

Review of Greenfields Agreements



Submission of the Australian Manufacturing Workers' Union (AMWU)

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

1. Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submissions to the Government Review into the new provisions of the *Fair Work Act* 2009 relating to the bargaining of Greenfields Agreements, that were inserted by the *Fair Work Amendment Act* 2015 (New Greenfields Provisions).
2. The AMWU has extensive experience in negotiating Greenfields Agreements in Construction and for Maintenance Services. These Greenfields Agreements have been useful in establishing productive industrial relations between workers and businesses.
3. The AMWU has had very few experiences with Greenfield's Agreements since the New Greenfields Provisions were enacted. This is partially because of the winding down of the construction phase of the mining boom, which is noted in the Greenfields Agreements Review Background Paper. In large part it is because the 'greenfields' provisions of the legislation are undermined by the capacity for firms to abuse the other collective bargaining provisions of the legislation to establish 'baseline' agreements with a small number of often insecure workers to undermine industry standards and artificially reduce wage costs for employers.
4. These arrangements generally exclude or limit the involvement of unions and deny employees effective representation, advice and support.
5. The broader context is the increasing preference by businesses to rely upon the Modern Awards rather than negotiate enterprise agreements. The number of workers in the private sector covered by an enterprise agreement has fallen by 25%.¹ Meanwhile the total number of workers exclusively covered by the Modern Award system has risen from 10% to 25%² (many more on individual contracts may also rely on the Modern Award system for the majority of their conditions and entitlements).
6. The Review should consider how any proposed further amendments will address systemically suppressed wages growth and how the amendments might, provide safeguards against sham bargaining and support improving the bargaining power of workers.
7. These submissions will address the following matters:
 - a. AMWU experience with Greenfields Agreements;
 - b. The need for amendments to address the use of sham enterprise agreements (also known as base line agreements) made with a small group of insecure workers; and
 - c. The need for a review that can assess the impact of the "notified

¹ [Department of Employment ABS Earning and Hours Data Link](#)

² [Department of Employment Trends in Federal Enterprise Bargaining — March 2017 Data Link](#)

negotiation period” provisions.

8. The AMWU supports the following recommendations:
 - a. Recommendation 1: The Review recommend to the Government that amendments be made to the Fair Work Act 2009 to guard against sham enterprise agreements which are made with a handful of insecure workers.
 - b. Recommendation 2: The Review recommend to the Government that the maximum nominal expiry date is 12 months from approval of the Greenfields Agreement.
 - c. Recommendation 3: The Review recommend to the Government that there should be a review 12 months after there has been an agreement made for the first time under s.182(4) involving an arbitration and a “notified negotiation period.”

2. AMWU experience with Greenfields Agreements

9. The AMWU has negotiated very few Greenfields Agreements since the New Greenfields Agreement Provisions were enacted. Where we have negotiated Greenfields Agreements, they have been in offshore construction, with businesses where the Union has an existing relationship. These existing relationships meant that there were no timing issues in relation to those agreements.
10. Overall, there hasn’t been significant use of Greenfields Agreements, which corroborates the findings of the Background Paper. However, there is an issue this review should further explore, which is the availability of the loophole open to businesses to enter into Enterprise Agreements without the involvement of Unions and with only a handful of insecure workers.

3. The need for amendments to address the use of sham enterprise agreements

11. There has been an increasing use of sham enterprise agreements (also known as base line agreements). These are enterprise agreements which are made by businesses with a handful of insecure workers.
12. Excluding unions from the bargaining process increases the imbalance in bargaining power between workers and business. The organisational memory and experience brought to the bargaining table through the involvement of unions significantly goes towards ameliorating the bargaining power imbalance between business and workers. In the context of Greenfields Agreements, businesses must negotiate in the first instance with a union.

13. It is a basic principle of the Act that it allows for collective bargaining. Collective bargaining as a concept has the inherent intention of increasing the bargaining power for workers. It is universally recognised that generally when workers come together, they are in a stronger bargaining position than when they attempt to bargain alone. Without access to collective bargaining, workers bargaining alone are unlikely to be able to bargain on an equal footing with the business (this is obviously less applicable to high net worth individuals). The objects of the Act go further in promoting collective bargaining.³
14. Some businesses have a preference to bargain with individual workers, because they will have the stronger bargaining position. This preference is evidenced by their support for statutory individual agreements, which were widely known as AWAs, and which were a cornerstone of WorkChoices. It is apparent, given their preference for individual bargaining that these businesses will try at every opportunity to minimise the opportunities for collective bargaining to improve the bargaining positions of workers. Now that AWAs are no longer allowed under the Act, business interests have found a new tactic to bargain with workers in circumstances when they are in the weakest bargaining position.
15. Casual employees who do not have the same bargaining power as permanent employees are being used by employers to rubber stamp Sham Collective Agreements that may go on to apply to permanent employees and to a workforce with a much broader demographic.

