Attracting major infrastructure, resources and energy projects to increase employment: Project life greenfield agreements.

Response to Attorney General's Department Discussion Paper

ACTU Submission, 1 November 2019
ACTU D. No 46/2019

Table of Contents

Overview

The ACTU is the peak trade union body and only national confederation representing working people and their unions in Australia. It consists of affiliated unions and State and regional trades and labour councils, collectively representing more than 1.5 million union members engaged across a broad spectrum of industries and occupations in the public and private sector. For more than 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

We and our affiliates are vehemently opposed to the introduction of "life of project" greenfield agreements, as referred to in the discussion paper to which we respond (hereafter, 'Discussion Paper 2'). The proposal is not a new one, being a variation on that last ventilated during the Productivity Commission's Inquiry into the Workplace Relations Framework in 2014-15 (and thereafter, not proceeded with). It is tantamount to creating something akin to special economic zones that deny working people fundamental labour rights to collective bargaining for the benefit of employers in the extractive industry and any other industries which might fit the nebulous description adopted in Discussion Paper 2 of "major infrastructure, resources and energy projects". Given the radical nature of the proposal, we derived some comfort from the recent declaration in Parliament by the Attorney General that the proposal would not be adopted in the absence of consensus:

> *....the Morrison government has undertaken to clearly identify ways in which we can increase productivity and make the IR system more efficient and fairer for both employers and employees, the idea being that we need to find ways, where there is a consensus that can be built around policy changes, that would put upward pressure on wages and make businesses stronger and help them to employ more people.*
>
> *.... if it is the case, as we have suggested in a recent discussion paper, we can find consensus about how to have enterprise agreements for the life of those projects.*[1]

Our clear and unambiguous statement, as the peak council representing the trade unions who are necessary parties to greenfields agreements, is that we do not support the proposal. As discussed herein, the proposal will interfere with the fundamental rights of workers to collectively bargain, in order to benefit profitable industries with a promise to remove a mythical barrier to investment, in

[1] Answer given by Attorney General to question without notice by Steven James MP, House of Representatives Hansard, 20 October 2019.

the absence of any cogent evidence that those industries are facing any significant issue with the existing provisions relating to greenfield agreements. It should follow that the proposal is abandoned.

The slippery slope continues

The provision of "life of project" greenfields agreements would mark a further deterioration of labour rights in Australia.

The *Fair Work Act 2009* (hereafter, 'FW Act') has been identified by the United Nations' *International Labour Organization* as failing to give effect to fundamental rights protected by international Conventions, such as the right to strike, freedom of association, the right to organise and the right to collectively bargain.[2] From that low base of protection, the government has progressively singled out particular workforces for even harsher measures:

- It took the extraordinary step of reintroducing the Australian Building Construction Commission and associated laws, which have brought about further knowing and deliberate transgressions of Australia's obligations under international conventions;
- It voted eight times in the Commonwealth Parliament to cut the Sunday and public holiday penalty rates of workers in the retail, hospitality, fast food and pharmacy industries, wilfully blind to the experts' view that it was likely to cause harm to those workers with no corresponding benefit[3], a view that was subsequently proven empirically[4];
- It acted to further restrict collective bargaining rights among its own workforce and the workforce of Government Agencies who are supposedly independent (such as statutory agencies), by placing artificial limits on wage increases and the duration of enterprise agreements, prohibiting enhancements beyond model provisions for consultation and dispute resolution and requiring that "conditions are not be enhanced overall" within those agreements.[5]
- It narrowed the scope of collective bargaining for emergency services workers.[6]
- It introduced a variation on WorkChoices era "employer greenfields agreements", allowing employers to seek to have the terms and conditions it desires imposed upon an incoming workforce and a union bargaining representative, irrespective of whether the union agrees to those terms or not.[7]

---

[2] ILO Committee of Experts on the Application of Conventions and Recommendations: Observation adopted in 2009, published 99th ILC session (2010); Direct request adopted 2009, published 99th session (2010); Direct request adopted 2011, published 101st session (2012); Observation adopted 2011, published 101st ILC session (2012); Direct request adopted 2013, published 103rd session (2014); Observation adopted in 2016, published 106th session (2017).
[3] Open letter from Economics and Other Professionals in related disciplines, 6 April 2017.
[4] O'Brien, M & Markey, R. (2019), The Impact of Penalty Rate Reductions on Employment Outcomes in Retail and Hospitality: A report on survey analysis findings.
[5] *Workplace Bargaining Policy 2018*
[6] Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016.
[7] FW Act s. 178B, 182(4).

