

Greenfields Agreements Review

Submission of the Australian Council of Trade Unions, 27 October 2017

Executive summary

1. The Australian Council of Trade Unions (**ACTU**) welcomes the opportunity to make this submission to the Greenfields Agreement Review (**Review**) of the effect and operation of amendments made to the greenfields agreement provisions of the *Fair Work Act 2009* (Cth) (**Act**)¹ in November 2015 by the *Fair Work Amendment Act 2015* (Cth) (**2015 greenfields amendments**).
2. We note that the Review is specifically considering whether the amendments have supported more effective greenfields agreement negotiations and whether any further amendments should be enacted to improve the effective access to greenfields agreements.²
3. In summary, the ACTU:
 1. submits that the introduction of unilateral employer greenfields agreements via s 182(4) ought to be repealed;
 2. supports the continued extension of the good faith bargaining rules to greenfields agreement making; and
 3. submits that the effective access to greenfields agreements could be improved by amendments to ensure that enterprise agreements can only be made with a voting cohort that is genuinely representative of the employees who will be covered by the agreement.

About the ACTU

4. Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years the ACTU has played the leading role in advocating in the Fair Work Commission (**Commission**), and its statutory predecessors, for the improvement of employment conditions of workers. It has consulted with governments in the development of almost every legislative measure concerning employment relations over that period.
5. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

¹ All statutory references in this submission are to this Act.

² *Greenfields Agreement Review Background Paper*, p 9.

The introduction of unilateral employer greenfields agreements

6. The ACTU submits that the introduction of unilateral employer greenfields agreements via s 182(4) ought to be repealed.
7. That enterprise agreements are ‘true agreements negotiated between the relevant bargaining representatives and made by more than one party’³ is a foundational principle of the Act, reflected in the emphasis on collective bargaining and enabling representation at work.⁴ Greenfields agreements are an exception to this important general principle that enterprise agreements are the product of collective bargaining and genuine agreement between the employer and workers, via their bargaining representatives.⁵
8. For this reason, greenfields agreements pose a ‘unique policy challenge’.⁶ Commission oversight and other protections, such as the better off overall test, are critical in respect of greenfields agreements. Greenfields agreements determine the pay and conditions of workers – for up to four years – without direct input from those workers, and with no scope for the workers to bargain for changes to their pay and conditions during the life of the agreement. The limited length of agreements is therefore a particularly important protection of workers’ interests in respect of greenfields agreements. To the extent that the Review may also evaluate length of greenfields agreements,⁷ the ACTU opposes any extension to the length of greenfields agreements.
9. The most important protection for workers in respect of greenfields agreements is that the agreement is bargained and agreed by the union entitled to represent their industrial interests. The union is comprised of workers from the relevant occupations and industries and provides a voice for workers in greenfields agreement making. The union is best placed to ensure that the interests of workers are appropriately and fairly taken into account.
10. Section 182(4) removes this protection by deeming a greenfields agreement to have been made with the relevant union/s despite the union/s not having agreed to it. This provision enables an employer to unilaterally determine the terms of a greenfields agreement at the conclusion of a six-month ‘notified negotiation period’. The Productivity Commission specifically recommended against the introduction of a provision such as s 182(4) because of the potential to incentivize employers to take a ‘hard bargaining’ approach, ‘holding out until the negotiating period had elapsed and having its proposed terms approved’.⁸
11. Section 182(4) was introduced without a sound policy basis. Importantly, both the 2012 Fair Work Act Review and the 2015 Productivity Commission Inquiry into the Workplace Relations Framework (**Productivity Commission Inquiry**) concluded that there should *not* be a return to unilateral employer greenfields agreement making arrangements, as permitted under the WorkChoices regime, and yet that

³ Fair Work Act Review, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, 2012, p 172 [6.5.3].

⁴ Section 3(e) and (f).

⁵ *Greenfields Agreement Review Background Paper*, p 6.

⁶ *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 711.

⁷ *Greenfields Agreement Review Background Paper*, p 4.