a. Case Study: McDermott Australia Pty Ltd v AWU, AMWU [2016] FWCFB 2222

16. In this case, the FWC Full Bench decided that casuals could vote on and approve an agreement even though they were in a period where they were not performing work. The employer negotiated a collective agreement with 36 casual employees during a period where there was “no campaign being undertaken by McDermott.”⁴ The casual employees were not performing any work and there appeared to be no permanent employees engaged.
17. While this particular agreement offers salaries in excess of \$190,000 per year with no sick leave, annual leave, it is the effect of the Fair Work Commission Full Bench decision and its interpretation of the Act, which is of interest to this review.
18. It cannot be the intention of the Act to allow for employers to engage a group of new casuals on the promise of future work and then purport to “bargain” with those employees for a collective Agreement. Casual employees have no job security and are clearly in a weaker bargaining position as compared to the employer. Even the promise of future work is dependent on their compliance with the employer’s wishes. It is important to note that unfair dismissal protection is only afforded to casuals who have been engaged in regular and systematic work for at least six months.

³ Section 3(f) Fair Work Act 2009

⁴ Paragraph [26] [2016] FWCFB 2222

19. The FWC Full Bench looked at sections 180, 181(1), 182(1) and 186 of the Act. Those section provide the framework for determining whether employees have “genuinely agreed” to the making of an enterprise agreement.
20. Division 4 of Part 2-4 of the Act provides for the approval of enterprise agreements. An agreement must be approved by the employees to whom it will apply, in the manner specified by the Act.

Section 181(1) provides that:

“An employer that will be covered by a proposed enterprise agreement may request the **employees employed at the time** who will be covered by the agreement to approve the agreement by voting for it.”(emphasis added)

21. The procedure available to an employer under s.181(1) is subject to ss.180(1-4), which states:

“180 (1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

(2) The employer must take all reasonable steps to ensure that:

(a) during the access period for the agreement, the **employees (the relevant employees) employed at the time** who will be covered by the agreement are given a copy of the following materials:

(i) the written text of the agreement;

(ii) any other material incorporated by reference in the agreement;
or

(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

(a) the time and place at which the vote will occur;

(b) the voting method that will be used.

(4) The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).” (emphasis added)

22. Section 182(1) of the Act provides:

“If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is

made when a majority of those employees who cast a valid vote approve the agreement.”

23. Section 186(2)(a) states as follows:

“The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement — the agreement has been genuinely agreed to by the employees covered by the agreement...”

24. What constitutes genuine agreement by the employees covered by an agreement, as required by s.186(2)(a), is the subject of s.188 which reads in part:

“An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:

(a) ...

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

...”

25. The FWC Full Bench considered that the words “employees employed at the time” referred to in the Act, include any casuals who were on the payroll and engaged to perform casual work. The Full Bench also reasoned that it would have resulted in disenfranchisement to not allow the casual employees a vote on an agreement that might regulate their terms and conditions of employment. The FWC Full Bench did not consider that there was anything unusual about a business choosing not to engage any permanent employees for the four years the enterprise agreement was to operate.
26. It is important to note that in this particular case, the issue came to a head only because there were unions involved in the process. There are examples that have been uncovered where employers bargain with a small group of employees without Unions to provide their experience and knowledge (these are further discussed below).

Why is this case study relevant to the Review?

