligations of employer's by removing or limiting the application of these Orders through the Regulations.

8.2. Transfer of Business rules

The broad scope of the 'transfer of business' rules of the Fair Work Act, section 311, are common areas that have significantly impacted on employers in the past.

Examples of members failing to meet compliance obligations posed by Transfer of Business rules:

1. An employer was operating under an EBA that had conditions of employment that were most relevant to large construction projects. Over time this became a small portion of the works that the business actually undertook.

The company, understanding that the EBA applies to that company, started a new company to tender for other types of work on a more competitive basis shifting employees between the two companies as the work was available – swapping between the EBA and the modern award.

The employer was not aware that the EBA is a transferrable instrument and should have continued to apply to the employees that are being swapped between the two companies.

The broad scope of the agreement coverage, and the reluctance of employee groups to agree to limit the application of agreements to particular types of work, meant that

the employer was unlikely to successfully terminate or vary the agreement without a strong objection from the union. As a small business they took an approach that appeared, on the face of it, to present a solution to the agreement issues.

2. A company purchased a business premises and equipment from the previous owner. The company employed a part-time attendant to work in the store as the new employer. The employee had previously worked for the other company but was terminated (made redundant) from their employment when the business was wound up. They were employed shortly afterwards by the new company who had not made any arrangements with the other company with regard to staff. The new employment occurred within 3 months of the termination from the previous employer.

When the employer terminated the employee a short time later the period of the employee's previous service counted towards their 'continuity of service'. Accordingly, they were eligible to make an unfair dismissal claim against the employer.

This was because the 'transfer of assets' between the two businesses created a 'connection' within the meaning of the Act and therefore the employee was considered a transferring employee.

The level of industrial understanding that is required for employers to understand their compliance obligations under the Act are cumbersome to say the least and arguably having knowledge of the impacts of transferring of business would have resulted in an entirely different outcome.

The Fair Work Act needs to strike a better balance between those employers who seek to avoid their industrial obligations and those situations where genuine new industrial arrangements are sought.

8.3. Termination of Employment

MEA submissions have previously outlined the experiences associated with the Small Business Fair Dismissal Code; however, issues surrounding termination of employment are broader than the effectiveness of this code and the likelihood that an employer will decide to make a payment to settle the matter.

It is the case that the Fair Work Act offers employees with easy access to unfair dismissal claims and a broad basis for general protections claims. Claims can very easily be made and are time consuming and costly to defend; employers are exposed to the ongoing risk of costly litigation following the termination of an employee.

Given this, the termination of poor performing employees often becomes costly and difficult for employers, and this has an impact on productivity and competitiveness of businesses, as well as on job creation; as described earlier members responded that they are increasingly cautious about taking on new employees.

The difficulties associated with dismissal processes often lead employers, particularly small businesses, to make hasty decisions as they feel they are not supported by the

Fair Work system prior to termination or by the decision makers of the FWC. It is anecdotally reported by members that the FWC decisions are employee biased and unfairly weight the processes of the employer against the seriousness of reasons for termination. This is particularly worrying for businesses that lack in-house human resource expertise as they will almost certainly fall foul of the FWC's high expectations with regard to process.

It is a feature of conciliators' performances during conferences in the FWC to:

- place undue emphasis on whether the employer offered the employee to have a support person present despite the Act only stating that an employer can't unreasonably refuse a request,
- place undue emphasis on whether the employee knew of the likelihood that termination was likely to lead to their dismissal in instances where conduct or performance was clearly against employment expectations,
- provide their view on the type of application that has been lodged and whether it would be better served as another type of application (e.g. general protections claim),
- provide their view on the weaknesses of the case during the 'group discussions'; or lead employer's on a very narrow line of questioning in order to establish some process flaw.

The performances of the FWC's conciliators directly contribute to applicants forming views that they have prospects in their claim, while at the same time encouraging them to settle the matter. This is contrary to their stated role and counterproductive to the conciliation process. The conciliators will often paraphrase the parties positions in such a way to place doubt in the employer's mind and enough motivation to inappropriately encourage them to offer 'go away' money.

Conferences should return to a system of conciliation where Commissioner's facilitated the sessions and provide a statement of the merits of the case to the parties. This would provide the parties with a genuine 'prima facie' assessment of the case by a decision maker. Rather than a situation where they have had their positions assessed in some 'paint by numbers' approach to assessing the merits of a dismissal.

