Electrical Trades Union of Australia
Proud to be Union

5 February 20210

ETU submission to the Education and Employment Legislation Committee inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]

The Electrical Trades Union holds strong concerns with Omnibus Bill and calls for key provisions to be overhauled or scrapped. In particular:

1. **The changes to casuals greenlights illegal work arrangements and promotes precarious employment;**
2. **The changes to greenfields will lock in harmful industrial relations for vulnerable workers for the life of the project;**
3. **The changes to agreement approvals will facilitate illegitimate and shonky deals from receiving the scrutiny they deserve;**
4. **The proposed job ads regime does not go far enough; and**
5. **An opportunity exists for sensible reforms to the powers of the Registered Organisations Commissioner.**

A. Introduction

Who is the ETU?

1. The Electrical Trades Union of Australia[1] (the "ETU") is the principal union for electrical and electrotechnology tradespeople and apprentices in Australia, representing over 60,000 electrical industry workers across the country.
2. The ETU welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee in respect of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 ("the **Omnibus Bill**").
3. The ETU's membership is spread throughout the economy, with significant concentrations in the resources, construction, and power industries, as well as throughout manufacturing, tourism, entertainment, business equipment and defence support. A typical ETU member is a highly skilled electrotechnology worker who has completed at least a four-year apprenticeship and is subject to ongoing training, certification, licensing, and development.

[1] Being a Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth)

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How the Omnibus Bill impacts ETU members

4. ETU members ordinarily work subject to enterprise or greenfields agreements, with award dependency being relatively rare.

5. Given the breadth of the ETU's coverage, its members would be significantly and adversely impacted by the passage of the Omnibus Bill in an unamended form. These submissions call out three key aspects which would have such an impact, namely:

    a. the changes to "casual" employment which would not only wipe out the ETU's efforts to combat casualisation of whole professions in mature industries, but jeopardise the employment security of *all* employees;

    b. the creation of a new regime for greenfields agreements, which would leave parties guessing at the needs of employees and employers in the distant future; and

    c. the abolition of protections built-in to the pre-approval steps for enterprise agreements.

6. Further, these submissions also:

    a. propose a sensible expansion of the provisions in respect of illegal job advertisements; and

    b. call-out the inequity of the regime under the RO Act for registered organisations as compared to that for underpaying employers.

7. Similarly, the proposed changes to the award system are of great concern. Whilst award-dependence is comparatively rare for ETU members, the award system remains the basis on which many terms and conditions are negotiated from and is critical for apprentices. Any undermining of this playing field will, ultimately, sound out in worse employment rights *even for agreement covered workers*.

8. The ETU draws the Committee's attention to the well-detailed and thorough submissions of the ACTU in this respect.

The ETU's position

9. The ETU holds grave concerns regarding the Omnibus Bill in its present form. It wholeheartedly supports the submissions of the ACTU and other unions in identifying the manifest defects in the draft legislation.

10. We live in a society where:

    a. wage growth has stalled;

    b. precarious employment is on the rise; and

    c. there is enormous unpredictability in the future of many industries,

11. On balance, the Omnibus Bill ***aggravates*** these issues instead of remedying them.

12. Nowhere is this more evident than with the proposed change to casual employment. To be absolutely clear, and without exaggeration, the way the Bill as drafted permits ***any*** job in Australia to be casualised. Rather than act to promote good jobs, this change would pour petrol on the bonfire of precarious work.

B. Combatting precarious employment

(Schedule 1) Against the changes to casual employment

13. The Omnibus Bill proposes a drastic redefining of casual employment. Upending 80 years of settled law, the Bill will:

    a. **amplify** the existing trend to precarious employment;

    b. legitimise **currently unlawful** business practices; and

    c. **cement** currently misclassified employees into casual employment.

What is the current definition?

14. Currently, the Courts have developed a robust and workable definition based on whether the employment is "regular, systematic, and predictable". This definition has received much attention since the decision in *Workpac v Skene*[2].

