



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

27 October 2017

Mr Matthew O'Callaghan
Greenfields Agreement Review
Department of Employment

Email: greenfieldsreview@employment.gov.au

Dear Mr O'Callaghan

Ai Group welcomes the opportunity to make a submission to the Greenfields Agreement Review.

The scope of the Review is to consider and evaluate the first two years of the operation of the two changes made to greenfields enterprise agreement making under the *Fair Work Act 2009* (**FW Act**) through the *Fair Work Amendment Act 2015* (**Amendment Act**):

-) The ability, where an agreement cannot be reached with a union or unions within a six-month period, for the employer to take the agreement to the Fair Work Commission to approve:
-) The application of good faith bargaining rules to greenfields enterprise bargaining negotiations.

The views expressed by Ai Group in relevant submissions

Ai Group has expressed detailed views on the provisions of the FW Act relating to greenfields agreements in the following submissions:

-) Joint submission of Ai Group and the Australian Constructors Association to the 2012 Fair Work Act Review – February 2012 (see extract in **Attachment A**);
-) Ai Group's Supplementary Submission to the 2012 Fair Work Act Review – March 2012 (see extract in **Attachment B**).
-) A further Ai Group submission to the 2012 Fair Work Act Review – May 2012 (see extract in **Attachment C**);
-) Ai Group's response to the recommendations of the 2012 Fair Work Act Review – August 2012 (see extract in **Attachment D**);

-) Ai Group's submission to the Productivity Commission (**PC**) Inquiry into the Workplace Relations Framework – March 2015 (see extract in **Attachment E**);
-) Ai Group's response to Draft Report of the PC Inquiry into the Workplace Relations Framework – September 2015 (see extract in **Attachment F**);
-) Ai Group's response to the recommendations of the PC Inquiry into the Workplace Relations Framework – January 2016 (see extract in **Attachment G**);
-) Ai Group's submission on the *Fair Work Amendment Bill 2014* (see extract in **Attachment H**).

Ai Group continues to have the view that the proposals in the above submissions would deliver a far more effective greenfields agreement system than the current greenfield agreement system, including the provisions introduced through the *Fair Work Amendment Act 2015*.

Background

Greenfields agreements were widely used in some industries, particularly the construction industry, prior to the Amendment Act.

A key concern about greenfields agreements is the power imbalance that exists between unions and employers when negotiating such agreements. The reality is that a head contractor usually needs to have an enforceable agreement in place to manage industrial risks and costs on a project.

The agreement is best entered into soon after the work is awarded but prior to the commencement of the works. This tight timetable means that employers are forced to negotiate with the relevant unions as it is unlikely that they will have the necessary workforce to enter into a brownfields agreement. This has the effect of providing unions with leverage to demand excessive terms and conditions, and to exert significant control over the employment arrangements. Unions have too much power to refuse to enter into a greenfields agreement unless all their demands are met.

To address the power imbalance, Ai Group proposed the reintroduction of a number of provisions which were formerly in place under the *Workplace Relations Act 1996*, namely:

-) The ability to enter into a greenfields agreements with any union eligible to represent any employees on a project; and
-) Employer greenfields agreements.

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.

In addition, the availability of employer greenfields agreements was important in removing some of the power imbalance which unions have when construction projects are about to start. The availability of these agreements influenced unions to adopt a more reasonable approach in greenfields agreement negotiations.

Amendment Act provisions

Good Faith Bargaining Requirements

Bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements in the FW Act. Ai Group supported this change on the basis that the provisions provide that a union is only a bargaining representative if the employer agrees to bargain with the union. This reduces the opportunity for unions to use good faith bargaining orders as a mechanism to frustrate and delay negotiations.

6 Month Notification period for FWC approval

The FW Act enables an employer who has not reached agreement with a union on a greenfields agreement after a 6-month notification period, to apply to have the agreement approved by the FWC. Ai Group submitted that the period should be 2 months.

The extent to which the 2015 greenfields agreement amendments have altered bargaining behaviour on the part of either employers or unions.

Ai Group members have indicated that the amendments provide employers with little benefit due to the length of the notification period. As such they have not utilised the provisions. This appears to be confirmed by the Department of Employment statistics in the background paper.