Now it seems the workforces of "major infrastructure, resources and energy projects" are in line for a second round of special treatment. In a context where 76% of the workforce currently holds their job for more than 1 but less than 5 years[8], it is clear that the adoption of the proposal will deny a large proportion of the workforces impacted by it the right to collective bargaining.

Discussion Paper 2 appears to mount an argument that the denial of fundamental collective bargaining rights is justified by the assertion that this is necessary to secure investment in large infrastructure projects. There is no such justification and there is no evidence of significant risk to investment driven by uncertainty of labour costs. Whilst we do not accept in principle that collective bargaining rights should be dismissed on that basis, we also point out that the ratio of wage growth to profit growth in the mining and construction industries in the year to June 2019 – the industries which Discussion Paper 2 indicates are those in which just over 55% of greenfield agreements are made - are already highly favourable to business compared to the average across all industries.

	Growth in profits, year to June 2019	Growth in salary and wages, year to June 2019
Mining Industry	25.5%	5.8%
Construction Industry	6.1%	-.6%
All Industries	10.6%	4.3%

Source: ABS 5676.0 (June 2019)

The mining and construction industries are clearly not in need of any special assistance. However, like in many other industries, their workforces are in need of measures to assist them get a fairer share of the wealth they generate. A further denial of collective bargaining rights will not deliver this.

To the extent that economic need is said to relate to the need to provide certainty during the investment phase, we would note that this was one of the justifications advanced in support of the revisions to the greenfield agreement making provisions in 2015.[9] When those provisions were reviewed in November 2017[10], after having operated for two years, it was found that *no* employers had in fact applied to make the unilateral "agreements" for which the legislation provided. Further,

[8] ABS 6226.0 (February 2019)
[9] Australian Government (2017), *Greenfields Agreements Review* at p.6, Explanatory Memorandum to the *Fair Work Amendment Bill 2014*, at p.ix-x
[10] Australian Government (2017), Greenfields Agreements Review

Discussion Paper 2 offers no examples of proposed infrastructure or other major projects that have not progressed because of long term uncertainty around labour costs attributable to existing greenfield agreement provisions.

The recently released Annual Report of the Fair Work Commission indicates that in 2018-19, only 3 applications for such "agreements" had been made (against 202 applications for regular greenfield agreements).[11] On closer examination, even that very small number provides no evidence of a need for investor certainty on greenfield projects:

- Two of the applications related to the same project. The applications were dismissed because the projects were not greenfield projects at all: the joint venture seeking the agreements had already commenced the works they were contracted to perform, and been paid over $860 million for having done so.[12]
- The other application was also dismissed, this time because the applicant did not provide a copy of the actual agreement (and the other required supporting documents) despite multiple requests by the Fair Work Commission.[13]

Furthermore, as recent analysis by the Centre for Future Work has shown, there is no evidence of a wages 'blow out' following the nominal expiry of greenfields agreements. By and large the new wage settlements are consistent with the agreements that they have replaced with very little variation between the average wage increases provided in greenfield agreements compared to the average wage increases for the conventionally negotiated agreements which have replaced those agreements where work is continuing. In the past three years the wage settlements have reflected the wider experience of enterprise bargaining in the economy with more modest pay rises. It follows that the premise of Discussion Paper 2 that there is a public interest need to deny workers on major infrastructure projects the right to collective bargaining in order to prevent them from holding the project to ransom until they can achieve unreasonable wage rises is false.

Further, it should not be assumed that all major projects are delivered using greenfield agreements. There are a raft of important infrastructure and building projects which require substantial investment which are delivered routinely around the country without the use of greenfield agreements at all. This typically includes the building of hospitals, roads and schools; three specific project types referred to in Discussion Paper 2 (page 3).

