

**Greenfield Agreements Review**

**Submissions of the Construction Forestry Mining and Energy Union –  
Construction and General Division**

**CFMUEU**

## Introduction

1. The Construction, Forestry, Mining and Energy Union - Construction and General Division (CFMEU) welcomes the opportunity to participate in this review of the greenfield agreement provisions of the *Fair Work Act* 2009 following the amendments made to these provisions in the *Fair Work Amendment Act* 2015<sup>1</sup>.
2. The CFMEU is the principal union in the building and construction industry with tens of thousands of members across the country. We proudly provide a voice for building and construction workers, and workers generally, in seeking, with the utmost vigour, to build workplaces that provide well paid, fair, secure and safe work.
3. Greenfield agreements are highly prevalent, for obvious reasons, in the building and construction industry. In reviewing the number of greenfield agreements registered <sup>2</sup>since the enactment of the *Fair Work Amendment Act* 2015, in November 2015, around 60% have been negotiated with the CFMEU. We are thus not just an important voice but the critical voice to be heard in regard to the interests of workers in the greenfield agreement making process.

## Greenfield Agreements

4. It is trite that greenfield agreements are exceptional in the collective bargaining regime established by the *Fair Work Act*. That regime places primacy on bargaining between employees and employers. A greenfields agreement reached between a union and employer is anomalous in this context. It is an abnormality the Act imposes strictures around. These strictures seek to ensure that the circumstances in which a greenfields agreement can be made are circumscribed. This flows from the fact that approval of a greenfields agreement means:
  - 4.1 employees do not participate in bargaining to determine their terms and conditions of employment;
  - 4.2 employees are locked out of bargaining for the nominal term of the agreement; and
  - 4.3 employees have their terms and conditions of employment determined by a union and employer (and currently possibly just an employer, s.182 (4)).

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<sup>1</sup> We note the commitment provided by the Government to undertake this review at the passing of the *Fair Amendment Act* 2015.

<sup>2</sup> As prepared in excel form by the Department of Employment and available at;  
<https://docs.employment.gov.au/documents/list-greenfield-agreements-made>

5. The bargaining and approval regime for greenfield agreements must therefore be approached with particular care and caution and ought to be subject to rigorous scrutiny by the Fair Work Commission.
6. The consistent myopic and neo-liberal ideological claims for employer unilateralism for greenfield agreements must be rejected<sup>3</sup>. This philosophical approach was rejected by the people of Australia in the 2007 'Workchoices' election. The researched analysis of employer unilateralism during the discredited Workchoices era established that such unilateralism was simply bad for workers. An analysis of greenfield agreements and AWA's during this period (such as was able to occur given the employer unilateralism of Workchoices acted in concert with the diminution of transparency and tribunal oversight) saw the loss of protected award conditions without compensation and some particularly egregious employer behaviour in attacking workers pay and conditions and seeking to destroy their bargaining power<sup>4</sup>.
7. In the contemporary economic climate a substantial economic concern is the now apparent systemic problem of low wage growth. It is now broadly accepted, across the partisan political divide, that low wage growth is not just a direct concern for workers<sup>5</sup> but for the health of the economy as a whole. The current economic climate calls on policy makers to address low wage growth and its accompanying inequality. This is patently not done by shifting greater power to employers but by addressing the power imbalance and implementing measures to increase the power and influence of trade unions and workers.

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<sup>3</sup> Unfortunately it is anticipated the likes of the Master Builders Association and the Australian Mines and Metals Association will continue to press for employer unilateralism for greenfield agreements.

<sup>4</sup>For a strong analysis of the outcome of greenfield agreements and the effects of employer unilateralism under Workchoices including some of the egregious employer behaviour that occurred see the report prepared by Associate Professor, Ms Carolyn Sutherland of Monash University in 'Agreement-making under Workchoices: The impact of the legal framework on bargaining practices and outcomes, October 2007', see in particular pages 35-37, the report is accessible at [https://www.monash.edu/\\_data/assets/pdf\\_file/0004/901606/4880-agreement-making-web.pdf](https://www.monash.edu/_data/assets/pdf_file/0004/901606/4880-agreement-making-web.pdf)

<sup>5</sup> There has been in neo-liberal discourse an attempt to portray employer interests as in the economy's interests and employee's interests as antithetical to the 'economy'. This is quite a perverse argument and one wonders who the economy is meant to represent given members of our society are overwhelmingly remunerated via their labour not their ownership of capital. For the recent growing consensus on the need to address low wage growth see the widely reported statement by the Reserve Bank Governor Philip Lowe on the need to address low wage growth; <http://www.smh.com.au/business/the-economy/rba-governor-philip-low-wage-growth-too-low-rates-to-climb-but-not-for-some-time-20170810-gxtb2l.html> ; the ongoing stagnation in wages growth was again highlighted in the June quarter report on bargaining trends released by the Department of Employment on 23 October, available at ; [https://docs.employment.gov.au/system/files/doc/other/trends\\_j17\\_v3.pdf](https://docs.employment.gov.au/system/files/doc/other/trends_j17_v3.pdf)

8. The evidence has established that collective agreements deliver better outcomes for workers<sup>6</sup>. For greenfield agreements this review ought to explicitly reject employer unilateralism. The review should state that greenfield agreements are a unique and critical area of agreement-making under the *Fair Work Act* that requires employee protection and representation through the requirement that all greenfield agreements must be struck with employee registered organisations.