In most instances, an employer requires their industrial instrument to be settled within a relatively short period. The notification period of 6 months does not create a sufficient benefit for the employer and, more importantly it does not reduce the leverage and power the unions have over the bargaining.

There would naturally be some benefit of having a set date by which, even if no agreement is reached, the greenfields agreement can still be approved. The problem is that the current period is too long. A two month period would be appropriate.

Therefore, the Amendment Act has had very little impact on bargaining behavior or outcomes.

Any concerns relating to the effect of the 2015 greenfields agreement amendments on bargaining outcomes and bargaining behaviour.

The 2015 changes have not provided any material benefit for employers. The changes have not achieved the policy outcome that the changes were intended to achieve, i.e. redressing the power imbalance between the unions and employers.

The extent to which there may be a relationship between these amendments and the number of applications for approval of greenfields agreements.

The decrease in greenfields agreement applications since the Amendment Act was introduced is, in our view, unrelated to the introduction of the Amendments.

A key reason for the decrease has been the introduction of Building Code 2016 (pre-published in 2014) and the unions' refusal, until recent weeks, to negotiate agreements which are compliant with the Building Code.

The extent to which there may be systemic issues or impediments to the making of greenfields agreements.

Ai Group's views on the impediments and the necessary amendments to address them are set out in the submission extracts in the Attachments to this correspondence.

Recommendations of the Productivity Commission relating to greenfields agreements.

Ai Group's views on the Productivity Commission's recommendations are set out in **Attachment G**.

The anticipated effects of returning to the legislative arrangements which applied to greenfields agreement making prior to November 2015.

It would be untenable to return to the Pre-Amendment Act position. As the Productivity Commission found, there was a clear imbalance of power between unions and employers which drove up costs. This problem remains and needs to be addressed.

The notification period should be reduced to 2 months. Also, the length of a greenfields agreement should be able to match the life of a project even if this is longer than four years,

Ai Group would be happy to provide any clarification that you may require on the views that we have expressed in this correspondence.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith

Head of National Workplace Relations Policy

ATTACHMENT A

EXTRACT FROM JOINT SUBMISSION OF Ai GROUP AND THE AUSTRALIAN CONSTRUCTORS ASSOCIATION TO THE 2012 FAIR WORK ACT REVIEW

FEBRUARY 2012

Greenfields agreements

Greenfields agreements are widely used and extremely important in the construction industry. As discussed above, the content of such agreements is currently a major problem.

A further problem is the power imbalance between unions and employers in negotiating greenfields agreements. The reality is that a head contractor usually needs to have an enforceable agreement in place to manage industrial risk on a project. Unions currently have too much power to refuse to enter into a greenfields agreement unless all their demands are met. To address the power imbalance, the following provisions should be reintroduced, as were formerly in place under the *Workplace Relations Act 1996*:

-) Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project;
-) Employer greenfields agreements should be reintroduced. (NB. Employer greenfields agreements in the construction industry typically included generous terms and conditions, consistent with those paid on other projects of the relevant type. The availability of these agreements was important in influencing unions to adopt a reasonable approach in greenfields agreement negotiations).

ATTACHMENT B

EXTRACT FROM Ai GROUP'S SUPPLEMENTARY SUBMISSION TO THE 2012 FAIR WORK ACT REVIEW

MARCH 2012

Greenfields agreements

A number of important changes need to be made to the provisions of the FW Act relating to greenfields agreements, as explained on pages 64-65 of our February 2012 submission.

The AWU (p.5-6) has proposed some particularly unworkable changes to the greenfields agreement provisions.

Firstly, the AWU argues that some employers are reaching agreement with a small group of their employees when they should be entering into a greenfields agreement. A greenfields agreement is one where there are no employees, so it is not surprising that an employer would enter into a conventional enterprise agreement if some of the employees have already been employed. Indeed, there is no other option. A similar issue has been raised by the CFMEU (pp.13-14). It is important that an employer and its employees are free to enter into any agreement that meets the requirements of the Act, not an agreement with the scope demanded by a union.

