



Australian Government

Department of Jobs and Small Business

Greenfields Agreements Review

ISBN

978-1-76051-366-5 [PRINT]

978-1-76051-364-1 [PDF]

978-1-76051-365-8 [DOCX]



With the exception of the Commonwealth Coat of Arms, the Department's logo, any material protected by a trade mark and where otherwise noted all material presented in this document is provided under a Creative Commons Attribution 3.0 Australia (<http://creativecommons.org/licenses/by/3.0/au/>) licence.

The details of the relevant licence conditions are available on the Creative Commons website (accessible using the links provided) as is the full legal code for the CC BY 3.0 AU licence (<http://creativecommons.org/licenses/by/3.0/au/legalcode>).

The document must be attributed as the Greenfields Agreements Review.

Contents

Glossary	4
Executive summary	5
Background to the review	6
Why were the greenfields agreement provisions amended?	6
History of greenfields agreements	7
Workplace Relations Act 1996	7
Workplace Relations Amendment (WorkChoices) Act 2005	7
Fair Work Act 2009	8
Fair Work Amendment Act 2015	8
Approach to the review	9
Responses to Background Paper issues	11
Information and statistics on greenfields agreements	12
Additional data since the Background Paper	12
Decline in agreement making	14
General observations	18
Access to greenfields agreement making information	20
Approval of greenfields agreements	21
Good faith bargaining	24
Impact of the 2015 amendments	24
Recognition of other unions	26
Six-month negotiation period and applications for approval of s 182(4) greenfields agreements	29
Is a six-month period appropriate?	29
Additional timing considerations	34
Prevailing pay and conditions test	36
Productivity Commission recommendations	37
Agreements made with small voting cohorts	41
The duration of greenfields agreements	46
Conclusion	48
Attachment A – Biography of Matthew O’Callaghan	49
Attachment B - Greenfields agreement provisions and the Fair Work Act	50
Attachment C - Agreements approved by ANZSIC and period approved	53

Glossary

ABI Australian Business Industrial

ACCI Australian Chamber of Commerce and Industry

ACTU Australian Council of Trade Unions

AiG Australian Industry Group

AFAP Australian Federation of Air Pilots

AMWU Australian Manufacturing Workers' Union

AMMA Australian Mines and Metals Association

ANMF Australian Nursing and Midwifery Federation

ANZSIC Australian and New Zealand Standard Industrial Classification

AWU Australian Workers' Union

AAWI Average Annual Wage Increase

BCA Business Council of Australia

BOOT Better off overall test

CFMEU Construction, Forestry, Mining and Energy Union

FWC Fair Work Commission

LPA Live Performances Australia

MBA Master Builders Australia

MUA Maritime Union of Australia

WAD Workplace Agreements Database

Executive summary

This review is provided pursuant to the *Fair Work Amendment Act 2015* (the Amendment Act) legislation which amended the *Fair Work Act 2009* (Fair Work Act) provisions dealing with greenfields agreements.

Those amendments established a requirement that employers and unions negotiating for a greenfields agreement must comply with the good faith bargaining requirements, which previously only applied to bargaining for non-greenfields agreements. The amendments also established an option of a notified six-month negotiation timeframe for employers and unions to make a greenfields agreement. An employer is able to apply to the Fair Work Commission to approve its proposed greenfields agreement, where agreement cannot be reached with the relevant union in that period. The amendments were primarily directed at addressing concerns about greenfields agreements in the resources development sector.

Whilst focused on the 2015 amendments, the review has also considered a range of other issues relating to greenfields agreements.

Background information relating to greenfields agreements was provided to a broad range of stakeholders who were invited to make submissions.

Consideration of these legislative changes has taken into account the substantial reduction in greenfields agreements since 2015 which is primarily related to the downturn in construction activity and the end of the resources boom. The review has also noted that there is no evidence that the good faith bargaining or agreement approval legislative provisions have been used since they came into effect.

The review has noted the significance of greenfields agreements to new employment in a broad range of areas.

The review has concluded that there is general agreement that the inclusion of good faith bargaining obligations remains appropriate and recommends that these provisions should be retained.

The review recommends that the six-month notified negotiation period be reduced. It suggests that three months is more appropriate. The review recommends that the test for approval of an agreement at the end of this time should remain unchanged.

A number of initiatives to expedite the approval of greenfields agreements have been suggested.

Stakeholders have raised a number of other matters related to greenfields agreements, which have also been addressed in this review.

The review has been prepared with the very able and professional secretariat assistance of several officers of the Department of Employment and recognition of their contribution is entirely appropriate.



Matthew O'Callaghan

27 November 2017

Background to the review

This review is a statutory requirement of the Amendment Act, which requires the responsible Minister to cause an independent review of Part 5 of Schedule 1 of the Amendment Act to be undertaken and completed within two years of its commencement.

On 3 October 2017, Matthew O'Callaghan, a former Senior Deputy President of the Fair Work Commission, was engaged by the Government to undertake the independent review. Mr O'Callaghan's background is summarised at Attachment A.

The Amendment Act commenced on 27 November 2015, and made a number of changes to the Fair Work Act. The review specifically examines the first two years of the operation of Part 5 of Schedule 1 of the Amendment Act relating to greenfields agreement making. In summary, the changes made to greenfields agreement making were:

- Extending good faith bargaining rules to greenfields enterprise bargaining negotiations.
- A new optional six month notified negotiation period for proposed single-enterprise agreements, where the agreement is a greenfields agreement. If an agreement cannot be reached with a union or unions within the six-month period, the employer can take a proposed greenfields agreement to the Fair Work Commission for approval. For shorthand, we are describing this type of an agreement as a 's 182(4) greenfields agreement'. The existing approval tests for greenfields agreements were also retained, with a new requirement to ensure that the agreement is consistent with prevailing industry standards.

Why were the greenfields agreement provisions amended?

Greenfields agreements are a form of enterprise agreement that can be made under the Fair Work Act before any employees who will be covered by the agreement have been engaged at a new enterprise. They are extensively used in infrastructure, construction and resources projects. They may only be made between the employer and a union or unions¹ that are able to represent a majority of employees who will be covered by the agreement.

On some projects, having certainty about industrial arrangements is an essential step in securing finance and other approvals for the project. It provides greater certainty about labour costs and removes the potential for exposure to protected industrial action. Greenfields agreements can be a key mechanism to achieve that certainty about wage costs and industrial action before employees are engaged.

The alternative for an employer may be to proceed with a new project without a greenfields agreement in place and negotiate an enterprise agreement when employees commence working on the project. This alternative risks protected industrial action early in the life of the enterprise or project, leading to potential scheduling and cost blowouts.

In the 2012 post-implementation review of the Fair Work Act, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (2012 Fair Work Act Review), evidence from a number of employer organisations suggested some unions were exploiting their legislated role in making greenfields agreements to seek excessive wage claims and delay the commencement of projects. It was argued that these delays had the potential to derail some projects entirely, and may have significant flow-on effects on the Australian economy.

¹ The terms 'employee organisation' and 'union' are used interchangeably in this review, though generally union is preferred for simplicity.

The Amendment Act was crafted with a view to ameliorating some of the problems affecting greenfields agreement making under the Fair Work Act. The objects of the changes under this review are:²

- to ensure that there are realistic timeframes for the negotiation of greenfields agreements
- to ensure that negotiations do not delay or jeopardise investment in major projects
- to provide that the interests of employees to be covered by such agreements are protected.

History of greenfields agreements

Workplace Relations Act 1996

Greenfields agreements were a workplace relations instrument introduced in the *Workplace Relations Act 1996* (WR Act). Under s 170LL of the WR Act, greenfields agreements were an instrument available to an employer proposing to establish, or establishing, a new business. These greenfields agreements were made prior to the employment of any of the persons who would be necessary for the normal operation of the business and whose employment would be subject to the agreement. The agreements could only be made with one or more employee organisations that were entitled to represent the industrial interests of the employees likely to be covered by the agreement.

The employer did not need to notify or reach an agreement with all of the possible relevant employee organisations for the agreement to be made. This has been a consistent feature of greenfields agreement making since its introduction into the workplace relations framework.

Like any collective agreement at the time, greenfields agreements were required to pass a 'no-disadvantage test' to ensure employees were not disadvantaged against the relevant state or national award.

Workplace Relations Amendment (WorkChoices) Act 2005

Significant amendments to greenfields agreements were made by the *Workplace Relations Amendment (WorkChoices) Act 2005* (the Work Choices amendments). The most significant change made by the Work Choices amendments to greenfields agreements was the introduction of two distinct streams for the agreements – union and non-union (also known as employer-only) greenfields agreements.

Making greenfields agreements with unions remained similar to the process previously outlined under the WR Act. Non-union greenfields agreements, by contrast, allowed an employer to unilaterally make the instrument. The nominal expiry date for these non-union greenfields agreements was limited to 12 months, after which the employees were able to pursue a new enterprise agreement with their employer. The introduction of this non-union stream led to a significant increase in greenfields agreements, particularly in the Accommodation and Food Services industry (from 1.5 per cent to 11.1 per cent), the Health Care and Social Assistance industry (from 0.4 per cent to 7.3 per cent) and the Retail Trade industry (from 0.4 per cent to 5.8 per cent).³

Under the Work Choices amendments, awards were not used as the benchmark to assess new agreements and there was no requirement to pass a 'no-disadvantage test'. Instead, all agreements were required to include five statutory minimum entitlements (regarding pay, annual leave, personal leave, hours of work and parental leave). Additionally, a number of 'protected' award conditions (relating to rest breaks, leave loadings, penalties, allowances, bonuses and public holidays) were identified, but these could be expressly excluded or modified by an agreement.

In 2007, the WR Act was further amended to introduce a 'fairness test', which required agreements to be assessed against protected award conditions to see if fair compensation in their overall effect was provided to employees by the agreement. This 'fairness test' required consideration of the terms in the proposed agreement against a select number of award conditions, and excluded most other matters.

² Explanatory Memorandum, Regulation Impact Statement Fair Work Amendment Bill 2014, p. x.

³ *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, 2012, p. 270.

Fair Work Act 2009

The Fair Work Act abolished non-union greenfields agreements, and the framework for making greenfields agreements broadly returned to the framework established by the WR Act. Under the Fair Work Act, greenfields agreements are either a single-enterprise agreement or a multi-enterprise agreement that is made between the relevant employer(s) and one or more relevant employee organisations. The agreement must relate to a genuine new enterprise that the employer(s) is establishing; and where no worker who is necessary for the normal conduct of the enterprise, and who will be covered by the agreement, has yet been employed.

Under the Fair Work Act, the Fair Work Commission must assess greenfields agreements against statutory requirements such as the relevant modern award and apply the 'better off overall' test (the BOOT, the successor to the 'no-disadvantage test'). In considering whether to approve an agreement, the Fair Work Commission must also be satisfied that the relevant employee organisation(s) that will be covered by the agreement (when taken as a group) are entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement and that it is in the public interest to approve the agreement (s 187(5)).

Fair Work Amendment Act 2015

The Amendment Act extended the 'good faith bargaining' requirements (which had been a feature of enterprise bargaining generally under the Fair Work Act), to the negotiation of greenfields agreements. Good faith bargaining sets out a number of requirements for bargaining representatives. The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet (s 228(1)):

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representatives responses to those proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not require a bargaining representative to (s 228(2)):

- make concessions during bargaining for the agreement
- reach agreement on the terms that are to be included in the agreement.

For a proposed greenfields agreement, bargaining representatives include the employer, an employee organisation that is entitled to represent the industrial interests of one or more employees that will be covered by the agreement and with which the employer agrees to bargain, and a person (if any) who is appointed as a bargaining representative of the employer (s 177).

This has the effect that, if an employer does not agree to bargain with an employee organisation, then the organisation is not a bargaining representative for the agreement. A greenfields agreement is ordinarily made when it is signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which does not need to be all of the relevant employee organisations for the agreement) (s 182(3)).

The Amendment Act provides that an employer that is a bargaining representative for a greenfields agreement may give written notice to each employee organisation that is a bargaining representative for the agreement, notifying them of the commencement of the six-month 'notified negotiation period' (s 178B). The notified negotiation period was initially three months when the Amendment Act was

introduced in the Parliament, but during negotiation with the Senate cross-bench, it was amended to six months. Cross-bench Senators argued that three months may not be a sufficient bargaining period and could compromise workers' rights.⁴

The agreement is taken to have been made if, when the notified negotiation period has ended:

- the bargaining representatives have not signed the agreement
- the employer gave the employee organisations a reasonable opportunity to sign the agreement, and
- the employer applies to the Fair Work Commission to approve the agreement.

The Fair Work Commission must be satisfied that an application to approve an agreement under s 182(4) meets all relevant approval tests under the Fair Work Act (such as the relevant approval requirements in ss 186 and 187, including the BOOT, a public interest test and a requirement that the relevant employee organisations are, taken as a group, entitled to represent the industrial interests of a majority of the employees). In addition to these standard requirements, the Fair Work Commission must also be satisfied that the agreement, considered 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.

The Amendment Act provisions are set out in further detail in Attachment B.

Approach to the review

The scope of the review is to consider and evaluate the first two years of the operation of the changes made to greenfields enterprise agreement making under the Fair Work Act, made by the Amendment Act. This review may also evaluate other matters which may be relevant to the operation of greenfields agreements.

The Fair Work Commission has advised the review, that as at 1 November 2017, no application has been made for approval of a s 182(4) greenfields agreement or for a good faith bargaining order in relation to a greenfields agreement.

The review published a Background Paper on the Department of Employment's website setting out key information in relation to the review on 6 October 2017.

The review then invited written submissions from a number of stakeholders who have had, or may have had, experience with greenfields agreement making. This list of stakeholders included:

- the Fair Work Commission
- 22 employee organisations, each of which have been covered by a greenfields agreement within the past four years
- 15 employer organisations at a state and national level, representing the interests of employer members, many of whom may have had experience negotiating greenfields agreements
- 29 individual employers that were either identified as having a significant history in greenfields agreement making in relation to large projects, or that have negotiated two or more greenfields agreements since November 2015.

Invitations to comment were emailed out in the week commencing 9 October 2017, with a formal postal invitation following the emails.

The closing date for submissions was 25 October 2017. Owing to the short timeframe provided, the review accepted some submissions after this date. The review received submissions from:

- the Fair Work Commission
- seven employer organisations
- seven employee organisations.

⁴ See Hansard: https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/e32f7c8c-0087-4580-abd4-e03d80c33290/&sid=0030; and https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/bb21c29d-b3f6-4b66-8bd5-4668ba5f93d4/&sid=0011.