⁸ *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 717.

is precisely what s 182(4) achieves.⁹ These arrangements were also emphatically rejected by the Australian electorate at the 2007 federal election. They remain deeply unpopular with the community – for good reason, including that these arrangements led to overall reductions in wages and conditions.¹⁰

12. Further, s 182(4) was introduced to mitigate a ‘*potential risk to projects of national significance*’, because of a perception that the previous provisions conferred on unions a capacity to frustrate the making of a greenfields agreement in a timely way.¹¹ There was no actual evidence that this power was abused or that any significant project had not proceeded for want of an agreement.¹² The evidence relied upon in the Explanatory Memorandum to the *Fair Work Amendment Bill 2014* (Cth) was speculative and anecdotal, particularly in relation to the time taken to negotiate a greenfields agreement.¹³
13. If the Government, despite the lack of evidence, remains concerned to address the perceived risk that s 182(4) was purportedly intended to address, the ACTU submits that the extension of the good faith bargaining rules to greenfields agreement making is sufficient.¹⁴ Employers are able to apply for bargaining orders to address precisely the bargaining behaviour that employer representatives alleged in support of its introduction. That there appears to have been no applications made for bargaining orders to address breaches of the good faith bargaining rules in respect of greenfields agreement making is only further evidence that this perceived risk is not borne out in reality and that the introduction of s 182(4) was unnecessary.¹⁵
14. Of course, the most telling evidence that its introduction was unnecessary is that no application has been made for approval of a greenfields agreement pursuant to s 182(4). Our affiliates report that they have not observed any altered bargaining behaviour on the part of either employers or unions as a result of the 2015 greenfields agreement amendments. We anticipate that the repeal of s 182(4) will have no effect on greenfields agreement making.

⁹ *Fair Work Act Review, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, p 172 [6.5.3] and *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 716, respectively.

¹⁰ See, eg, *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 716 and the research cited therein; Carolyn Sutherland, ‘Agreement-making under Work Choices The impact of the legal framework on bargaining practices and outcomes’, Office of the Workplace Rights Advocate, October 2007.

¹¹ *Fair Work Act Review, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, p 82 [4.6.6] (emphasis added). The Explanatory Memorandum to the *Fair Work Amendment Bill 2014* (Cth) (**Explanatory Memorandum**) picked up on these themes, as noted in *Greenfields Agreement Review Background Paper*, p 13.

¹² Ibid.

¹³ Explanatory Memorandum, p xii.

¹⁴ We note that both the *Fair Work Act Review, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* and the Productivity Commission Inquiry recommended alternative options to address this perceived risk. The ACTU has previously made submissions in respect of those options and other recommendations of the Productivity Commission relating to greenfields agreements: ACTU Response to Towards More Productive and Equitable Workplaces: An evaluation of the Fair Work Legislation, D. No 49/2012, 21 August 2012 <<https://www.actu.org.au/media/297226/ACTU%20Response%20to%20Towards%20More%20Productive%20and%20Equitable%20Workplaces%20-%20An%20evaluation%20of%20the%20Fair%20Work%20legislation.pdf>>; and ACTU Submission to the Productivity Commission Inquiry into the Workplace Relations Framework <https://www.pc.gov.au/_data/assets/pdf_file/0007/188287/sub0167-workplace-relations.pdf>.

¹⁵ The ACTU is unaware of any such applications and has been unable to identify any such applications.

15. However for as long as s 182(4) remains in the Act, there is the potential for it to be utilised by employers to unilaterally determine pay and conditions, without the important safeguard of agreement with the relevant union/s on behalf of the workers for whom they are the legitimate bargaining representative under the Act. It is because of this potential that s 182(4) must be repealed.
16. This potential is of particular concern where workers have reduced market power, for example, 'in non-project settings where timing is not as critical, or where workers may be less mobile or [formally] skilled, meaning that imbalances in bargaining power may persist.'¹⁶ As noted, section 182(4) was introduced to mitigate a perceived risk in respect of major capital projects and resource development projects.¹⁷ Its operation however is not so limited and it has potential for use in industry contexts where workers have reduced market power.
17. Workers' market power is also contingent on the economic context – for example, workers have reduced market power when there are 'relatively few alternative projects available to potential employees'.¹⁸ These are the precise economic circumstances that workers currently face, given the reduction in the number and scale of capital development projects.¹⁹ The current economic context is also marked by wage stagnation. As noted above, there is empirical evidence that unilateral employer greenfields agreements led to overall *reductions* in wages.²⁰ Collective bargaining is one of the most effective means to improve wage growth.²¹ In light of the growing consensus on the need to generate wage growth,²² reform should be directed to abolishing unilateral greenfields agreements and supporting genuine collective bargaining (further discussed below).