Secondly, the AWU is proposing that good faith bargaining obligations should apply to greenfields agreements. This was the approach which was in the *Fair Work Bill 2008* but the requirement was removed through amendments introduced by the Australian Government when the Bill was in Parliament. The Government made these amendments after employer groups (including Ai Group and the Australian Constructors Associations) and some unions expressed concern that good faith bargaining requirements would delay the commencement of projects and lead to an employer potentially having to bargain in good faith with several unions which were competing for coverage.

ATTACHMENT C

A FURTHER Ai GROUP SUBMISSION TO THE 2012 FAIR WORK ACT REVIEW

MAY 2012

Greenfields agreements

In Ai Group's submissions to the Fair Work Act Review, Ai Group has strongly argued that the current provisions concerning greenfields agreements are not working and require urgent amendment. The amendments required include:

1. **The content of enterprise agreements should be limited to matters pertaining to the employment relationship.** Unions currently have far too much power in the bargaining process and are able to force employers to include highly restrictive and unproductive provisions in greenfields agreements for new construction projects including matters which do not pertain to the employment relationship. Employers typically need to reach agreement with the relevant union/s before the project starts in order to control industrial risk. (See Ai Group's February 2012 Main Submission at pp.62-65 and pp.144-146, together with Ai Group's March 2012 Supplementary Submission at pp.23-24).
2. **Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project.**
3. **Employer greenfields agreements should be reintroduced.** Employer greenfields agreements in the construction industry typically included generous terms and conditions, consistent with those paid on other projects of the relevant type. The availability of these agreements was important in influencing unions to adopt a reasonable approach in greenfields agreement negotiations.

Following the discussion with the Panel on 14 March, Ai Group has given more thought to the amendments necessary to address the current problems regarding greenfields agreements. We continue to strongly support the above three proposed changes.

With regard to the second proposal above, the following additional points are relevant:

- J Between 1993 and 1996, greenfields agreements were not expressly provided for in the *Industrial Relations Act 1988* but it was common for a head contractor to enter into an unregistered project agreement with relevant union/s and for subcontractors to make registered enterprise agreements which were consistent with the project agreement.

-) Between January 1997 and March 2006, greenfields agreements were able to be made under s 170LL of the *Workplace Relations Act 1996* between an employer and any union eligible to represent any employee on a new project.
-) Between March 2006 and June 2009, union greenfields agreements (s 329) and employer greenfields agreements (s 330) were able to be made under the *Workplace Relations Act 1996*. Union greenfields agreements were able to be made between an employer and any union eligible to represent any employee on a new project (s 329(2)).

The ability for an employer 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 CFMEU was pursuing unreasonable claims the head contractor was able to reach a greenfields agreement for the project with the AWU (or vice versa). The previous provisions worked effectively and there was no valid reason to replace those provisions with the current *Fair Work Act 2009* (FW Act) provisions which have not worked effectively.


With regard to the third proposal above, the following additional points are relevant:

-) Employer greenfields agreements should be required to pass the Better Off Overall Test and not contravene the National Employment Standards.
-) Employer greenfields agreements should have a maximum term of four years (This is important because often projects continue for at least four years and the expiry of the agreement during the construction of the project would create significant industrial risk. While employer greenfields agreements under the *Workplace Relations Act 1996* had a maximum term of 12 months (s 352(1)(a)), at the time of introduction in 2006 these agreements were not subject to a no disadvantage test or fairness test.)

