Construction, Forestry, Maritime, Mining and Energy Union submission to the Attorney-General's Department's Discussion Paper

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

1 November 2019

CFMEU

Introduction and summary

1. The Construction, Forestry, Maritime, Mining and Energy Union (**CFMEU**) represents, nationally, over 120,000 people in a range of industries including construction, mining, forestry, maritime, textile, furniture and building products and power generation. We proudly provide a voice for workers, including by seeking to build workplaces that provide well-paid, fair, secure and safe work.

2. We welcome the opportunity to provide comment on the Attorney-General's Department's paper entitled *Attracting major infrastructure, resources and energy projects to increase employment – Project life greenfields agreements* (**the Discussion Paper**).

3. The CFMEU strongly opposes the proposal that greenfields agreements be able to have nominal expiry dates which extend beyond four years, or for the life of a project. The proposal:

    a. relies on a false policy assumption that the re-negotiation of greenfields agreements is a major, or predominant reason why projects may be delayed or over-budget. The government is content to demonise workers and their unions, but is ignoring the real reasons why these things occur;

    b. overtly precludes workers from being able to collectively bargain, or take protected industrial action, indefinitely. This is both inconsistent with the objects of the *Fair Work Act 2009* (**FW Act**), as well as inconsistent with well-established principles in international labour law;

    c. ignores the fact that most projects, and current greenfields agreements, have terms that are less than four years;

    d. would operate in a scheme which already allows employers to set the terms and conditions of employment unilaterally, without there being any genuine agreement with workers or their unions;

    e. would drive down workers' wages and conditions, whilst giving employers an unassailable advantage at the expense of workers;

    f. cherry-picks from, but is inconsistent with, previous independent reviews which do *not* support the proposal.

False policy assumptions

4. Before addressing the substance of the Discussion Paper, we would firstly like to express our dismay at the fact that a decision appears to have already been taken by the Attorney-General in relation to the proposal to extend the nominal expiry of greenfields agreements out for the entire life of a project. So much was made clear during a Senate Estimates hearing conducted on 23 October 2019 where Ms Alison Durbin, the First Assistant Secretary of the Industrial Relations Policy Division of the Department, stated:

> … The Attorney is clear that he supports this idea. He thinks it is a good idea and that it would bring significant productivity and other benefits to large-scale infrastructure projects but it remains under consultation. He will consider the feedback both on the idea and on the technical detail about how such an idea could be legislated and put into operation[1].

5. This approach is disappointing because it clearly pre-empts the 'consultation' period. It does, however, explain the leading nature of the "discussion questions" contained in the Discussion Paper.

6. It is particularly exasperating that the Discussion Paper – as a means of advocating for the proposed reform – repeats the fallacy promoted by the Master Builders Association (**MBA**) that an "analysis of the building and construction industry and the working days lost to industrial disputation" has "found that union activity can increase project costs by 'up to30 per cent'"[2].

7. That claim is wrong, and misleading.

8. The only attribution in the Discussion Paper to the MBA's "analysis" is a reference to a press release issued by them on 14 March 2019. Notably, there is no source within that press release which substantiates the 30% allegation; nor is there any source identified in the Discussion Paper. Indeed, despite this allegation being repeated by the Coalition for literally years now, and as an excuse for any number of union-busting policies, no clear basis for the allegation has *ever* been put forward by either the MBA or the Government as far as we can tell.

9. By contrast, a recent independent and publicly available report prepared by the McKinsey Global Institute titled *Reinventing Construction: A Route to Higher Productivity*[3] indicates that Australia:

    a. is managing to combine high measure productivity levels with comparatively fast growth (page 3); and

    b. is considered an "outperformer" which has achieved healthy productivity levels and growth rates (see Exhibit E2).

10. Further, the 2019 "*International Construction Costs: Smart decisions creating long-term value*" report prepared by Arcadis Design and Consultancy – another, independent, publicly available report - demonstrates the international competitiveness of the Australian market. This report indicates that the most expensive Australian city for construction costs – Sydney – is ranked 34th in the world for construction costs, trailing nine US cities. The next most expensive Australian city is Brisbane, which doesn't even make the world's top 50 most expensive cities for construction.

11. In these circumstances it is wholly disingenuous for the Attorney-General to repeatedly raise the allegation that unions are responsible for 30% cost increases; indeed, it is actively misleading.

