

A Fatal Glitch in the IR 'Matrix'

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NEXT year will be the centenary of the Australian industrial relations system based on Henry Bournes Higgins 'Harvester Man' legacy. Since 1904, this system has sought to manipulate employment arrangements artificially and protect them from a whole raft of external influences, especially competition.

Since December 2002, the National Electrical and Communications Association (NSW) (NECA) has opposed the approval of Electrical Trades Union (ETU) pattern enterprise bargaining agreements on the grounds of restraint of trade and potential breaches of the *Trade Practices Act 1974* (TPA). The case is now before a Full Bench of the Industrial Relations Commission of New South Wales and will be heard and determined later this year.

Although this all started as simply another run-of-the-mill industrial relations (IR) case, progress so far indicates that the application of commercial competition laws to IR is opening up a whole range of issues (or cracks) that few key players want exposed. As vested interests on both the employer side and union side wait in the shadows, ready to scramble to justify why the concept of 'IR' should keep its anti-competitive status and thus maintain its current TPA exemption, this case cuts straight through the smokescreen to bring the debate to the real issue: *Is the industrial relations system being used to manipulate or restrict access to markets, thereby determining how those markets operate?*

The issue in this debate is, therefore, not about rationalizing the maintenance of anti-competitive behaviour in respect of IR, it is about how IR is being used as a tool to mask anti-competitive behaviour in the market generally. Viewed in this context, labour market reform (especially in the building and construction industry) does not simply extend to making labour more flexible and productive at the workplace, but to making commercial markets themselves more competitive.

Witting and unwitting individuals engage in IR daily. We should be under no illusion, however, that conscious and orchestrated behaviour is behind this use of IR to make markets less competitive. The issues in this case, therefore, mark a fatal glitch in the IR 'Matrix'.

PATTERN AGREEMENTS

The enterprise agreements referred to are not genuine (that is, individual company) enterprise arrangements, but 'pattern agreements'. Pattern agreements are enterprise agreements that are identical in form and content in respect of wages and conditions of employment. They are signed up to by a number of employers across an industry sector. They are negotiated at an 'industry level' and their flow-on to the enterprise level does not allow for any modifications.

The issue of pattern agreements is significant in the context of this case not because pattern bargaining or pattern agreements are themselves prohibited, but because

of the 'context' in which the negotiations for the restrictive clauses within these pattern agreements have occurred.

It is obvious that pattern agreements are approved by industrial relations tribunals. This approval occurs because legislation allows the tribunal to view the pattern agreement as a single company enterprise agreement rather than the industry-wide arrangement that it is.

RESTRICTIVE PROVISIONS

Briefly, the 'restrictive clauses' in the pattern agreements under challenge require companies to:

1. Source additional labour only from labour hire companies who *have an enterprise agreement with the ETU*.
2. Endeavour to ensure that subcontractors *have an enterprise agreement with the ETU*.
3. Require apprentice group training companies that supply apprentices to *get an enterprise agreement with the ETU*.

Obviously, these restrictive clauses place obligations on external third parties who seek to supply a host company or acquire goods and services from a host company. It is these obligations which, in their purpose or effect, seek to restrict competition in the electrical contracting market to only those companies that have signed a pattern agreement with the ETU.

MAKING THE 'UNOFFICIAL' OFFICIAL

The Cole Building Royal Commission exposed what everyone in the

building and construction industry already knew, namely, that to win major contracts on building projects in the capital cities of Australia one needs to have a pattern agreement. Hence, competition on these projects was shown to be ‘unofficially’ restricted to those companies that have signed a pattern agreement.

The restrictive clauses being sought by the ETU here, however, attempt to make ‘official’ these arrangements and in turn seek industrial tribunal sanction within a pattern agreement to enable legal enforcement and wider legitimacy. This is a bold attempt to use the IR smokescreen for what in any other setting would most likely be condemned as restrictive trade practices and a breach of the TPA.

THE TPA DOES NOT APPLY TO IR—WRONG!

The TPA contains one of the broadest exemptions ever with respect to ‘industrial relations and employment related issues’ [see s.51(2)(a)]. But it gives no so-called ‘blanket prohibition’ with respect to employment matters, and it does not extend to certain ‘restrictive trade practices’ [see s.51(2)]. Thus, although some IR arrangements which are clearly anti-competitive are given special sanction under the TPA, other areas of IR that have the effect of restricting trade and competition have no exemption.

The TPA therefore specifically acknowledges that these other areas of IR, such as the restrictive clauses being discussed, must be subject to the maintenance of competition, because they are capable of changing or determining how a market operates.

THE ETU POSITION

The ETU is lying low when it comes to debating NECA on the restrictive clauses. ‘This is not about restricting competition or extending the pattern agreement,

it’s all about the job security of ETU members’, says the ETU, ‘and in any event the employer has agreed to it’.

Terms in IR such as ‘consent’, ‘agreement’, ‘bargain’ and, in this case, ‘job security’ are in most cases accepted at their most innocent and straightforward levels. This is the public face of IR and it must occur or the IR Matrix will fall apart. For example, to suggest that pattern agreements are genuine ‘consent’ arrangements is simply to ignore the IR and commercial realities, yet consent is one of the central considerations upon which enterprise (and pattern) agree-

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ments are approved by Industrial Relations Tribunals.