ATTACHMENT D

Ai GROUP'S RESPONSE TO THE RECOMMENDATIONS OF THE 2012 FAIR WORK ACT REVIEW

MAY 2012

No.	Recommendation	Ai Group's position	Comments
22	The Panel recommends the FW Act be amended to include a new provision after s. 240 which expressly empowers FWA to intervene on its own motion where it considers that conciliation could assist in resolving a bargaining dispute, including in respect of a greenfields agreement.	Opposed	<p>Ai Group does not support FWA having the power to intervene on its own motion in bargaining disputes. Section 240 allows any bargaining party to seek the involvement of FWA through conciliation.</p> <p>If industrial action arising from a bargaining dispute is threatening to damage the economy or harm the population, FWA is able to act on its own initiative under s. 424.</p>
25	The Panel recommends that the Government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.	Supported	<p>In Ai Group's experience the main problem with the BOOT has not been the provisions in the FW Act but the way in which it has been applied by some individual FWA Members. This is a key reason why Ai Group has pursued or intervened in 17 appeals relating to the bargaining provisions in the Act. Several of these appeals have related to the way that the BOOT has been applied by FWA Members. Fortunately, in all of these cases the original decisions have been overturned by a Full Bench.</p>
27	The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to the negotiation of an s. 172(2)(b) greenfields agreement, with any necessary modifications.	Opposed	<p>This proposal was originally incorporated within the <i>Fair Work Bill 2008</i> but was amended during the Parliamentary process as a result of strong opposition from Ai Group, the Australian Constructors Association and some other employer groups. Under this proposal, any union which wanted to be involved in bargaining for the greenfields agreement would need to be bargained with. Any union would have the ability to apply for a good faith bargaining order and substantially delay the commencement of construction work until its demands were met.</p> <p>The key changes which need to be made to the greenfields agreement provisions in the FW Act are:</p> <ul style="list-style-type: none"> <p>  Greenfields agreements to be allowed between an employer and any union eligible to represent any employee on a project;</p>

			J Employer greenfields agreements to be permitted subject to compliance with the NES, the BOOT and other statutory requirements.
28	The Panel recommends that the FW Act be amended to require employers intending to negotiate a s. 172(2)(b) greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.	Opposed	<p>This proposal was originally incorporated within the <i>Fair Work Bill 2008</i> but was amended during the Parliamentary process as a result of strong opposition from Ai Group and a number of other industry groups. Here is a relevant extract from Ai Group's submission to the Senate Committee which inquired into the <i>Fair Work Bill 2008</i>:</p> <p><i>“An employer would be required to notify every union which is eligible to represent even one employee who will be covered by the agreement. Every union would then be deemed to be a bargaining representative for the agreement (s.177). The employer would then have an obligation to bargain in good faith with every union (s.179).</i></p> <p><i>Even on a small project many unions would be required to be notified and bargained with and on a major project a very large number of unions would need to be notified and bargained with. Any union would have the ability to apply for a good faith bargaining order and substantially delay the commencement of construction work until its demands were met</i></p> <p><i>The greenfields agreement provisions are a recipe for demarcation disputes, substantially increased union power, and increased construction costs (including for Governments). Delays in commencing projects caused by the ill-conceived greenfields agreement provisions would be very costly. “</i></p>
29	The Panel recommends that the FW Act be amended so that s. 240 (as with our Recommendation 22) applies to the negotiation of a s. 172(2)(b) greenfields agreement.	Supported, with an amendment	<p>Ai Group supports an amendment being made to s. 240 to enable an employer who is negotiating a “single-enterprise agreement” which is a greenfields agreement to apply to FWA for FWA to deal with the dispute by conciliation provided that this right does not extend to unions. The Panel's proposal that every union which is eligible to represent any employee on the project may seek FWA's involvement under s. 140 is unworkable. It would result in substantial delays to projects.</p> <p>Ai Group opposes Recommendation 22 for the reasons set out above.</p>
30	The Panel recommends that the FW Act be amended to provide that, when negotiations for a s. 172(2)(b) greenfields agreement have reached an impasse, a	Opposed	Ai Group does not support giving the unions or FWA on its own motion the ability to impose an arbitrated outcome on clients, head contractors, sub-contractors and employers.



The Australian Industry Group

51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

	specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party, conduct a limited form of arbitration, including 'last offer' arbitration, to determine the content of the agreement.		In the construction industry, clients and head contractors need to maintain control over project costs, as they are the parties who must pay the costs and incur the risk if costs exceed projections.
--	---	--	--

ATTACHMENT E

AI GROUP'S SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK

MARCH 2015

Greenfields agreements

Greenfields agreements are widely used in some industries, particularly the construction industry.

A major problem is the power imbalance between unions and employers in negotiating greenfields agreements. The reality is that a head contractor usually needs to have an enforceable agreement in place to manage industrial risk on a project. Unions currently have too much power to refuse to enter into a greenfields agreement unless all their demands are met.

To address the power imbalance, the following provisions should be reintroduced, as were formerly in place under the *Workplace Relations Act 1996*:

-) Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project;
-) Employer greenfields agreements should be reintroduced.

