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ABI and NSWBC response to 'Attracting major infrastructure, resources and energy projects to increase employment - Project life greenfields agreements' discussion paper



NSW Business Chamber

140 Arthur Street

North Sydney NSW 2060

P: 13 26 96

F: 1300 655 277

Introduction

Australian Business Industrial (ABI) and the NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Attorney General's Department in relation to 'Attracting major infrastructure, resources and energy projects to increase employment - Project life greenfields agreements'.

ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

For more information contact:

Elizabeth Greenwood
Policy Manager, Workers Compensation, WHS and Regulation
NSW Business Chamber
Tel: [REDACTED]
Email: [REDACTED]

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1. INTRODUCTION

- 1.1 The key issue under review in the Discussion Paper is that under the *Fair Work Act 2009 (Cth)* (**FW Act**), enterprise agreements including greenfields agreements can only have a “nominal term” for a **maximum of four years** after approval.
- 1.2 The Chamber and ABI strongly agree with Attorney General, the Hon. Christian Porter, when he stated at the Committee for Economic Development of Australia (**CEDA**) conference on 18 September of “how important these [major project] are to the health of the economy going forward.”¹
- 1.3 The Discussion Paper raises the possibility of increasing the nominal time for Greenfield Agreements to cover the whole of projects in order to attract more major infrastructure and energy projects in Australia which will in turn increase employment opportunities.
- 1.4 We have formed a view that the introduction of new amendments to the FW Act to extend the life of greenfield agreements would be beneficial to the Australian economy.

2. ABI AND THE CHAMBER’S REPONSES TO DISCUSSION QUESTIONS

Question One: *Are there examples of case studies where projects have been delayed or deferred because of a greenfields agreement has reached its nominal expiry date, and there is difficulty in negotiating a new agreement?*

- 2.1 According to the Productivity Commission, greenfield agreements are most prevalent in construction projects, which make up roughly two-thirds of

¹ The Hon. Christian Porter Minister for Industrial Relations Speech “The Government’s Approach to Industrial Relations Reform” 19 September 2019

greenfields agreements.²

2.2 While ABI and the Chamber has clear examples where large construction projects have been negatively impacted by the limitations of a greenfield agreement's nominal expiry date but due to our members wishes, we are not at liberty to disclose them.

2.3 We believe that large projects, such as the example seen by Chevron's Gorgon LNG project in Western Australia could have significant effects on the Australian economy and its labour market and has the potential derail some large projects entirely.

Question Two: *What are the implications of this occurring? and*

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

2.4 Various forums have recognised the serious implications of projects being delayed or deferred because of the expiry of a greenfields agreement.

2.5 In the first review, post implementation of the FW Act named *"Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation"* (2012 Review) recognised that some unions were exploiting their legislated role in making greenfields agreements to seek excessive wage claims. Although the 2012 review references specifically, commencing a project, the same can be said for continuing a project.

2.6 The 2012 review stated that:

"we consider that there is a significant risk that some bargaining

² Page 711 Volume 2 Workplace Relations Productivity Report 2015

practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia. This is because the existing provisions effectively confer on a union (or unions) with coverage of a majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way. Unions in this position are able to withhold agreement and effectively prevent the determination of terms and conditions in advance of a project commencing. In light of the evidence we were presented about the need for certainty over the labour costs associated with major projects, we are concerned at the risk of delays in greenfields agreement making that this entails. We have considered a range of mechanisms to address these concerns.”³

2.7 The Productivity Commission also commented on the serious implications for construction projects as follows:

2.8 *“greenfields agreements...are not intended to be enduring, but logically should survive for the duration of construction of a particular project. Any agreement with a life less than the expected duration of the project exposes the business to substantial risks. Delays in negotiating a greenfields agreement can lead to underutilised capital and may cause the contractor to incur a penalty for delay in the delivery of the project. This creates an imbalance in bargaining power. Even if employees do not actually use this leverage, the ex-ante risk of it raises investor risk and may add to project cost. Empirical evidence suggests that there is a preference for longer lifespans for greenfields agreements — roughly*

³ Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, 2 August 2012, page 171.

two thirds of current greenfields agreements are for a period greater than 3 years”⁴

2.9 According to Attorney General Porter in his speech to CEDA:

2.10 *“Master Builders Australia has estimated that infrastructure project in Australia such as schools, roads and hospitals can cost up to 30 per cent more due to this type of disruptive, union, militancy and unlawfulness on construction sites.”*

2.11 We agree with these sentiments that there are serious implications for projects being delayed or deterred and large infrastructure projects, such as hospitals, roads and schools, must be delivered on time and on budget. It is vital that Australia is attracting large infrastructure projects and industrial uncertainty and the impact of industrial action.

