Submission to the Attorney-General's Department regarding Greenfields Agreements

Brendan McCarthy[[1]](#endnote-1)

**Background**

This submission is made as a proposal for workplace arrangements for Major Construction Projects (MCP's) that are typical in oil, gas and mining developments. I have decided to make this submission because of what I perceive to be a lack of consideration of the underlying reasons why the Fair Work Act (the FWA) provisions for enterprise bargaining for MCP's needs reforming.

What is now in place is in the FWA is the result of trying to fit MCP arrangements into the the regulatory regime that applies across all industries. The real problem is that there is no recognition of what the reality of peculiarity of the commercial arrangements for MCP's.

In the 1970’s MCP workplace arrangements consisted of industry wide Awards applying and various types of overaward arrangements being put in place on top of Award provisions. Typically, the most contentious of the elements of those overawards arrangement was the site allowance to be paid on a particular project, indeed the Australia Industrial Relations Commission would often arbitrate what that allowance should be often contorting itself to establish exceptional circumstances in order to conform to the Wage Fixing Principles applying generally at the time. The wages and conditions generally set for an MCP whilst maybe not expressly stipulated, were understood to apply for the duration of the project’s construction for all employers and employees on the site.

Since those times there has been significant change to construction methods such as modularisation. Contractual arrangements between Project developers the primary or major project manager have also substantially changed. Joint venture arrangements among major contractors is also now more common as is the practice of engaging an Engineering Procurement and Construction Management (EPCM) specialist contractor as distinct from a construction only contractors.

Rights to take industrial action came with the introduction of enterprise bargaining in the 1980's. Enterprise bargaining for MCP's was not common place until the mid 1990's but the arrangements. It was not until the Workplace Relations Act 1996 came into effect that enterprise agreements specifically for MCP's became more common.

The WR Act 1996 provided that the only entities that could make a Greenfields agreement were an employer that was going to employ employees for a project and a Union that had coverage of prospective employees. Whilst there have been changes to the legislation since 1996 the fundamental requirement is still that an employer and a union are the parties the can make a Greenfields agreement.

**The Underlying Issue**

The single most critical element to workplace regulatory arrangements on MCP's is the right of employees to take protected industrial action. In my view the overwhelmingly motivating factor for a business to enter into Greenfields Agreements is to mitigate against the risk of industrial action during the construction phase of a major project. There are other factors but that is the critical reason.

The damage from industrial action from even a small number of employees at a site is immense. Firstly, the work of a single contractor at an MCP is always dependent on the work of other contractors. This can result in a few workers from a single employer on a site jeopardising the critical path for the whole project. Secondly a delay in the critical path of a construction project can jeopardise contractual obligations to complete a project incurring punitive costs for project manager and contractors. Thirdly the Developer of most MCP’s have contractual supply obligations to supply the product to customers by a particular date. Contracts in place for the supply of product is usually critical in obtaining financial support for a project. The developer can suffer punitive damages for failing to meet the commencement date obligations to supply product. Fourthly, developers and financiers for major projects need to be satisfied that costs and returns estimated for the development.

The use of Greenfields agreements has been the instrument that has been used to satisfy developers and others of risk mitigation of industrial action during the construction phase of an MCP. With the nature of projects becoming larger and the construction phase longer the risks are much greater.

The fundamental element of a Greenfields agreement is that can only be made by a union and a prospective employer. Another requirement for enterprise agreements generally and not just Greenfields agreements is a maximum term of four years.

It is these two elements that in combination I suggest should be changed for Greenfields agreements

**Proposal re parties to Greenfields Agreements of Major Construction Projects**

I suggest that a Greenfields agreement should be able to be made by a Project Developer or the Construction Project Manager or Major Contractor and a union or unions. That is, it should not be a requirement that only an employer of prospective employees can make a Greenfields agreement with a Union.

It is a reality that the non-union parties with the most skin in the game for the industrial relations practices at a major project are the Developer of the project and a Major Contractor for the project. In practice either or both of those parties working collaboratively and consent to the workplace terms and conditions for employees at the site. It is certain to be contained the commercial contract between the Developer and a Major Contractor. Similarly, the Major Contractor will have provisions in their commercial contracts with sub-contractors stipulating similar requirements.