Between 1996 and mid-2009, greenfields agreements were able to 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 an employer 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 was able to reach a greenfields agreement for the project with the Australian Workers Union (AWU) or vice versa. The previous provisions worked effectively unlike the current FW Act provisions which are not working effectively.

The availability of employer greenfields agreements was important in removing some of the power imbalance which unions have when construction projects are about to start. The availability of these agreements influenced unions to adopt a more reasonable approach in greenfields agreement negotiations .

Employer greenfields agreements should:

-) Be required to pass the Better Off Overall Test (BOOT) and not contravene the National Employment Standards (NES).
-) Have a maximum term of four years. This is important because often projects continue for at least four years and the expiry of the agreement during the construction of the project would create significant industrial risk.
-) Be available if an employer has not reached agreement with a union after eight weeks of negotiations with that union. The eight week period should automatically commence from the time of the first meeting between the parties to negotiate the agreement.

Ai Group does not support the additional criterion included in the *Fair Work Amendment Bill 2014* which is before the Senate, i.e. that employer greenfields agreements must meet “prevailing pay and conditions within the relevant industry for equivalent work”. This concept would lead to a raft of problems including:

-) Unions would have the power to delay and frustrate the approval of greenfields agreements;
-) Major delays would be experienced in commencing projects;
-) There would be flow-on of many unproductive and inflexible clauses which currently appear in union agreements;
-) Unnecessary disputation and litigation would result;
-) Individual Fair Work Commission (FWC) Members would have wide discretion to reject greenfields agreements on the basis of their own individual views on what the prevailing standards are;
-) Employers would have no certainty about whether their greenfields agreement would be approved by the FWC; and
-) Inconsistent decisions would be made by different FWC Members given the vagueness of the criteria.

No doubt the constructions unions would argue that “prevailing pay and conditions within the relevant industry for equivalent work” would comprise the very costly and inflexible conditions in union pattern agreements in the



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

construction industry. Similarly, undoubtedly the mining unions would argue that “prevailing pay and conditions within the relevant industry for equivalent work” would comprise the very costly and inflexible conditions in union agreements in the mining industry. This proposed criterion in the *Fair Work Amendment Bill 2014* is unworkable.

ATTACHMENT F

AI GROUP'S SUBMISSION ON THE DRAFT REPORT OF THE PRODUCTIVITY COMMISSION INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK

SEPTEMBER 2015

Greenfields agreements

Ai Group agrees with the finding in the Draft Report that unions wield excessive power under the existing greenfields agreement arrangements.

Draft Recommendation 15.6 would subject bargaining representatives for greenfields agreements to the good faith bargaining requirements in the FW Act. This proposal has been the subject of a great deal of debate during the development of the *Fair Work Bill 2008* and since the FW Act was implemented. The Bill as originally introduced into Parliament imposed good faith bargaining obligations on bargaining representatives for greenfields agreements but the provisions were removed from the Bill before it was passed by Parliament. The reason for this was because, as drafted, the provisions in the Bill would have allowed any union which was eligible to represent any employee on a project to become involved in the negotiations for the greenfields agreement, and to apply to the FWC for a bargaining order indefinitely delaying the making of the agreement.

The *Fair Work Amendment Bill 2014* appropriately addresses this issue. The following extract from Ai Group's submission to the Senate Committee inquiry into the Bill is relevant:

"Item 23 inserts a new s.177. This is an important provision that identifies the bargaining representatives for a proposed greenfields agreement. Importantly, a union is only a bargaining representative if the employer agrees to bargain with the union. Any other approach would not be workable. If all unions eligible to represent any employee on the project were given bargaining rights, each union would have the right to pursue bargaining orders in the FWC and would have the ability to frustrate the negotiations between the employer and other unions and delay the approval of the agreement."

Draft Recommendation 15.7 would amend the FW Act to enable an employer who had not reached agreement with a union after three months to:

-) Continue negotiating with the union;
-) Request that the FWC undertake “last offer” arbitration; or
-) Submit the employer’s proposed greenfields agreement for approval with a 12 month nominal expiry date.