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[1] https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ed27f2fc-7c76-456e-8ed1-bfcce42abcdb/toc_pdf/Education%20and%20Employment%20Legislation%20Committee_2019_10_23_7295.pdf;fileType=application%2Fpdf#search=%22committees/estimate/ed27f2fc-7c76-456e-8ed1-bfcce42abcdb/0000%22 at page 59

[2] At page 5 of the Discussion Paper; https://www.masterbuilders.com.au/Newsroom/Construction-Strikes-Double-—-The-ABCC-Must-Be-Ret

[3] The McKinsey Global Institute Report is available at: https://www.mckinsey.com/~/media/McKinsey/Industries/Capital%20Projects%20and%20Infrastructure/Our%20Insights/Reinventing%20construction%20through%20a%20productivity%20revolution/MGI-Reinventing-Construction-Executive-summary.ashx

12. It is particularly disheartening that a Discussion Paper prepared by the public service, which as a fundamental principle of the Westminster system of government should be impartial, would continue to spread the MBA's propaganda.

13. We also note that – despite there being more workers in the economy than ever before – the number of days lost to industrial action in Australia are at record lows, including within the construction industry[4]. To the extent that the Discussion Paper refers to the Gorgon and Wheatstone projects, we note that there were greenfields agreements which expired prior to completion of (stages of) those projects, however no protected industrial action was taken.

14. More broadly, recent public commentary from employer associations and the Government suggests that the proposal contained in the Discussion Paper is more about blame-shifting than any genuine analysis of issues which impact the productivity or cost-effectiveness of large construction or resource projects. We discuss this further below.

The current provisions of the *Fair Work Act 2009*

15. Because they are agreements that are negotiated prior to any workers being engaged, greenfields agreements are already anomalous; they are not a feature of the industrial relations systems in other modern democracies.

16. Since the enactment of the *Fair Work Amendment Act 2015* (**the 2015 Amendment Act**), the relevant provisions of the *Fair Work Act 2009* (**FW Act**) operate so that:

    a. an employer is able to issue a written notice to commence a notified negotiation period for a greenfields agreement;

    b. the good faith bargaining provisions (and other provisions of the FW Act which are designed to facilitate fair bargaining) will apply, but fall away six months after the written notice is issued[5]; and

    c. after a six month period, if agreement is not reached, the agreement is taken to have been made, and an application for approval can be made to the Fair Work Commission (**FWC**) without the employer reaching agreement with the relevant union[6].

17. The practical effect of these provisions is that:

    a. employees do not participate in bargaining to determine their terms and conditions of employment; and

    b. employees are locked out of bargaining, and are unable to take protected industrial action, for the nominal term of the agreement.

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[4] Business reporter Stephen Letts, 'Chart of the day: How bolshie are Australian workers in an era of stagnant wage growth?' Updated 7 Sep 2018, available online at https://www.abc.net.au/news/2018-09-07/chart-of-the-day-strikes-industrial-disputes/10208572; Jim Stanford, 'Briefing Note: Historical data on the decline in Australian industrial disputes', The Australia Institute and the Centre for Future Work, 30 January 2018.

[5] Section 255A of the *Fair Work Act 2009*

[6] Section 182(4)of the *Fair Work Act 2009*

18. The obvious problem with the 2015 amendments is that it allows employers to engage in 'hard bargaining' for a period of 6 months, after which they can determine the terms and conditions of employment *entirely unilaterally*. This is precisely *why* the Government ought to exercise particular care when dealing with any reform to the greenfields agreement regime, as opposed to non-greenfields agreements.

The 'reform option'

19. The only proposal contained in the Discussion Paper is that the nominal expiry date of greenfields agreements be extended so as to cover the life of "longer-term building and construction projects or similar types of major projects".

The proposal is not supported by previous independent reports

20. As required by the 2015 Amendment Act, a review was conducted into greenfields agreements in 2017 by the Department of Jobs and Small Business. The review was conducted independently by a former Senior Deputy President of FWC, Matthew O'Callaghan, and a report issued on 27 November 2017 (**the 2017 Review**[7]).

21. The 2017 Review specifically considered the question of whether the nominal expiry date for greenfields agreements should be extended to five years or the life of a given project, including by reference to the Productivity Commission's earlier report into the Workplace Relations Framework (**the 2015 Productivity Commission Report**).

22. The 2017 Review specifically rejected the proposal to extend the nominal expiry date for greenfields agreements. The report stated:

> 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.
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> (Emphasis added)

23. The earlier 2015 Productivity Commission Report did recommend that the FW Act should be amended to allow for the nominal expiry dates of greenfields agreements to match the life of a greenfields project. *However* – and critically - that recommendation was tempered by:

[7] https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/greenfields_agreements_review.pdf

a. a requirement that the business satisfy the FWC that any period longer than five years was "justified"[8]; and

b. a proposal whereby, if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:

    i. continue negotiating with the union;

    ii. request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union; or

    iii. submit the employer's proposed greenfields arrangement for approval with a *12 month nominal term*[9].

