SUBMISSION

Australian Government
Attorney-General's Department

Attracting major infrastructure, resources and energy projects to increase employment: Project life greenfields agreements

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Introduction

The Australian Industry Group (**Ai Group**) and the Australian Constructors Association (**ACA**) welcome the opportunity to make a submission to the Attorney-General's Department discussion paper on: *Attracting major infrastructure, resources and energy projects to increase employment - Project life greenfields agreements*. The Discussion Paper invites input from parties on whether the nominal expiry date of a greenfields agreement should be allowed to be better aligned with the life of longer-term building and construction projects or similar types of major projects.

Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors. The ACA is a national industry association which represents Australia's major construction contractors.

This submission argues that:

- The *Fair Work Act 2009* (**FW Act**) should be amended to permit enterprise agreements that cover work on major projects to continue for the life of the project even if this is longer than the current four-year limit on the nominal term. Many major projects continue for longer periods, for example, the Snowy Hydro 2.0 Project is projected to continue for five to six years.

- This reform should not be limited to greenfields agreements. Regular enterprise agreements commonly regulate work on major projects.

- A key industry concern about greenfields agreements is the current power imbalance that exists between unions and employers when negotiating these agreements. A head contractor usually needs to have an enforceable agreement in place prior to the commencement of a project to manage industrial risks and costs on the project. The tight timeframe gives unions substantial leverage to demand excessive wage rates and conditions.

- To address the power imbalance, and to give employers the ability to negotiate a fair, project-life agreement, the following two supplementary reforms need to be introduced:

    - Employers need to have the ability to enter into a greenfields agreement with any union eligible to represent any employees on a project, as was the case under the *Workplace Relations Act 1996* between 1996 and mid-2009; and

    - The six-month 'notified negotiation period' for negotiations with the relevant unions, before an employer can have a greenfields agreement approved by the Fair Work Commission (**FWC**) without the agreement of the unions, needs to be reduced to three months.

Project-life enterprise agreements

There is strong industry support for the FW Act being amended to permit enterprise agreements that cover work on major projects to continue for the life of the project even if this is longer than the current four-year limit on the nominal term. Many major projects continue for longer periods, for example, the Snowy Hydro 2.0 Project is projected to continue for five to six years.

Enterprise bargaining is typically resource-intensive and disruptive. During the life of the project, resources are best devoted to ensuring the delivery of the project on time and within budget, and that high standards of safety and quality are maintained.

Enterprise bargaining creates the risk of protected industrial action at a critical stage of construction. A one-day stoppage on a major project can cost hundreds of thousands of dollars. In addition to the more obvious direct costs of the industrial action, there are numerous other costs which arise due to delays in completion resulting from industrial action. These costs include:

- Liquidated damages;
- Program acceleration expenses, e.g. extra overtime;
- Daily costs of hire for rental equipment, such as cranes, mobile plant, sheds, offices and other equipment; and
- Damage to the contractor's reputation which may result in the loss of future business.

One area of great concern to contractors is the additional stresses that arise when accelerated 'catch-up' programs need to be implemented due to delays caused by industrial disputes. These programs can have a negative impact on safety and quality, and result in significant additional costs.

Typically, the head contractor on a project does not employ most of the workers on the project; the majority of the workers on the project are typically employed by subcontractors. Where industrial action is taken by the employees of any of the subcontractors, this often disrupts the work of other subcontractors and the overall project. Also, industrial action taken by the employees of the head contractor or any of the subcontractors can lead to hundreds of workers of other subcontractors being stood down without pay because they can no longer be usefully employed on the project.

It is in everyone's interests for enterprise agreements covering work on major projects to be permitted to continue for the life of a project, even if this is longer than four years.

During the recent Federal election campaign, the Labor Party expressed support for this important reform. Therefore, hopefully this reform can be delivered with the support of the Government and the Opposition.

The reform should not just apply to greenfields agreements

This reform should not be limited to greenfields agreements. Regular enterprise agreements commonly regulate work on major projects.

As discussed above, most of the labour on a major project is provided by subcontractors. Therefore, even if the head contractor is able to reach a greenfields agreement with the relevant unions covering the life of the project, the unions could readily refuse to negotiate greenfields agreements with subcontractors, thus exposing the project to disruptive industrial action during a critical stage of construction. Unless this issue is addressed, the intent of the reform is likely to be frustrated because major projects will still be exposed to industrial action.

Another reason why this reform should not be limited to greenfields agreements is that subcontractors often find it difficult to meet the requirements for greenfields agreements because their employees typically move from project to project. One of the requirements for a greenfields agreement is that the employer *'has not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement'* (s.172(2)(b)(ii) of the FW Act).