Question Four: *Should there need to be a maximum length to a greenfields enterprise agreement at all, and if so what should it be and why?*

2.12 ABI and the Chamber supports flexibility for the Australian workforce which aligns with the objects of the FW Act.

2.13 A company may want certainty for a maximum length to an agreement and another alternately might want an agreement that supports a project life. We also acknowledge that greenfields agreements that endure for the life of a project may not be best suited to all projects.

2.14 Section 3 of the FW Act states as follows:

⁴ Productivity Commission Inquiry into the Workplace Relations Framework, 2015 Volume 2, page 689.

“(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

...

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;”

2.15 We agree with the recommendation that the Productivity Commission suggested as it is a sensible approach that strikes the balance between being flexible for business and promoting economic growth while also encouraging collective bargaining.

2.16 The Productivity Commission recommended as follows:

“Recommendation 20.4

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.”⁵*

2.17 In our view, the above approach gives employers and contractors additional certainty to plan ahead, but sufficient flexibility to industry stakeholders and the Commission to extend, or not extend, greenfields agreements where it is appropriate to do so.

Question Five: *What benefits are likely to arise from employers, workers and the community if length of project greenfield agreements were possible?*

⁵ Productivity Commission Inquiry into the Workplace Relations Framework, 2015 Volume 2, page 691.

- 2.18 A critical component in any cost projection for a company undertaking a large project is the costs of labour. Companies and contractors require certainty in being able to project labour costs without the concern of industrial action and disputation.
- 2.19 As the law stands employees can only take protected industrial action once an enterprise has reached its nominal expiry date. If the government extends the life of greenfields agreements, or companies are given the option to have a greenfields agreement that can cover the life of the project, companies and contractors will be able to estimate their labour costs with confidence and ideally result in the employment of a greater number of people.
- 2.20 There are four main reasons why if greenfields agreements were to have a life as long as an individual project it would provide greater certainty to the building and construction industry. These are that:
- (a) when tendering for a contract, labour costs can be projected for as long as the project which provides certainty for;
 - (b) if an enterprise agreement, including greenfields agreements are still in their nominal expiry date, industrial action i.e. strikes cannot be legally taken meaning that big, time-sensitive projects which are particularly vulnerable to union involvement and industrial action will remain productive and efficient.
 - (c) there is often time-sensitivity when large projects are in motion and having to re-negotiate an enterprise agreement can unfairly disadvantage the employer into having to pay much higher wage costs to ensure the project is finished; and
 - (d) re-negotiating an enterprise agreement is expensive, arduous and

resource intensive.

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

2.21 There are some concerns however, regarding the introduction of a longer nominal expiry date.

2.22 These are that:

- (a) locking in wages for a long time period could result in inflexibility if there is an economic downturn or the project changes; and
- (b) if there is a transfer of business, the new employer will inherit the new agreement.

2.23 These concerns could be remedied potentially by adding provisions into the legislation that allow for a review mechanism during the greenfields agreement however, it could present high risk and employees may also be able to review the agreement, defeating the purpose of extending the life of the greenfields agreement in the first place.

Question Seven: *Should longer project agreements be required to allow some form of escalation in wage rates over the period of the agreement*

2.24 Currently, an agreement only needs to pass the better off over test at test time if the agreement applied to employees.

2.25 The Chamber does not support the notion that greenfields agreements require any additional approval requirements beyond those already required in the FW Act regardless of whether limited or for the life of project. The FW Act already has the mechanisms available both before approval, and during the

life of an enterprise agreement if necessary, to ensure employees are better off overall under an agreement.

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

2.26 We do believe that there should be a legislative ability to apply to the Commission to extend a greenfields agreement in the event of a major disruption to a project. In such a scenario the Commission would have discretion as to whether the relevant criteria has been met to warrant the extension of the life of the greenfields agreement.