The reality now is also that the bulk of employers intending to perform works on an MCP don't bargain in the normal sense with a union to make an agreement. That is because the Major Contractor or group of Major Contractors bargain with unions and make an agreement that becomes a framework agreement for all employers that undertake works on that project. It is practically impossible for any employer to be permitted by the Project Manager to perform any works on a site without first going through the procedural ritual of employer and the relevant union signing the framework agreement and having it approved by the Fair Work Commission.

In reality only one agreement made and the neither eventual employer the eventual employees have any involvement whatsoever in the content of the agreement. The practice is that a Commercial Contract is made between a Developer and Major Construction Manager for works to be performed on the project and the terms of that commercial contract will stipulate have the effect in practice for the Major Contractor to make a Greenfields agreement and that agreement be a framework agreement.

Recognition of the practice is evident within many enterprise agreements that construction contractors have for non MCP work through automatic opt-in provisions in their standard agreements. These provisions typically state that one set of terms and conditions usually applies but when the employee works on an MCP the terms of the MCP framework agreement will apply.

The legislative framework for Greenfields agreements in this regard is contradictory. The are no employees that are involved in the making of the Greenfields agreement but in reality, there is also no employer. The Developer or Major Contractor are in reality a proxy for the eventual employer party when they establish a framework Greenfields Agreement. This reality should be legislatively recognised.

**The Term of Greenfields Agreements should be for the life of a Construction Project**

I suggest that there be no expiry date for Greenfields agreements. Thus, the agreement should apply for the term of the project. The lack of a term for an agreement would have the consequence that protected action cannot be taken during the construction of that project.

For the vast majority of construction projects that is the case now as the construction works are often completed within four years. It seems non-sensical that the only projects that are currently exposed to the potential for protected industrial action are those that the largest and most expensive and subject to the most risks but in all probability with the capacity to provide the most and widest benefits.

I am not suggesting that all greenfield agreements automatically have a life of project term but rather that the parties be able to agree to a project life term.

It is often proposed is that the current four-year term limit be extended. Whilst I agree with that suggestion it is only partially addresses the issue. Some greenfield agreements have shorter terms than four years, but the works could continue beyond the expected duration of the term of those agreements. It should be a matter for the parties when they make an agreement as to what its term is. Indeed, there could be occasions where the parties decide they wish to have a term that expires mid-term of a project. If the parties do agree to a shorter term than the expected construction time for a project the parties should also be able to include in the agreement what is to occur at the expiration of that agreements term without legislative restrictions.

It is often overlooked that currently there is no prohibition on bargaining during the term of an agreement. The only restriction of in term bargaining is there is no right to take protected industrial action.

A consequence of life of project terms is that there would need to be a prescription through a clear definition of what a "project" was. This need not be, and in my view should not be, tied to a particular value or project nature. To have limitations of those types it would exclude projects that should have the same type of rights and protections as other projects. It would also lead to arbitrary decision as to a project economic or community benefit. I suggest that it should be a matter that the parties to an agreement should define in the agreement itself what the project is defined as.

**Summary**

My suggestion is therefore

1. Enable Greenfields agreements to be made between a Developer, the Major Construction Manager (or group of Managers) for a project and a Union or group of Unions.

2. Allow parties to make Greenfields agreements for the life of a project.

1. The Honourable Brendan McCarthy was Deputy President of the Fair Work Commission and its preceding bodies (Fair Work Australia and the Australian Industrial Relations Commission) from October 2001 until December 2014. Between 2004 and 2014 he had responsibility for all Commission matters involving the building construction industry in Western Australia. He therefore was responsible for all Commission matters involving building and construction for projects such as Hismelt, Burrup Ammonia Plant, Ravensthorpe Nickel Project, Worsley Alumina Capital Project, Alinta Cogeneration Project, Woodside LNG Train V, Woodside Pluto Project, Wheatstone LNG Project, Gorgon LNG Project and a number of Rio and BHP and Fortescue Iron Ore Projects. [↑](#endnote-ref-1)