In *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association,*[1] the High Court held that an employer can make an enterprise agreement for a new project with a group of existing employees who will work on the project, even if the project has not commenced at the time when the agreement is made and the employees are engaged in another part of the employer's business. The case related to a regular enterprise agreement – not a greenfields agreement. The High Court's decision highlights that in many cases it will be more appropriate for an employer to enter into a regular enterprise agreement for work carried out on a new project, rather than a greenfields agreement.

Ai Group and ACA propose that so long as an enterprise agreement has a scope that covers the work on a major project, the nominal expiry date of the enterprise agreement should be permitted to align with the expected completion date of the project.

The need to redress the power imbalance in the negotiation of greenfields agreements

A key industry concern about greenfields agreements is the current 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 prior to the commencement of a project, to manage industrial risks and costs on the project.

Greenfields agreements are typically entered into after the work is awarded to the head contractor by the client and prior to the commencement of the works. The short window of time that typically applies for the making of a greenfields agreement is demonstrated by various FWC decisions

[1] [2017] HCA 53.

concerning the approval requirements for greenfields agreements. An employer is not able to apply for a greenfields agreements in anticipation of the commencement of a new enterprise. The FWC dismissed a greenfields agreement approval application in circumstances where an employer sought an agreement to cover any future enterprise that may be established in order to enable quick engagement of employees.[2] Employers are also prevented from delaying an application for the approval of a greenfields agreement as it has been held that carrying out preliminary works can result in the proposed greenfields agreement not applying to a 'genuine new enterprise' for the purposes of the approval requirements in the FW Act.[3]

The tight timeframe for making a greenfields agreement gives unions substantial 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, and to give employers the ability to negotiate a fair, project-life agreement, the following two supplementary reforms need to be introduced:

1. **Employers need to have the ability to enter into a greenfields agreement with any union eligible to represent any employees on a project, as was the case under the *Workplace Relations Act 1996***:

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. This flexibility operated to reduce the incidence of unreasonable union claims. For example, if the CFMEU was pursuing unreasonable claims the head contractor could reach a greenfields agreement for the project with the AWU or vice versa.

2. **The six-month 'notified negotiation period' for negotiations with the relevant unions, before an employer can have a greenfields agreement approved by the FWC without the agreement of the unions, needs to be reduced to three months:**

Sections 178B and 182(4) of the FW Act enable an employer, that has not reached agreement with a union on a greenfields agreement after a 6-month notified negotiation period, to apply to have the agreement approved by the FWC. This reform was introduced through the *Fair Work Amendment Act 2015*.

In addition to the usual approval requirements for enterprise agreements, there are a number of other requirements that must be met under this approval option for greenfields agreements:

1. There must have been a 'notified negotiation period' for the agreement (see above);

2. The notified negotiation period must have ended;

[2] *Excelior Pty Ltd*, [2011] FWA 2493.

[3] *Applications by CPB Contractors Pty Limited & John Holland Pty Ltd* [2019] FWC 1122.

3. The employer must have given each union that was a bargaining representative for the agreement a reasonable opportunity to sign the proposed greenfields agreement.

4. The FWC must be satisfied that the agreement when *'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'* (s.187(6)). The following extract from the Explanatory Memorandum for the *Fair Work Amendment Bill 2014* provides guidance on this requirement:

> "116. Guidance on the factors that the FWC may have regard to in considering whether the agreement provides for pay and conditions that are consistent with prevailing pay and conditions within the relevant industry for equivalent work is provided in a legislative note under the new subsection. That is, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area. This is intended to make clear that the FWC would not be required to ensure that the pay and conditions provided in the agreement are comparable to existing enterprise agreements across Australia. It is not intended that the reference to prevailing pay and conditions would involve an exhaustive analysis of every source of employment entitlement in a particular industry and in most cases it is expected that it would be appropriate to compare the proposed agreement to a small number of comparable enterprise agreements.
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> 117. It is intended that the FWC could be satisfied of this new approval requirement in circumstances where the FWC is unable to determine whether an agreement is consistent with the prevailing pay and conditions within the relevant industry for equivalent work because it is a new industry (such that making a meaningful assessment of prevailing industry pay and conditions is not possible).
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> 118. This new approval requirement is not intended to modify or delay the current timeframes for FWC consideration and finalisation of these agreements. That is, the approvals process for these agreements is intended to be consistent with the overall purpose of the amendments in this Part to ensure the expeditious negotiation of single-enterprise greenfields agreements and the commencement of new businesses."

If all of the approval requirements are met and the greenfields agreement is approved by the FWC, the agreement is taken to have been made by the relevant employer with each of the unions that were 'bargaining representatives' for the agreement. The FWC is required to note in its approval decision that the agreement covers each union that was a bargaining representative for the agreement.