15. However, to be clear, this definition *far* predates *Skene*. This definition has been the law of the land since at least 1936 with the High Court's decision in *Doyle v Sydney Steel Co Ltd*[3]. This decision has been repeatedly reaffirmed by courts across Australia[4].

16. The effect of the test is that employment will only be casual when it is – in fact – casual. In other words, it is *not* regular, systematic, and predictable. It is a test firmly grounded in reality and a test which has served its purpose for over 80 years.

17. Nothing in the *Skene* decision changed the definition, it just brought the issue to everyone's attention.

Where has this issue come from?

18. Noting the longevity of the current definition, the question is begged – why the recent hue and cry? Perhaps the answer lies in the headlong rush by employers in the resource sector to strip conditions when the mining boom ended.

19. From the ETU's experience, prior to 2014, casual electricians were a relative rarity. Where casual jobs did exist, they were genuinely casual in that work was offered and accepted on an ad hoc basis. This arrangement, when sought by both parties and implemented properly, can benefit both employers and employees.

20. Since the end of the mining boom (c.2014), the employment makeup of the resources sector has changed dramatically. At site after site, workers were offered a choice – stay on your rate of pay but go casual or go out the gate. Instead of direct-hire workforces, jobs were flooded with "labour-hire" – though in truth these operators are routinely little more than a recruiter and payroll service, with all control resting with the host employer.

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[2] [2018] FCAFC 131

[3] (1936) 56 CLR 545

[4] See *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420; *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78; *MacMahon Mining Services Pty Ltd v Williams* (2010) IR 123

21. In response to this, the ETU launched its Stop the Casual Rip-Off campaign, which has seen hundreds of workers come forward to complain about working the same shift and doing the same job, but now being called casual.

What "casual employment" looks like in the resources sector

22. Employment in the resources sector is characterised by:

    a. strict shift rosters;

    b. often FIFO or DIDO arrangements; and

    c. workgroups depending upon other workgroups.

23. There is simply nothing "casual" about this work. An employee flown from Perth to Karratha, then helicoptered to an offshore rig for two weeks is not casual. Employees living in a construction camp with airfares booked weeks or months in advance are not casual. Employees required to undergo sixteen hours of pre-start induction and hold multiple certifications are not casual. There is simply nothing about these engagements which is casual – every aspect of the employment is strictly mapped out.

Case Study: Chris Ford, Monadelphous Engineering

24. Chris Ford was employed as an Inlec (Instrument Electrician E&I Tech) by Monadelphous Engineering Australia ("MEA") at Karratha, in Northwest WA.

25. Given the skilled nature of his role, and the high-risk work performed, Chris was required to maintain certification in respect of:

    a. high voltage switching;
    b. confined space entry;
    c. gyrolock training;
    d. low voltage rescue/CPR; and
    e. first aid.

26.

27. Chris worked for MEA from 2015 to 2019, had flights and accommodation pre-booked and paid for by MEA, and each November was given his roster **for the next year**.

28. Chris worked as part of an electrical crew in an integrated operation. If he didn't show for work, then it was usually not possible for his crew to complete tasks involving HV switching. Any absence would compromise not only the ability of his crew to do its tasks, but also the capacity for other crews. Due to the need for site inductions and familiarity with the plant, MEA couldn't simply find another HV qualified sparkie.

29. No one, not Chris nor his workmates, ever took their jobs casually. Treating electrical work casually gets people killed. His work was skilled, regular, predictable and systematic.

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31. Chris's situation is all too typical of the workplace practices that are rife through the industry.

The myth of "double dipping"

32. A common refrain heard in the debate is that "casuals get paid more". This is an argument that conceals more than it reveals and fails to acknowledge the reality on site. Specifically, it elides two key features of modern employment:

    a. the rise of "safety net" agreements; and

    b. this rise of labour hire.

33. "Safety net" agreements[5] are enterprise agreements which pay the minimum award terms and conditions BUT do not reflect the actual rates of pay. They are commonly obtained by artificially manipulating the composition of the workforce so that only a small number of workers are involved. The result is that the employer gets a "shield" from bargaining and is then free to set the terms and conditions on an individual basis.