8.4. Performance of the Fair Work Ombudsman

The performance of the FWO is deeply concerning as the information that they provide is largely unable to be relied upon as a defence by employers who have genuinely sought to comply with their requirements. Furthermore, the advice is relied upon by employees who inaccurately pursue claims against employers based on a narrow or often incorrect interpretation.

It has been our experience and is also often reported by our members that where the FWO has been contacted for their view and there is a doubt or where an award is silent on a particular issue the FWO will simply give a view that favours the employee in most

instances without any basis within the document or the Fair Work Act for forming this view.

In particular, the FWO's collectively inconsistent understanding of apprenticeships is dangerous to employers' attempts to comply with their obligations. Regularly the FWO is unaware of the relationship between the training contract and their apprentice's employment contract; these arrangements are mutually exclusive.

Some examples to illustrate the experiences of MEA and its members:

8.4.1. Notice periods for apprentices

The provisions of the National Employment Standards (NES), the *Fair Work Act 2009* (the Act) and the relevant Award, the *Electrical, Electronic and Communications Contracting Award 2010* relate to terminated employees, including apprentices.

In this situation an apprentice was not offered ongoing employment at the completion of their apprenticeship. The employee claimed that they were entitled to payment for or in lieu of the notice period.

1. The employee was solely engaged as an apprentice.
2. The parties discussed 'options' post apprenticeship but that no offer of ongoing employment was made.
3. The parties discussed that the apprenticeship was due to be completed in about 5 weeks.
4. The employee's employment ceased at the completion of his apprenticeship on 19 December 2013.

The FWO erred in its assessment when it created a link to notice provisions that apply to employees, including apprentices, who have been terminated without consideration of the meaning of dismissed under the Act.

It is submitted that an apprentice who is laid off at the conclusion of their indenture were under contracts for a 'specified period of time' and thus the apprentice was not entitled notice by virtue of s123 1(a) of the Act.

In support of the employer's position that the apprentice was employed for a specified period of time the decision of the Full Bench of the then Australian Industrial Relations Commission in *Qantas Airways Limited v Fetz & Ors*; (Print Q1482, [1998] 616 *IRCommA*) was supplied.

The principal issue before the Full Bench of the Australian Industrial Relations Commission was whether the employees had been engaged under a contract of employment for a specified period of time or for a specified task. If either, then the employees could have no recourse to the federal unfair dismissal remedy owing to the operation of reg 30B(1)(a) and/or (b) of the *Workplace Relations Regulations 1996*.

While eligibility for unfair dismissal was not being tested in this matter the question of the nature of the Applicant's contract of employment as an apprentice is relevant to this matter.

In course of the appeal the Full Bench considered whether the underlying nature of the apprentices' contracts fell within the meaning of reg 30B(1)(a) [exclusion of specified period of time contracts].

When comparing the construction of section 117 of the *Fair Work Act 2009* and the construction of Regulation 30B to the *Workplace Relations Act 1996* these sections are in affect the same.

In the 'Fetz' matter the Full Bench rejected reading into the contracts an implied term despite the context of a 40-year custom of re-employing apprentices as tradespersons.

It was put to the FWO that as they are considered to be employed on a contract of specified period of time an apprentice who is not taken on by the employer as a tradesperson upon completion of the apprenticeship, is not entitled to a period of notice under the *Fair Work Act*.

However, despite this the employer had to defend its position, effectively against the advice of the FWO, to the Federal Circuit Court as the employee continued their claim based on the information provided to them by the FWO.

This example is glaring in its own right and caused significant cost and lost time for this employer. More glaring is that on several occasions when members have sought the opinion of FWO in relation to terminating an apprentice during their training contract that the FWO has stated that notice is **not** payable to apprentices.

8.4.2.Suspension of Training Contracts

Vocational training contracts for apprentices are subject to their own state based legislation. It is a common feature of these vocational training Acts that the apprentice and the employer can agree to enter into periods of 'suspension' for various reasons.

These periods of suspension allow the parties to put the training contract on hold for a period of time by mutual consent. This process is usually administered by the relevant state training authority by way of application. Given that the training contract and the employment contracts are mutually exclusive the suspension of one means the suspension of the other. However, the FWO commonly advises employers that they cannot stand the apprentice down without pay. This advice is inconsistent with the specific provisions allowable under the training contract.