The six-month 'notified negotiation period' is much too long given the tight timeframes that typically apply for the negotiation of a greenfields agreement (as discussed above). The 'notified negotiation period' needs to be reduced markedly.

Over a six-month period there is a real risk that the employer will find that it is no longer eligible to make a greenfields agreement because the enterprise may no longer be seen as a 'genuine <u>new</u> enterprise' and/or the employer may have employed some persons to carry out preliminary work on the project.

As noted above, the six-month 'notified negotiation period' was introduced by the *Fair Work Amendment Act 2015*. The version of the *Fair Work Amendment Bill 2014* initially introduced into Parliament provided for a 'notified negotiation period' of three months. The Bill was the subject of an inquiry by the Senate Education and Employment Legislation Committee. Although the majority report of the Committee recommended that the Bill be passed in its original form, s.178B was varied in the course of negotiations with Crossbench Senators to extend the 'notified negotiation period' to six months. Senator Xenophon said, in the Senate on 16 September 2015:[4]

> "…In the case of the current bill, the government is proposing three months after the date when negotiation of the greenfields agreement started. The amendment I have co-sponsored with senators Day, Lazarus, Madigan, Muir and Wang changes this specified time period from three to six months. We believe that this provides more time and, importantly, more opportunity for both employers and unions to reach a consensus. I am very pleased that a number of my crossbench colleagues have been able to come together on this particular aspect of the bill, and I hope the government will support this amendment."

In 2017 a regulatory review of the greenfields agreement provisions in the *Fair Work Amendment Act 2015* was conducted by Mr Matthew O'Callaghan, a former Senior Deputy President of the FWC.

The O'Callaghan Review reported that, as at 1 November 2017, no application had been made for the approval of a greenfields agreement in reliance upon s.182(4) of the Act.[5] Since the final report was prepared, there has continued to be very few applications made in reliance upon s.182(4). In the FWC's 2017/18 reporting period, only one application was made.[6] In the 2018/19 reporting period, three applications were made.[7] Two of the applications from the 2018/19 reporting period were lodged by joint venture partners working on the West Gate Tunnel Project and were refused.[8]

The O'Callaghan Review concluded that the six-month 'notified negotiation period' was too long. The final report stated:[9]

> 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…..

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[4] Hansard, 16 September 2015.

[5] Department of Jobs and Small Business, *Greenfields Agreements Review* (27 November 2017), p 9.

[6] Fair Work Commission, 'Access to Justice – Annual Report 2017-18', p 66.

[7] Fair Work Commission, 'Access to Justice – Annual Report 2018-19', p 141.

[8] *Applications by CPB Contractors Pty Limited & John Holland Pty Ltd* [2019] FWC 1122.

[9] Department of Jobs and Small Business, *Greenfields Agreements Review*, (Final Report) November 2017, p 34.

The following recommendation was included in the final report:

> 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.[10]

Response to questions in the discussion paper

Are there examples or case studies where projects have been delayed or deferred because a greenfields agreement has reached its nominal expiry date, and there is difficulty in negotiating a new agreement? What are the implications of this occurring?

Where an employer has had to negotiate a new agreement before a project was complete, typically the terms and conditions reached have been excessive given the imbalance in bargaining power. Liquidated damages typically apply on projects which are not completed on time.

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

Yes, for the reasons outlined in this submission.

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

A maximum length is not necessary because the term would not be able to continue beyond the life of the project. A greenfields agreement can only be made for a 'genuine new enterprise' (s.172(2)(b)(i)). The FWC is accustomed to considering whether a particular project is a 'genuine new enterprise'.[11]

What benefits are likely to arise for employers, workers and the community if length of project greenfields agreements were possible?

The existing arrangements are not working in the interests of employers, workers or the community for the reasons outlined in this submission.

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

The risks would be limited. If the relevant employer was of the view that there were unacceptable risks associated with locking-in wage increases for several years, the employer would logically not enter into a life-of-project agreement.

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[10] Department of Jobs and Small Business, *Greenfields Agreements Review* (Ai Group Submission) 27 October 2017, p 4.

[11] *Excelior Pty Ltd*, [2011] FWA 2493.

Should longer project agreements be required to allow some form of escalation in wage rates over the period of the agreement?

No. The FW Act already addresses this issue. Section 206 provides that the base rate of pay under an enterprise agreement must not be less than the relevant modern award rate. As modern award rates increase during the life of an agreement, the floor on wage rates under the enterprise agreement also increases.

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

If a variation to the term of an existing greenfields agreement is necessary, the current provisions of the FW Act enable the variation to be made, subject to the existing maximum nominal term.

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