Ai Group supports the recommendation with the following modifications:

-) The minimum three month negotiating period with a union should be two months. (Three months is too long to delay the commencement of a project, particularly when further delays would occur in having the agreement approved, regardless of what option was chosen by the employer at the conclusion of the period).
-) The minimum negotiating period should commence as soon as the employer initiates bargaining, or agrees to bargain, with the union.
-) If a head contractor makes a greenfields agreement to create a project-specific framework agreement for the project, the minimum negotiation period should not apply to the subcontractors’ agreements as this would result in lengthy project delays.
-) The maximum 12 month nominal expiry date for employer greenfields agreements should be three years. 12 months is too short as this would create too much uncertainty on the project.

ATTACHMENT G

Ai GROUP'S RESPONSE TO THE RECOMMENDATIONS OF THE PRODUCTIVITY COMMISSION INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK

JANUARY 2016

No.	Recommendation	Ai Group's position	Comments
20.4	<p>The Australian Government should amend s. 186(5) of the FW Act to allow an enterprise agreement to specify a nominal expiry date that:</p> <ul style="list-style-type: none">) can be up to five years after the day on which the FWC 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 FWC that the longer period was justified. 	Supported	<p>This recommendation has substantial merit.</p> <p>There is no reason why an enterprise agreement should not have a life of five years if this is what the employer and employees covered by the agreement prefer. Enterprise bargaining is often costly and disruptive.</p> <p>Also, many major projects have a life of more than 5 years. The expiry of enterprise agreements during the life of the project can be extremely disruptive and damaging.</p>
20.5	<p>The Australian Government should amend the FW Act to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.</p> <p>The no-disadvantage test would be conducted by the FWC. It would assess that, at the test time, each class of employee, and each prospective class of employee, would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s).</p>	Supported	<p>Ai Group supports this recommendation. The No Disadvantage Test should incorporate the following elements:</p> <ul style="list-style-type: none"> • The comparison should be against the relevant modern award; and • The "test time" should be the time the application for approval of the agreement is made (as currently applies under s.196(3)).

21.1	<p>The Australian Government should amend the FW Act so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:</p> <ul style="list-style-type: none">) continue negotiating with the union) request that the FWC 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. <p>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.</p>	Supported	<p>Consistent with Ai Group's submissions to the PC, the minimum negotiating period should commence as soon as the employer initiates bargaining or agrees to bargain with the union/s, rather than requiring the service of a particular notice on the union/s.</p>
21.2	<p>The Australian Government should amend the FW Act to allow for the establishment of project proponent greenfields agreements.</p> <p>When seeking approval of a greenfields agreement, a project proponent (such as a head contractor) could seek to have its agreement recognised as a project proponent greenfields agreement.</p> <p>Once a project proponent greenfields agreement is in place for a project, subcontractors that subsequently join the project, and that do not have a current enterprise agreement covering their employees on the project, should have the option of applying</p>	Supported	<p>This recommendation has some similarity to the proposal in Ai Group's September 2015 submission to the PC that the minimum negotiation period for employer greenfields agreements (see Recommendation 21.1) should not apply in the following circumstances:</p> <p><i>"If a head contractor makes a greenfields agreement to create a project-specific framework agreement for the project, the minimum negotiation period should not apply to the subcontractors' agreements as this would result in lengthy project delays."</i></p>

	<p>to the FWC to also be covered by the project proponent greenfields agreement. To approve the application, the FWC must be satisfied that:</p> <ul style="list-style-type: none">) the subcontractor does not have an existing enterprise agreement that covers its employees on the project) the subcontractor was not coerced by any party into joining the project proponent greenfields agreement) the project proponent greenfields agreement would pass a no-disadvantage test for the employees of the subcontractor against the relevant award. <p>The FWO and Fair Work Building and Construction should periodically carry out investigations to audit compliance and ensure that parties are not being coerced into signing on to project proponent agreements. Sanctions should be put in place for parties found to be engaging in coercion, including financial penalties and exclusion from having future access to project proponent arrangements for a specified period of time</p>		
--	--	--	--

