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# SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION

GREENFIELDS AGREEMENTS REVIEW  
27 OCTOBER 2017

## Summary

The Australian Workers' Union ('AWU') covers employees in industries in which greenfields agreements are widely used. As a consequence, the AWU is and has been involved in the bargaining for a vast number of these agreements.

The amendments introduced by the *Fair Work Amendment Act 2015* ('Amendment') in November 2015 sought to vary the process of making greenfields agreements by introducing a 'notified negotiation period' of six months, the expiry of which allowed an employer to effectively make a unilateral greenfields agreement, and extending good faith bargaining requirements to greenfields agreements.

The AWU has been invited to make submissions on what effect the introduction of these two changes has made to the landscape of greenfields agreement bargaining and the current climate of greenfields agreements in general. It is the position of the AWU that there is no evidence that the amendments have had any ascertainable effect on the bargaining process for greenfields agreements. What has had an effect however, is the rise in popularity of 'no-stake' brownfields agreements. The recent uptake of such agreements amongst employers undermines the enterprise agreement process as a whole, and has undeniably had a negative impact on the number of greenfields agreements that have been lodged with the Fair Work Commission ('FWC').

## Section 182(4) and Unilateral Greenfields Agreements

The creation of s182(4) of the *Fair Work Act 2009* ('Act') heralded the reintroduction of the availability of unilateral employer greenfields agreements. As such, this provision completely undermines the enterprise bargaining provisions in the Act and should be repealed. We note that prior to the Amendment, both the Productivity Commission<sup>1</sup> and the *2012 Fair Work Act Review*<sup>2</sup> ('Review') expressed that they did not support the reintroduction of unilateral employer greenfields agreements. The AWU has significant and genuine concerns that this provision, although ostensibly inserted for the purpose of assuaging employer fears of union wrongdoing during the bargaining for greenfields agreements, explicitly provides a process for the making of unilateral employer greenfields agreements.

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<sup>1</sup> *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November

<sup>2</sup> *Fair Work Act Review, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, p 172 [6.5.3].

Notwithstanding our strong opposition to s182(4) of the Act because of its potential to entirely undermine the greenfields agreement making process by denying the voice of the employee, the AWU understands that the provision at s182(4) of the Act has not once been utilised since its insertion in November 2015. All arguments aside regarding the contents of the provision, it is only logical to find that a provision that has remained unused for the entire time it has existed is redundant and should be removed.

The employer submissions to the *2012 Fair Work Act Review* ('Review') regarding concerns about potential delays and uncertainty caused by unions allegedly abusing the greenfields agreement process were vaguely premised on 'perceptions of risk' and their 'experience'. No actual evidence on which to base such claims was offered. Considering that this provision remains unused and effectively surplus to any need, these perceptions were clearly in error and the resultant amendments were therefore unnecessary.

The AWU was a bargaining representative for a significant number of the greenfields agreements provided in the list that accompanied the invitation to submit to this review. In fact, a significant minority of the greenfields agreements listed is attributable to three major projects – Roy Hill, Wheatstone, and Ichthys. The agreements for these projects number 448, or approximately 36% of all agreements listed. The bargaining for these agreements took place before the Amendment was incorporated into the Act, and there has been no project since that has required greenfields agreements on such a scale.

Section 182(4) should be repealed. Not only is the provision at odds with the balance of the Act, the recommendations of the Productivity Commission, and the recommendations of the Review Panel, it is evidently redundant in any operative sense. Prior to the Amendment, there was no evidence to suggest that such an amendment was required; now it is undeniable that s182(4) is both undesirable and unnecessary.

### **Good Faith Bargaining Principles for Greenfields Agreements**

The AWU has not seen any notable effects from the extension of the good faith bargaining principles to greenfields agreements. Unlike the insertion of s182(4), we do see that the extension of the good faith bargaining principles to greenfields agreements has some merit. Also unlike the insertion of s182(4), the extension of good faith bargaining principles does not categorically undermine the greenfields

agreement making process under the Act. We note that according to the *Greenfields Agreements Review Background Paper* both the Productivity Commission<sup>3</sup> and the Review<sup>4</sup> recommended the application of the good faith bargaining principles to greenfields agreements as the means to effectively address the employers' claims of unions supposedly intentionally frustrating the agreement making process.

The AWU supports the retention of the extension of the good faith bargaining principles to greenfields agreements.

### **The Decline of Greenfields Agreements**

The figures provided in the Background Paper pertaining to the number of greenfields agreement applications and approvals certainly show a sharp reduction in their number over the period between 2012 and 2017. As noted above, the AWU has not recently been involved in bargaining for a project that has required a comparable number of greenfields agreements to Roy Hill, Wheatstone, or Ichthys. Clearly the reduction in investment in large-scale capital projects has contributed to the decline in the number of greenfields agreements lodged and approved. However, we submit that notwithstanding this reduction in investment being a significant factor, it is not the sole contributor to the decline in the number of greenfields agreements.

As employer groups have variously pointed out, a preferable state of affairs for employers regarding greenfields agreements would be to allow employers to make greenfields agreements without the involvement of a union – a unilateral determination by the employer of terms and conditions of employment on a particular project. The AWU considers this proposition to be ridiculous, incredibly undesirable, and against the public interest. As discussed above, s182(4) of the Act does in fact create a structure that allows employers to make such agreements after a period of time. More importantly, our experience is that some employers have found an easier way of achieving largely the same outcome. The perverse incentives and loopholes within the Act have caused employers to abandon the use of greenfields agreements altogether.