27. The first particular circumstance of concern is one where an employer can avoid entering into Greenfield’s Agreement by engaging casuals who have no unfair dismissal protection and then begin bargaining with those casuals for an agreement. The principle of collective bargaining to improve the bargaining position of employees is not achieved where those employees have no protection from unfair dismissal (which the FWC can provide remedies for, without the need to go to court).
28. It is true that casuals do have General Protections provisions which according to the words of the Act protect them from any adverse action because of their

involvement in bargaining.⁵ However, the General Protections generally require enforcement in the courts.⁶ The current Federal Circuit Court (in Sydney) has indicated that following court directed mediation that it can take between 12 to 18 months before a General Protections matter can be heard by that court. Putting aside from these extended time periods for court hearings, it is unlikely that a casual employee would spend time seeking legal advice to pursue a former employer in court in addition to looking for employment.

b. Case Study: Catalyst Services Enterprise Agreement 2014 [2014] FWCA 9445 (CUB Dispute Agreement)

29. This case involved the approval by the FWC of an agreement which purported to cover only three employees who were all casuals.⁷ This is a high profile agreement which was a relevant industrial instrument in the recent Carlton United Breweries (CUB) dispute.
30. While the company which is named in the Agreement is “Catalyst Recruitment Systems Pty Ltd”, the company named Programmed was purporting to use the Agreement to hire its employees who were to work at CUB. Catalyst Recruitment Systems Pty Ltd is still registered with ACN 050 243 251 and an office in Burswood, Western Australia.⁸
31. An ABC report uncovered other facts surrounding the approval of the Agreement which would be of concern to the review.⁹ The ABC report uncovered that the employee who signed the agreement had been employed for all of three weeks, only working six days during that three week period.
32. Looking at the employer’s statutory declaration (Form 17 (F17), which is a standard form in the FWC) accompanying the application for the FWC to approve the agreement, there seems to be a very small window in which the employee who signed the Agreement could have engaged in bargaining, which seems to corroborate the ABC report.
33. The F17 indicates there was 5 weeks during the period of bargaining through to when ballots were posted out. The F17 indicates that bargaining commenced on 13 October 2014 when the employer distributed the Notice of Employee Representational Rights. The actual ballot documentation was sent in the post on 10 November. The date that voting closed was 17 November 2014. This is a period of five weeks, meaning the employee who signed the Agreement reported in the ABC report was not present for the entire period of bargaining through to the close of the vote.

⁵ S.340 of the Act

⁶ Unless all the parties agree to allow the FWC to arbitrate

⁷ Form 17 (F17) Employer’s statutory declaration in supports of an application for approval of an enterprise agreement, which was lodged by the employer with the FWC indicated at question 2.10 that three employees “will be covered by the agreement.” Further at question 4.3 of the F17, the employer indicates that all three are casual employees.

⁸ ASIC Website company search

https://connectonline.asic.gov.au/RegistrySearch/faces/landing/recentSearch.jspx?recentSearchId=0&_af.ctrl-state=117lbys0jc_28

⁹ <http://www.abc.net.au/news/2016-08-26/carlton-united-breweries-worker-dispute-exclusive-details/7785170>

34. An ABC media report indicated that the worker who signed the agreement “did not know what the company did and knew nothing about the agreement he signed.”¹⁰
35. This example highlights the counter point to the FWC Full Bench’s concern in [Case Study: McDermott Australia Pty Ltd v AWU, AMWU \[2016\] FWCFB 2222](#) that not allowing casuals to vote would be disenfranchising them. We know that the agreement in this case study then went on to attempt to cover the permanent employees who were to work at CUB and possibly many other locations where Catalyst/Programmed provides its services. The Programmed website indicates that it employs some 20,000 employees across a wide range of industries.¹¹

c. Case Study: UGL Resources (Contracting) Pty Ltd; OM Contracting Maintenance Enterprise Agreement 2015 [2015] FWCA 2850

36. UGL Resources (Contracting) Pty Ltd negotiated an enterprise agreement titled OM Contracting Maintenance Enterprise Agreement 2015 which was to cover four employees. The F17 employer’s statutory declaration obtained by the AMWU from the FWC indicates the employer’s answers to the following questions:
- a. 2.10 Number of employees to be covered by the agreement? **4**
 - b. 3.5 Does the Agreement contain any terms that are less beneficial than equivalent terms and conditions in the reference instrument(s) listed in questions 3.1 and 3.2 and/or does the agreement confer any entitlements that are not conferred by those reference instruments? **No**
37. For this file, before providing the FWC file to the AMWU, the FWC has redacted the information about whether any employees are casual at question 4.3. However, the content of the Agreement points to the fact that only casuals will be engaged under the Agreement.
38. The wage rates are higher than what the Modern Award provides for but lower than the relevant industry standard. The Trade rate for a mechanical fitter under this enterprise agreement Grade 5 is \$937.57, while the Modern Award wage rate for C10 which is the equivalent base trade rate is \$783.30.
39. The Agreement purports to cover all employees who are employed by United Group Resources (Contracting) Pty Ltd in the classifications across Australia.
40. The Agreement excludes the operation of the Award and does not incorporate any Modern Award terms.
41. The employer describes themselves as operating in the “Industrial Construction and Maintenance Services.”