### **Greenfield Agreements and the *Fair Work Amendment Act 2015***

9. The review's background review paper, notes the two changes to the making of greenfield agreements that arose from the 2015 amendments to the *Fair Work Act* were the following;
  - a) That the bargaining representatives for greenfield agreements would now be covered by the good faith bargaining rules pursuant to the *Fair Work Act*, section 177; and
  - b) That employers can unilaterally seek to register greenfield agreements in circumstances of protracted bargaining where agreement has not been reached, section 182 (4).
10. The result of the amendments appear to be exceedingly limited. At the time of writing this submission the CFMEU is unaware of any application for good faith bargaining orders for a greenfield agreement or of any application for the registration of a greenfield agreement without the consent of a registered employee organisation.
11. The claims of trade unions being engaged in capricious or obstructionist bargaining in negotiations for greenfield agreements, as levelled by employer groups in seeking the amendments, should now be seen as problematic.
12. The union approach to negotiating greenfield agreements has not changed. We have remained focused on securing safe and fair jobs for our members and workers in the industry.

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<sup>6</sup> Agreements are available on the FWC website where the outcomes are easily reviewed. The difference is substantial; estimates vary but the wage differential between a union to non-union job is around a staggering 20%, see also David Peetz, Individual Contracting, Collective Bargaining and Wages In Australia, 2009 at [https://research-repository.griffith.edu.au/bitstream/handle/10072/29660/59864\\_1.pdf?sequence=1](https://research-repository.griffith.edu.au/bitstream/handle/10072/29660/59864_1.pdf?sequence=1); we note this is consistent with the international experience see one researched example in the United States, George Long, Differences between union and non-union compensation, 2001 – 2011, Monthly Labor Review, April 2013 at <https://www.bls.gov/opub/mlr/2013/04/art2full.pdf>.

13. We note the decline in greenfield agreements lodged for the period 2015/16 and the review's background paper indicating that this may be linked to the reduction in investment in the mining industry. We would comment that we believe the downturn in the mining industry has had an impact, along with the completion of a number of major resource projects although the extent of the impact is difficult to assess. We make no further comment on the basis for the reduction in greenfield agreements other than to note the assertion by employer groups that the previous legislation was a disincentive to employers to enter into greenfield arrangements is entirely at odds with this outcome.
14. The provisions providing for employer unilateral agreement making for greenfield agreements, section 182 (4), was based on assertions of capricious conduct by trade unions in the greenfield bargaining processes<sup>7</sup>. The failure to see any good faith bargaining applications or the invocation of s 182(4) to conclude agreement-making raises serious concerns about the basis for these assertions. We ought to at the very least acknowledge reliance was wrongly placed on these assertions by employers. The good faith bargaining provisions and their application to greenfield agreements allows actual evidence to be put before the Commission about capricious or indeed unreasonable conduct. This has not occurred. Employer unilateralism for greenfield agreements must now be abolished.
15. We note the review's background paper acknowledges the position of the Productivity Commission in rejecting a return to the 'Workchoices' era of employer unilateralism for greenfield agreements<sup>8</sup>. Having regard to the failure, as noted above, for employers to provide any evidence of unreasonable conduct in bargaining for greenfield agreements the other measures proposed by the Productivity Commission are without merit and are simply variations on employer unilateralism, albeit a step back from the Workchoices regime.
16. Employer groups have engaged with the good faith bargaining regime in the *Fair Work Act* in their advocacy regarding the JJ Richards Case<sup>9</sup> (which was wrongly labelled as 'strike first talk later'<sup>10</sup>) in seeking that bargaining occur before the capacity to strike is engaged. The provisions are thus broadly accepted by stakeholders and ensures that good faith bargaining must occur and if it is not occurring there are simple and easily accessible measures to gain relief through the good faith bargaining rules and the Fair Work Commission. Employers seeking greenfield agreements should require nothing more. We note despite the now questionable assertions of capricious conduct there was no evidence

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<sup>7</sup> See the review paper at page 11 in referencing the 2012 Fair Work Act Review.

<sup>8</sup> The review's background paper at page 14.

<sup>9</sup> *J.J Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

<sup>10</sup> A simply false assertion when the facts in this case was that the employer refused to bargain at all. Indeed the amendments successfully sought now advantage employers who act capriciously and counter to the objectives of the Act. It is an example of legislators acting ideologically and or believing the 'spin' raised in response to this case by the likes of AMMA.

of any project not proceeding by want of an agreement in the 2012 Fair Work Act Review<sup>11</sup>. Regardless, employer unilateralism, is not the solution to any assertion of bad faith bargaining for all stakeholders involved in the pursuit of a greenfield agreement.