Many employers have engaged in the unilateral determination of the terms and conditions of employment for employees by making enterprise agreements with a small voting cohort that is not representative of the employees who will be covered

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<sup>3</sup> *Greenfields Agreement Review Background Paper*, p 14.

<sup>4</sup> *Greenfields Agreement Review Background Paper*, p 11.

by the agreement. The AWU considers the rise in popularity of this type of ‘no-stake’ agreement as a significant contributor to the decline in the number of greenfields agreements being lodged and approved by the FWC. It is our belief that many employers see this type of agreement as a more palatable alternative to bargaining with a union and pursue this option in instances where a greenfields agreement is required.

These no-stake agreements are usually made with very few employees that are not representative of the employees that the agreement purports to cover. One recently approved no-stake agreement is an agreement covering the construction of the Forestfield Airport Rail Link Tunnel in Western Australia<sup>5</sup>. The tunnel was a genuine new enterprise, perfectly suited to a greenfields agreement with the appropriate unions. However, the primary contractor, Salini, made an agreement with three employees with the site yet to be operational. These employees were unrepresented. The classification structure in the agreement provides for eight classifications. Each classification covers a number of occupations, with some classifications covering over 50. It beggars belief that an agreement that covers well over 100 occupations yet was voted on by three employees could possibly satisfy ss186(2)(a) or 186(3) of the Act.

Adding to our assertion that this agreement made in this way in order to exclude union involvement is the generic name the employer chose for the agreement – “*Company Enterprise Agreement 2016-2020*” – completely unrelated to the project it covers. This agreement now provides the terms and conditions for hundreds of workers on this project, and despite this, will remain in place until 2020 with no avenue to for the employees to pursue an agreement that is genuinely bargained for before that time. The company, circumventing the greenfields agreements provisions and completely undermining the bargaining processes provided in the Act, effectively determined the terms and conditions of employment for all of these employees unilaterally.

More recently, the well-publicised dispute regarding United Group Limited (‘UGL’) at Esso’s Longford gas plant (‘Longford’) continues. How this dispute unfolded is an excellent case study of how employers can freely undermine the enterprise agreement bargaining process and avoid their obligations under the Act.

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<sup>5</sup> *Salini Australia Pty Ltd, AG2016/1552.*

On winning a five-year maintenance contract for Longford, UGL contacted relevant unions, including the AWU, to bargain for a greenfields agreement to cover the work at Longford. UGL provided the unions with suggested terms and conditions for the agreement. These terms and conditions were vastly inferior to those that applied to the current maintenance workforce at Longford who would continue to perform the work under the new UGL contract. Consequently, the unions involved did not accept these terms and conditions.

Not willing to engage in genuine bargaining, UGL then withdrew from the process and insisted that any employee who wished to work under the new contract at Longford was required to be employed through a recently registered subsidiary of UGL, MTCT Services ('MTCT'). Importantly, this meant that the terms and conditions of employment that applied to these employees were those contained in the MTCT agreement – given the generic title of "*NM Enterprise Agreement 2016*". Not only was this agreement notably inferior to the prevailing terms and conditions at Longford, it was made in Western Australia with a small number of employees who were not at all representative of the employees at Longford.

The UGL matter is yet another example in an already lengthy list of corporate avoidance of obligations under the Act, and paints an accurate picture of the easily found and exploited loopholes available to employers in the greenfields agreement process. These tactics are being used nationally to replace fairly bargained-for conditions, with award-type agreements. Some of these involve 40% wage cuts and worse.

Other examples of high profile no-stake agreements that have been approved by the FWC are BGC Contracting<sup>6</sup> and Toll Energy<sup>7</sup>. The number of applications for the approval of these agreements continues to grow, and many are approved despite concerted attempts by unions to have the applications dismissed at first instance and on appeal. As more no-stake agreements are approved, the number of employers engaging in the process will only increase. This in turn will again reduce the number of applications for the approval of greenfields agreements lodged with the FWC, and the effectiveness of any provision relating to greenfields agreements will eventually become a moot point.

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<sup>6</sup> *BGC Contracting Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Australian Workers' Union & Construction, Forestry, Mining and Energy Union* [2017] FWCFB 2741.

<sup>7</sup> *Maritime Union of Australia, The v Toll Energy Logistics Pty Ltd* [2015] FWCFB 7272.

## **Moving Forward**

The Act needs amending to ensure that an enterprise agreement can only be the result of genuine bargaining between an employer and employees/employee organisation that is authentically representative of the employees the agreement purports to cover. This includes the repeal of s182(4) and the insertion of additional legislative restraints pertaining to employees being fairly chosen, enterprise agreements being genuinely agreed and the banning of any form of no-stake agreement. Anything less will result in the persistent undermining of the legislative framework and a bastardisation of the intent of enterprise bargaining through a continuing sidestepping of the legal obligations that apply to the making of enterprise agreements in Australia.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'D. Walton', with a stylized, flowing script.

**Daniel Walton**  
**National and NSW State Secretary**  
**THE AUSTRALIAN WORKERS' UNION**