8.4.3.Mediation in response to claims

Employers who have had a claim made against them by an employee will be informed by the FWO that they should participate in a mediation conference. At this time the

employer is simply notified of the time and method (telephone) of the mediation. There is no outline of the particulars of the claim being sought; further when these are requested only general outlines are provided to the employer.

It is the view of MEA that the success of the mediation process would be greatly improved if the Ombudsman adopted a similar process to the FWC with regard to the lodgement of a claim with particulars to allow the employer to provide a response that is served on the parties prior to the conference.

This structure would provide an opportunity:

Employer	Employee
<ul style="list-style-type: none"> – to consider the veracity of the claim – what investigation it can undertake in order to determine the extent of a valid claim – allow an employer to rectify, or seek to rectify, prior to the mediation needing to occur 	<ul style="list-style-type: none"> – to consider the accuracy of the employer’s response against the advice they have been provided – provide an opportunity for the employee or representative to investigate the response – allow an employee or representative seek to agree to terms to finalise the matter prior to the mediation needing to occur

This process would also benefit the FWO mediators by establishing an agenda, highlight the areas of contention or agreement and provide the mediators with a context to the industrial instruments applied which can be helpful when facilitating the conversations.

MEA submits that the performance of the FWO needs to be reviewed. MEA suggests that:

- the employers should be able to rely on the advice of the FWO when they are genuinely attempting to comply with their obligations,
- reconsider the model for their advisors giving advice – it is apparent from the variability of the advice that either the advisors lack industrial knowledge generally or are too broadly focused to give specific advice when required to do so.

The FWO provides an important service and all parties need to be able to rely on their advice to contribute to fewer disputes in the workplace.

9. Industrial Conflict and Days Lost Due to Industrial Action

While it is understood that the Productivity Commission has no mandate to investigate Workplace Health Safety aspects of employment law it is still the case that within the construction industry specious ‘safety issues’ are still being used detrimentally against employers to pursue industrial campaigns or to ‘flex’ industrial muscle.

It is submitted for consideration that where an application to stop or prevent industrial action is made under section 418, 419 of the Fair Work Act that the Commission is given powers to enforce a penalty where it finds that the action taken is unprotected industrial action and not genuinely in the pursuit of a safe working environment.

9.1. Example – A Leaky Toilet

In July 2013 on a major construction project to complete an Oral Health building within the precinct of the new Queensland Children's Hospital the entire construction site of some 280 employees across 6 levels of approximately 6000m² was shut down because of a 'safety issue' presented by a 30m² area of floor where a toilet had leaked water.

The site was shut down for almost a complete week in response to the issue. Despite the primary contractor's best attempts at expediently managing the 'safety issue' the employees, based on the representations by their union organisers, walked off the job. Ultimately the primary contractor and the affected subcontractors on site were forced by the actions of the unions to make an application to the Fair Work Commission to stop or prevent industrial action (matter C2013/5072).

The FWC hearing ran well into the night to establish whether there was a legitimate reason for the employees to remain off site and whether the conduct was considered industrial action.

The tribunal member in this matter determined that the union parties had taken industrial action and as a result made an order precluding the union and employees from taking further industrial action for one month, up to the completion of the project.

Unions will often take these types of actions in the lead up to the completion of a project in order to 'eek out' a few more weeks worth of pay for the employees on site.

Furthermore, while these orders by the FWC are a decision by a Court and are legally binding it is not uncommon for construction unions to ignore these orders and recommence or continue with industrial action.

9.2. Example – Handbrake-gate

In September of 2014 there was a spate of 'safety issues' arising from the misuse of a handbrake on forklifts on construction sites in the South-East Queensland region. One such site affected by a rolling forklift 'safety issue' was a residential construction site in Brisbane's Fortitude Valley (Qld).

On prompt inspection it was found that the only explanation for the rolling forklift, which was operating on the ground floor, was that the operator had failed to engage the handbrake. In response the electrical employees, working predominantly fitting out the emergency evacuation lighting and systems on the floors above, stopped worked.

In total the handbrake incident cost the employer close to a full week of work as employees, through encouragement by their union representatives, would not return to work. The employer was forced to engage labour hire staff to complete the work that the employees refused to do.

It was again the case that this site, which had been plagued by these kinds of issues during construction, was nearing completion. The refusal by the electrical workers to attend site coincided with the impending Fire Department inspection and approval of the building. Had the subcontractor failed to meet this deadline the inspection would have

been delayed by weeks and they would have breached their contract enlivening significant financial penalties under the contract.