34. Take, for example, employees of Powertech. The current agreement provides that employees will be paid the higher of any award obligation or $28.77. Consequently, casual employees are entitled to a loading of around $7.20 per hour for a rate of nearly $35. In fact, however, due to the skilled nature of the work and the high demand for these electrical workers, workers – including casuals – are paid a flat rate in excess of $70 per hour, **over double what the enterprise agreement prescribes**. This is a classic baseline agreement, nothing more than a protection from bargaining but affording employees next to no additional rights. Where market rates of pay so far outstrip the minimum set down in an award or baseline agreement, there simply is no casual loading.

35. Casual workers are more likely to be sub-contractors and labour hire, and enterprise agreements will not, ordinarily, cover sub-contractors and labour hire. Consequently, it is routinely the case that two workers will perform the same work, side-by-side, but one will be a direct-hire on permanent employment, whilst the other will be casual through a labour hire agency on *less money*. Whilst the Union campaigns against this, it has become all too *de rigueur*.

36. In these industries, casual loading does not functionally exist as an entitlement – casuals routinely get paid less than permanents due to corporate evasion of Fair Work obligations. In these circumstances, **there is simply nothing to double-dip**.

Case Study: Llwyd Saul – a precarious career

37. Llwyd is an electrical fitter/mechanic in his forties. He currently works building a meat storage facility at the Brisbane Port. Llwyd is employed by Inselec, a labour hire agency, for the host-employer Crisp.

38. Llwyd's employment is entirely predictable. He works set hours Monday to Friday, the same as the broad workforce.

39. However, this workforce, which all do the same job, has three different tiers:

    a. there are labour-hire workers like Llwyd – they earn $38 an hour and are casual;

[5] Also known as "baseline" or "no-stakes" agreements

b. there are Crisp employees who are casual – they also earn $38 an hour; and
c. there are Crisp employees who are permanent – they earn around $45 an hour.

40. Assuming Llwyd is, in fact, a casual, all of this is perfectly legal - same job, same hours, lower pay.

41. Previously, Llwyd worked on the construction of the M8 Tunnel in Sydney. He was employed on a fly-in fly-out basis. His roster was fixed in his letter of offer. Yet Llwyd was a casual.

42. In fact, Llwyd earns less today – as a casual – than he did in 2012 *as a permanent*.

43. Today, Llwyd has not one hour of accrued sick leave, and not one hour of accrued annual leave. If he must look after his kids, **he loses money**. If he gets sick, **he loses money**.

44. *Prima facie*, these jobs were – in truth – not casual. But this Omnibus Bill will act to **sweep these abuses under the carpet**.

45. The argument around the casual loading harkens back to an era of "common rule" rates of pay, an era than ended decades ago and simply has no relevance to the current circumstances – it is a chimera and a sham. In many sectors, **casual loading is simply dead**.

<u>The problem with "permanent casuals"</u>

46. What should be clear by now is that whole careers, professions and trades are being casualised. Difficulties in enforcement has seen precarious work flood whole sectors which hitherto had been a source of good, stable employment.

47. Rather than enforcing the law and cracking down on this abuse, the proposed change will act to cement it.

48. To be clear, the current definition and the *Skene* decision has **zero impact** on jobs traditionally associated with casual employment. Christmas casuals at Big W or Target are casuals, uni students working occasional shifts at McDonalds drive are casuals. Nothing in *Skene* upsets this.

49. The problem is where permanent workers, such as Llwyd Saul and Chris Ford, can work twenty years in an industry and have no sick leave and no annual leave. If these workers get sick or injured, it is on them. These are real, permanent jobs that employees **used to be able to plan their lives around**, that they used to be able to count on. The *Skene* decision says **they still are**, but the Omnibus Bill will change this. It will greenlight this metastasizing problem, seeing more and more employees stripped of their basic employment rights and protections and locking Chris and Llwyd out of permanent, reliable jobs into the future.