24. Both the 2017 independent review and the 2015 Productivity Commission review recognised and tried to grapple with what the Productivity Commission aptly described as the "unique policy challenge" associated with enterprise agreements being made without any workforce to bargain with. The current Discussion Paper, by contrast, wholly ignores this context. It disregards the bulk of the analysis done by these two recent reviews and – instead – champions a recommendation which neither of the reviews supported.

25. By cherry picking form the 2015 Productivity Commission Report, and wholly ignoring the 2017 Review, the political motives of the Government are revealed.

The proposal undermines collective bargaining and is inconsistent with international law

26. The very existence of enterprise agreements which are made without the involvement of any workers, and which are essentially able to be made unilaterally by employers, is already concerning. It denies employees the capacity to make decisions about their employment arrangements, and prevents them from taking protected industrial action to support their claims. The stripping away of this basic industrial right should be taken very, very seriously.

27. The right to strike, and the right to bargain collectively, are fundamental rights that are enshrined in international law. They represent the essential means available to workers and their unions to promote and protect workers' social and economic interests. Indeed, protected industrial action is often the *only* means available to workers to assert their interests against employers in an already unbalanced negotiation environment.

28. The current bargaining scheme contained in the FW Act has already been criticised by the United Nations' International Labour Organisation (**ILO**) for failing to give effect to fundamental rights protected by international conventions which Australia is signatory to, including because of the restrictions that already exist relating to the risk to collectively bargain, and to strike[10].

[8] Recommendation 20.4. Note that the Productivity Commission also recommended that non-greenfields agreement be allowed to run for 5 years after approval

[9] Ibid

[10] ILO Committee of Experts on the Application of Conventions and Recommendations: Observation adopted in 2009, published 99th ILC session (2010); Direct request adopted 2009, published 99th session (2010); Direct request adopted

29. The Discussion Paper exacerbates those pre-existing concerns. Moreover, by adopting the MBA's rhetoric over the alleged cost of industrial action, it demonises these fundamental rights and renders them as wholly subservient to corporate interests.

The Discussion Paper ignores a fundamental threshold issue

30. Another significant threshold issue is that the Discussion Paper does not clearly address, or define, is the scope of the definition of 'projects'. Specifically, it is unclear whether the proposal is intended to apply to all greenfields applications, or to a certain subset of greenfields agreements relating to "major infrastructure, resources and energy projects".

31. If it is the former, then it is important to note that greenfields agreements are not limited to major projects, or to the construction and infrastructure sectors.

32. If it is the latter, then there is no real guidance in the Discussion Paper as to how such projects would be identified or defined. This opens up clear avenues of abuse. The *Cape Australia Wheatstone Project Agreement 2013* (a greenfields agreement), for example, had a coverage clause which provided that the Agreement would "*apply to the on-site construction work for the Wheatstone Project (the Project) at Ashburton North near Onslow*". This kind of definition is extraordinarily broad, and obviously problematic because the scope of work required for construction is not defined. If such broad definitions continue to be permitted, then employers will exploit the fact that projects can last for decades. The Wheatstone project, for example, has a predicted lifespan of 30 years.

33. Either way, the 2017 Review found that:

    a. no basis for any extension of the potential duration of greenfields agreements was made out in the material provided to the review, in relation to construction and resource development projects; and

    b. there was no material provided to the review that supported an extension to the duration of greenfields agreements that apply outside of the construction and resource development sectors.

34. The material that was provided to the 2017 Review included extensive submissions from major employer groups including – at least[11] – the Australian Chamber of Commerce and Industry, the Australian Mines and Metals Association, Australian Business Industrial, the Business Council of Australia and the Australian Industry Group. We are also aware that the review consulted with 'experienced workplace relations professionals in major resource projects on an in-confidence basis'. The conclusions in the 2017 review were not uninformed.

2011, published 101st session (2012); Observation adopted 2011, published 101st ILC session (2012); Direct request adopted 2013, published 103rd session (2014); Observation adopted in 2016, published 106th session (2017).

[10] Open letter from Economics and Other Professionals in related disciplines, 6 April 2017.

[11] The Review's website indicates that submissions are only available where permission for them to be made publicly available has been given. We are also aware that the review also consulted with "experienced workplace relations professionals in major resource projects on an in-confidence basis". This obviously denied unions and worker the opportunity to respond to their submissions.

35. The Discussion Paper appears to be the Government's attempt to allow employer interests to have another bite out of an apple that has already been bitten twice.

Discussion Questions

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?

36. There are many reasons why a large project may be delayed, or may blow out in cost. It is disingenuous to lay the largest proportion of blame at the feet of workers and their unions; it is not construction workers, or their attempts to negotiate fair wages and entitlements, which lead to the major cost blowouts and delays that arise on large projects.