Conclusion

Productivity in the construction industry is perpetually hampered by this type of conflict which is largely hidden from statistical information gathered about the number of days lost to industrial action.

Primary contractors and subcontractors are almost always between a figurative rock and a hard place as a result of the completion deadlines and force majeure types of clauses common to building contracts.

The conduct of the unions speciously using safety arguments to pursue industrial campaigns or to 'flex' industrial muscle is a longstanding matter and highlights the significant productivity impacts resultant from 'safety issues' capriciously raised on construction sites.

Furthermore, the impact of these lost days is most significantly felt by the mid to lower tier subcontractors working under the primary contractor. These subcontractors virtually 'slit their own throats' in order to win the work and as such have very limited margins on these projects and they cannot sustain this type of cost.

Submission

The MEA submits that the Productivity Commission should consider what additional powers it should give the FWC to respond to and penalise parties who pursue these types of capricious safety disputes or at the very least should track the 'number of days lost to 'safety disputes'' in order to assess the productivity impact this type of widespread behaviour has on the construction industry.

10. Appropriate scope for independent contracting

The electrical contracting industry relies on genuine subcontracting arrangements in business of all sizes to assist with peak demands for work, to supplement their workforce or to provide specialised skill sets.

Given the considerable ambiguity in the area of ongoing subcontracting arrangements many businesses are taking on great risk or impacting on the productivity of their business when it comes to engaging in subcontracting arrangements.

10.1. Case Study¹²

The below case study highlights the risks business faces even in situations where it establishes sound written documentation with a subcontractor working with their business.

The decision by the Fair Work Commission highlights the difficulty for a business when understanding what constitutes genuine subcontracting arrangements compared with an employment relationship.

Between February 2011 and April 2012 the 'subcontractor' installed solar panels for the business in accordance with a 'subcontracting agreement'. The engagement was subsequently terminated and the 'subcontractor' made an unfair dismissal claim to the Fair Work Commission.

¹² Mr Shannon Mander v Sunrise Solar Installations Pty Ltd T/A Sunrise Solar Installations [2013]FWC953

The business was of the view that there should be no such unfair dismissal case to answer there was no employment; they objected to the claim.

The Commissioner heard from both parties about the arrangement of work. The business relied on the written 'subcontracting' agreement which operated in accordance with the following:

- the 'subcontractor' was not supervised in his work,
- he had discretion as to how the job was undertaken, subject to compliance with regulatory requirements and standards,
- the 'subcontractor' could employ labour to assist with the installation work,
- he provided his own tools, equipment and transport,
- he submitted invoices for payment,
- the 'subcontractor' decided when and if he would work, and
- the 'subcontractor' assumed responsibility for the quality of his workmanship and bore financial responsibility for the panels and fixings in his possession.

It was also the case that the 'subcontractor' was:

- required to wear the business's uniform,
- apart from two short periods and a period of absence due to a shoulder injury, worked solely for the business,
- the applicant was not allowed to advertise his services as an installer to customers,
- other works were prohibited unless the work was of a type not done by the business, and
- he was not able to transfer or assign the work to another person or company.

In considering the matter the Commission pointed out in no uncertain terms that the nature of subcontracting relationships are determined by considering the written terms that they operate under and the actual work practices adopted by the parties.

The Commission found:

- the subcontractor was operating solely for benefit of the engaging business, not his own,
- he presented as an employee of the business,
- he could only undertake installation work utilising the products supplied by the business and undertook work as scheduled by the business, and
- labour, technical and training support provided by the respondent integrated the work of the applicant into the respondent's business.

While the Commission did agree that many of the factors, including the written agreement, would tend to point toward a person engaged as a subcontractor they did not overcome the overriding characteristics of the relationship. The applicant was providing his 'subcontracting' services solely for the benefit of the respondent's business rather than his own.

As such, the FWC determined the 'subcontractor' was in fact an employee of the business. The matter then proceeded to a further hearing to determine whether or not there was a valid reason for dismissal and if so, was it harsh, unreasonable or unjust.

Adding to the cost of the defence of this claim there will now be further consideration with regard to employment entitlements, such as unpaid leave and superannuation for the period of employment.