C. Guessing at workers' future

(Schedule 4) Why the proposed greenfields scheme hurts employees

50. Life in the resources sector is hard. The money may be good, but the work is tough, the days are long and the conditions are often terrible. Fly-in fly-out ("FIFO") or Drive-in drive out ("DIDO") is common, accommodation is rarely comfortable, and the quality of food varies

wildly. Mental health issues are rife, suicide clusters happen[6], and family breakdown is all too common.

51. The prevalence of these issues is borne out in academic research and government inquiries[7]. Key issues that a brought up again and again[8] are:

    a. roster patterns;

    b. quality and nature of camp accommodation and food; and

    c. access to communication arrangements.

52. Good steps have been taken. Most obviously, the Western Australian government has published a Code of Practice which expressly calls out these issues. But the field of research is still young and more work needs to be done[9].

53. That is the context in which the proposed greenfields changes will apply – only to the construction of the so-called "mega-projects", usually in remote areas of Australia where access to services and support can be all but impossible.

54. The key issue is the proposed extension of greenfields to 8 years. Once made, a greenfields agreement can only be varied *at the initiative of the employer* until it passes its nominal expiry date. Employees have **no rights** and **no capacity** to vary an agreement that is in-term, or have it referred to an independent umpire.

55. The ETU was a key participant in the greenfields working group convened by Minister Porter. Noting the confidentiality attached to those discussions, suffice to say that strong and workable proposals were developed. Unfortunately, these proposals have been scrapped.

56. The original rationale for greenfields agreements was to get the job up and running, hence under previous regimes the maximum term of such agreements has been shorter than for ordinary agreements. This was a compromise to reflect two competing considerations:

    a. first, the need to get the construction of large-scale projects up and running with certainty for employers and employees – hence the rationale for greenfields agreements at all; but

    b. secondly, recognising the impossibility for parties to identify the workplace needs of the project too far into the future.

57. It is that second consideration which is completely ignored in the Omnibus Bill. If passed, parties will essentially be asked to *guess* what will be needed for its first 8 years (and

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[6] Up to 14 suicides were reported in connection with the Inpex project alone – see Martin J 2020 FIFO Rosters and workers' health and safety: a case study of the impacts of extended shift rosters on electrical workers in construction in the resources sector Queensland Council of Unions

[7] See the literature review contain in the *Centre for Transformative Work Design's* "Impact of FIFO work arrangements on the mental health and wellbeing", WA Mental Health Commission (September 2018)

[8] See Martin J 2020 *FIFO Rosters and workers' health and safety: a case study of the impacts of extended shift rosters on electrical workers in construction in the resources sector* Queensland Council of Unions

[9] *Centre for Transformative Work Design's* "Impact of FIFO work arrangements on the mental health and wellbeing", WA Mental Health Commission (September 2018) at 95

potentially longer). As the case study of Mr Robert Smith demonstrates, this is simply not possible.

58. By definition, greenfields agreements are negotiated before the start of a project. Whilst this may seem obvious, it belies that many of the crucial arrangements are not yet in place[10]. At the time of negotiations:

    a. Camp accommodation may not be built at all;

    b. Airline rosters will not be available; and

    c. The inevitable complications of translating a design into reality will still be undiscovered.

59. Accordingly, it is simply impossible for the parties to foresee what the industrial relations *should be*. On the critical issue of mental health, parties are unable to judge in the abstract how a greenfields agreement will impact workers' wellbeing until it becomes a lived reality.

60. These are issues which cannot be resolved outside of enterprise bargaining. For good reason, rosters are typically locked into the agreement. Rosters are critical for both employers and employees as they dictate:

    a. the remuneration for employees;

    b. the profit for employers; and

    c. to varying extents, the harm to the mental health of workers.

61. Changing a roster in the resource sector drives at the heart of the viability of the job itself. It is just one piece and any alteration will require a reset of a range of other conditions. This is why **the opportunity to renegotiate is so crucial**. It gives employees and employers the opportunity to trade on terms and conditions to deliver an outcome which gets the project done with the least harm to the workforce.

[10] It is relevant to note that *none* of these arrangements are locked in for eight years in any sort of commercial contract, let alone an instrument like an enterprise agreement.