¹⁰ <http://www.abc.net.au/news/2016-08-26/carlton-united-breweries-worker-dispute-exclusive-details/7785170>

¹¹ <https://programmed.com.au/industries/manufacturing/>

Lack of Union Weakens the Safety net

42. The agreement was not negotiated with any union. There was only one employee bargaining representative.
43. The employer provided a statutory declaration stating that there were no less beneficial conditions when the proposed Agreement was compared to the Modern Award. When the proposed Agreement was examined by the FWC, it was identified that there were some conditions which may be less beneficial, particularly for casuals in relation to minimum hour engagements and for apprentices in relation to their wage rates.
44. In response to these concerns raised by the FWC, the employer provided undertakings to provide those entitlements in the *Manufacturing and Associated Industries and Occupations Award 2010* which may be more beneficial.
45. The process that follows demonstrates the dangers of unions being left out of the bargaining process. Once the employer had provided the undertaking, they also provided a hand written note which they apparently received from the employee representative. The hand written note says:

"I ANDREW GREENWOOD ON BEHALF OF UGL EMPLOYEES GIVE THE
PRESCRIBE UNDERTAKING TO BE CARRIED OUT IN REGARDS TO 2015 EA.
[SIGNED]"

46. Attaching the hand written note by email to the FWC, the employer wrote the following email.

"Morning Yota

The Bargaining Rep for the Employees in relation to the OM Contracting Maintenance enterprise Agreement 2015 has sent this attached handwritten note this morning. We did not assist him in preparing this but simply asked him to write confirming his acceptance or non-acceptance of the Undertakings. His note indicates that He is making the Undertakings on behalf of the employees which I hope does not confuse the issue. The employees are currently in the field working and written communication is a little difficult.

I trust that the Deputy President will take from his handwritten note that he has read the Undertakings and has no issue with them being provided as part of the Application process. Indeed he has adopted them as if he were making the Undertakings.

Please let me know if you require anything further.

Kind regards

Terry Elliot (National Industrial Relations Manager)"

47. It's clear from the handwritten note that the employee bargaining representative does not fully understand what he is agreeing to or being asked to agree to.

Without union involvement, employee representatives may, as in this example not have sufficient industrial relations experience to ensure the safety net floor provided by the Modern Awards applicable protects employee terms and conditions, particularly those terms and conditions for casuals and apprentices.

48. Following the Agreement being approved, the Union has received inquiries from members about certain other conditions which appear to be worse off than under the Award. In particular, the Agreement provides at clause 3.1.3(v) that casuals who work overtime are not paid their overtime based on their casual rate of pay, they are paid overtime based on the rate of pay for permanent employees.
49. Another concern raised by union members is that they are unable to decline overtime work or engage in any action with the intention of banning overtime worked. Clause 5.4.16 of the Agreement indicate that employees cannot engage in any overtime ban or refuse to work overtime.
50. There are also a range of allowances from the Modern Award which do not appear to be included in the Agreement and which the FWC has not enquired about. Given the broad ranging nature of the contractor's described industry and locations of work, there may be a significant number of allowances which might be applicable to work at any particular time.

Full Time Casual Employment being used

51. Another aspect of the agreement of note in examining the undertakings is that the employer claims that there is no need for part-time work under the agreement. In response to the FWC concerns that it was unclear whether the Agreement was to be used to employ part-time employees as there didn't appear to be any provisions for part-time work hours, the employer wrote the following in an email submissions:

"Yes, that is correct the agreement does not deal with part time employees, as it has not been the intention of the parties to include them. The work that is done under the proposed agreement is mostly project-related and can involve remote locations where part time employment is impractical. On this basis part time employment has not been included and the Company has been prepared to ensure that permanent full time (weekly hire) has been available for all employees and that casual labour would just then be used to supplement that."

52. The F17 has been redacted, so it is unclear how many of the four employees are in fact permanent full time or casual. However, the range is between 1 and 4, given only 4 employees were purported to be covered by the Agreement at the time the Agreement was approved.

FWC Better Off Overall Assessment is not fail proof

53. While the Fair Work Commission was able to identify some terms which may be less favourable, the FWC did not identify that there was an inconsistency between the consultation clause requirements and the hours of work clause. Union involvement would have provided an important advocate for workers' interests.