No submissions from individual employers were received by the review. All submissions made to the review were made publically available on the review's website, hosted by the Department of Employment's greenfield agreement review secretariat, at: www.employment.gov.au/greenfields-agreements-review.

The Background Paper set out the following non-exhaustive list of issues for stakeholders to address in submissions:

- The extent to which the 2015 greenfields agreement amendments have altered bargaining behaviour on the part of either employers or unions.
- Any concerns relating to the effect of the 2015 greenfields agreement amendments on bargaining outcomes and bargaining behaviour.
- The extent to which there may be a relationship between these amendments and the number of applications for approval of greenfields agreements.
- The extent to which there may be systemic issues or impediments to the making of greenfields agreements.
- Recommendations of the Productivity Commission relating to greenfields agreements.
- The anticipated effects of returning to the legislative arrangements which applied to greenfields agreement making prior to November 2015.
- The impact of the reduction in the number and scale of capital development projects on greenfields agreement making since 2015.
- Any other matter relating to the negotiation of, and the approval process for, greenfields agreements.

Following receipt of submissions, the review made follow-up requests to some stakeholders to clarify their submissions or seek additional evidence where possible.

The review also contacted a small number of experienced major resource project and construction workplace relations experts for further professional information and advice. These informal discussions assisted the review to canvass issues the resource and infrastructure industries may commonly consider or encounter in developing projects in the greenfields space.

The review would like to thank all stakeholders who provided submissions for consideration and/or made further comment to assist the review's consideration of these matters.

The review took into account the evidence presented in submissions, in further discussions with stakeholders, and data from various sources, including that provided by the Department of Employment's Workplace Agreements Database (WAD). Given the limited use of the provisions of the Amendment Act, stakeholder organisations were generally unable to provide significant evidence of the impact of the provision, instead relying on their experiences and observations regarding what impact, if any, the provisions may have had on greenfields agreement making. The reviewer has also drawn on his personal experience. The review has attempted to give fair weight and consideration to all the evidence provided, and make reasonable recommendations based on identifiable risks in greenfields agreement making.

Section 3 of the Fair Work Act sets out the object of the Act, which is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. The object refers to a range of factors, including providing workplace relations laws that are fair, flexible and promote productivity and economic growth, ensuring a guaranteed safety net of minimum terms and conditions, and an emphasis on enterprise-level collective bargaining underpinned by good faith bargaining obligations the promotion of working arrangements that are fair, flexible and arrangements which promote productivity and economic growth.

In undertaking the review, regard has been had to all these factors as well as the fundamental difference in the basis for greenfields agreements as distinct from the general enterprise agreement stream.

The review has not sought to assess whether greenfields agreements have an impact on the costs of government funded infrastructure projects. This was outside the scope of the review.

Responses to Background Paper issues

As noted above, the Background Paper invited stakeholders to address a number of issues. Comment was invited on the extent to which the 2015 greenfields agreement amendments have altered bargaining behaviour on the part of either employers or employees and any concerns relating to the amendments. The union and employer organisation responses were generally consistent in asserting that the amendments have had little impact on bargaining behaviour.

Unions generally noted that they bargained in good faith and supported the extension of the good faith bargaining requirements to greenfields bargaining. They further argued that the capacity for a s 182(4) greenfields agreement to be made had not been utilised and was in any event inappropriate, unnecessary and had the potential to be used to reduce employee benefits.

Employer organisations universally expressed support for the 2015 amendments, but argued that they were not sufficient to curb inappropriate behaviour on the part of unions. Employer organisations generally sought further changes to address behaviours which could impact on future resource development initiatives.

The Background Paper invited observations about the extent to which there may be a relationship between these amendments and the number of applications for approval of greenfields agreements. Both unions and employer organisations said that the reduction in major project and construction activity was a significant factor in the reduction of the number of greenfields agreements over the past two years.

Additionally, the unions expressed concern about the extent to which agreements made with small numbers of employees are then applied to much larger cohorts. The unions expressed particular concern at the extent to which these agreements were being made without union involvement and in circumstances where a greenfields agreement would be more appropriate.

The stakeholders were also invited to comment on the 2015 recommendations of the Productivity Commission. Generally, submissions by unions rejected those recommendations and employers had mixed support for them. For example, Australian Business Industrial (ABI) supported replacing the prevailing conditions test with a simple assessment against the BOOT, but failing that suggested exploring last offer arbitration as recommended by the Productivity Commission.

In considering the information provided to it, the review has differentiated between different industry sectors as much as possible. Some sectors assume particular significance. References to resource developments relate to major mineral and gas developments which have been generally characterised as Australia's resources boom. References to construction work generally refer to commercial and industrial construction activity. A particularly significant component of that sector is described as infrastructure construction work, which refers to large scale, mainly civil construction projects.

Information and statistics on greenfields agreements

Additional data since the Background Paper

The Background Paper provided a range of information about where agreements are made and the timeframe for approvals. The Department of Employment has also been able to provide further data from the WAD.

Table 1: Average duration of greenfields agreements⁵

Period approved	Agreements	Average duration
Nov 2013 – Oct 2014	597	2.8
Nov 2014 – Oct 2015	320	3.1
Total Pre Nov 2015	917	2.9
Nov 2015 – Oct 2016	231	2.6
Nov 2016 – Jun 2017	87	2.7
Total Post Nov 2015	318	2.6
Total	1235	2.8

Table 1 shows that the average duration of greenfields agreements has reduced slightly since the commencement of the Amendment Act, from an average of 2.9 years before the Amendment Act commenced to an average 2.6 years after. There is no suggestion from submissions that this is related to the Amendment Act and is more probably the result of the changing profile of the greenfields projects available in the current economic environment.

Table 2: Average Annual Wage Increase (AAWI) in greenfields/non-greenfields agreements⁶

Period approved	Non-greenfields			Greenfields			Total
	Agts	Agts %	AAWI (%)	Agts	Agts %	AAWI (%)	
Jul 2009 – Oct 2014	34140	91.7%	3.6	3078	8.3%	4.4	37218
Nov 2014 – Oct 2015	4939	93.9%	3.1	320	6.1%	3.2	5259
Total Pre Nov 2015	39079	92.0%	3.5	3398	8.0%	4.3	42477
Nov 2015 – Oct 2016	4947	95.5%	3.0	231	4.5%	3.4	5178
Nov 2016 – Jun 2017	2567	96.7%	2.9	87	3.3%	2.8	2654
Total Post Nov 2015	7514	95.9%	2.9	318	4.1%	3.1	7832
Total	46593		3.4	3716		4.2	50309

⁵ Workplace Agreements Database, Department of Employment.

⁶ Workplace Agreements Database, Department of Employment.

Table 2 shows that the difference in the AAWI for greenfields when compared with non-greenfields has declined since the commencement of the Amendment Act, from 0.8% prior to the Amendment Act commencing, to 0.2% after. However, the gap has really been relatively small since around 2014, suggesting the decline in wage increases for greenfields projects may be related to the broader factors such as the downturn in resource prices and reduced numbers of greenfields projects.

Two tables setting out greenfields and non-greenfields agreements by ANZSIC and period approved are included at Attachment C. These provide a high level overview showing that the number of greenfields agreements when compared to non-greenfields agreements has been trending downwards since at least 2013.

They also show which industries are most likely to use a greenfields agreement, with the construction industry a disproportionately large user. The number of construction greenfields agreements has also been trending downwards since 2013.

Table 3: Greenfields agreements approved by State over the last 4 years⁷

Agreement Type	Agreements	% of all Greenfields
ACT	19	2%
NSW	142	11%
NT	76	6%
Qld	131	11%
SA	19	2%
Tas	2	<1%
Vic	159	13%
WA	502	41%
Multi State	185	15%
Grand Total	1235	100%

Table 3 shows that since 2014, almost half of all greenfields agreements made cover Western Australia, particularly when you take into account Multi State agreements, which might in part cover Western Australia. This seems consistent with the location of many larger resources projects have been based in recent years.

In terms of construction work, the Master Builders of Australia (MBA) advised:⁸

Unlike most other sectors where Greenfields agreements may be used for a new business or enterprise, the building and construction industry use of Greenfields agreements is more likely to represent employment arrangements that exist for a significant part of a project duration rather than the formative stages of a new business or enterprise.

It is common for some types of projects, particularly those involving major infrastructure and/or those of a significant size, to be undertaken by entities which are the creation of a partnership or other similar arrangement between major sector contractors. These most commonly manifest themselves in the form of a joint venture arrangement where two or more contractors have a joint business entity to operate and manage a project. This is often necessary due to the size and scale of particular projects.

⁷ Workplace Agreements Database, Department of Employment. Period reflected is 1 November 2013 to 30 June 2017.

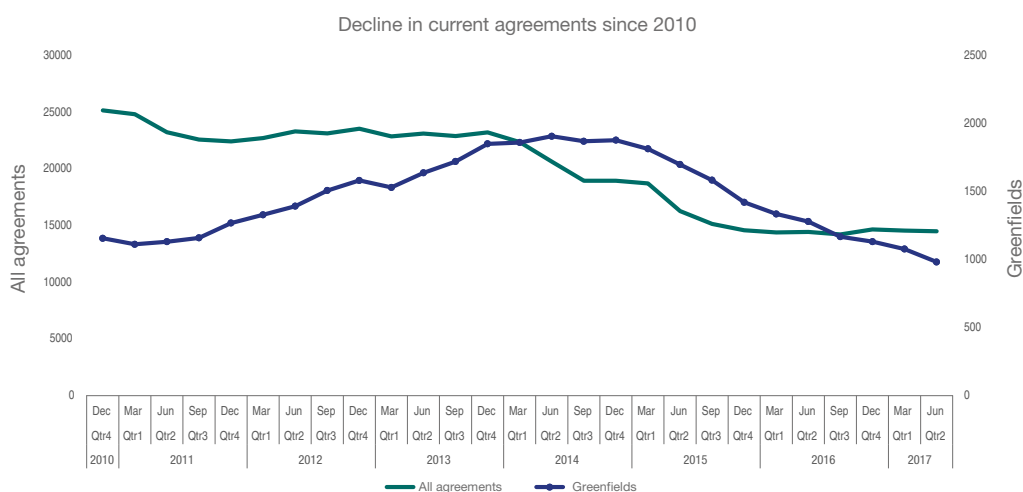
⁸ MBA Submission, pars. 32-34.

Such arrangements require the establishment of a new legally identifiable business entity. As such this, combined with the project based nature of work arrangements, lend themselves to the adoption of Greenfields agreements specific to that project.

Decline in agreement making

There has been a significant reduction in the number of applications to the Fair Work Commission to approve greenfields agreements since 2015. This reduction is proportionally greater than the reduction in the overall number of enterprise agreements being proposed for approval. Chart 1 below shows a peak in current greenfields agreements in 2014 and the overall decline in all agreements from 2010 to 2017.

Chart 1: Decline in current enterprise agreements since 2010⁹



Further information on the decline in agreement making is available in Table 4 below. Table 4 shows the decline in the number of greenfields agreements proposed for approval has been more severe than the overall numbers of agreements since 2015. WAD approved agreements data indicates that, following the commencement of the Amendment Act, greenfields approvals declined by 65 per cent, compared to a decline of 24 per cent for all enterprise agreements. Noting the short timeframe, the conclusions that can be drawn from this are limited. However, more broadly, it may suggest that the drivers for the decline in greenfields agreement making are significantly different from those affecting enterprise agreement making more generally.

⁹ Workplace Agreements Database, Department of Employment.

Table 4: Decline in all approved agreements and greenfields agreements - Nov 2013 to Oct 2015 compared to Nov 2015 to June 2017¹⁰

	Nov 2013 to Oct 2015	Nov 2015 to June 2017	% decline
All agreements	9945	7514	24%
Greenfields	917	318	65%

Agreement making generally is in decline, with the share of workers covered by collective agreements decreasing from 43.4 per cent in 2010 to 36.4 per cent in 2016.¹¹ At the same time, there has been an increase in award reliance, with the share of workers covered by awards increasing from 15.2 per cent in 2010 to 22.7 per cent in 2016.¹²

The increase in award reliance may be explained by the reclassification of some teachers from collective agreement to awards¹³ and a broad increase in the share of employees covered by awards in the Retail Trade and Health Care and Social services industries.

The reasons for the decline in bargaining are not clear but may be related to:

- a decline in active agreement making in certain sectors, such as construction
- natural maturation of the system as some companies and employees choose not to replace existing agreements which suit their needs but continue to update wages as required
- declining union membership.

Broader issues regarding the trends in enterprise bargaining are beyond the scope of this review.

While the decline in enterprise agreement making more generally may have an impact on the decline in greenfields agreement making, the significant reduction in greenfields agreement applications appears to correspond with the reduction in investment in the resources industry in Australia, which peaked in 2013 and has more than halved since. Previously high commodity prices encouraged the development of new mines and gas fields, and construction of the necessary infrastructure (railways, ports, pipelines, etc.). However, as these projects were completed, and prices fell, the volume of new investment and associated employment also returned to more normal levels. The Department of Industry, Innovation and Science reports that *“while large liquefied natural gas (LNG) projects remain . . . the list of major projects yet to be completed is forecast to rapidly diminish over the next two years.”*¹⁴ The end of the resources boom will likely have affected both the number of construction related agreements and the number of greenfields agreements which relate to ancillary work and functions. Since greenfields agreements typically relate to new projects, they are likely to have been especially affected.

The union submissions generally acknowledged that the decrease in the number of greenfields agreements being made since 2015 reflected the reduction in resource development and infrastructure projects since that time.

The Australian Council of Trade Unions (ACTU) stated:¹⁵

Our affiliates have reported to us that there are two major drivers for the reduction in the number of applications for approval of greenfields agreements: the reduction in the number and scale of capital development projects and downturn in the construction sector and mining and resource development work; and employers choosing to make enterprise agreements with small and unrepresentative voting cohorts in circumstances where they would previously have made a greenfields agreement.

¹⁰ Workplace Agreements Database, Department of Employment.

¹¹ Australian Bureau of Statistics (ABS) data uses the general term ‘collective agreements’ to capture to all bargaining employment arrangements at both a state and national level.

¹² ABS *Employee Earnings and Hours*, Cat. No. 6306.0, 2010 to 2016, published and unpublished data.

¹³ The ABS undertook a conceptual review of the Method of Setting Pay framework in 2016.

¹⁴ Department of Industry, Innovation and Science, *Resources and Energy Quarterly*, September 2017.

¹⁵ ACTU Submission, par. 19.