62. Case Study: Robert Smith – life and work on the Gorgon Project

63. Robert is a dual trade electrical fitter mechanic/instrumentation technician. He also holds a Certificate 4 in Hazardous Areas – Electrical, and a Certificate 4 in Training and Assessing.

64. From 2014 to 2016, Robert worked at the Gorgon Project on Barrow Island – a $53 billion gas project. Rob worked for Kentz as a Hazardous Areas Inspector on a FIFO basis.

65. Initially working a 29 days on – 9 days week off roster, life was tough. Robert saw depression and the like run wild through his workmates. People would go home completely defeated by spending a month at a remote site, only to reenter "normal life" and find that they were no longer part of their family's routine. At one point there was a run of suicides, including one worker who tried to take his own life on the plane home.

66. The roster was the root of this, 23 and 10 was simply too much. But this roster was locked into the greenfields agreement which covered the job[11].

67. In 2015, it was time to renegotiate. The big-ticket items: the roster and domestic violence leave. After months of bargaining and concessions, the workers and the employers finally agreed to reduce the work swing by an entire week- down to 3 weeks on and 1 week off and introduce domestic violence leave.

68. This new, better roster and the new leave provisions were locked into the new agreement[12]. And it made an immediate difference. The work was still tough, and life was still hard. Mental health problems were still too common. But it was better.

69. It wasn't just these two issues which were addressed. When the original agreement was negotiated, there were no allowances for hazardous areas, nor for work team leaders, and nothing for cyclone procedures – there simply not envisaged as issues. As the project developed, it became apparent:

    a. that due to poor quality assurance from international suppliers, there would be a much greater need for hazardous area inspection;

    b. that the need for a "permit system" around plant was needed, resulting in permit holders routinely supervising dozens of staff; and

    c. that the project was going to be hit by an unexpected number of cyclones.

70. None of these issues were foreseen in 2012 when the Agreement was negotiated, nor could they have been. Rather, the parties had to adapt and adjust the industrial instrument to ensure it met the need of the business and the workforce. Increased quality assurance was delivered, a permit system was properly reflected in classifications and pay rates, and cyclone procedures were instituted safeguards for early evacuation and notification for workers. These improvements could only be achieved via bargaining – the very opportunity which the Omnibus Bill will destroy.

71. It remains that there has been **no demonstrated need** for an extension in the term of greenfields agreements. To date, **no** data has been provided showing **any** project slated to extend beyond five years.

72. It is relevant to note that the greenfields provisions were last amended in 2015, introducing a mechanism for employers to opt out of bargaining with supposedly intransigent unions[13]. In the five years since these provisions were passed, there has been a total of *one* attempt to use them. Surely this is indicative that unions, in truth, are not intransigent and that the current regime *does* deliver results that employers can live with.

73. The greenfields regime must be flexible enough to adapt to the evolving needs on site. The proposed amendments do the exact opposite, locking in life of project agreements that, in all likelihood, will kill people.

D. No greenlight to dodgy deals

(Schedule 3, Parts 1-6 and 9-11) Against the changes to the approval process for enterprise agreements

74. The ETU notes with strong concern that the Bill would gut the pre-approval steps for enterprise agreements. Whilst these steps may appear bureaucratic or unnecessary, in truth they serve as an important check on dodgy deals. The pre-approval regime acts as a handbrake on employers seeking to rush agreements through after a sham bargaining process, whether due to employees being unaware of the fact of bargaining or the employee cohort being artificially manipulated to produce a desired outcome.

75. The ETU **strongly endorses** the submissions of the ACTU – any change to these pre-approval steps must be accompanied by a thorough review of the bargaining process *in toto*. Absent that, we will continue to see the rise of "safety net" or "baseline" agreements, which merely pay the minimum rates but act as a shield *against* bargaining.

76. To take a recent example, the ETU was successful in overturning an enterprise agreement lodged by Celotti Australia[14].

77. Celotti is a labour hire agency employing workers across the country. In February 2020 it lodged with the FWC an agreement that:

    a. covered *twelve different awards*;

    b. did not contain rates of pay, but instead linked back to the relevant award plus $1;

    c. expressly noted that above agreement rates would be paid;

    d. in truth, contained *no substantive terms* beyond the underlying awards;

    e. that had not been subject to a single bargaining meeting; and

    f. covered 91 employees.