---

[11] Fair Work Commission (2019), Annual Report 2018-10: Access to Justice, Appendix D, Table D16.
[12] Applications by CPB Contractors Pty Ltd & John Holland Pty Ltd [2019] FWC 1122
[13] Application by Strata Plan 77815 [2018] FWC 7603

However, just because there is no *need* to adopt life of project agreements, that does not mean they will not be used. For some employers, the availability of life of project agreements might lead to greater interest in relying on the 2015 Amendments to the FW Act to have their own "agreement" locked in place for the duration of their operations, and their "bargaining in good faith" strategies will be modified accordingly. In effect there will be a capacity to "weaponise" s 178B, s.182 (4) and 187 of the Fair Work Act 2009. The prospect of such widespread avoidance of collective bargaining makes it critically important for the government to spell out clearly just which types of operations are contemplated within the "major infrastructure, resources and energy projects" description used in Discussion Paper 2.

Clayton's greenfield agreements

The ACTU and our affiliates have long raised concerns about what we have variously termed "no-stake agreements", "base line agreements" or "Clayton's greenfield agreements". Much like "the drink you have when you're not having a drink", these agreements are made for greenfield projects, but are not greenfield agreements because they are not negotiated with (let alone agreed with) a representative union. Instead, they are made between the employer and a small number of employees (perhaps even 2 or 3) who do not represent the interests of the broader workforce and are often only engaged casually and for a short term, prior to the engagement of a full scale operational workforce. Despite the decision of the Federal Court in invalidating the One Key Resources sham enterprise agreement in April 2018, unions remain concerned that these "baseline agreements", that bind hundreds or even thousands of workers, are often characterised by the fact that they are:

1. Not union negotiated and indeed not negotiated at all but are unilaterally developed by employers,
2. Are voted on by a very small cohort of workers, and
3. Offer minimal pay and conditions designed to satisfy BOOT but undercut established rates in the industries covered by the agreements.

It should be recalled that Australia is unusual in authorising the making of collective agreements directly with employees, even where unions covering workers of that class exist. The International Labour Organization's Committee on Freedom of Association has expressed the view that this may be detrimental to the principle that negotiations between employers and organisations of workers should be encouraged and promoted.[14]

It might be thought that a greenfield agreement would be an available method of ensuring union involvement that secures industry standard terms and conditions and delivers higher wages to a workforce on a greenfield project over the nominal life of an agreement. However the decision of the High Court of Australia in *Aldi Foods Pty Ltd v. Shop Distributive & Allied Employees Association*[15] firmly establishes that a greenfields agreement becomes unavailable from the moment an employer agrees with *any* existing employee that it *will* employ them in a new business or undertaking it wishes to establish, even where that employee currently works in a completely

[14] ILO (2018), "Freedom of Association: Compilation of decisions of the Committee on Freedom of Association", 6 ed, at [1344].
[15] [2017] HCA 53

different part of the business.[16] It would appear, as a result, that large contracting companies can propose an agreement for work to be performed under a new tender to 2 workers engaged casually under an existing tender if it has offered them and they have accepted a position working under that new tender. This applies irrespective of whether either of those workers do, in fact, *ever perform work* under the new tender. In so doing, the employer can prevent the taking of protected industrial action in support of collective bargaining by the workforce ultimately employed to work under the new tender, and unilaterally prevent the implementation of any new collective agreement for that workforce, for up to four years.[17] Such conduct clearly undermines collective bargaining and organising and eliminates the right to strike.

The incentive for employers to pursue such a strategy is that it locks down the terms and conditions in the undertaking, below those that would be likely if a union had been involved. It also prevents lawful protected industrial action being taken in support of claims for improvements, until the nominal expiry date. Save for the compromised acquiescence of the handful of employees involved, these are essentially unilateral agreements whose closest parallels are the unilateral employer greenfield "agreements" of the *WorkChoices* era. Agreements of this type are referred to as "baseline agreements" by employers. Unlike the market reception of Clayton's beverages, many opportunistic employers have taken the view that baseline agreements are better than the real thing.