The Australian Mines and Metals Association (AMMA) submission stressed the significance of an efficient greenfields agreement capacity to the mining and resources sector in the following terms:¹⁶

New projects are important to the resources industry and the nation. As highlighted in an economic analysis by KPMG, investment in major resource projects has historically been a major driver of economic growth. Given the benefits that flow to the Australian economy from investment in, and the timely completion of, major resource projects, it is imperative that an effective suite of options are available for greenfields agreement making under the FW Act [Fair Work Act].

Increasing confidence to invest in Australia's resources sector is an important counter-cyclical measure which can improve economic and living standards and create job opportunities. A key driver in creating investor confidence is policy certainty. The correlation between policy certainty and increasing investor confidence is best explained in AMMA's *Resource Industry Market Outlook*, which provides a market outlook taking into account a number of economic factors.

Effective greenfields agreement making provisions are critical to ensuring this confidence. The Regulation Impact Statement (RIS), which accompanied the Explanatory Memorandum to the Original Bill [Fair Work Amendment Bill 2014], goes into some detail about the importance of the resources industry and the criticality to major projects of the capacity to efficiently and effectively enter into greenfields agreements. In particular, this is necessary to:

- a) Secure investor funding which will not be provided without cost certainty;
- b) Ensure projects are not delayed or abandoned due to economically unsustainable outcomes;
- c) Avoid situations where projects commence without industrial certainty, leading to industrial action early in the life of an enterprise, leading to scheduling and cost blowouts.

As also noted in the RIS, greenfields agreement negotiations (in the context of major projects) are most likely to occur in the feasibility stage of projects. The current market experience is that of maintaining existing assets rather than developing new ones. In this climate, greenfields agreement making will be reduced.

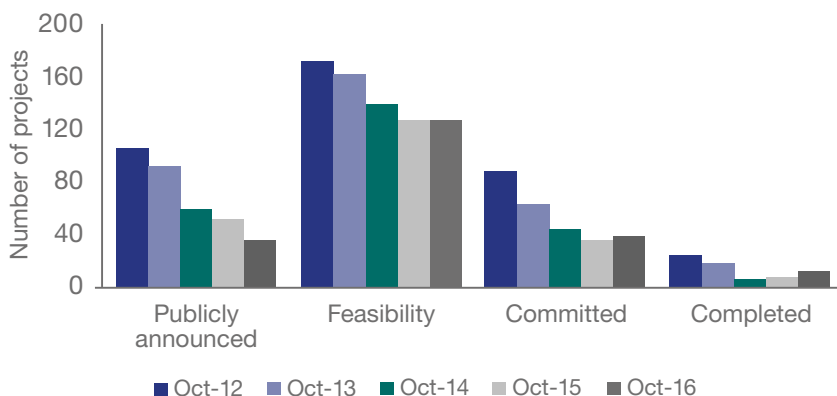
Employer organisations asserted that the substantial reduction in capital and resource development projects coincided with the reduction in the number of greenfields agreements. AMMA stated:¹⁷

¹⁶ AMMA Submission, pars. 7-10.

¹⁷ AMMA Submission, pars. 28-29.

The following Figure 1.1 demonstrates number of projects in the investment pipeline from 2012 to 2016:

Figure 1.1: Number of projects in the investment pipeline, 2012 to 2016



Source: Department of Industry, Innovation and Science (2016)

In addition to the changed investment climate, businesses face a variety of other situations where a greenfields agreement cannot be made under the FW Act [Fair Work Act]. Businesses may not need a greenfields agreement where, for example, it already has in place an agreement with a broad enough scope that enables it to tender for other work that falls within that scope.

ABI stated:¹⁸

There is evidence of reduced numbers of greenfields agreements, due at least in part to reduced investment levels, but perhaps also due to a view on the part of those in some sectors who are investing in a new enterprise that greenfields agreements do not efficiently bring the certainty about labour costs that they should.

It is clear that there has also been a reduction in the number of major projects, but less clear which industries have suffered a disproportionate fall in the number of greenfields negotiations attempted. There is no available evidence that the [Amendment Act] changes have brought unfairness into greenfields agreements outcomes, and the relative speed in their approvals compared with non-greenfields agreement approval applications suggests otherwise.

Australian Chamber of Commerce and Industry (ACCI) advised:¹⁹

As set out below in relation to the seventh issue, we see this as illustrating:

- a) A reduction in [greenfields agreements] numbers from a peak driven by massive investments in resources construction, which required multiple contractors, each with separate [greenfields] agreements.
- b) Perhaps a reversion towards a longer-term mean level of demand for [greenfields] agreements following a peak driven by major resource projects (of around 100-200 agreements per year).

¹⁸ ABI Submission, p. 7.

¹⁹ ACCI Submission, par. 23.

The MBA noted:²⁰

While it appears there has been a decrease amongst the use of Greenfields agreements in building and construction industry, this is likely to be related to a commensurate drop in the amount of Government funded infrastructure projects and/or other factors unrelated to the Greenfields provisions in the Fair Work Act. We note, for example, that changes to commodity prices have impacted the level of activity in the oil, gas and mining sectors which has a flow on to the number of new projects likely to attract the use of a Greenfield Agreement.

The review has concluded from this material that the reduction in the overall number of greenfields agreements since November 2015 is not a consequence of the legislative amendments but primarily reflects the conclusion of several major resource development projects and the end of what has been referred to as the 'resources boom'. Greenfields agreements nevertheless remain an important mechanism to efficiently establish business start-up arrangements and continued access to agreements of this nature is critical to a broad cross-section of industries. This is particularly the case for the construction and resource development sectors which rely heavily on this agreement making stream.

General observations

Both the union and employer organisation responses to the review made broad assertions which were not generally supported by specific examples relating to the 2015 greenfields amendments.

The capacity to reach greenfields agreements prior to the engagement of employees is a mechanism which continues to be significant in the establishment of new businesses. Leaving aside variations in construction and resource development work, the application of greenfields agreements has remained at a consistent level. Further, greenfields agreements have particular relevance to resource and infrastructure projects. These sectors stressed the importance of stability in workplace industrial arrangements from both project approval and project management perspectives.

The limited information available to the review confirmed that resource development projects commonly require workplace relations arrangements to be established with a high degree of certainty to attract finance. Even when this financial approval was not required, it is common that major resource development projects involve costing estimates based on the rapid achievement of sustainable workplace relations arrangements. In this context, the review was given repeated advice that there was a need for a 'circuit breaker' or mechanism to quickly assist in resolving differences and that the absence of that capacity put resource development projects and contractors at risk.

The information available to the review confirmed the significance of greenfields agreement making in the infrastructure construction sector and particularly where joint ventures were formed for specific projects. In these areas, greenfields agreements are commonly sought to allow a project to commence and conclude on a stable and secure basis.

The employer organisation responses universally sought the retention of greenfield agreement making capacity and generally reiterated positions previously put to earlier inquiries. The employer organisations referred to the need for certainty and, particularly for major resources and development projects, a capacity to reach greenfields agreements quickly to expedite project commencement.

Opposition to the use of small voting cohorts to make enterprise agreements with broad coverage was a common theme in union submissions.

Union responses to the review recognised that greenfields agreements differ in character to the mainstream agreement making process involving employees. There was some divergence in union views about the long-standing capacity for a greenfields agreement to be negotiated with a particular

²⁰ MBA submission, par. 45(a).

union when other unions had coverage of some employees. While there were no calls for the removal of the capacity to make a greenfields agreement, the union submissions often expressed a stated preference for agreements made with employees.

The ACTU stated:²¹

That enterprise agreements are ‘true agreements negotiated between the relevant bargaining representatives and made by more than one party’ is a foundational principle of the [Fair Work] Act, reflected in the emphasis on collective bargaining and enabling representation at work. Greenfields agreements are an exception to this important general principle that enterprise agreements are the product of collective bargaining and genuine agreement between the employer and workers, via their bargaining representatives.

For this reason, greenfields agreements pose a ‘unique policy challenge’. Commission oversight and other protections, such as the better off overall test, are critical in respect of greenfields agreements. Greenfields agreements determine the pay and conditions of workers – for up to four years – without direct input from those workers, and with no scope for the workers to bargain for changes to their pay and conditions during the life of the agreement.

...

The most important protection for workers in respect of greenfields agreements is that the agreement is bargained and agreed by the union entitled to represent their industrial interests. The union is comprised of workers from the relevant occupations and industries and provides a voice for workers in greenfields agreement making. The union is best placed to ensure that the interests of workers are appropriately and fairly taken into account.

This position was supported by both the Construction, Forestry, Mining and Energy Union (CFMEU) and the Australian Manufacturing Workers Union (AMWU). It should be noted that the Maritime Union of Australia (MUA) adopted the CFMEU submission in its entirety.

The unions emphasised that union involvement in enterprise agreement making was an important employee safeguard.²² Additionally, the AMWU expressed concern that there was an increasing tendency for businesses to rely on award conditions rather than negotiated agreements.²³

The unions reported that their actions and experience before and after the greenfields amendments did not support the retention of the current legislative provisions which provide a capacity to make a s 182(4) greenfields agreement.

MBA’s submission to the review suggested that since the Amendment Act was passed, there appears to be a greater proportion of agreements negotiated with the CFMEU and less negotiated with the Australian Workers’ Unions (AWU).²⁴ This may reflect the changed profile of greenfields projects from large-scale capital to more infrastructure development projects and consequently a shift in the relevant unions which employers are likely to engage with. For example, the AWU submission agrees with the MBA’s finding that it has negotiated significantly fewer greenfields agreements since the passage of the Amendment Act, and it also noted that it was the reduction in investment in large-scale capital projects that had contributed to the decline in the number of greenfields agreements being lodged and approved.²⁵

²¹ ACTU submission, pars. 8-10.

²² CFMEU Submission, pars. 4, 5 & 8; ACTU Submission, par. 9; AMWU Submission, par. 12.

²³ AMWU Submission, par. 5.

²⁴ MBA Submission, par. 45(c).

²⁵ AWU Submission, p. 4.

Access to greenfields agreement making information

The review has relied on the data provided by the Fair Work Commission and information provided by the WAD. Whilst this information has been useful in many respects, there are significant gaps in the information available. Had additional information about greenfields agreement making issues across the spectrum of industry been available this would have assisted both the policy development and the review process. For instance, there is no information on the length of time it generally takes to conclude a greenfields agreement, or the frequency with which greenfields agreement proposals are abandoned because the process was too slow or too difficult.

Responses to the review have confirmed that there is some reluctance on the part of employers to detail their specific circumstances.

Some additional information could be obtained by the Fair Work Commission through minor legislative changes. For instance, if employers were required to advise the Fair Work Commission of the commencement of a six-month negotiation period, this could put the Fair Work Commission on notice about a possible s 182(4) agreement determination and also provide useful data about the greenfields agreement making process.

However, even that would provide limited information about the issues confronting parties negotiating greenfields agreements. To this end, the review suggests that further research be undertaken at regular intervals to identify issues and trends in relation to the greenfields agreement making process.

Some limited additional information can also be obtained without legislative change. This would provide some useful guidance on the greenfields agreement negotiation process, particularly if the Fair Work Commission reported on the duration of greenfields bargaining processes by industry sector.

Recommendation 1

That the Fair Work Commission amend its greenfields agreement application form to request information about when bargaining commenced to collect more comprehensive information about the greenfields agreement making process.

Recommendation 2

That the Government consider commissioning regular research on greenfields agreement making issues to better inform future policy decisions, and contribute constructively to investment decision-making.

Approval of greenfields agreements

The review considered the Fair Work Commission's approval process for greenfields agreements. The Fair Work Commission has provided the following advice in this respect:²⁶

Until October 2014 all enterprise agreement approval applications were allocated directly to Commission Members to deal with and determine as they deemed appropriate. Some specialist administrative support was available to Members, for example, to provide some analysis regarding the BOOT. Members sought this assistance in approximately 5 per cent of applications.

In October 2014 the Commission piloted an 'agreement triage process' to promote greater consistency and improve timeliness in enterprise agreement approval decisions. The triage process involves a team of legally qualified staff conducting a comprehensive analysis of agreements lodged for approval. This analysis assists the Commission Member dealing with the application, in making their decision under the FW Act [Fair Work Act]. At all times the decision as to whether to approve an agreement is made by a Member.

In May 2015, the triage pilot was independently reviewed by Inca Consulting in association with Dr George Argyrous, Senior Lecture in Evidence-Based Decision Making, University of NSW.

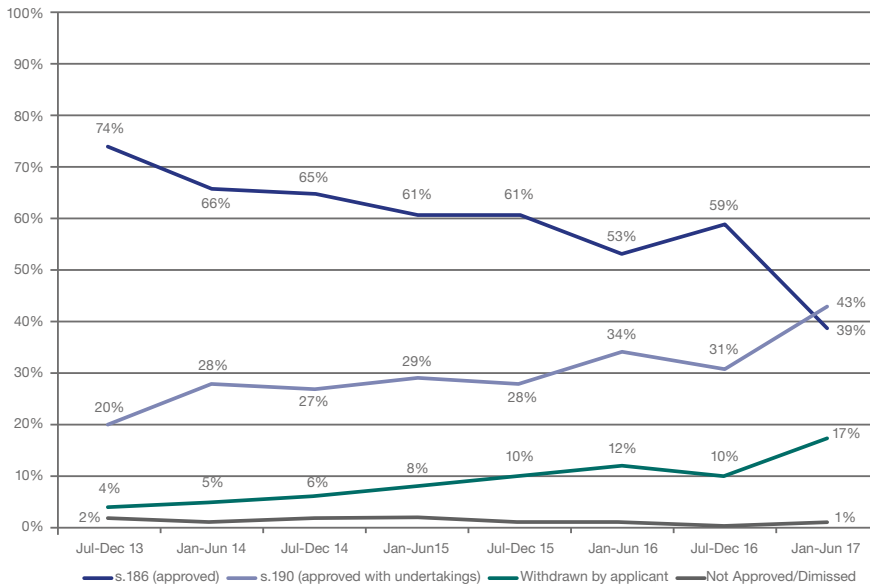
The report of the review of the agreement triage pilot is available on the Commission's website at [Agreement triage pilot independent review May 2015](#).

Initially the triage process was confined to enterprise agreements in a small number of industries and states, but was progressively expanded. By the end of November 2016, the triage process was applied to all applications for approval of agreements, including greenfields agreements.