54. There is a requirement at s.205(1A) which requires that for any change to the employees' regular roster or hours of work, the consultation clause in the Agreement must require the employer:
- (a) To provide information to the employees about the change; and
 - (b) To invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
 - (c) To consider any views given the by the employees about the impact of the change.
55. The Consultation clause in the Agreement does provide for this process at clause 1.8.2. However, the hours of work and rostering clauses provide that the employer is only required to give 48 hours notice of any change. It is not clear how this consultation is to occur within the 48 hours notice period. The Modern Award consultation clause requires that the employer consult before making decision. This makes it clear that the notice period only commences once the employer has made a decision.
56. In this Agreement, there is no requirement to consult before making a decision, meaning that the clause could require the employer only to consult within the 48 hours which would be difficult, judging by the employer's correspondence in relation to the employee bargaining representatives response to the undertakings.

Hours of work

57. While the Agreement does pay more than the Award, the employer's submissions attached to the undertakings indicate that some of the work the company is aware will be performed by employees who are to be covered by the agreement appears to be fly in fly out (FIFO). There does not appear to be any rostering arrangements identified in the Agreement for FIFO, although there is Living Away From Home Allowance. A few other clauses seem to create a grey area, where the employer can dictate with minimal notice the actual hours of work and rostering arrangements for employment.
58. Clause 5.2.1 Ordinary Hours
- "The Ordinary Hours shall be thirty-eight (38) per week over 4 weeks. Roster may be organised on the following bases:
- (a) 38 hours within a work cycle not exceeding seven consecutive days; or
 - ...
 - (e) such other roster as may meet the needs of the client."
59. Clause 5.2.4 Ordinary Hours

“The Company may vary the hours of work and shift rosters (including FIFO roster) to meet operational requirements. The Company may transfer an Employee to or from day work or shift work rosters, and from one shift panel to another. Employees shall be provided with forty-eight (48) hours’ notice (unless a shorter period is agreed with the Employee) from the Company of a variation of the hours of work and shift rosters or a transfer between such rosters.”

These Arrangements Avoid Industry Standards

60. These types of Sham Enterprise Agreements allow employers in particular industries to avoid the standard terms and conditions of employment which exist in a particular industry.
61. For example, the AMWU is aware that this agreement was used to engage employees who worked in the Oil Refining and Manufacturing Industry, where the standard hours of work are 35 hours per week.¹² The Oil Refining and Manufacturing Award 2010 was not used by the FWC for the purposes of the BOOT test.
62. The AMWU also understands that the Agreement has applied to full time employees working under the “maintenance contract” between UGL the Viva Geelong Refinery.

d. Case Study: WorkPac Construction Pty Ltd; Engineering Services Agreement 2016 [2016] FWCA 1383

63. This agreement¹³ is an example of an agreement made without union involvement, where conditions that the employer said were “agreed” by the handful of employees were clearly below the Modern Award. The employer rolled up allowances into the hourly rate, and tried to present the argument that employees would be better off. This was remedied by the Commission which sought undertakings from the company. The undertaking which were provided to the FWC contained completely new wage rates from what was originally in the agreement which was apparently agreed to by employees.
64. The case file reveals another concerning characteristic of this group of employees who were asked to “agree” to the employer’s proposed enterprise agreement. The F17 reveals that the employer claimed that the enterprise was going to cover only 12 employees. However, we know that Workpac has provided labour hire requiring more than 12 employees.
65. The F17 also reveals that all 12 of these employees were casual employees.
66. The number of employees who actually voted in the ballot to approve the enterprise agreement is redacted by the Fair Work Commission.

¹² https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000072/default.htm Oil Refining and manufacturing Award 2010 provides for 35 hour week at clause 10.1 of the Award.