ATTACHMENT H

EXTRACT FROM Ai GROUP'S SUBMISSION ON THE FAIR WORK AMENDMENT BILL 2014

APRIL 2014

<i>Provision</i>	<i>Ai Group position</i>	<i>Comments</i>
<u>Part 5 – Greenfields agreements</u> Item 19, 20, 22, 23, 24, 25 and 26 Bargaining representatives	Supported	<p>Item 23 inserts a new s.177. This is an important provision that identifies the bargaining representatives for a proposed greenfields agreement. Importantly, a union is only a bargaining representative if the employer agrees to bargain with the union. Any other approach would not be workable. If all unions eligible to represent any employee on the project were given bargaining rights, each union would have the right to pursue bargaining orders in the FWC and would have the ability to frustrate the negotiations between the employer and other unions and delay the approval of the agreement.</p> <p>Items 19, 20, 22, 24, 25 and 26 are mainly minor consequential amendments.</p>
Items 21 and 27 Notified negotiation period	Amendment proposed	<p>As drafted, s.178B will lead to coercion by unions:</p> <ul style="list-style-type: none">) not to serve the notice for the “notified negotiating period”; or) not to serve the notice until negotiations with the unions have been exhausted resulting in a further 3 month delay once the negotiations have concluded; or) to insert a distant prospective date in the notice. <p>Major construction companies deal with unions on numerous projects at the same time and the cost of industrial disruption on each project is very high. Therefore, they are particularly exposed to union coercion.</p> <p>The Bill should be amended to require the employer to serve the written notice on each employee organisation bargaining representative at the time when the employer agrees to bargain with the bargaining representatives in accordance with s.177(b)(ii). This would result in the three month “notified negotiating period” commencing when the negotiations with the unions commence and it would enable the employer to lodge the greenfields</p>

		<p>agreement with the FWC for approval at the end of the 3 month period. It would of course not prevent negotiations continuing with unions after the expiry of the three month period if the employer is willing to do so.</p> <p>Also, if the FWC approves a greenfields agreement for a project lodged by a head contractor after the 3 month “notified negotiating period” has elapsed the subcontractors on the project should be able to lodge a greenfields agreement for that same project without a further 3 month “notified negotiating period”. On major projects typically most of the labour is supplied by subcontractors and it is essential that subcontractors are able to implement their own greenfields agreement for the project to ensure that they are able to fulfil the head contractor’s project requirements in areas such as:</p> <ul style="list-style-type: none">) project hours;) inclement weather arrangements; and) drug and alcohol testing on the project. <p>In the final report arising from Royal Commission into the Building and Construction Industry, Commissioner Cole accepted that <i>“if all work arrangements were negotiated at the enterprise level and lacked flexibility, head contractors could lose important elements of control over building sites, thereby creating problems with coordinating and planning work”</i>.¹</p> <p>Until the head contractor finalises its greenfields agreement for the project, the subcontractors will be uncertain about the project requirements and hence will be uncertain about the content of their greenfields agreements for the project. For example, if the head contractor implemented a greenfields agreement incorporating a 38 hour week with flexible Rostered Days Off (RDOs) for the project, the subcontractors would need to ensure that their agreement for the project did not prescribe fixed RDOs.</p> <p>Further, on major projects, all of the subcontractors are not known at the commencement of the project because packages of work are released throughout the project. If the 3 month “notified negotiating period” applies to all greenfields agreements on a project, lengthy project delays will result.</p>
--	--	--

¹ Volume 5, p.105.

<p>Items 28, 29, 30, 31 and 32</p> <p>Application for approval of a greenfields agreement by employer after notified negotiation period</p>	<p>Supported</p>	<p>These are appropriate requirements for the approval of a greenfields agreement lodged by an employer after the notified negotiating period.</p>
<p>Item 33</p> <p>Prevailing pay and conditions within the relevant industry for equivalent work</p>	<p>Opposed</p>	<p>The proposed s.187(6), as drafted, is not workable.</p> <p>The concept of requiring agreements made under s.182(4) to meet “prevailing pay and conditions within the relevant industry for equivalent work” would lead to a raft of problems including:</p> <ul style="list-style-type: none">) Unions would have the power to delay and frustrate the approval of greenfields agreements;) Individual FWC Members would have wide discretion to reject greenfields agreements on the basis of their own individual views on what the prevailing standards are;) Employers would have no certainty about whether their greenfields agreement would be approved by the FWC;) Inconsistent decisions would be made by different FWC Members given the vagueness of the criteria;) Major delays would be experienced in commencing projects;) There would be flow-on and reinforcement of many unproductive and inflexible clauses which currently appear in union agreements; and) Unnecessary disputation and litigation would result. <p>No doubt the constructions unions would argue that “prevailing pay and conditions within the relevant industry for equivalent work” would comprise the very costly and inflexible conditions in union agreements in the construction industry. Similarly, undoubtedly the mining unions would argue that “prevailing pay and conditions within the relevant industry for equivalent work” would comprise the very costly and inflexible conditions in union agreements in the mining industry.</p>