The chart below contains a breakdown of agreement matters by result since the commencement of the triage process. It shows the percentage over time of applications for approval of single enterprise agreements that have been granted, granted with undertakings, withdrawn by the applicant, and dismissed. Prior to the triage pilot, 74% of applications for approval of single enterprise agreements were approved without undertakings compared to 39% in the first six months of 2017. Twenty per cent of applications prior to the pilot were approved subject to one or more undertakings, compared to 43% in 2017, and 4% of applications were withdrawn by the applicant compared to 17% in 2017. The increase in the number of undertakings suggests that the triage process has systematically identified potential shortcomings in agreements lodged with the Commission for approval.

²⁶ Fair Work Commission (FWC) Submission, pars. 12-18.

Chart 2: Agreements by result type



At all times the judgment as to whether an agreement should be approved or not is made by Members, to be exercised in accordance with their oath of office and the requirements of the FW Act [Fair Work Act]. The triage process has, however, assisted Members to exercise their function in a consistent and rigorous way.

The Fair Work Commission provided updated statistics on the time taken to finalise enterprise agreement applications set out in Table 5 below and noted:²⁷

Since the introduction of the triage process, there has been a steady increase in the proportion of applications that do not appear to meet all of the statutory requirements at the time of lodgment. Analysis and identification of these applications tends to be more complex and take longer. For example, rather than dismissing such applications, Members have sought to assist the parties to address concerns through accepting written undertakings. Generally, the Commission takes longer to approve agreements with written undertakings since it must seek the views of the employer and bargaining representatives before granting approval.

As illustrated in Chart 2 the incidence of agreements approved with undertakings has more than doubled since July–December 2013. Currently 43% of agreements are approved with undertakings.

In addition, internal resourcing pressures for staff in the agreement triage team have contributed to delays in the approval process. With highly skilled staff regularly achieving promotions, the Commission is streamlining its administrative processes to ensure that appropriate resourcing is maintained.

²⁷ FWC Submission, pars. 34-36.

Table 5: Enterprise agreements—timeliness, type of agreement

Type of application	KPI ¹	Days from lodgment to finalisation							
		50% of matters (median)				90% of matters			
		2016–17	2015–16	2014–15	2013–14	2016–17	2015–16	2014–15	2013–14
s.185—Single-enterprise	32 days	33	18	21	17	71	49	56	50
s.185—Greenfields	32 days	19	12	14	14	59	35	46	41
s.185—Multi-enterprise	32 days	42	28	34	26	124	85	90	54

¹ Key performance indicator from the Commission's 2016–17 portfolio budget statements

The Fair Work Commission has also confirmed that greenfields agreements are not given any form of particular priority in the approval process. That being the case, it might be surmised that the shorter time duration for approval of these agreements when compared to non-greenfield agreements reflects fewer issues with agreement approval. There are also fewer procedural requirements that apply to greenfields agreement approvals. The Fair Work Commission advice in this respect was:²⁸

The triage process for greenfields agreements in the same as for non-greenfields agreements, notwithstanding the different pre-approval requirements under Part 2-4 of the Fair Work Act 2009.

Apart from the construction and resource project sectors, little information was provided to the review about the impact of approval times on employment decisions. However, in the infrastructure construction and resource project areas, the advice provided to the review emphasised the importance of greenfields agreements being approved well before employment commenced. The review has concluded that delays in the approval of greenfields agreements have the real potential to impact on commercial and employment decisions. If a greenfields agreement is made and yet not approved by the Fair Work Commission, it is not possible to commence employment with any certainty about employment conditions. The potential consequences from a project wide perspective are substantial.

The time for commencement of work after a contract is awarded is often as little as 30 days. Delays in agreement approvals expose contractors to significant employment risks and to potential commercial charges associated with project delays and disruption.

Recommendation 3

The approval of greenfields agreements by the Fair Work Commission should be generally expedited. As a minimum, the Fair Work Commission should request information from employer parties to greenfields agreements about anticipated employment start dates, as part of the application process to facilitate approval before that date. Further, that the Fair Work Commission should report annually against this information.

²⁸ Email communication with the Fair Work Commission, 13 November 2017.

Good faith bargaining

Impact of the 2015 amendments

The Fair Work Act provides that a bargaining representative for an enterprise agreement may apply to the Fair Work Commission for bargaining orders. The Fair Work Commission may make bargaining orders if it is satisfied that one or more of the bargaining representatives for the proposed enterprise agreement are not meeting the good faith bargaining requirements set out in s 228, or the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement (s 230(3)). The Fair Work Commission advised the review that no applications have been made for a bargaining order in relation to a greenfields agreement.²⁹

Neither unions nor employer organisations flagged any breaches of good faith bargaining obligations, or applications for bargaining orders, since November 2015.

The significant decline in the number of greenfields agreements made since the 2015 amendments means that a conclusion about the effectiveness of the good faith bargaining requirements is difficult.

Specifically, in relation to the good faith bargaining obligations currently applicable to greenfields agreements, the ACTU noted:³⁰

The ACTU supports the continued extension of the good faith bargaining rules to greenfields agreement making. Although our affiliates report that they have not observed any altered bargaining behaviour on the part of either employers or unions as a result of the 2015 greenfields amendments, we agree with the view of the Fair Work Act Review that there is no cogent policy basis for the previous exception for greenfields agreement making from the good faith bargaining rules.

The CFMEU advised that:³¹

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.

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.

The AMWU noted the significance of dealing with known, and presumably trusted employers. It stated:³²

The AMWU has negotiated very few Greenfields Agreements since the New Greenfields Agreement Provisions were enacted. Where we have negotiated Greenfields Agreements, they have been in offshore construction, with businesses where the Union has an existing relationship. These existing relationships meant that there were no timing issues in relation to those agreements.

Overall, there hasn't been significant use of Greenfields Agreements, which corroborates the findings of the Background Paper. However, there is an issue this review should further explore, which is the availability of the loophole open to businesses to enter into Enterprise Agreements without the involvement of Unions and with only a handful of insecure workers.

The AWU position was that:³³

The AWU was a bargaining representative for a significant number of the greenfields agreements provided in the list that accompanied the invitation to submit to this review. In fact,

²⁹ As at 1 November 2017.

³⁰ ACTU Submission, par. 18.

³¹ CFMEU Submission, pars. 11-12.

³² AMWU Submission, pars. 9-10.

³³ AWU Submission, p. 3.

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

AMMA was the only employer organisation to assert that union bargaining behaviour had changed since the 2015 amendments.³⁴ In relation to good faith bargaining, AMMA stated:³⁵

Applying the good faith bargaining provisions to greenfields agreement making is something AMMA has advocated for since its 2012 submission to the Fair Work Act Review Panel as part of the post-implementation phase of the FW Act [Fair Work Act]. AMMA argued for it again in our initial submission to the Productivity Commission, as a logical step in introducing more rigour and broader options into the making of greenfields agreements.

AMMA strongly supports the retention of the good faith bargaining provisions to greenfields agreement making.

Previously, a criticism of greenfields agreement making was that unions would simply refuse to negotiate with a particular employer, fail to respond to proposals, or fail to meet in a timely fashion. In the context of project work, unions know employers need to get labour arrangements in place rapidly to secure investment into projects, which is a disparity of bargaining power in favour of unions. The good faith bargaining obligations act as an incentive to ensure that the parties behave as they would in trying to reach any enterprise agreement. Certainly, they in no way adversely affect bargaining behaviour such that any consideration should be given to removing them.

Otherwise, the employer organisations did not contend that union behaviours since the greenfields amendments had significantly changed or that these behaviours contravened the good faith bargaining obligations in the Fair Work Act.

ACCI stated:³⁶

However, we can usefully recall that:

- a. We understand the majority of [greenfields] agreements to have always been successfully negotiated between prospective employers and trade unions, and agreed consensually to proceed for approval.
- b. Thus, in most industries and circumstances, the 2015 changes will not have altered, or not have altered markedly, bargaining behaviours. This does not however diminish their importance, and their utility cannot be usefully assessed by solely focussing on simple measures of direct usage.
- c. The focus of the 2015 changes was the minority of situations in which negotiations protract, are not conducted in good faith, or are being gamed to place investment pressures on employers to agree to overinflated terms. This is why we describe the 2015 amendments as a circuit breaker / safety valve for the minority of [greenfields] negotiations that protract and thereby endanger critical, job creating investment.
- d. Even where behaviours do change, the impact may have been subtle and difficult to observe. The existence of the safety valve provided by s 182(4) is likely to ensure more [greenfields] negotiations proceed consensually and constructively, and yield [greenfields] agreements supported by both prospective employers and unions. Thus, much of the actual behavioural change may be observable through more [greenfields] agreements being successfully negotiated between employers and unions.

³⁴ AMMA Submission, pars. 19-20.

³⁵ AMMA Submission, pars. 13-15.

³⁶ ACCI Submission, par. 12.

- e. However this is something of a counterfactual which is difficult to measure, and it certainly does not come out in the agreement data provided to support this review.
- f. What is really needed to assess any change in behaviours is a “realisation rate” and an assessment of what proportion of negotiations towards a [greenfields] agreement actually yield a [greenfields] agreement that is made consensually, and how this changes over time. We don’t understand this data to be available, and the review needs to rely instead on the views of those most experienced in making [greenfields] agreements.
- g. However, the Australian Chamber is not aware of:
 - i. Examples following the introduction of the 2015 amendments, of employers embarking towards [greenfields] agreements they judge to be necessary for investment / the commencement of work, only to abandon them as too difficult.
 - ii. Any genuine union grievance with the process post-2015, or examples of unions being forced to agree to a [greenfields] agreement that ‘sells their members short’ for fear of being drawn into the process under s 182(4). This was one of the professed concerns in 2014 and 2015, but we do not understand it to have been borne out in practice following the amendments.

Implicit in the submissions dealing with the good faith bargaining obligations established by the 2015 amendments is recognition that a breach, or an asserted breach, of those obligations can give rise to an application for a Good Faith Bargaining Order from the Fair Work Commission.

The review has concluded that good faith bargaining obligations established by the 2015 amendments should be retained in their entirety. However, it is not possible to conclude that the obligation to comply with good faith bargaining behaviours will mean that all greenfields agreements will be made in a timeframe which meets the imperatives of new business ventures.

Recommendation 4

That the good faith bargaining obligations established by the 2015 amendments be retained in their entirety. These amendments are generally supported and no disadvantage to employers, employees and unions has been identified.

Recognition of other unions

Section 177 of the Fair Work Act provides that an employer who will be covered by a greenfields agreement (and, if relevant, their nominated representative) is a bargaining representative. The same status is accorded to an employee organisation that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement³⁷, in relation to work performed under that agreement and is an employee organisation with which the employer has agreed to bargain.

³⁷ Note, s 187(5) requires that the Fair Work Commission must be satisfied that the relevant employee organisation(s) that will be covered by the agreement (when taken as a group) are entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement and that it is in the public interest to approve the agreement.

The Australian Federation of Air Pilots (AFAP) submission identified concern about the capacity for exclusion of one or more unions, with the requisite coverage, from the greenfields agreement making process.³⁸ The AFAP referred to a particular greenfields agreement in this respect and sought that the Fair Work Act be amended so as to require that an employer recognise any union with the appropriate coverage of the employees to be covered by that agreement. In this respect the AFAP sought that the Fair Work Act be amended to remove the discretion currently enshrined in s 177(b)(ii) for an employer to nominate the union or unions with whom they agreed to bargain.³⁹ The AFAP asserted that the 2015 amendments had the effect of enabling the exclusion of unions at the discretion of the employer and resulted in bargaining outcomes which were below industry standards in a given sector.⁴⁰

As noted previously in this review, greenfields agreements have not required employers to negotiate with all relevant unions since their first inclusion in federal workplace relations legislation in the WR Act. It was, however, a recommendation of the review panel in the 2012 Fair Work Act Review that employers be required to notify all relevant unions. The 2012 Fair Work Act Review did not recommend that employers be required to reach an agreement with all relevant unions, and this would not seem necessary given the requirement for the Fair Work Commission to be satisfied that the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of the majority of employees who will be covered by the agreement (s 187(5)).

It should be noted that, unlike the union submissions generally, the AFAP confirmed that it did not object to a fixed negotiation period and 'last-offer arbitration', provided all relevant bargaining representatives are recognised by employers for the duration of the negotiating period, and have standing in any arbitration.⁴¹

The Australian Nursing and Midwifery Federation (ANMF) expressed concern about the extent to which greenfields agreement making processes need to be different from the general agreement making and approval processes. The ANMF concluded:⁴²

ANMF supports regulation for Greenfield agreements that recognises the legitimate role of unions and requires the bargaining parties to conduct negotiations and to complete agreements on a fair basis including:

1. There is a requirement the employer notify and recognise all unions entitled to represent employees to be covered by the agreement.
2. Greenfield agreements come within a regulatory framework that has a primary object of collective bargaining in good faith.
3. That conciliation and/or arbitration of outstanding matters be available on application.
4. Where the FWC exercises arbitral powers to resolve an impasse the Tribunal must be required to have regard to prevailing employment conditions in settings of a similar scale or nature.

The ACTU did not identify this concern in its submission. None of the other individual unions who made submissions in this matter sought a change to require employers to recognise all unions with coverage as bargaining representatives.

³⁸ AFAP Submission, p. 1.

³⁹ AFAP Submission, p. 4.

⁴⁰ AFAP Submission, p. 3.

⁴¹ AFAP Submission, p. 4.

⁴² ANMF Submission, p. 2.

The Australian Industry Group (AiG) submission dealt with this issue in the following terms:⁴³

Between 1996 and mid-2009, greenfields agreements could be made under the *Workplace Relations Act 1996* between an employer and any union eligible to represent any employee on a new project. The ability for employers to reach a greenfields agreement with any union eligible to represent any employee on a project operated to reduce the incidence of unreasonable union claims. For example, if the Construction, Forestry, Mining and Energy Union (CFMEU) was pursuing unreasonable claims the head contractor could reach a greenfields agreement for the project with the Australian Workers Union (AWU) or vice versa.

Other employer organisation submissions did not address this issue and it was not something the Background Paper sought comment on. However, there was a general level of support from the workplace relations practitioners the review spoke to that it was important to have the choice amongst eligible unions in agreement making and that this capacity was frequently critical to ultimately reaching an agreement.

An amendment to s 177, of the nature sought by the AFAP and the ANMF, would have the practical effect of increasing the complexity of a greenfields bargaining process. Such an amendment would often require multiple unions to agree amongst themselves on acceptable agreement provisions, or to effectively delegate carriage of a particular negotiation to a given union. Despite the ANMF and AFAP's claims, the review was not presented with widespread and substantial anomalies or inequities arising from the current capacity of an employer to select the union (or unions) with which it wishes to make a greenfields agreement.