Our affiliates have dealt with numerous instances of these agreements both in the context of greenfields work such as the Aldi case and in the broader context of enterprise bargaining. In some cases, they have succeeded in ultimately having the agreements set aside, but only after the agreements have first been approved by the Fair Work Commission. For example:

> Rigforce[18]
>
> The AWU succeeded in having an agreement set aside, which purported to cover employees throughout Australia for a labour hire provider in the offshore drilling industry. The agreement was made with 3 workers. The company concerned, Rigforce, had made a previous agreement in 2013 (also with 3 workers) which had reached its nominal expiry date. The 2013 agreement provided that any wage rises beyond those effective in 2013 were at the "complete discretion" of the company. However, in 2015, a related entity made

[16] At [24], [73]-[87]
[17] FW Act s 51-54, 219-224, 413(6), 417.
[18] See [2019] FWCFB 6960

a new agreement, also with 3 employees. All three agreements covered the same type of work. Rigforce global boasts on its website of being a global provider in the industry since 2008, "..dealing exclusively with workforce solutions for offshore drilling operations".[19]

The 2015 agreement had been identified by our affiliates as providing the poorest terms and conditions in the offshore drilling industry, and indeed the rates were below those expressed as the starting rates in the 2013 agreement. The 2015 agreement was the agreement governing the work at the relevant time.

Efforts were made by our affiliates to recruit members so bargaining could be commenced. Thereafter, the employing entity listed on the payslips for some of the employees changed from RFMS (which had made the 2015 Agreement) to Rigforce (the entity that had made the 2013 Agreement). Three employees of Rigforce had voted on and made the new 2019 Agreement before our affiliates could formally commence bargaining.

Ultimately, what decided the appeal was one incorrect statement made by the employer in the materials it circulated to those three employees. The statement was that the minimum wage rates had been increased. The rates were indeed higher than under the 2015 Agreement, but that agreement was with a different employing entity. The rates were lower than those in the 2013 Agreement, which applied to the employing entity which the Rigforce Group had chosen to revive and utilise for the purposes over the 2019 Agreement. It appears the employer had been confused by its own subterfuge.

The legal ruling was that the agreement had not been genuinely agreed to because the employer had not taken all reasonable steps to explain the effect of the agreement. However, other grounds of appeal, which were directed toward the contrivance which had enabled the avoidance of bargaining, did not succeed. For example, the Full Bench was not satisfied that there were any other reasonable grounds for believing that the agreement had not been genuinely agreed to and were satisfied that the group of employees had been fairly chosen. On the last issue, the Full Bench said:

> *"The real complaint of the AWU is that the Rigforce business has changed the corporate entity it uses to employ its workforce and make enterprise agreements in order to avoid bargaining with the substantial portion of its existing workforce, for many of whom the AWU would have been the default bargaining representative. It*

[19] https://rigforceglobal.com

> *may be accepted that an inference could be drawn from the available material that this is what has occurred, although we note that Rigforce's position is that it wished to consolidate its employment in one single corporate entity. However, it seems to us that the "fairly chosen" requirement in s 186(3) and (3A) is concerned with the selection of the group of employees employed by the employer or employers who made the agreement in question, and does not deal with a situation where a group of companies selects (and perhaps manipulates) different employing entities within the group at different times for the purpose of making enterprise agreements and operating as the employer of the relevant part of the workforce. In other words, taking the AWU's case at its highest, it is not demonstrative of any error in the conclusion that the "fairly chosen" requirement was satisfied."*

In our view, the "real complaint", as referred to by the Full Bench, is one which should preclude an agreement being made.

Broadspectrum

Broadspectrum, formerly known as Transfield, is a major provider of logistics, engineering, construction services, maintenance services and numerous other services under competitive tendering arrangements. It forms part of the Ferrovial Group of companies, which has an annual revenue of $19 Billion.[20]

In 2015 it decided to establish a new business unit in order to procure work in court premises and correctional facilities. It hired four staff in mid 2016, for the purposes of preparing tenders to procure that work. A month or two later, it asked those four employees to vote on agreement that would apply to work to be performed in those locations in the event that Broadspectrum secured that work. It did not secure a contract to perform any such work until some three months after the agreement had been made, and did not commence performing that work until the following year.

The agreement was initially approved by the Fair Work Commission; however, it was challenged by our affiliates on two principal bases. Firstly, that the agreement was not made by employees who were covered by it and secondly that the employees who did vote on it had no stake in the agreement.

[20] http://www.broadspectrum.com/about-us

This matter involved 6 proceedings[21] in three forums[22] over two years to finally conclude that there was something not right about office four workers voting to approve an agreement that covered work in private prisons which they were not employed to perform.

A close reading of the decision of the Full Federal Court in the matter, which deals with the decision of the Hight Court in *Aldi*[23] does however indicate that the result would have been different had the relevant workers been explicitly contracted from the outset to perform the work in the private prisons once that work became available.