In the NECA/ETU case, the restrictive clauses have other purposes beyond that of job security for employees. They place obligations on companies who are not party to the pattern agreement and may not even be aware of its terms. As a condition of legally obtaining work, these obligations require that a company also have a pattern agreement with the ETU for a term of up to three years. They require a company to sign up to a pattern agreement that cannot be negotiated or amended. They even require a company to exclude its leg-

olated right to make an enterprise agreement directly with its own employees.

If these aren’t the consequences of the restrictive clauses, then the ETU itself doesn’t understand the effects of its own agreement.

BUT HOW FAR CAN IR GO?

If restrictive clauses in pattern agreements can be used expressly to restrict competition in a tertiary market such as the Building and Construction Industry, how much further can the industrial relations system go in sanctioning anti-competitive practices in markets? Perhaps there is no limit!

Pattern bargaining is potentially the most anti-competitive form of behaviour one will find in IR. It grounds itself in orchestrated manipulation of industrial relations legislation by unions and employers, and is legitimized by industrial relations tribunals at State and Federal levels.

Significant issues of power and money are at stake for all involved should the system of pattern bargaining break down in the building and construction industry. Genuine enterprise bargaining which creates competitive advantage between enterprises with respect to the use and price of labour would see devastating consequences for those with vested interests in the maintenance of current arrangements.

VESTED UNION INTERESTS

Building and construction unions require pattern bargaining as an essential ingredient to their survival. These unions have overcome any perceived difficulties from the introduction of enterprise bargaining in the early 1990s and built their whole empire on pattern bargaining. Pattern bargaining has become the ‘Union Privilege Business Model’ in the IR Matrix.

In terms of union membership, signing up a company to a pattern agreement means (amongst other

things) greater unionization of company employees. The more pattern agreements a union can achieve, the more union members it will generally have.

At the employee level, pattern bargaining allows the union machine to promote a consistent ideology of mutual reward and obligation across its membership base, along the lines of 'equal pay for equal work'. Here, competition between employees for individual recognition based upon performance is quashed even before it can be vocalized.

Within the union, centralization of demands and outcomes across an industry assists incumbent union leaders to maintain control mechanisms and stop potential factions being formed. Union office is essentially permanent tenure provided one's factional opponents can be stopped from taking hold; a pattern agreement is the perfect tool in this regard.

The Cole Building Royal Commission has exposed how construction unions can gain access to secret commissions and/or interest from the introduction and maintenance of employee entitlements, including from insurances and employee entitlement funds. Here, pattern bargaining is used by unions to claim publicly that entitlement protection, training or insurances are being sought as benefits for employees, while at the same time direct and indirect financial benefits (in the millions of dollars) are flowing back to union administrations.

VESTED EMPLOYER INTERESTS

Unions are well aware that nothing scares a company more than naked competition. Indeed, it is competition that determines profit and loss, and it is competition that determines survival and death. Promises of a 'level playing field' and protection from non-union labour under the guise of a pattern agreement become very attractive.

It is the major employers in the building and construction industry who generally form the original pattern agreement. It is these same major employers who are most exposed to union domination and militancy. These major employers see the pattern agreement or 'level playing field' as a normal business reaction to their union exposure. The rationale goes like this: 'if my company is going to have to pay these rates, then I can't compete unless everyone else is made to do the same'. The necessary flow-on from this is the destruction of normal competitive market forces.

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Although many employers and employer associations will argue against the methods used by unions in attaining their pattern agreement, not all will openly argue against pattern bargaining itself.

CONCLUSION

This article has provided a limited opportunity to discuss some facets of the interaction between IR and anti-competitive behaviour, some of which is sanctioned under the TPA and some of which is not.

Provisions in enterprise agreements that restrict managements' capacity to run their businesses are not new. Neither are pattern agreements. NECA's current challenge

to restrictive clauses in pattern agreements on the grounds of potential breaches of the TPA, however, is the first time that these types of issues and concepts are to be argued before an industrial relations tribunal.

Far from simply being another employer/union scuffle over IR, the ramifications of this case lie not only in the final outcome, but in the arguments themselves. The broader implications of continued attention by courts, tribunals and the wider community to these type of issues as considerations or policy will create significant concern for those with vested interests in the continued maintenance of the IR Matrix.

A more vigorous application of competition policy in terms of the effect of IR on the operation of the market is the key to fundamental and lasting reform in IR. The trouble is that those advocating IR reform not only want reform, they also want to be able to control it. Unleashing the forces of competition, however, is the unleashing of an agenda that no-one can control except those who should be in control, namely, employers and employees at the workplace level as they react to the operations of the market.

If there is any possibility of conflict between IR and the TPA, common sense indicates that the TPA should be the victor. Pattern agreements must not be allowed to continue in any form, and vested interests must be made to swallow the bitter pills that this reform will bring.

The struggle for competitive markets has given Australians much of what we have today. It is this struggle that must continue to be our priority in the future.

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