Historically, different unions have had preferences for different types of industrial arrangements. Redundancy and insolvency protection arrangements represent examples of these differences. Often it is the case that these arrangements are represented by a particular union as the 'norm' when, in reality, other unions have pursued slightly different approaches. A requirement that a potential employer negotiate with all unions who could cover the employees to be engaged by a new business venture is highly likely to substantially increase both the complexity of the negotiations and the costs associated with implementing the new agreement.

It should be noted that the making of a greenfields agreement with one particular union has no effect on union membership arrangements, which are determined by the relevant union coverage rules.

Those union coverage rules mean that there are numerous instances where multiple unions could be involved in making a greenfields agreement. There is no material available to the review which indicates that unions without the necessary coverage are entering into greenfields agreements. A number of applications to approve greenfields agreements have been unsuccessfully challenged on this basis.⁴⁴

The ANMF proposal for a specified fixed negotiation period and last-offer arbitration appears inconsistent with the position otherwise generally supported by the unions.

The review has concluded that the good faith bargaining obligations should not be extended to include an obligation that an employer must negotiate with all employee organisations with membership coverage of the employees to be covered by a proposed greenfields agreement. The 2015 amendments did not change the Fair Work Act in this respect and a change of this nature would lead to significant disputation making the greenfields agreement process substantially unworkable.

⁴³ AiG Submission, p. 3.

⁴⁴ For examples, see: *The Australian Workers' Union v Killarnee Civil & Concrete Contractors Pty Ltd, ITF The Thompson Family Trust and another* [2011] FWAFB 4349; *Leighton Contractors Pty Limited re Leighton Contractors Broadmeadow Sustaining Operations Project Union Greenfield Agreement* [2011] FWAA 5408; *John Holland Pty Ltd re Abigroup, John Holland and the Australian Workers' Union-Regional Rail Link Southern Cross Station to Footscray Junction Project 2012-1015* [2012] FWAA 1565; *Macmahon Contractors Pty Ltd re MJHJV (Macmahon) Ichthys Onshore Construction Greenfields Agreement* [2012] FWAA 2937.

Recommendation 5

The good faith bargaining obligations should not be extended to include an obligation that an employer must advise and then negotiate with all unions with membership coverage of the employees to be covered by a proposed agreement.

Six-month negotiation period and applications for approval of s 182(4) greenfields agreements

These elements of the 2015 greenfields agreement amendments are the most contentious component of the amendments. The history of these provisions was addressed at some length in the background paper. In summary, the amendments provide an optional negotiation process for employers and unions to make a greenfields agreement. To access this option, the amendments require the employer to notify the union(s) of the commencement of a six-month negotiation period and provide a reasonable opportunity for the agreement to be signed. At the conclusion of the six-month notified negotiation period, if an agreement has not been made between the employer and the unions, the employer can apply to the Fair Work Commission to approve a proposed agreement.

There are two essential components of this aspect of the amendments. The first goes to the duration of the six-month notified negotiation period before an employer can apply to the Fair Work Commission for approval of a greenfields agreement under s 182(4). The second goes to the test that the Fair Work Commission is then required to apply in considering any such application. In addition to the other approval requirements, s 187(6) requires the Fair Work Commission to be satisfied that the agreement, considered 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. A note attached to this section provides further guidance to the effect that the Fair Work Commission may have regard to the prevailing pay and conditions in the relevant geographical area. In this report, the considerations required of the Fair Work Commission are referred to as the 'prevailing pay and conditions' test.

Is a six-month period appropriate?

Since the greenfields agreement amendments have taken effect there has been no application for approval of a s 182(4) greenfields agreement. The legislation does not require an employer to advise the Fair Work Commission, or anyone other than the bargaining representatives, that the six-month negotiation period has commenced. None of the submissions identified instances when notices under s 178B of this nature had been provided. However, after further detail was requested by the review, some parties acknowledged that notices had been issued. The review has not been able to identify a specific number of notifications. Discussions with workplace relations professionals disclosed some instances where notices of this nature had been provided soon after the negotiations had commenced. In these instances, some of the negotiations had resulted in agreements being made, other negotiations had been abandoned whilst others were continuing.

The stakeholder positions with respect to negotiating periods and s 182(4) greenfields agreement applications should necessarily take into account the extensive debate which occurred over these issues over a number of years. As noted in the Background Paper, this issue was considered extensively by the Productivity Commission. The Productivity Commission report recommendation was:⁴⁵

RECOMMENDATION 21.1 (SECTION 21.2)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:

- continue negotiating with the union
- request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union
- submit the employer's proposed greenfields arrangement for approval with a 12-month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the no-disadvantage test specified in recommendation 20.5.

These parts of the greenfields agreement amendments were strongly opposed by the unions. The ACTU position was that:⁴⁶

Section 182(4) removes this protection by deeming a greenfields agreement to have been made with the relevant union/s despite the union/s not having agreed to it. This provision enables an employer to unilaterally determine the terms of a greenfields agreement at the conclusion of a six-month 'notified negotiation period'. The Productivity Commission specifically recommended against the introduction of a provision such as s 182(4) because of the potential to incentivize employers to take a 'hard bargaining' approach, 'holding out until the negotiating period had elapsed and having its proposed terms approved'.

Section 182(4) was introduced without a sound policy basis. Importantly, both the 2012 Fair Work Act Review and the 2015 Productivity Commission Inquiry into the Workplace Relations Framework (Productivity Commission Inquiry) concluded that there should *not* be a return to unilateral employer greenfields agreement making arrangements, as permitted under the WorkChoices regime, and yet that is precisely what s 182(4) achieves. These arrangements were also emphatically rejected by the Australian electorate at the 2007 federal election. They remain deeply unpopular with the community – for good reason, including that these arrangements led to overall reductions in wages and conditions.

Further, s 182(4) was introduced to mitigate a '*potential* risk to projects of national significance', because of a perception that the previous provisions conferred on unions a capacity to frustrate the making of a greenfields agreement in a timely way. There was no actual evidence that this power was abused or that any significant project had not proceeded for want of an agreement. The evidence relied upon in the Explanatory Memorandum to the *Fair Work Amendment Bill 2014* (Cth) was speculative and anecdotal, particularly in relation to the time taken to negotiate a greenfields agreement.

...

Of course, the most telling evidence that its introduction was unnecessary is that no application has been made for approval of a greenfields agreement pursuant to s 182(4). Our affiliates report that they have not observed any altered bargaining behaviour on the part of either employers or unions as a result of the 2015 greenfields agreement amendments. We anticipate that the repeal of s 182(4) will have no effect on greenfields agreement making.

⁴⁵ Productivity Commission Inquiry Report, *Overview and recommendations* (30 November 2015), p. 60.

⁴⁶ ACTU Submission, pars. 10, 11, 12, 14, 15, 16 and 17.

However for as long as s 182(4) remains in the Act, there is the potential for it to be utilised by employers to unilaterally determine pay and conditions, without the important safeguard of agreement with the relevant union/s on behalf of the workers for whom they are the legitimate bargaining representative under the Act. It is because of this potential that s 182(4) must be repealed.

This potential is of particular concern where workers have reduced market power, for example, 'in non-project settings where timing is not as critical, or where workers may be less mobile or [formally] skilled, meaning that imbalances in bargaining power may persist.' As noted, section 182(4) was introduced to mitigate a perceived risk in respect of major capital projects and resource development projects. Its operation however is not so limited and it has potential for use in industry contexts where workers have reduced market power.

Workers' market power is also contingent on the economic context – for example, workers have reduced market power when there are 'relatively few alternative projects available to potential employees'. These are the precise economic circumstances that workers currently face, given the reduction in the number and scale of capital development projects. The current economic context is also marked by wage stagnation. As noted above, there is empirical evidence that unilateral employer greenfields agreements led to overall *reductions* in wages. Collective bargaining is one of the most effective means to improve wage growth. In light of the growing consensus on the need to generate wage growth, reform should be directed to abolishing unilateral greenfields agreements and supporting genuine collective bargaining (further discussed below).

The AWU summarised its position:⁴⁷

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

The CFMEU advocated a similar position in the following terms:⁴⁸

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. 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.

None of the union submissions addressed the circumstances described by employers where no agreement had been possible after six months of negotiations.

The employer organisations adopted a very different position to the unions. ACCI argued that the capacity to apply for a s 182(4) greenfields agreement had to be seen in the context of the end of the resources boom, which substantially explained the reduction in the number of agreements and significantly impacted on commercial and labour market opportunities. ACCI argued for the replacement the six-month negotiation period with a three-month term, together with broader options at the discretion of the employer at the end of the negotiating period.⁴⁹

⁴⁷ AWU Submission, p. 3.

⁴⁸ CFMEU Submission, par. 14.

⁴⁹ ACCI Submission, pars. 37-41.

The AiG argued that the six-month notification period should be reduced to 2 months because of the tight timeframes applicable to major development projects.⁵⁰

ABI noted the reduction in the number of major investment projects made an assessment of the effect of this element of the greenfields agreement amendments difficult but suggested that the notified negotiation period be reduced to 3 months. Furthermore, ABI proposes further consideration of the Productivity Commission recommendations. It opposed involuntary arbitration and supported a simple assessment against the BOOT. Failing this, ABI tentatively favoured a 'last offer arbitration' option.⁵¹

AMMA strongly supported the retention of a notified negotiation period. AMMA stated:⁵²

There is a clear need for some form of 'circuit breaker' to assist negotiations to proceed in a timely and constructive fashion. In feedback sought in response to this review, one AMMA member observed:

"knowing that there was a timeframe where arbitration could be utilised, the closer it came to six months, the union was held to meaningful conversations."

This observation is a reflection that, in the experience of that member, bargaining behaviour was positively affected by the 2015 amendments. Other feedback received by AMMA expressed similar sentiments, although not all of AMMA's members have seen a positive improvement in bargaining behaviour on the part of unions, with feedback noting that the process for greenfields negotiations is often still heavily weighted in favour of unions. This is particularly the case where a contractor is obliged to have an agreement in place prior to mobilising labour, and there is a lead in time of less than 6 months before work is scheduled to commence. As greenfields agreements must be made with a union, the leverage exercised remains significant.

It is AMMA's view that further amendments are necessary to ensure a system that is effective and fair.

In terms of the six-month negotiation period, AMMA confirmed its position that this should be reduced to 3 months. It stated:⁵³

AMMA has not been able to identify any clear link between the 2015 amendments and the decrease in greenfields approval applications and suggests for the resources and energy sector at least, the current investment climate has impacted on the need for new greenfields agreements to be made.

...

Member feedback revealed that 85 per cent of employers who negotiate greenfields agreements for new projects are concerned about the time taken to reach a greenfields agreement. This is not just due to the resources taken to engage in bargaining, but also the realities of timeliness between the requirement to reach an agreement, engage a workforce and commence work on some projects will be less than 6 months.

...

It also should be noted that the notification period of six months is a trigger for an application to be made to the FWC. The ultimate outcome, including final costs liabilities of the enterprise, will not be known for some time. Notwithstanding that an agreement is made when s 182(3) or s 182(4) are satisfied, the agreement is still subject to formal approval.

⁵⁰ AiG Submission, p. 3.

⁵¹ ABI Submission, p. 9.

⁵² AMMA Submission, pars. 19-21.

⁵³ AMMA Submission, pars. 30, 33, 35 and 36.

Under the FWC's timeliness benchmarks, it aims to finalise all agreement approval applications within 12 weeks. It notes that the timeliness benchmarks are aspirational, and it expects that there will be circumstances where the FWC cannot meet its timeliness goals for a variety of reasons. The most recent FWC Annual Report reveals that 90 per cent of greenfields agreements were finalised by the FWC within 59 days in 2016-17.

The experienced workplace relations professionals involved in major resource development projects with whom the review consulted⁵⁴ suggested that a six-month notified negotiation period was simply too long as even a delay of a few months could have serious repercussions for the viability of a significant project. Certainty in terms of project labour costs was acknowledged as a critical element in final project costing and approval decisions. Whilst the high commodity prices during the resources boom provided increased project funding latitude, normal trading conditions make this cost certainty critical.

Based on feedback from workplace relations professionals, a general approach for these projects was for an initial greenfields agreement to be negotiated for an early stage of a project. This agreement may involve civil works with negotiations over a two to three-month period. The initial agreement could alternatively be negotiated with a managing contractor who was also a direct employer on a given project. This was particularly the case if external funding was being sought but applied even if a resource development project was being funded from internal resources. The general terms and conditions of the initial agreement were commonly adopted in other greenfields agreements as other contractors bid for, or win, other areas of work on a project, with variations specific to individual contractors.

Having the initial agreement established in a reasonable time is important to the commencement of the project. Additionally, as subsequent contractors often had only a few weeks between being awarded a contract and commencing, delays in concluding agreements applicable to contractors' work on a project have the potential to stop these contractors from being able to commence working or to expose them to potential additional costs or disruption.

The review was advised by workplace relations professionals that, depending on the nature of the project, contractors could have only very limited time to finalise a bid, and, if successful, could be required to mobilise a workforce within a similar short time period. On other projects these time frames were substantially extended. The difference appears to relate to the project management approach adopted for a given project. Timeframes for building construction and infrastructure projects were generally shorter than those applicable for major resource development projects.

As noted elsewhere in this report, if a greenfields agreement cannot be negotiated, the alternatives are that the project does not go ahead, or to go ahead without a greenfields agreement, exposing the project to potential protected industrial action. In addition to the risk of protected industrial action, the MBA also expressed concerns about the prevalence of unlawful behaviour by the CFMEU in the building sector.⁵⁵ Taken together, this may present a significant risk to the viability of a project.

Finally, the advice provided to the review by workplace relations professionals was that greenfields agreements negotiated for major resource projects have historically involved estimates of 'going rates and conditions' and relatively consistent wage increases. For most major projects completed in the period from 2009-2015 this has translated to wage increases of five per cent per annum. The significant reduction in resource prices and the absence of new resource projects means that the boom wages and conditions experienced for the resources sector may have been disturbed.

When the duration of the six-month negotiation period is considered in the context of all the information provided to the review, it represents a substantial possible delay and could very likely jeopardise either a final project approval decision or a contractor's capacity to participate in a project.

⁵⁴ These consultations were undertaken by telephone on 3 November 2017, 16 November 2017, 21 November 2017 and 23 November 2017, and were made on an in-confidence basis.

⁵⁵ MBA Submission, pars. 19 & 20, and Attachment A.