The "no stake" argument was not determined. It is not clear that it would have succeeded.

UGL

UGL was, via a joint venture, a contracted provider of maintenance services to Esso. Those services were provided at Esso's onshore and offshore gas facilities in South Eastern Victoria. The work was governed by union negotiated enterprise agreements.

UGL was re-awarded the tender for the work, and commenced negotiations with unions for a new enterprise agreement. In parallel to this, it used a subsidiary company to make a new agreement with 5 workers in Western Australia. Thereafter, the UGL workforce engaged at the Esso facilities were laid off by UGL and informed that they could apply to do the same work for the subsidiary company – a rates of pay reduced by up to 30%. A bitter industrial dispute followed and raged for two years before a confidential settlement was reached.

SESLS Industrial

SESLS Industrial Pty Ltd (SESLS) is a labour hire business operating across coal and other heavy industries. It is a wholly owned subsidiary of SES Labour Solutions (SES), with the parent company of both SES and SESLS being Brunel Energy, a global labour hire and recruitment company operating in over 30 countries.

In 2013 SES made an agreement with its workforce, with a nominal expiry date of 19 April 2017. In March 2017, rather than bargain with the SES workforce for a new Agreement,

[21] [2016] FWCA 8209, [2017] FWCFB 871, [2017] FWC 1818, [2017] FWCFB 3202, [2018] FCAFC 139, [2019] HCATrans 057.
[22] Fair Work Commission, Federal Court and High Court.
[23] [2017] HCA 53

SESLS made an agreement with just three employees, all of whom were purportedly engaged as casuals under the Award. The effect of this Agreement was, among other things, to remove a number of protections around the hours to be worked by employees and the way in which those hours would be worked, as well as reducing allowances payable and drastically increasing the circumstances where an employee's employment can be terminated without notice when compared with the Award. Under the new Agreement employees were paid only 1% above the Award rate.

By making the Agreement as SESLS rather than SES, the Company reduced the risk of employees – and their union – bargaining for a better deal, including the risk of industrial action. Since making the Agreement, SESLS has expanded exponentially, with that workforce being precluded from bargaining until the SESLS Agreement expires in 2021.

There would be many more examples, including those that were never discovered by our affiliates or discovered only after the time for lodging an appeal had expired.

If the Government is serious about making the IR system fairer and putting upward pressure on wages, it is critical that it closes this loophole. However, by proposing life of project agreements rather than closing down the "baseline" option, the Government is simply adding options to the menu of ways to avoid collective bargaining and to suppress wages.

Response to discussion questions

Are there examples or case studies where projects have been delayed or deferred because a greenfield agreement has reached its nominal expiry date, and there is difficulty in negotiating a new agreement? What are the implications of this occurring?

It is conspicuous that these questions are being posed. It is novel for a policy development process to commence with a request for evidence to justify a pre-determined policy outcome. As outlined in the previous chapter of this submission, it is now clear that while new enterprise agreements in the private sector are increasingly rare, new agreements are being negotiated to replace greenfields agreements and they are delivering outcomes that broadly reflect the relevant wages market. Average wage settlements in the past three years have followed the broader economic trends of more modest wage growth. In any event, the experience of our affiliates in re-negotiating greenfield agreements is consistent with the range of outcomes which might be expected in the limited collective bargaining framework the FW Act provides.

The Gorgon Project - Barrow Island Enterprise Agreement 2015[24] is an example of a major project where a greenfields agreement was successfully replaced with an enterprise agreement during the construction phase of the project with no delay or deferral. The Fair Work Commission offers this description of the Gorgon Project,

> "The Gorgon Project will develop the Gorgon and Jansz-Io gas fields, located within the Greater Gorgon Area, about 130 kilometres off the north-west coast of WA.
>
> The $43 billion investment includes the construction of a three-train 15 million tonnes per annum Liquefied Natural Gas plant on Barrow Island, offshore subsea architecture and a domestic gas plant with the capacity to provide 300 terajoules per day to supply gas to Western Australia. First gas is expected in 2014.
>
> Gorgon will employ about 10,000 people at peak construction and create more than 3500 direct and indirect jobs throughout the life of the Project.[25]