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[13] See the *Fair Work Amendment Act 2015* (Cth) and the amended section 182 of the *Fair Work Act*.

[14] *CEPU & ors v The Trustee for Celotti Australia Discretionary Trust T/A Celotti Workforce* [2020] FWCFB 5011

78. This was a classic "baseline" or "safety net" agreement. In no way was it setting the terms and conditions of employment. In no way did it reflect the intent of enterprise bargaining. Instead, it was purely a four-year shield against bargaining.

79. When the purpose of the enterprise bargaining regime is considered, these sorts of agreements are fundamentally illegitimate.

80. In *Celotti*, the ETU was able to demonstrate that the agreement lacked the requisite authenticity to be approved. This was, at root, a dodgy deal.

81. The changes proposed in the Omnibus Bill would take away one of the key tools that workers have to dispute such inauthentic agreements, thereby stripping employees of their few means of protecting against sham bargaining.

82. Enterprise bargaining *could* be a means of resuscitating wage growth. Instead, the Bill promotes a system which ***shields against bargaining*** and does nothing to advance the mutual interests of employers and employees.

E. Advertising illegality

(Schedule 5, Part 3, Items 23 27) Broadening the scope of the job ads regime

83. The Omnibus Bill introduces a civil penalty provision prohibiting job listings which advertise rates of pay below the minimum wage.

84. This reform is to be welcomed but suffers from two baffling limitations.

85. First, enforcement is restricted to the Fair Work Ombudsman which unfortunately lacks have the resources to take on this burden. Granting this power to registered organisations, including employer organisations, would greatly bolster this new regime and save tax-payer dollars.

86. Second, there is no reason whatsoever for the regime to be limited to the minimum wage. Rather, it should apply to any posting which advertises conditions in breach of:

    a. the NES;

    b. occupational licensing; or

    c. an applicable industrial instrument.

87. The ETU routinely unearths, or is alerted to, ads for unlicensed electricians, casual rates of pay below the award, and similar conditions which would be in breach of industrial and licensing law.

88. Occupational licensing is an important component to be included. No one would tolerate a job ad seeking an "unregistered doctor", the same should be true for electricians and other licensed trades. Being able to tackle this issue *before* it becomes a problem would be an obvious benefit for not only workplace safety, but consumer safety in general.

89. The ETU can see no reason to restrict these provisions solely to the minimum wage. Surely illegality is illegality.

F. No fairness for Registered Organisations

(Schedule 5, Part 4, Items 33-35) Introducing corporate equivalency

90. Almost as an aside, the ETU notes the reforms to the FWO and ABCC's powers for "enforceable undertakings" and "infringement notices".

91. It remains baffling why these same tools are not afforded to the Registered Organisations Commission.

92. The CEPU, the parent union to the ETU, was recently fined $200,000 for late filing of changes to office holders. The prosecution of the late filings, in the main, resulted from the CEPU self-reporting their occurrence.

93. Under the RO Act, each contravention was subject to up to a $64,000 penalty. The equivalent conduct under the *Corporations Act 2001* is subject to a fines regime – currently $82 if within 1 month and $340 if later. No company has *ever* been sued for the same conduct.

94. The CEPU fully cooperated with the ROC and – for the most part – there was no substantial controversy over the facts.

95. Where there was controversy was on the scale of the penalty. At the first directions hearing, Counsel for the ROC advised the Court that the regulator was seeking a penalty of nearly $4.5 million. This was subsequently amended down substantially.

96. Ultimately, the CEPU expended close to $300,000 in legal fees, and the ROC in excess of $500,000 of taxpayer money.

97. If the ROC had these same powers of enforceable undertakings and infringement notices then there is every chance that these problems could have been appropriately resolved earlier and without the expenditure of enormous sums of money and amounts of time for both the CEPU ***and the ROC***.

98. The ETU again calls for the obvious reforms which should be made in this space.