Workplace relations professionals in the infrastructure construction sector agreed that the six-month negotiation period was too long and suggested three months was a more appropriate timeframe as they were commonly required to mobilise on a project well within six months. These practitioners indicated that greenfields agreements reached for major infrastructure construction projects may only apply to the primary contractor and were not generally replicated by smaller subcontractors. Where no agreement was possible, alternative employment arrangements may be made, sometimes at lower rates of pay.

Infrastructure construction greenfields agreements negotiations could conceivably be assisted by informal conferences in the Fair Work Commission, although some employers voiced reservations about the nature of the assistance available through the Fair Work Commission's 'interest based bargaining'.

In overall terms, workplace relations professionals from the infrastructure construction sector confirmed that the six-month negotiation period was too long and represented a threat to stable and secure employment initiatives.

Additional timing considerations

Two additional time elements need to be considered. Firstly, it is unlikely that the six month notified negotiation period would be commenced at the outset of greenfields agreement discussions for a major resources project agreement. It was put to the review that employers commonly seek to engage with unions as project partners. This is reflected in the wording of many project related agreements. Given the advice provided by both unions and employer associations, it appears most likely that, notwithstanding the amendments, resource project agreements discussions have been pursued without formal commencement of the notified negotiation period. The historical practice of initiating discussions directed at achieving agreement has continued without formal commencement of the notified negotiation period. The fact that no submission to this review has identified the commencement of such a notified negotiation period on a resource project is consistent with this position. Consequently, even in the event that a negotiation period is to be notified for a resources project, it is most likely that some time will be spent negotiating before this is done.

The review was advised by one infrastructure construction expert that time pressures dictated the initiation of the notified negotiation period at an early stage in the negotiations in some circumstances. However, other construction sector stakeholders were unable to corroborate this practice on the information they had available, making the prevalence of the practice in that sector difficult to estimate.

In addition to the time associated with the normal Fair Work Commission agreement approval process, the concept of a notified negotiation period must necessarily be considered in conjunction with what happens at the end of that period if an application is made for approval of a s 182(4) greenfields agreement. Whilst the 2015 greenfield agreement amendments were primarily directed at facilitating major project and resource development initiatives, consideration of the prevailing pay and conditions required to be undertaken by the Fair Work Commission will depend on the circumstances of the application. In order to consider the likely time and issues associated with the application of the prevailing pay and conditions test, the review has considered the limited information available in a cross section of potential greenfields agreement applications.

Resource development project agreements represent an obvious potential application of s 182(4). As noted above, the initial greenfields agreement negotiated on a given major project is likely to be the most contentious agreement. Generally, this involves an agreement reached with the initial major subcontractor. There is no indication that project wide agreements with which subcontractors are obligated to comply are now applied, as they may be incompatible with the *Code for the Tendering and Performance of Building Work 2016*. However, there is some similarity between the first greenfields agreement reached on a resource development or major infrastructure project, and subsequent contractor greenfields agreements. The information available to the review indicates that these matters are only rarely referred to the Fair Work Commission. Some insight into the negotiation of initial project agreements can be gained from the Wheatstone Project.

Wheatstone case study

The Wheatstone Project is the construction of two liquefied natural gas (LNG) rail lines and a domestic gas plant linked to four gas fields off the coastal town of Onslow, in Western Australia. This significant economic development is estimated by Chevron to result in more than 30,000 direct and indirect full-time equivalent jobs in Australia over the life of the project and contribute approximately \$6 billion to Australian GDP per year.

While many greenfields agreements have been made for the Wheatstone Project, the Thiess Pty Ltd Wheatstone Project Agreement 2012 (the Thiess Agreement) and John Holland Pty Ltd Wheatstone Project Agreement 2012 (the John Holland Agreement) are examples of where a single union, the Australian Workers Union (AWU), made a greenfields agreement with an employer, where the other relevant unions, the Construction, Forestry, Mining and Energy Union (CFMEU), the Australian Manufacturing Workers' Union (AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) opposed the agreement. The Thiess Agreement had substantially the same terms and conditions as the John Holland Agreement, but contained some additional provisions relating to tunnelling work.

According to Fair Work Australia's decisions to approve the Thiess Agreement ([2012] FWAA 7466) and the John Holland Agreement ([2012] FWAA 7307), the CFMEU, AMWU and CEPU opposed the application to approve the agreements on the ground that it was not in the public interest (s 187(5)(b)) as the AWU had not appropriately represented the interests of the employees who were to be employed under the agreements. Fair Work Australia Commissioner Williams rejected the CFMEU, AMWU and CEPU's submissions and approved the agreements on 29 August 2012.

In approving the Thiess Agreement, Commissioner Williams commented on the application of the public interest test in relation to the John Holland Agreement:

[56] The fact that, in the bargaining process for the John Holland Agreement, the unions did not achieve all they wanted is not unusual or surprising. However, the public interest is to be tested against what is actually in the Agreement, not what the unions claimed. Critically if the AWU had persisted together with the other unions in demanding complete adherence to the log of claims, the John Holland Agreement and then this Agreement would not have been reached at all; to the detriment of the Wheatstone Project and the employees to be employed there.

The AWU and the other unions had pursued their claims on the Wheatstone Project through six months of negotiations. While a s 182(4) greenfields agreement was not available to Thiess or John Holland during these negotiations, the existence of this type of agreement may have changed the dynamics and behaviour of parties during negotiations.

The Wheatstone experience is consistent with the earlier conclusions about timeframes for making greenfields agreements. The Wheatstone example also demonstrates the extent to which the range of matters likely to be in dispute are relatively limited. Most issues likely to be disputed relate to the starting point for wage rates, the rate of wage increases and roster or working hours arrangements.

It is difficult to see how an application for approval of a greenfields resource development or an infrastructure construction project agreement which was fundamentally different to concurrent agreements in that industry or geographic area could be sustained under the prevailing pay and conditions test. It is far more likely that the debate and points of difference will go to questions of degree or issues associated with new projects in geographic areas where there are differing arrangements in place.

Notwithstanding this, the normal approval time for a greenfields agreement will most likely be extended by the application of the prevailing pay and conditions test in s 187(6). That test is likely to require some consideration of comparable arrangements by the Fair Work Commission. This will particularly be the case for the first occasion when a test of this nature is to be applied. It is quite conceivable that this may involve either consideration by a Full Bench of the Fair Work Commission or that the first such matter may involve a subsequent appeal. Consequently, it may be the case that the approval process in the first tested instance involves time allocations of some months. Subsequent applications may still take some time to finalise.

This means that the conclusion of a contested greenfields agreement might take well in excess of the six-month negotiation period. Time delays of this nature are very likely to harm or jeopardise a significant project or an individual contractor's ability to deliver.

The review is satisfied that a capacity to resolve protracted disagreements about greenfields agreements is necessary and that the six-month period is too long to be a satisfactory circuit breaker. This concern is exacerbated when the period before a notification and the period after an application to the Fair Work Commission to approve an agreement are taken into account. It represents an unreasonable period of uncertainty which has the real potential to stop or disrupt a major resource development proposal from proceeding or to severely disrupt and delay these projects or businesses that wish to participate in them. This is not a criticism of any of the parties seeking to negotiate an agreement, but rather, a reflection of the employment significance of the successful negotiation of greenfields agreements.

Recommendation 6

That the capacity for an employer to seek approval of a greenfields agreement at the expiry of the notified negotiation period be retained.

Recommendation 7

That the Government reduce the notified negotiation period from six months. The review considers a three-month period consistent with the initial amendment proposal is more appropriate.

Prevailing pay and conditions test

The prevailing pay and conditions test was included in the Amendment Act to ensure that the interests of employees were still taken into account where an employer failed to reach agreement with a union within the six-month negotiation period.⁵⁶ The absence of any application to invoke the prevailing pay and conditions test established by the 2015 greenfields agreement amendments makes assessment of this form of circuit breaker difficult.

There is no evidence that s 187(6) and the existence of the capacity for an employer to make an application for approval of a s 182(4) greenfields agreement after the completion of a notified negotiation period has disadvantaged employees, unions or employers. However, in the event that the existing provisions of the Fair Work Act need to be applied, there is a reasonable basis for concern that uncertainty about what is meant by the prevailing pay and conditions test could result in delays that would adversely affect resource development or infrastructure construction projects.

⁵⁶ Explanatory Memorandum, Regulation Impact Statement Fair Work Amendment Bill 2014, p. x.

The advice provided to the review by infrastructure construction experts went to concerns about how the Fair Work Commission would apply the prevailing pay and conditions test. Probable differential approaches by different Members of the Fair Work Commission and likely delays associated with the application of that test, were critical factors in decisions not to seek to utilise s 182(4).

There is no evidence from industry sectors other than construction and resource development which indicates that this issue represents a matter of concern to employers who enter into greenfields agreements.

Productivity Commission recommendations

This test can be contrasted with the recommendations made by the Productivity Commission in 2015. Those recommendations are set out below:

RECOMMENDATION 21.1 (SECTION 21.2)⁵⁷

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:

- continue negotiating with the union
- request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union
- submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the no-disadvantage test specified in recommendation 20.5.

AMMA advocated for adoption of the Productivity Commission recommendation 21.1 in the following terms:⁵⁸

AMMA and its members are also supportive of the Productivity Commission's recommendation 21.1, which recommends providing a suite of options where parties are not able to reach agreement after three months of negotiating. Importantly, the recommendation included options:

- To continue to negotiate with the union;
- To request the FWC undertake a "last offer" arbitration by choosing between the last offers made by the employer and the union;
- To submit the employer's proposed greenfields agreement for approval with a limited (12 month) nominal expiry date.

The MBA proposed the adoption of a new form of 'no-disadvantage test' against award standards. However, the MBA remarked in relation to the same Productivity Commission recommendation:⁵⁹

The need for certainty in the making of Greenfields agreements is paramount. The three points [in the] above recommendation [in PC recommendation 21.1] would not deliver certainty. Arbitration of any kind is not appropriate as investors will not submit to an imposed outcome when considering labour costs as part of an investment proposal. A Greenfields agreement should not last for only 12 months but for the life of the project as elsewhere recommended by the Commission. For all of these reasons, we do not support this recommendation.

In terms of the prevailing pay and conditions test enshrined in s 187(6) of the Fair Work Act, AMMA argued that the application of that test could entrench inflated, non-competitive terms and conditions that are no longer relevant to the market conditions of the day. In this regard it referred to very high labour costs at the

⁵⁷ Productivity Commission Inquiry Report, *Overview and recommendations* (30 November 2015), p 60.

⁵⁸ AMMA Submission, par. 47.

⁵⁹ MBA Submission, par. 74.

height the resources boom and expressed concern that maintenance of these arrangements which negatively impact all investment opportunities. AMMA proposed that:⁶⁰

In terms of an appropriate test where an arbitrated outcome is called for, if not the prevailing industry standards test that currently exists in the FW Act [Fair Work Act], AMMA supported the Productivity Commission's recommendation of a requirement to pass the no-disadvantage test. This recommendation was made in the context of a suite of other recommendations about agreement making, so may be beyond the scope of this review. Failing that, the two existing tests (the BOOT and the public interest test) are adequate to protect employees' interests.

Other employer organisation submissions also supported moving away from a prevailing pay and conditions test and instead simply relying on the general agreement processes such as the BOOT.

The AMWU considered that s 187(6) was intended to provide some protection to prevent greenfields agreements being made with terms and conditions below the prevailing pay and conditions in an industry and forecast its desire to be involved in any determination of this issue by the Fair Work Commission. The AMWU recommended that there should be a review to "consider the impact of the notified negotiation period provisions"⁶¹ 12 months after there has been a s 182(4) greenfields agreement made for the first time.⁶²

In the context of their calls for an extension of the good faith bargaining obligations, both the AFAP and the ANMF indicated support for last resort arbitration for disputed issues by the Fair Work Commission.⁶³

None of the workplace relations professionals the review spoke to proposed a departure from the prevailing pay and conditions test, but both groups acknowledged uncertainty about how the test would be applied. This uncertainty was also acknowledged by the CFMEU, in the following terms:⁶⁴

Whilst noted in the question we reiterate our opposition to employer unilateralism for the making of a greenfield agreement. The prevailing pay and conditions test is of utility although we are yet to see its practical application by the Commission. If the compelling arguments for the abolition of 182 (4) are to be resisted we would submit that the test should be strengthened.

An employer unilateral greenfield agreement should exceed prevailing pay and conditions in the relevant industry and should provide for 'best practice pay and conditions' in the relevant industry. Further relevant employee registered organisations must be accorded the opportunity to address the Commission as to what best practice standards are for pay and conditions in the relevant industry.

We would respectfully argue the basis for this standard is clear. Employer unilateralism is antithetical to the objectives of the Fair Work Act and if it is to remain available in the prescribed and unique circumstances of a greenfields agreement than its application should be scrutinised, and as matter of policy, be designed to achieve best practice outcomes for employees.

The 2015 greenfields agreement amendments enable an employer to elect to continue to negotiate for a greenfields agreement after the conclusion of the notified negotiation period. Hence, this first aspect of the Productivity Commission recommendation is effectively met by the current legislation.

The proposition that the Fair Work Commission undertake 'last offer arbitration' by choosing between the last offers made by the employer and the union leaves significant questions about the criteria or factors to be considered in any such arbitration. It appears likely that any such last offer arbitration would take into

⁶⁰ AMMA Submission, par. 43.

⁶¹ AMWU Submission, p. 14.

⁶² AMWU Submission, pars. 80-89.

⁶³ ANMF Submission, p. 2 & AFAP Submission, p. 4.

⁶⁴ Email communication with the CFMEU, 23 November 2017.

account the prevailing pay and conditions. However, it appears to enable far more extreme positions to be put and argued, and have very real potential for protracted proceedings which would impact on resource development project decision-making. For instance, it would enable a much lower wage proposal to be proposed for approval. Whilst that may be argued to be justifiable, it is difficult to reconcile with the desire for a rapid greenfields agreement settlement process and the objective of certainty in agreement making.

There was limited information from stakeholders about the likely effects of providing for a greenfields agreement to be simply tested against award standards. The review has concluded that such an approach would permit the approval of agreements which were significantly different from the prevailing pay and conditions of the relevant industries. This creates doubt about the sustainability of such an agreement and appears contrary to the construction and resources project sector's expressed desire to quickly achieve certainty in workplace industrial arrangements.

The union concern that an application for approval of a s 182(4) greenfields agreement could result in a reduction in wages or conditions is difficult to sustain on a plain approach to the concept of the prevailing pay and conditions test. Almost by definition, an attempt to substantially reduce wages and conditions appears contrary to any assessment of normal arrangements applicable to a project or business venture.