[24] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae415859.pdf
[25] https://www.fwc.gov.au/about-us/members-case-allocations/case-allocation-system/chevron-gorgon-gas-project

It should be recalled the review of greenfield agreement making, concluded less than 2 years ago, examined the merits of extending the expiry date of greenfield agreements .[26] An unusual feature of the review process was that it was effectively conducted through two streams: Whilst an open, public submission process was conducted in which employee and employer organisations participated, the review also consulted with "experienced workplace relations professionals involved in major resource development projects on an in-confidence basis"[27] , who had not made public submissions, well after the time for the lodgement for public submissions had closed[28]. This obviously denied our affiliates the right to interrogate and respond to the materials put by those persons. Notwithstanding this inherent procedural bias which effectively awarded the resources industry a free kick, when it came to address the issue of life of project agreements, the review found "…a basis for this has not been made out in the material provided to this review"[29]. To the extent that the review did expose the views the unnamed "experienced workplace relations professionals involved in major resource development projects", it is clear that even as a group their views on the issue were equivocal:

> *"Observations from workplace relations professionals involved in resource development and infrastructure construction projects were varied. A majority observed that while most contractors completed their work on a given resource development project within a four-year time frame, delays in the completion of projects, or simply, the duration of some projects sometimes meant that a greenfields agreement reached its expiry date before the contractor had completed its scope of work. This meant that renegotiation of agreement arrangements occurred at a time in the life of the project that was particularly sensitive. However, in most instances greenfields agreements applying in both resources projects and infrastructure construction projects operate so that they expired at different times over the life of a project and thereby minimised the potential for disruption associated with the renegotiation process. Some practitioners observed that five year or 'end of project' agreements were likely to be difficult to negotiate and could establish higher wages and conditions."* (emphasis added)

Does the current 4 year maximum term for a greenfield enterprise agreement represent a significant problem for employers, workers and proponents of, or investors in, greenfield projects?

---

[26] Australian Government (2017), Greenfields Agreements Review at p.46
[27] Australian Government (2017), Greenfields Agreements Review at page 33, note 54.
[28] Australian Government (2017), Greenfields Agreements Review at pages 9-10
[29] Australian Government (2017), Greenfields Agreements Review at p.47.

The statistics and examples quoted on pages 2-3 of Discussion Paper 2 are not consistent with their being a problem from an employer or investor perspective.

Potential investors are in the business of assessing the total risk v reward offered by any proposed project and they are fully aware that they need to price in those risks when deciding which projects to invest in and at what price. They consider a whole range of risks including sustainability, broader economic conditions and who bares the risk if something goes wrong (e.g. toll roads and risk of underutilisation).

Despite the apparent assumption that life of project length greenfield agreements might offer some investors greater certainty of the associated labour costs for a given project, there are consequential risks that those same investors would need to consider, and they include the risk the labour costs being locked in at either too high or too low a level. The risk of cost being locked in at too low level brings with it the prospect that thinly capitalised labour hire service providers being unable to sustainably provide the skilled workforce required for the project, thus leaving the investor exposed to unexpected costs.

By comparison the current four-year limits on the nominal life of a greenfield agreement allows for medium term planning while ensuring the capacity to recalibrate in order to ensure a reliable supply of skilled labour on the project.

Should there need to be a maximum length to a greenfield enterprise agreement at all, and if so what should it be and why?

Enterprise agreements are required to have a nominal expiry date not more than 4 years after the date on which the agreement is approved by the Fair Work Commission.[30] However, an enterprise agreement continues to operate beyond its nominal expiry date until it is terminated or replaced by another agreement.[31]

The function of the nominal expiry date is not to signify when the agreement "expires" in the manner in which that word is commonly understood. Rather, the nominal expiry date is used as legal drafting device to condition other rights.

---

[30] Fair Work Act 2009, s. 186(5).
[31] Fair Work Act 2009, s 52-54, 58

The rights conditioned by the nominal expiry date are significant. For example, the various lengthy processes and approvals involved in employees and unions being permitted to organise a lawful strike (or any other form of "protected industrial action") cannot be commenced until 30 days before the nominal expiry date of an existing agreement[32] and no protected industrial action can be engaged in until after that nominal expiry date.[33] In addition, the "good faith bargaining requirements"[34] which ordinarily apply when bargaining is underway, cannot be enforced more than 90 days before a nominal expiry date.[35] The good faith bargaining requirements provide, among other things, that an employer must recognise and bargain with the employees' union(s), that it must participate in meetings with them and that it must give genuine consideration to and respond to their proposals and give reasons for those responses. Protected industrial action and, to a lesser extent, good faith bargaining orders, are important means by which unions can influence and progress bargaining to conclusion.

