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Committee Secretary
Senate Education and Employment Legislation Committee
PO Box 6100, Parliament House
Canberra ACT 2600

BY EMAIL: eec.sen@aph.gov.au

Dear Committee Secretary,

INQUIRY INTO THE *FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) BILL 2020*

1. At the Senate Committee hearing for the Inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**the Bill**) held in Canberra on 19 February 2021, the following question on notice was put to me:

   Senator O'NEILL: *Chair, could I put one question on notice? Mr Noonan, in your opening statement you referred to 'six months of bogus bargaining' with regard to greenfields.*
   Mr Noonan: *Yes.*
   Senator O'NEILL: *We've run out of time to take your evidence today but, if you could provide a statement explaining that in your very clear way, it would be much appreciated.*
   Mr Noonan: *Yes.*

2. The question was in reference to the "major projects" greenfields agreement provisions contained in Schedule 4 of the Bill. My reference to "six months of bogus bargaining" was a reference to the fact that the Bill will interact with current provisions of the *Fair Work Act 2009* (**FW Act**) so as to facilitate and incentivise employers to make unilateral, "employer-only" greenfields agreements (without the agreement of any relevant union) after the completion of a 6 month bargaining period.

3. Since the enactment of the *Fair Work Amendment Act 2015* (**the 2015 Amendments**), the relevant provisions of the FW Act operate so that:

   a. an employer is able to issue a written notice to commence a notified negotiation period for a greenfields agreement;

b. the good faith bargaining provisions (and other provisions of the FW Act which are designed to facilitate fair bargaining) will apply, but will fall away six months after the written notice is issued[1];

c. after the six month period, the agreement is taken to have been 'made' and an application for approval can be unilaterally lodged by an employer in the Fair Work Commission (**FWC**); and

d. FWC *must* then approve the agreement subject to a test which requires it is be satisfied that the greenfields agreement "on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work". [2]

4. The 2015 amendments were legislated in the context of assertions by employer associations alleging capricious conduct by trade unions in the greenfield bargaining processes. Those claims were disingenuous and have proven to be wrong. This is demonstrated by the fact that - since the 2015 Amendments were put into place - not one single greenfields agreement has been made under these provisions. [3] This fact alone is cogent evidence that the 2015 Amendments are not necessary in order for greenfields agreements to be reached with unions in a timely fashion.

5. However it is not just the ongoing existence of the 2015 Amendments that make the concept of bargaining bogus under the Bill. This is because the Bill makes a significant amendment which will weaponise the 2015 Amendments in a way that will entirely deprive unions from having any bargaining leverage during the six month bargaining period.

6. Under the current FW Act, all agreements (including greenfields agreements) commence operation either 7 days after approval by FWC, or a later day if that day is specified in the agreement. [4] However, in both cases, the nominal expiry of the agreement must not be more than 4 years after *the day on which the FWC approves the agreement*. [5] By contrast, under the Bill the nominal life of a 'major project' greenfields agreement– which itself has been doubled from 4 to 8 years – will not start to run until that the day the agreement *commences operation* (as opposed to 8 years after the day FWC approves it). [6]

7. This means that employers will be positively incentivised *not* to reach agreement with a union simply because they will be able to avoid doing so. E.g., employers will be able to let the clock run out on a 6 month 'bargaining period':

a. without any risk of losing the full benefit of the increased 8 year nominal life of the agreement;

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[1] Section 255A of the *Fair Work Act 2009*

[2] Section 187(6) of the FW Act

[3] Four applications have been made by employers under s.182(4). Two were erroneously made under the wrong provision, and did not proceed. The only decision which has been issued was in relation to AG2018/6254 and AG2018/6255, on 21 February 2019 – see [2019] FWC 1122. In that case the applications were not successful because FWC determined that the projects were not genuine new enterprises (and therefore not eligible to be 'greenfields' agreements)

[4] Section 54(1) of the FW Act

[5] Section 186(5) of the FW Act

[6] See proposed amendment to s.186(5)(b)(i) at Item 3 of Schedule 4 to the Bill

b. knowing that the 8 years will not start to run until work commences under the agreement, which itself could be literally years after FWC approval; and

c. in circumstances where the overwhelming majority of construction projects last for less than 4 years. [7]

8. The remarkable imbalance in this equation is even more startling when it is noted that even under *WorkChoices* - which first introduced the concept employer-only greenfields agreements[8] –such agreements were strictly limited to 12 months operation.

9. The interaction between the 2015 Amendments and the Bill will also mean that the current "prevailing pay and conditions" test which FWC must apply at the point of approval will be virtually meaningless. Because the 2015 Amendments have not been successfully utilised to date, the test itself has never been applied. It is quite impossible to understand how it might be met in circumstances where it may be simply not possible for FWC to foresee what the 'prevailing' conditions might be literally years into the future.

10. For these reasons, the only thing that will come in between an employer successfully locking employees and their unions out of any meaningful input whatsoever into the terms and conditions of major project greenfields agreements is, quite literally, "six months of bogus bargaining".

11. Please do not hesitate to contact me further should you wish any further clarification.

Kind regards,

Dave Noonan
National Secretary
Construction & General Division

[7] See paragraphs [159] – [167] of our submission to the Inquiry
[8] The *Workplace Relations Amendment (WorkChoices) Act 2005* provisions which first allowed for employer only greenfields agreements were repealed along with that Act when the *FW Act* was legislated in 2009