It is far more likely that the matters that are disagreed will relate to more marginal arguments, to issues of managerial prerogative, or disputes over whether a rate, a roster or hours arrangement which is applicable in some areas should be extended to the employees to be covered by the new greenfields agreement. In this context, a disagreement over such a claim sought in a greenfields agreement must be weighed against the potential that the project or business may not then proceed. Obviously, this becomes a particularly significant issue relative to resource development and infrastructure construction projects.

The review has concluded that the prevailing pay and conditions test provides employees with protection of general standards agreed in that industry and geographic location. That protection is appropriate as greenfields agreements are not negotiated directly with employees.

The experience of the resources boom is that some employers agreed to wages and conditions claims and escalation arrangements that were exceptional by general standards. It may well be that employers now say they had no choice in the matter and that they were forced into these arrangements in order to reach an agreement. Alternatively, the wage costs may not have been a concern during the peak of the resources boom.

The employer proposals to be able to return to the relatively simple BOOT against award wages and conditions anticipates that unions can be expected to agree to arrangements significantly less than those applicable on other major resource projects without the endorsement of their members. It is arguable that employees should be involved in decisions to adopt agreement arrangements that significantly deviate from 'going rates' on comparable projects.

A further observation in this regard is appropriate. Employers may consider the extent that the current reduction in major project activity provides the opportunity to reset the wage escalation arrangements that applied during the resources boom rather than relying on a tribunal to do this.

Some workplace relations professionals in the infrastructure sector flagged a concern that the prevailing pay and conditions test could be complicated where a particularly generous agreement, agreed for reasons very specific to a site, was used as a reference point. This could be exacerbated where there are very few comparable projects in a particular geographic region. There is a potential for this to lead to argument before the Fair Work Commission and additional delays.

In the construction sector, agreements which are not project related also often reflect common approaches sought by particular unions. The MBA notes that despite various regulatory regimes seeking to minimise pattern agreements, they are still common.⁶⁵ Again, similarities in greenfields

⁶⁵ MBA Submission, par. 42.

construction agreements applicable in various sectors indicates that the prevailing pay and conditions test is likely to be relatively straightforward.

Greenfields agreements are also frequently reached with labour hire companies to apply to employees who are to be engaged to work in businesses which have an agreement. This creates an expectation that labour hire employees will receive wages and conditions commensurate with employees engaged by the host employer. It is difficult to conceive that a dispute over those terms and conditions is likely or that it would involve difficulties in the application of the prevailing pay and conditions test.

The other significant use of greenfields agreements relates to businesses which are putting in place new ventures or locations. Transport, refuse and retailing businesses often fall into this category, as do live performance ventures. Consideration of these agreements discloses close similarities with existing arrangements applying elsewhere within those businesses. As a result, it is difficult to see that the application of the prevailing pay and conditions test is likely to be an overly complicated process.

Implicit in s 182(4) is the expectation that greenfields agreements will meet and exceed the general BOOT. Consideration of greenfields agreements demonstrates this is already the case.

Despite some of the concerns outlined above, the material before the review indicates that the prevailing pay and conditions test should not represent a particularly complex test, or the capacity for major reductions in relatively standard pay and conditions. It is more likely to be applied to resolve differences of a more marginal or incremental nature and is the most appropriate mechanism for the assessment of this type of agreement. The review does note concerns regarding the administrative processes for the Fair Work Commission to apply this test as being a likely source for delays for any initial cases considered.

Notwithstanding the review's finding that the test should be retained as an appropriate safeguard for the consideration of s 182(4) greenfields agreements, the initial application of the prevailing pay and conditions test could be facilitated by the Fair Work Commission through the establishment of principles to be considered in the application of the prevailing pay and conditions test. These principles could be developed in consultation with key stakeholders. The development of principles of this nature can be expected to further simplify consideration of the issues in s 187(6).

Recommendation 8

That the prevailing pay and conditions test be retained as the most appropriate test for consideration of applications made for approval of a s 182(4) greenfields agreement.

Recommendation 9

That in the event that an application is made pursuant to s 182(4), the Fair Work Commission should take all possible steps to ensure that the matter is resolved as expeditiously as possible.

Recommendation 10

That the Fair Work Commission develop and publish principles which detail the approach the Fair Work Commission will apply to applications for approval of greenfields agreements pursuant to s 187(6) and the prevailing pay and conditions test.

Agreements made with small voting cohorts

The term 'brownfields agreements' was used by unions to describe agreements reached with a small number of employees, but which then applied to a much larger cohort of employees who were subsequently engaged. Of particular concern to the unions is the propensity for these agreements to be reached without union involvement. The AMWU referred to these same agreements as 'base line' or 'sham' agreements.⁶⁶

The union submissions argued that brownfields agreements were sham agreements that were being utilised to reduce existing employee entitlements.

The ACTU detailed this concern in the following terms:⁶⁷

The ability for employers to make agreements with small and unrepresentative voting cohorts is a significant 'systemic impediment to the making of greenfields agreements'. It has allowed employers to achieve what they called for in the Fair Work Act Review and the Productivity Commission Inquiry but which both reviews rejected: unilateral employer greenfields agreements, without having to bargain with a union and without having to wait until the expiry of a set negotiation period.

The most effective means 'to improve the effective access to greenfields agreements' is to amend the Act to ensure that enterprise agreements can only be made with a voting cohort that is genuinely representative of the employees who will be covered by the agreement. Such amendments would require stakeholder consultation but could potentially include, for example:

- an amendment to s 181 so that employers are not able to request employees to vote to approve an agreement that contains a majority of classifications in which no employees are currently employed;
- an amendment to s 186(3) so that the Commission must also be satisfied that the group of employees who voted to approve the agreement was fairly chosen and, in so determining, must take into account whether the group was genuinely representative of the employees to be covered by the agreement and whether group was chosen to exclude a readily identifiable group of future employees or to avoid other aspects of the bargaining regime, such as the right to take protected action or to be represented by a bargaining representative; and
- an amendment to s 188 so that the Commission must also be satisfied that the agreement was made with a genuinely representative cohort of employees.

The CFMEU described this concern on the basis that:⁶⁸

The CFMEU has serious concerns with what has been termed, 'brownfield agreements', that is agreements that have nominal employees in comparison to the scope and coverage of the agreement being sought. Following the *John Holland* case, 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. A classic example of this conduct was disclosed in the *Site Fleet Services* case. 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

⁶⁶ AMWU Submission, par. 11.

⁶⁷ ACTU Submission, pars. 20 and 21.

⁶⁸ CFMEU submission, pars. 18-20.

new enterprise agreement with national coverage and job classifications covering same 10 modern awards! 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])

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*.

Whilst possibly outside the purview of this review 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.

The AWU expressed similar concerns and referred to examples of agreements that had been reached in circumstances which it argued did not meet the requirements for approval of an agreement under the *Fair Work Act*.⁶⁹

The AMWU identified concerns that businesses were increasingly bargaining with individual employees using the award as a base.⁷⁰ It cited various examples of particular concern and sought that amendments be made to the *Fair Work Act* to guard against such agreement practices.⁷¹ In referring to their cited examples, the AMWU expressed concern about the approval process applied by the Fair Work Commission, including the application of the BOOT and the extent to which the agreement approval was genuine. They argued that a range of agreements of this nature should not have been approved. The AMWU proposed that, if this issue was properly addressed, broader and more constructive use might be made of greenfields agreements. The AMWU stated:⁷²

If these sham enterprise agreements are addressed through adequate amendments to the *Fair Work Act 2009*, there may be a return to the use of Greenfields Agreements. This may then result in the use of the arbitration provisions if there is a deadlock in negotiations.

The New Greenfields Provisions allow for an employer to seek approval of an Enterprise Agreement without the Agreement of the relevant Union(s). There have been no uses of this particular part of the New Greenfields Provisions, so there are no decision of the Fair Work Commission approving such Agreements, where a business and the relevant union did not reach agreement within the timeframe.

There is an attempt to provide some protection to the potential workers to be covered by the Greenfields Agreements in the New Greenfields Provisions at s.187(6) of the *Fair Work Act 2009*, which provides as follows:

“(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent.”

The AMWU similarly expressed concern about what it described as the “increasing use of sham enterprise agreements”.⁷³ It sought that businesses should negotiate in the first instance with a union. The AMWU identified particular concerns with agreements with broad coverage reached with casual employees and suggested that these agreements ought not be approved under the *Fair Work Act*.⁷⁴

⁶⁹ AWU Submission, pp. 5-6.

⁷⁰ AMWU Submission, par. 5.

⁷¹ AMWU Submission, pars. 16-79 & 90(a).

⁷² AMWU Submission, pars. 80-82.

⁷³ AMWU Submission, par. 11.

⁷⁴ AMWU Submission, pars. 12-15.

As the CFMEU identified, it is arguable that these concerns are outside of the terms of reference of this review.⁷⁵ However, these concerns have been addressed in the context of the argument that they impact on greenfields agreement making. Indeed, workplace relations practitioners remarked on the extent to which agreements of this nature are a possible consequence of an incapacity to make greenfields agreements.

The Fair Work Act provides detailed and rigorous requirements for the making of agreements between employers and employees. There are additional requirements that the Fair Work Commission must take into account when considering applications for approval of agreements.

There is no requirement for an employee organisation to be involved in making non-greenfields enterprise agreements. Non-greenfields agreements may be reached between employers and their employees. Division 3 of Part 2-4 establishes that employee organisations are the default bargaining representatives for their members. Further, s 183 provides that a union that was a bargaining representative for the agreement may give the Fair Work Commission a written notice stating that it wants the agreement to cover it.

One of the essential requirements for the Fair Work Commission to approve an enterprise agreement is that the group of employees covered by the agreement was fairly chosen.⁷⁶ This has been a particularly contentious issue in the building and construction industry since the commencement of the Fair Work Act. What makes this industry particularly susceptible to these arguments is the extent to which the employers in the industry often require different employee skills at different times and locations. As the CFMEU observed, the decision of the Full Federal Court in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 represents a significant finding in this respect.⁷⁷ A more recent decision in *CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266 deals with somewhat different circumstances. It is neither necessary nor appropriate that this review details the types of agreements that are permissible and those that are not. Suffice to say that these decisions represent findings based on particular circumstances.

As the case law in relation to these types of agreements is continuing to develop, a call for amendments to be made to the Fair Work Act to remedy alleged deficiencies must be considered premature.

Case studies - Small voting cohorts

Construction, Forestry, Mining and Energy Union (CFMEU) v John Holland Pty Ltd (John Holland)

In 2012 John Holland commenced construction work at the Perth Children's Hospital construction site. John Holland engaged three employees, who each voted to make the *Western Region Agreement Western Australia 2012-2016* (the John Holland Agreement), which was expressed to cover all John Holland building and construction employees in Western Australia, except employees covered by other project or site-specific agreements. The John Holland Agreement was expected to eventually cover around 25 employees and included classifications that the three employees voting on the agreement were not employed in.

While the John Holland Agreement was initially approved by Fair Work Australia in May 2012⁷⁸, it was overturned by a Full Bench in September 2012⁷⁹. The Full Bench found that the John Holland Agreement undermined collective bargaining, and that the group of employees covered by the Agreement was not 'fairly chosen' as it was not possible to know which employees would ultimately be covered by the Agreement in the future.

⁷⁵ CFMEU Submission, par. 20.

⁷⁶ S 186(3) and(3A) of the *Fair Work Act 2009*.

⁷⁷ CFMEU Submission, par. 18.

⁷⁸ [2012] FWAA 4449.

⁷⁹ [2012] FWAFB 7866.

John Holland appealed to the Federal Court and the matter was ultimately resolved by a Full Court of the Federal Court. The Federal Court (Buchanan J) found that in determining whether a group of employees covered by an agreement was fairly chosen, Fair Work Australia was required to ascertain ‘the nature of the work to be regulated and rewarded by the agreement rather than how many employees may, in the years to come, carry out the work, or where’⁸⁰. That is, this requirement will be satisfied where the group of employees covered by the agreement, by reference to the work they do under the agreement, was ‘fairly chosen’. Buchanan J found that the phrase ‘the group of employees covered by the agreement’ in s 186(3) should be broadly construed as ‘a reference to the whole class of employees to whom the agreement might in future apply, rather than the group of employees which actually voted on whether to make the agreement’.⁸¹

The Federal Court also found that the ‘fairly chosen’ requirement does not permit the Fair Work Commission to withhold approval on the basis of concerns that an agreement would undermine collective bargaining.

Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd

One Key Workforce Pty Ltd (One Key) is a labour hire business that operates in a wide range of industries. Between March and August 2015, One Key recruited three employees, with whom it subsequently made the *RECS (Qld) Pty Ltd Enterprise Agreement 2015* (the RECS Agreement).

The RECS Agreement was expressed to cover employees who would be covered by 11 different modern awards, in industries including mining, construction, manufacturing, road transport, clerical, hospitality, oil refining, and maritime offshore oil and gas.

On 30 October 2015, the Fair Work Commission approved the RECS Agreement with undertakings.⁸² On 28 November 2016, the CFMEU challenged the approval in the Federal Court. The CFMEU broadly submitted that the RECS Agreement was incorrectly approved and failed the BOOT; the employer had failed to take ‘all reasonable steps’ to explain the terms of the proposed Agreement; the Agreement had not been ‘genuinely agreed to’; the Agreement impermissibly incorporated unknown policies and procedures; and the Agreement was not correctly signed.

The Federal Court (Flick J) found that by merely stating the terms of the RECS Agreement to the employees, without explaining the terms and effect of those terms, One Key had failed to take all reasonable steps to meet the pre-approval requirement at s 180(5) of the Fair Work Act.

The Federal Court accepted the approach in John Holland, but was of the view that if the small cohort of employees who vote on the agreement has limited experience in areas of employment covered by the agreement, or represent areas of employment which are factually different to the various areas covered by the agreement, then the agreement may not have been genuinely agreed to.

The Federal Court found that the RECS Agreement could not have been genuinely agreed to by the three employees and that the Fair Work Commission failed to consider the ‘ability or appropriateness’ of the three employees ‘being called upon to agree to terms and conditions covering employees in such diverse areas of employment as road transport, clerking or the hospitality industry’⁸³, noting that these employees had very confined employment experience (and were covered by a limited number of awards). The Federal Court concluded that One Key ‘unquestionably’ made the RECS Agreement with these employees ‘with the intent [to] preclude a genuine bargaining process’.⁸⁴

⁸⁰ *Construction, Forestry, Mining, and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 at [64].

⁸¹ *Ibid* at [34].

⁸² [2015] FWCA 7516.