The limitation of the right to strike to the narrow confines of enterprise bargaining and only after any applicable agreement has passed its nominal expiry date, is one of many areas where the FW Act falls far short of Australia's international commitments to workers' rights.[36] Open ended agreements supressing bargaining rights for even longer than the 4 years permitted today are not supported by us or our affiliates, in any context.

The legitimate pathway to extending the term of any enterprise agreement is collective bargaining for a replacement agreement, supported by a right to strike.

What benefits are likely to arise for employers, workers and the community if length of project greenfield agreements were possible?

Any benefits would be one-sided in favour of some employers and against the national interest. We would expect that the availability life of project greenfield agreement would lead to increased reliance on sections 182(4) and 178B of the FW Act by employers, because of the difficulty of reaching agreement on any terms that adequately justify an indeterminate suppression of

[32] Fair Work Act 2009, s. 438(1)
[33] *Fair Work Act 2009*, s. 413(6), 417.
[34] Fair Work Act 2009, s .228
[35] Fair Work Act 2009, s. 229(3)
[36] International Labour Organisation, Op. Cit note 2 above.

bargaining rights (particularly in a context where the bargaining rights provided by the FW Act are deficient in any event).

Any proposal to extend the nominal life for a period beyond four years seriously weakens the protection offered by s.187(6) whereby the agreement must be one that, "provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work." This is a point in time provision to prevent employers from using greenfields agreement from undercutting workers' pay and conditions. There is nothing in the Fair Work Act that requires a greenfield agreement to provide for on-going wages growth.

Given the primacy of enterprise agreements in determining the minimum wage levels payable to employees, any open-ended extension of the life of a greenfields agreement risks replicating the experience of workers trapped on WorkChoices era agreements still in force some ten years after the advent of the Fair Work Act. Here we specifically draw attention to the expertise of hospitality workers in the Merivale Group who were still paid WorkChoices flat hourly rates in 2018 that have fallen well behind the modern award safety net[37].

Where a greenfields agreement does provide for ongoing wages growth, if the wages set in the agreement prove to be an underestimate of the market, there may be retention issues and labour supply problems for employers and transaction costs for those workers who leave the employment. Those who remain in their employment would experience relative declines in their standard of living. Particularly where projects are centred around rural and regional towns, there may be community wide detrimental economic effects if a major employer in the region is not paying wages that support the continued growth of the consumer demand elements of the local economy .

It is more difficult to predict the effects of an overestimate. Judging from the reasoning in Discussion Paper 2, if the return on investment is certain and consistent with what was predicted, it ought not matter that the wage costs are significantly above market. We would be aided in considering this issue if we had some certainty about whether the proposal also involves retention of the procedures concerning terminating agreements that have not reached their nominal expiry date. In particular, is it proposed that the employer will remain irrevocably bound by the "life of project" agreement unless the employees agree to terminate it and the Fair Work Commission considers it appropriate to do so?[38]

---

[37] https://www.abc.net.au/news/2018-11-12/merivale-staff-move-to-kill-off-pay-agreement/10467566
[38] See FW Act s. 219-224.

Are there any known risks that might arise for employers, employees, promoters of, and investors in, greenfield projects if greenfield agreements were allowed to operate for a project's length, and how might any risks be mitigated?

There would be competitive risks for the investment and labour markets associated with these projects, and the "prevailing pay and conditions test" for new deemed "agreements" would become increasingly difficult to apply and become significantly less effective over the life of a project .

Should longer project agreements be required to allow some form of escalation in wage rates over the period of the agreement?

The legitimate pathway to setting wage rates is collective bargaining, supported by a right to strike consistent with recognised international standards.

Should there be a mechanism to extend, or to shorten, an existing greenfields enterprise agreement? If so, how might this work?

The legitimate pathway to varying the term of any enterprise agreement is collective bargaining for a replacement agreement, supported by a right to strike consistent with recognised international standards.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU D No.

46/2019

ACTU Australian Unions