The extension of the good faith bargaining rules to greenfields agreement making

18. The ACTU supports the continued extension of the good faith bargaining rules to greenfields agreement making. Although our affiliates report that they have not observed any altered bargaining behaviour on the part of either employers or unions as a result of the 2015 greenfields amendments, we agree with the view of the Fair Work Act Review that there is no cogent policy basis for the previous exception for greenfields agreement making from the good faith bargaining rules.²³

¹⁶ *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 716.

¹⁷ As noted in *Greenfields Agreement Review Background Paper*, p 13, by reference to the Explanatory Memorandum.

¹⁸ *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 716.

¹⁹ *Greenfields Agreement Review Background Paper*, p 17.

²⁰ See, eg, *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, p 716 and the research cited therein; Carolyn Sutherland, 'Agreement-making under Work Choices The impact of the legal framework on bargaining practices and outcomes', Office of the Workplace Rights Advocate, October 2007.

²¹ See, eg, the Senate Education and Employment References Committee, *Corporate avoidance of the Fair Work Act 2009*, September 2017, especially p 111 [9.9]-[9.12], and the research cited therein.

²² See, eg, commentary from the: Reserve Bank of Australia <<https://www.rba.gov.au/speeches/2017/sp-gov-2017-07-26.html>>; Treasurer Scott Morrison <<http://www.abc.net.au/news/2017-03-13/scott-morrison-low-wage-growth-biggest-challenge-economy/8350032>>; International Monetary Fund <<http://www.news.com.au/finance/economy/australian-economy/imf-slashes-australias-economic-growth-forecast/news-story/f85284eee706076dabe19640c107f341>>.

²³ *Fair Work Act Review, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, p 172 [6.5.3].

The reduction in the number of applications for approval of greenfields agreements

19. Our affiliates have reported to us that there are two major drivers for the reduction in the number of applications for approval of greenfields agreements: the reduction in the number and scale of capital development projects and downturn in the construction sector and mining and resource development work; and employers choosing to make enterprise agreements with small and unrepresentative voting cohorts in circumstances where they would previously have made a greenfields agreement.²⁴

Improving effective access to greenfields agreements

20. The ability for employers to make agreements with small and unrepresentative voting cohorts is a significant 'systemic impediment to the making of greenfields agreements'.²⁵ It has allowed employers to achieve what they called for in the Fair Work Act Review and the Productivity Commission Inquiry but which both reviews rejected: unilateral employer greenfields agreements, without having to bargain with a union and without having to wait until the expiry of a set negotiation period.
21. The most effective means 'to improve the effective access to greenfields agreements'²⁶ is to amend the Act to ensure that enterprise agreements can only be made with a voting cohort that is genuinely representative of the employees who will be covered by the agreement. Such amendments would require stakeholder consultation but could potentially include, for example:
- an amendment to s 181 so that employers are not able to request employees to vote to approve an agreement that contains a majority of classifications in which no employees are currently employed;
 - an amendment to s 186(3) so that the Commission must also be satisfied that the group of employees who voted to approve the agreement was fairly chosen and, in so determining, must take into account whether the group was genuinely representative of the employees to be covered by the agreement and whether group was chosen to exclude a readily identifiable group of future employees or to avoid other aspects of the bargaining regime, such as the right to take protected action or to be represented by a bargaining representative; and
 - an amendment to s 188 so that the Commission must also be satisfied that the agreement was made with a genuinely representative cohort of employees.

²⁴ For a discussion of the increase in this type of agreement making, see, the Senate Education and Employment References Committee, *Corporate avoidance of the Fair Work Act 2009*, September 2017, pp 14-21, [3.9]-[3.39]

²⁵ *Greenfields Agreement Review Background Paper*, p 19.

²⁶ *Greenfields Agreement Review Background Paper*, p 9.