⁸³ *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd* [2017] FCA 1266 at [122].

⁸⁴ *Ibid* at [124].

Conclusion

Under the Fair Work Act, small voting cohorts do not necessarily prevent an agreement from being genuinely and fairly made between an employer and employees, but this will depend on the facts of each case. The Fair Work Act includes safeguards to ensure that employees voting on an agreement are suitably informed about the agreement, and that the employees voting on an agreement are fairly chosen, have a reasonable understanding or experience of the work, and the process cannot be manipulated to undermine genuine bargaining.

In any event, analysis of non-greenfields agreements over the past five years does not demonstrate any increase in the numbers of agreements involving small numbers of employees. This analysis is shown in Table 6 below.

Table 6: Non-greenfields agreements with five or fewer employees⁸⁵

Year of approval	Non-greenfields agreements with five or fewer employees	% of all non-greenfields agreements
2012	1752	23.36%
2013	1265	21.27%
2014	938	18.34%
2015	821	17.49%
2016	998	19.99%
1 st half 2017	337	19.16%
Total	6111	20.36%

While the aggregate data does not provide information on how many of these agreements may be considered 'brownfields' agreements, a significant spike in agreements made with five or fewer employees is not apparent. This does not support or establish a link between the reduction in greenfields agreements and the use of agreements involving small numbers of employees.

A final comment is appropriate. Observations from employers reflect common frustration at union opposition to reviewing wages and conditions which were reached at a time of significant economic growth and business profitability or, for a project where they reflected a normal arrangement, when those circumstances no longer exist. Employers contend that greater readiness on the part of unions to at least consider changes in economic circumstances may reduce the need to consider other agreement making options.

No basis for changing the Fair Work Act to limit the circumstance under which agreements can be reached with small numbers of employees has been established. Neither has a link between the 2015 greenfields agreement amendments and agreements reached between employers and small numbers of employees been established. In any event, the Fair Work Act provides for mechanisms to address concerns over the extent to which agreements have been properly made and approved by the Fair Work Commission.

⁸⁵ Workplace Agreements Database, Department of Employment.

The duration of greenfields agreements

The Fair Work Act provides that enterprise agreements, including greenfields agreements, must specify a date on which they will nominally expire, which must not be more than four years after the day that the Fair Work Commission approves the agreement (s 186(5)).

The Productivity Commission recommendation was that:

RECOMMENDATION 20.4 (SECTION 20.4)⁸⁶

The Australian Government should amend s. 186(5) of the Fair Work Act 2009 (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or
- matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where it does so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

In reaching this conclusion, the Productivity Commission noted that implementing it would affect around nine per cent of agreements.⁸⁷

In its submission, the AMWU argued that the maximum nominal life of a greenfields agreement should be 12 months.⁸⁸

The employer organisations generally supported the capacity to have greenfields agreements which applied for five years or for the duration of a given project. For example, the MBA noted:⁸⁹

This is exactly the sort of reform that will benefit the building and construction industry and provide the certainty of labour costs that underpins investment decisions. Having agreements in place for five years or during the life of a Greenfields project is warranted for the necessary certainty. However, the reform of pattern bargaining should be a priority so that unacceptable pattern agreements are not in place for even longer periods.

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.

The very nature of greenfields agreements, as distinct from non-greenfields agreements, means that some particular care should be exercised in considering a different nominal expiry date.

⁸⁶ Productivity Commission Inquiry Report, *Overview and recommendations* (30 November 2015), p. 59.

⁸⁷ *Workplace Relations Framework*, Productivity Commission Inquiry Report No 76, 30 November 2015, vol 2, pp. 689-690.

⁸⁸ AMWU Submission, par. 8(b).

⁸⁹ MBA Submission, par. 70.

The review has considered the extent to which the nominal expiry date for greenfields agreements should be extended to five years or the life of a given project. Extending greenfields agreement duration in this manner would deny employees the capacity to make decisions about their employment arrangements for what might be very long periods of time. Further, if greenfields agreements are able to operate for the duration of a given project, the review is concerned that wages and conditions agreed at the commencement of one project could adversely affect other projects, commenced in entirely different commercial circumstances.

While there may be appropriate arguments favouring consideration of the extension of the potential duration of greenfields agreements applicable to construction and resource development projects, a basis for this has not been made out in the material provided to this review. Additionally, there was no material provided that supports such a position with respect to greenfield agreements that apply outside of the construction and resource development sectors.

Given the need for certainty on significant projects, the review also considers that a shorter nominal expiry date for greenfields agreements is inappropriate.

Conclusion

The 2015 greenfields agreement amendments must be considered in the context of the substantial downturn in resource development and construction work, which has reduced the demand for greenfields agreements since November 2015. Notwithstanding this, there remains an important role for greenfields agreements arrangements to facilitate new employment initiatives.

Despite the reduction in resource development and construction work, greenfields agreements are crucial to the arrangement of approvals and the efficient conduct of these major projects.

The good faith bargaining requirements, introduced in 2015, should be retained in their entirety.

The duration of the six-month negotiation period should be reduced, but the test for consideration of a proposed employer greenfields agreement should be retained as it represents the fairest mechanism for the resolution of continuing differences.

The review has recommended a series of other procedural changes designed to improve the Fair Work Commission's approach to greenfields agreements.

A handwritten signature in black ink, appearing to read 'M. O'Callaghan', written over a solid horizontal line.

Matthew O'Callaghan

27 November 2017

Attachment A – Biography of Matthew O’Callaghan

Matthew O’Callaghan was appointed as a Senior Deputy President with the Australian Industrial Relations Commission in January 2001. He continued in this role with Fair Work Australia, then the Fair Work Commission, until April 2017, when he retired. Over that time, he undertook Commission functions across the entire spectrum of industry, with an emphasis on work in South Australia and Western Australia.

Since his retirement, Mr O’Callaghan has undertaken a range of consulting work.

Prior to 2001, Mr O’Callaghan held senior and chief executive positions within the South Australian public sector.

Mr O’Callaghan was the Chief Executive of the South Australian Employers’ Federation until 1993 and has a long background in construction workplace relations issues. He commenced his workplace relations career at the BHP Whyalla steel-works.

Attachment B - Greenfields agreement provisions and the Fair Work Act

Part 2-4 of the Fair Work Act deals with the effect and the operation of enterprise agreements, and the processes to be followed in order to make an enterprise agreement and have it approved by the Fair Work Commission.

The Fair Work Act (section 172) provides that a greenfields agreement can be made between an employer(s) and relevant employee organisation(s) if that agreement relates to a genuine new enterprise that is being established or is proposed to be established, and for which the employer(s) has not employed any persons who will be necessary for the normal conduct of the enterprise and will be covered by the agreement. Greenfields agreements represent an exception to the general principle that enterprise agreements are reached between employers and their employees.

Because a greenfields agreement is made between an employer(s) and employee organisation(s), rather than employees, the agreement making process is different. Section 182(3) of the Fair Work Act simply confirms that a greenfields agreement is made when it has been signed by each employer and relevant employee organisation that it is expressed to cover. This need not be all of the relevant employee organisations for that agreement. Additionally, the Fair Work Commission can only approve a greenfields agreement if it is satisfied that the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of employees who will be covered by the agreement in relation to the work to be performed under the agreement, and it is in the public interest to approve the agreement (s 187(5)).

The specific sections of the Fair Work Act under consideration in this review are outlined below. Section 182(4) states:

lf:

- (a) a proposed single enterprise agreement is a greenfields agreement that has not been made under subsection (3); and
- (b) there has been a notified negotiation period for the agreement; and
- (c) the notified negotiation period has ended; and
- (d) the employer or employers that were bargaining representatives for the agreement (the **relevant employer or employers**) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and
- (e) the relevant employer or employers apply to the FWC for approval of the agreement;

the agreement is taken to have been **made**:

- (f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and
- (g) when the application is made to the FWC for approval of the agreement.

Note: See also section 185A (material that must accompany an application).

The notion of a notified negotiation period is addressed in section 178B of Fair Work Act in the following terms:

178B Notified negotiation period for a proposed single enterprise agreement that is a greenfields agreement

- (1) If a proposed single enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:
 - (a) to each employee organisation that is a bargaining representative for the agreement; and
 - (b) stating that the period of 6 months beginning on a specified day is the **notified negotiation period** for the agreement.
- (2) The specified day must be later than:
 - (a) if only one employee organisation is a bargaining representative for the agreement—the day on which the employer gave the notice to the organisation; or
 - (b) if 2 or more employee organisations are bargaining representatives for the agreement—the last day on which the employer gave the notice to any of those organisations.

Multiple employers—agreement to giving of notice

- (3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

Further, section 185A states:

An application under subsection 182(4) for approval of an agreement must be accompanied by:

- (a) a copy of the agreement; and
- (b) any declarations that are required by the procedural rules to accompany the application.

For completeness, the refer to the relevant Fair Work Commission Rules.⁹⁰

Good faith bargaining rules were also extended to greenfields agreement making. The Amendment Act inserted section 177, which states:

The following paragraphs set out the persons who are bargaining representatives for a proposed single enterprise agreement that is a greenfields agreement:

- (a) an employer that will be covered by the agreement;
- (b) an employee organisation:
 - (i) that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and
 - (ii) with which the employer agrees to bargain for the agreement;
- (c) a person who is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

As designated bargaining representatives, the parties to greenfields agreement making are required to adhere to the Fair Work Act prescribed good faith bargaining requirements set out in section 228:

- (1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
 - (a) attending, and participating in, meetings at reasonable times;

⁹⁰ Refer to Rule 24(5B) and 24(5C) Sch 1 *Fair Work Commission Rules 2013*.

- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

(2) The good faith bargaining requirements do not require:

- (a) a bargaining representative to make concessions during bargaining for the agreement; or
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

Section 255A provides that a number of provisions, including the good faith bargaining provisions, do not apply at the conclusion of the notified negotiation period.

Attachment C - Agreements approved by ANZSIC and period approved

Greenfields agreements approved from 1/11/13 - 30/6/17, by ANZSIC Division Name⁹¹

ANZSIC Division Name	Greenfields						Total					
	Nov 2013 - Oct 2014	%	Nov 2014 - Oct 2015	%	Nov 2015 - Oct 2016	%	Nov 2016 - Jun 2017	%	Nov 2013 - Oct 2014	Nov 2014 - Oct 2015	Nov 2015 - Oct 2016	Nov 2016 - Jun 2017
Accommodation and Food Services	4	1%	4	1%	3	1%		0%	146	124	101	53
Administrative and Support Services	48	8%	28	9%	19	8%	7	8%	240	201	169	89
Agriculture, Forestry and Fishing	2	0%		0%	1	0%		0%	38	66	46	33
Arts and Recreation Services	1	0%	4	1%	7	3%	3	3%	47	51	61	29
Construction	384	64%	227	71%	146	63%	45	52%	1609	1403	1973	733
Education and Training		0%	1	0%		0%	1	1%	232	244	224	130
Electricity, Gas, Water and Waste Services	12	2%	5	2%	8	3%	2	2%	139	182	114	67
Financial and Insurance Services		0%		0%		0%		0%	57	36	36	24
Health Care and Social Assistance	1	0%	1	0%	3	1%		0%	508	557	403	208
Information Media and Telecommunications	3	1%	1	0%		0%	1	1%	43	43	34	18
Manufacturing	30	5%	14	4%	12	5%	7	8%	982	982	745	493
Mining	12	2%	3	1%	4	2%	6	7%	175	129	105	59
Other Services	15	3%	2	1%	3	1%		0%	147	156	132	99
Professional, Scientific and Technical Services	31	5%	6	2%	2	1%	4	5%	149	146	113	71
Public Administration and Safety	5	1%	2	1%	4	2%	2	2%	227	161	233	137
Rental, Hiring and Real Estate Services	17	3%	3	1%	1	0%	1	1%	119	82	88	43
Retail Trade	2	0%	1	0%	1	0%	2	2%	106	57	69	38
Transport, Postal and Warehousing	24	4%	16	5%	17	7%	6	7%	434	445	373	206
Wholesale Trade	6	1%	2	1%		0%		0%	205	194	159	124
Grand Total	597	100%	320	100%	231	100%	87	100%	5603	5259	5178	2654

⁹¹ Workplace Agreements Database, Department of Employment.

ANZSIC Division Name	Non-greenfields						Total					
	Nov 2013 - Oct 2014	%	Nov 2014 - Oct 2015	%	Nov 2015 - Oct 2016	%	Nov 2016 - Jun 2017	%	Nov 2013 - Oct 2014	Nov 2014 - Oct 2015	Nov 2015 - Oct 2016	Nov 2016 - Jun 2017
Accommodation and Food Services	142	3%	120	2%	98	2%	53	2%	146	124	101	53
Administrative and Support Services	192	4%	173	4%	150	3%	82	3%	240	201	169	89
Agriculture, Forestry and Fishing	36	1%	66	1%	45	1%	33	1%	38	66	46	33
Arts and Recreation Services	46	1%	47	1%	54	1%	26	1%	47	51	61	29
Construction	1225	24%	1176	24%	1827	37%	688	27%	1609	1403	1973	733
Education and Training	232	5%	243	5%	224	5%	129	5%	232	244	224	130
Electricity, Gas, Water and Waste Services	127	3%	177	4%	106	2%	65	3%	139	182	114	67
Financial and Insurance Services	57	1%	36	1%	36	1%	24	1%	57	36	36	24
Health Care and Social Assistance	507	10%	556	11%	400	8%	208	8%	508	557	403	208
Information Media and Telecommunications	40	1%	42	1%	34	1%	17	1%	43	43	34	18
Manufacturing	952	19%	968	20%	733	15%	486	19%	982	982	745	493
Mining	163	3%	126	3%	101	2%	53	2%	175	129	105	59
Other Services	132	3%	154	3%	129	3%	99	4%	147	156	132	99
Professional, Scientific and Technical Services	118	2%	140	3%	111	2%	67	3%	149	146	113	71
Public Administration and Safety	222	4%	159	3%	229	5%	135	5%	227	161	233	137
Rental, Hiring and Real Estate Services	102	2%	79	2%	87	2%	42	2%	119	82	88	43
Retail Trade	104	2%	56	1%	68	1%	36	1%	106	57	69	38
Transport, Postal and Warehousing	410	8%	429	9%	356	7%	200	8%	434	445	373	206
Wholesale Trade	199	4%	192	4%	159	3%	124	5%	205	194	159	124
Grand Total	5006	100%	4939	100%	4947	100%	2567	100%	5603	5259	5178	2654

⁹² Workplace Agreements Database, Department of Employment.

JSE18-0008