¹³ <https://www.fwc.gov.au/documents/documents/agreements/fwa/ae418074.pdf>

67. The bargaining power of 12 casuals without job security as compared to the employer should be of concern to this review. These types of agreements highlight the way in which companies are minimising employee bargaining power and insulating the business from strong employee claims for a fair share of the profits from their work.

e. Case Study: Innofield Services Pty Ltd; Innofield Services Pty Ltd Enterprise Agreement 2016 [2016] FWCA 1834

68. This is another agreement which was made with only a handful of employees.
69. The employer's F17 reveals that the employer answered the Agreement was to cover 5 employees.
70. It was also intended to cover all employees employed by the company in classifications in the agreement across Australia.
71. The AMWU understands that the company has won tenders for maintenance work and has provided employees to perform maintenance work in sections of the Viva Geelong Refinery during maintenance shut down periods.
72. The wages rates are higher than the wage rates in the Modern Award. However, the Employer's F17 indicates that there are a number of conditions which are in the Modern Award which are not included in the Enterprise Agreement.
73. The FWC decided that the Agreement passed the Better Off Overall Test. There doesn't appear to be any consideration in the FWC decision approving the Agreement given to the differences between the Enterprise Agreement and the Modern Award and whether or not the higher wage rates compensate for other conditions from the Modern Award which were left out of the Agreement.

f. Case Study: MTCT Services Pty Ltd; NM Enterprise Agreement 2016 [2016] FWCA 8366

74. This case study is another example of an Agreement (the *NM Enterprise Agreement 2016*) that was entered into for the sole purpose of undermining and reducing existing entitlements.
75. Prior to the approval of this Agreement UGL had, in a joint venture with Kaefer Integrated Services Pty Ltd (UGL Kaefer), provided maintenance services to Esso - a company that operating onshore and offshore oil and gas facilities in South Eastern Victoria. The maintenance employees working at these facilities were employed under Union negotiated Enterprise Agreements.
76. In late 2016, UGL used a shelf Company (MTCT) to bargain with a handful of employees in WA.
77. Despite the F17 form declaring that the Agreement would only apply to 5 employees, the coverage clause of the Agreement is in fact broad enough to

include any MTCT employee anywhere in Australia performing work under a maintenance classification.

- 78. This paved the way for UGL Kaefer to lay off their maintenance employees performing work at Esso facilities and advertise new jobs with MTCT under the NM Enterprise Agreement, which provides for significantly reduced pay and conditions.
- 79. These case studies demonstrate how widespread these Sham Enterprise Agreements are becoming.

4. The need for a review that can consider the impact of the “notified negotiation period” provisions

- 80. If these sham enterprise agreements are addressed through adequate amendments to the Fair Work Act 2009, there may be a return to the use of Greenfields Agreements. This may then result in the use of the arbitration provisions if there is a deadlock in negotiations.
- 81. The New Greenfields Provisions allow for an employer to seek approval of an Enterprise Agreement without the Agreement of the relevant Union(s). There have been no uses of this particular part of the New Greenfields Provisions, so there are no decision of the Fair Work Commission approving such Agreements, where a business and the relevant union did not reach agreement within the timeframe.
- 82. There is an attempt to provide some protection to the potential workers to be covered by the Greenfields Agreements in the New Greenfields Provisions at s.187(6) of the *Fair Work Act* 2009, which provides as follows:

“(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent.”
- 83. This section attempts to provide some protection which prevents Greenfields Agreements from being made with terms and conditions which are below the prevailing pay and conditions within the relevant industry.
- 84. In any such hearing, the union will still need to be making submissions and devoting resources to representing workers’ interests.
- 85. There is concern that in light of the systemic suppression of wage growth by the *Fair Work Act* 2009, Greenfields Agreements should be limited in their term to 12 months. This will allow workers to begin negotiating collective agreements based on the performance of the business and the workers and ensure that there is a more appropriate link between the productivity and profits of the business and the workers’ remuneration.

86. This was also a recommendation of the Productivity Commission and noted in the Background paper.
87. The AMWU recommends that the Government should amend the Greenfields provisions to limit the term to 12 months.
88. The fact that there has been no use of the provisions means that the review cannot adequately inquire into the actual impact of these New Greenfields Provisions.
89. The AMWU recommends that the Government should conduct a review 12 months after the New Greenfields Provisions about arbitration and “notified negotiation periods”¹⁴ have been accessed for the first time.

5. Conclusion

90. The AMWU supports the following recommendations:
 - a. Recommendation 1: The Review recommend to the Government that amendments be made to the Fair Work Act 2009 to guard against sham enterprise agreements which are made with a handful of insecure workers.
 - b. Recommendation 2: The Review recommend to the Government that the maximum nominal expiry date is 12 months from approval of the Greenfields Agreement.
 - c. Recommendation 3: The Review recommend to the Government that there should be a review 12 months after there has been an agreement made for the first time under s.182(4) involving an arbitration and a “notified negotiation period.”

End

27 October 2017

¹⁴ Section 182(4) of the *Fair Work Act 2009*