Many of the unproductive provisions in construction industry agreements are arguably not “permitted matters” under s.172 of the Act (e.g. clauses which impose major restrictions on the engagement of subcontractors) but are able to be included in agreements because the FWC is only prevented from approving agreements which contain “unlawful terms” as defined in s.194 of the Act.

The Bill should be amended to remove Item 33. If a greenfields agreement passes the Better Off Overall Test (BOOT) and does not contain provisions which are inconsistent with the National Employment Standards, then the agreement should be approved. If this is not acceptable, we propose that s.187(6) in the Bill be amended 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 ~~the~~ pay and conditions that are ~~consistent with~~ not less than the prevailing pay and conditions within the relevant industry for equivalent work in an equivalent enterprise.”

(7) In considering the prevailing pay and conditions within the relevant industry for equivalent work in an equivalent enterprise, the FWC must have regard to:

(i) The type of enterprise;

(ii) The size of the enterprise;

(iii) The industry sector;

(iv) The geographical area where the new enterprise is located;

(v) The work to be performed under the greenfields agreement; and

(v) Any modern award which covers the new enterprise and the terms of that award as they relate to classifications covered by the greenfields agreement.

(8) In considering the prevailing pay and conditions within the relevant industry for equivalent work in an equivalent enterprise, the FWC must not have regard

		<p><u>to any matters in the agreement which are not matters identified in paragraph 172(1)(a).</u></p> <p>Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions within the relevant geographical area.</p>
<p>Items 34, 35, 36, 38, 39</p> <p>Consequential amendments</p>	Supported	These are minor consequential amendments.
Item 37	Supported	Importantly this provision only permits the unions which were bargaining representatives for the greenfields agreement to be covered by the agreement.
<p>Items 40, 41, 42, 43, 44, 45, 46, 48, 50, 51</p> <p>Limitations relating to greenfields agreements</p>		<p>Item 50 inserts a new s.255A. This is a vital provision which prevents unions frustrating the greenfields agreement process in s.182(4). Without this provision, unions would be able to file an application the day before the 3 month “notified negotiating period” expires, and commence potentially lengthy FWC proceedings in pursuit of a bargaining order etc.</p> <p>Items 40, 41, 42, 43, 44, 45, 46 and 48 insert a useful note in various relevant sections of the Act referring to s.255A.</p>
<p>Item 47</p> <p>Scope orders</p>	Supported	This is an important item that preserves the existing approach whereby scope orders are not available for greenfields agreements. Giving union access to scope orders for greenfields agreements would delay the commencement of projects.
<p>Item 49</p> <p>Limitations relating to greenfields agreements</p>	Supported	Proposed paragraphs 255(1)(d), (e) and (f) are appropriate to prevent the FWC making orders which would frustrate the operation of the greenfields agreement process in s.182(4). However, as discussed above for Item 27, the Bill should be amended to require the employer to serve the written notice under s.178B on each employee organisation bargaining representative at the time when the employer agrees to bargain with the bargaining



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

		representatives in accordance with s.177(b)(ii).
Item 52 Bargaining related workplace determinations	Amendment proposed	Section 271A should be broadened to exclude all greenfields agreement negotiations. Also, Subdivision B (Serious breach declarations) of Division 8 of Part 2-4 should not apply to greenfields agreements.
Proposed additional item Maximum nominal term of a greenfields agreement	Supported	The Bill should be amended to enable greenfields agreements to have a longer nominal term than four years if the project will continue for more than four years. It is very disruptive for the greenfields agreement/s on a project to expire before the project has been concluded.