10.2. Superannuation Contributions

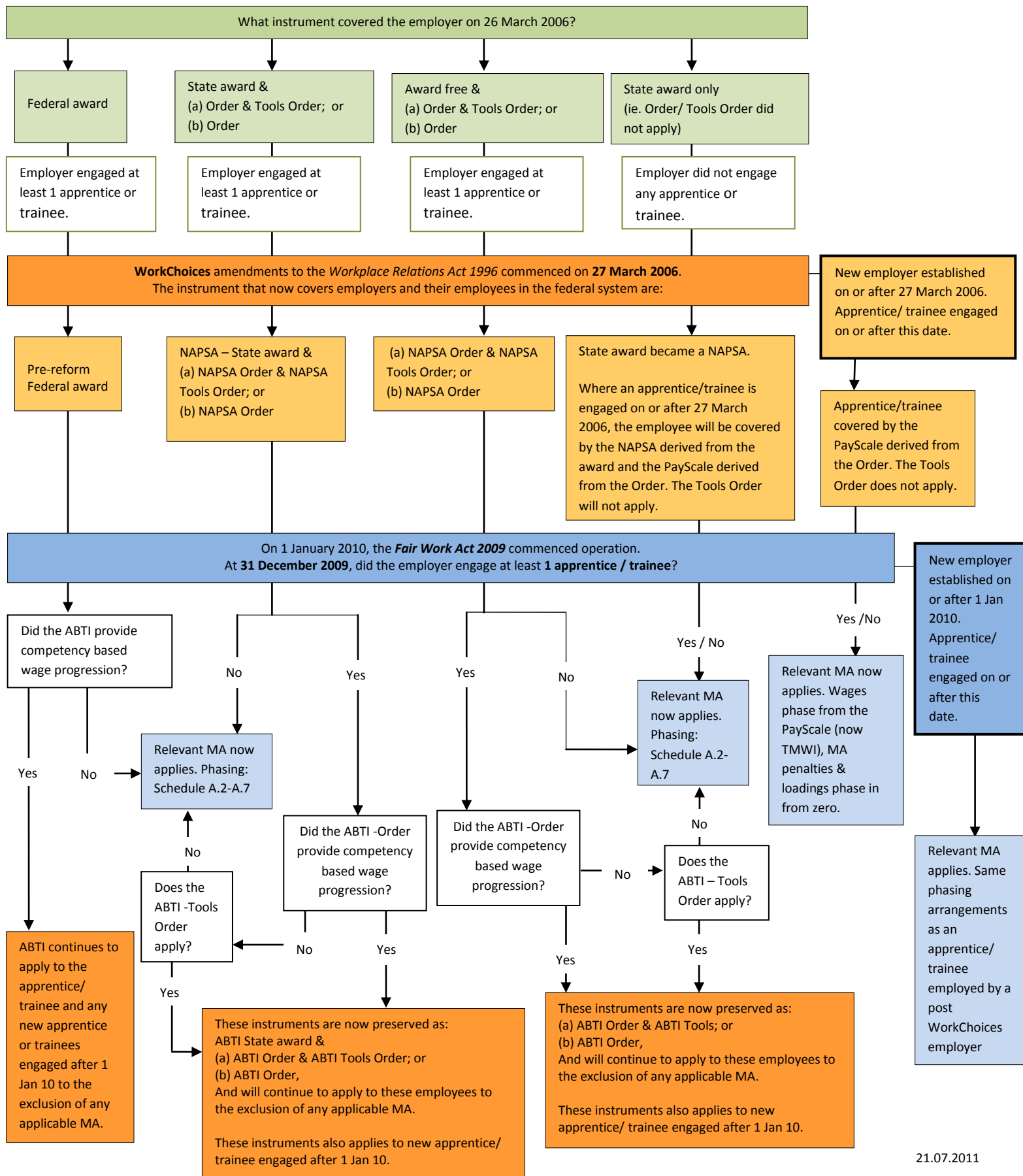
Furthermore, a large majority of contractors are still unaware of the requirement to make super contributions for subcontractors who provide an invoice with a labour component of 50% or more. This lack of awareness is prevalent despite this superannuation guarantee ruling being issued in 2009.

The information available through the Australia Taxation Office and the ruling is ambiguous, if not evasive, on the direction for businesses who are engaging subcontractors.

Businesses need, as much as is possible, clear and unambiguous information and direction regarding their obligations. Small business in particular does not have the financial position to seek professional legal advice on every aspect of their business.

APPENDIX 1

Preservation of the QLD Orders for apprentices & trainees: Constitutional Corporations



APPENDIX 2

Preservation of QLD Orders – apprentices & trainees: Division 2B employers