17. In response to the outcome of the 2015 amendments to the *Fair Work Act*, the CFMEU, as the primary organisation representing greenfield employees, seeks this review recommend the repeal of section 182 (4) of the *Fair Work Act*.

### **Other issues in regard to greenfield agreements**

18. The CFMEU has serious concerns with what has been termed, ‘brownfield agreements’<sup>12</sup>, that is agreements that have nominal employees in comparison to the scope and coverage of the agreement being sought. Following the *John Holland* case<sup>13</sup>, probably the seminal case in dealing with the requirement for the employee cohort in an agreement to be fairly chosen, we have unfortunately seen employers placing reliance on *John Holland* to act to manipulate the bargaining process. To ‘game the system’, by making agreements with a small number of employees (sometimes handpicked) to seek to secure agreements with massive scope and coverage, invariably at or around legal minima wage rates<sup>14</sup>. A classic example of this conduct was disclosed in the *Site Fleet Services* case<sup>15</sup>. In *Site Fleet Services*, a labour hire group set up a new entity and then hand-picked 14 ‘employees’ off its database to allegedly ‘bargain’ for a new enterprise agreement with national coverage and job classifications covering same 10 modern awards<sup>16</sup>! The case highlighted a disgraceful attempt to game the system. In rejecting the agreement for approval Commissioner Roe stated;

*‘..the process of making the agreement lacked authenticity and moral authority’* (at [45])

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<sup>11</sup> See page 11 of this Reviews background paper.

<sup>12</sup> Agreements where the ‘stake’ of employees in the agreement is limited and problematic and often coupled with the agreement containing substantial scope and application.

<sup>13</sup> *John Holland v CFMEU* [2014] FCA 286.

<sup>14</sup> In our extensive experience often not containing provisions for wages to be increased over the life of the agreement or to be increased at the whim and sole discretion of the employer. On numerous occasions, arising from our objections, agreements have been withdrawn due to the failure to meet legal minima or undertakings (often numerous undertakings) have been required by the Commission.

<sup>15</sup> *Site Fleet Services Pty Ltd* [2017] FWC 2163.

<sup>16</sup> The 10 modern awards covered a multitude of industries and in excess of 100 classifications. The wage rates offered were around 36 cents an hour above the award, in substance therefore award rates, whilst a host of conditions were less beneficial than the award including conditions that would affect remuneration.

19. We are concerned ‘brownfield agreements’ are being used to avoid coverage of existing agreements, to avoid the greenfield agreement making obligations in the *Fair Work Act* and to ‘bargain’ in a manner contrary to the objectives of the *Fair Work Act*<sup>17</sup>.
20. Whilst possibly outside the purview of this review<sup>18</sup> we would welcome the reviewer noting the ‘brownfield agreement’ phenomenon and that it constitutes attempts by employers to bargain in a manner inconsistent with the objectives and intention of the *Fair Work Act* and in some cases to seek to avoid the employer’s obligation to negotiate a greenfield agreement with a registered employee organisation.
21. The length of greenfield agreements is raised for possible comment. We do not propose any changes to the current arrangements, where the provisions are consistent with non-greenfield agreements, that is, one to four years. Comments by the Productivity Commission that greenfield agreements could be extended to 5 years and or the length of the project,<sup>19</sup> are with respect, not appropriate having regard to the nature of greenfield agreements as we noted earlier in these submissions.
22. In regard to administrative issues we hold some concerns that 32 days from lodgement to approval for a greenfield agreement appears too long. We however hold concerns over the agreement review functions currently being undertaken and what we perceive as the failure by the Fair Work Commission to address serious issues regarding the BOOT and genuine agreement in the current assessment processes for enterprise agreements. We would place primacy on this issue as opposed to turnaround times. Although we do not see them in conflict and both turnaround times and the quality of the review and analysis of enterprise agreements can be improved simultaneously in our view.

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<sup>17</sup> The issue of brownfield agreements was addressed by a number of the submissions to the Senate inquiry into Corporate Avoidance of the Fair Work Act, as some examples we refer to the submissions of the ACTU and Maurice Blackburn Lawyers, submission 182 and 157 respectively.

<sup>18</sup> We note the scope of the review provides for parties to address systemic issues per dot point 4, page 19 of the background paper for the review.

<sup>19</sup> See page 15 of this review’s background paper.

## Concluding Comments

23. This review ought to reject employer unilateralism in the unique arrangements for the making of greenfield agreements under the *Fair Work Act*. To this end the review must recommend the repeal of section 182 (4) of the *Fair Work Act*.

### CFMEU Recommendation;

The amendment arising from the *Fair Work Amendment Act 2015* to allow for unilateral employer greenfield agreements, section 182 (4) of the *Fair Work Act*, should be repealed.

Construction, Forestry, Mining and Energy Union  
25 October 2017