37. The CFMEU has recently released a report relating to infrastructure investment in Australia titled *Bad Customers: The billions going missing from infrastructure investment in Australia*. A copy of the report is **attached**[12]. This report sets out the massive failures in the procurement processes for major building and infrastructure projects currently utilised by the Federal and State Governments. These flawed processes have led to disastrous projects such as the New Royal Adelaide Hospital, the new Perth Children's Hospital, the Toowoomba 'Over the Range' road motorway, and the Sydney Light Rail project.

38. These are just a few examples. All of these projects have been characterised by cost blowouts, time delays, significant safety concerns, a high level of defects and massive litigation between the respective client governments and the principal contractors responsible for delivering them. Notably, however, the delays in these projects have nothing whatsoever to do with the negotiation of union agreements, greenfields or otherwise. Rather, they relate to:

    a. governments choosing to accept low bids with very small, or no margin for error. Competition on cost alone has driven adversarial relationships in the construction industry, with companies looking to drive down labour costs by adopting opaque company structures. This has led to the growth of hierarchical pyramid contracting, where a head contractor sits above multiple layers of sub-contractors. This encourages non-compliance with statutory employment requirements, poor health and safety, and failures of quality assurance systems. It also encourages insecure work, and contributes to the high rate of insolvency amongst subcontractors;

    b. a complex and reactionary regulatory environment, with significant duplication of commonwealth and state regimes, which contributes to significant delays in obtaining approvals;

    c. the outsourcing of project delivery to the private sector, which has encouraged the denuding of the public sector of the staff, skills and expertise required to oversee projects. Indeed, a recent report by Deloitte Economics compiled for Consult Australia

[12] *Bad Customers: The Billions going missing from infrastructure investment in Australia*: see https://www.cfmmeu.org.au/sites/www.cfmmeu.org.au/files/uploads/bad-customers.pdf

found that "conservatively, public sector clients could save 5.4% of professional services costs alone through better procurement"[13];

d. poorly scoped projects, resulting in variations, rework and interface issues between trades and sub-contractors;

e. unclear contract drafting, poor contract administration and overly optimistic scheduling and costs estimates; and

f. skills shortages.

Case Study: The delays and budget blowouts at the Perth Children's Hospital

In 2010, the Western Australian Government approved a $1.2 billion business case for the Perth Children's Hospital Project with construction to commence in early 2013 and scheduled for completion by June 2015.

The Government chose to accept an extremely cost-competitive bid, with small margins for error, from a company it had not previously used to manage projects of such scale and complexity. The departmental oversight arrangements added to the complexity, with dual governance and accountability arrangements that saw the Department of Treasury responsible for the construction, while the Department of Health managed all aspects of commissioning.

The project was not covered by any greenfields agreement.

Once construction was underway, a string of issues began to arise, including:

- *Asbestos, fire safety and intractable lead contamination;*
- *Slow progress due to 15-20 per cent fewer tradespeople being on site than planned;*
- *Sub-standard work due to reliance on price as the main determining factor in awarding contracts, which saw subcontractors utilise unskilled workers such as backpackers instead of the existing skilled local workforce; and*
- *A culture of underpayment of workers by subcontractors that instilled a fear of speaking out about unsafe working conditions.*

Delays alone at the hospital cost $115m, and the overall budget was blown out by over $300m. The hospital opened three years late.

Throughout all of this, the Federal Government sought to demonise the CFMEU and blame us for the problems associated with the project. However, the findings and recommendations of the subsequent inquiry conducted by the Public Accounts Committee of the Western Australian Legislative Assembly make it clear that the problems which plagued the project, and resulted in the costs blowout and significant delay, lay at the feet of the Government and the head contractor. The report, entitled "PCH – A Long Waiting Period: A critique of the State's management and oversight of the Perth Children's Hospital project" can be found here.

[13] Deloitte Access Economics (2015) *Economic benefits of better procurement practices*. Retrieved from www.consultaustralia.com.au/docs/default-source/infrastructure/better-procurement/dae---consult-australia-final-report-050215---96-pages.pdf

39. In the construction industry, research conducted by Equity Economics estimates that that the government's waste in infrastructure has cost Australian taxpayers $10.8 billion over the last ten years, and may cost an additional $5.0 billion over the coming three[14].

40. The Discussion Paper wholly ignores these matters. Instead, it demonises workers and their unions for its own political objective.

41. Workers in the maritime industry have been similarly demonised for delays or cost blow-outs in the offshore sector. Statements from multi-national corporations and the business lobby groups - and many media accounts - blame continual delays on workers and their unions, often via grossly exaggerated complaints about high wages. Their explanations are about blame-shifting; they are not genuine analysis.

42. In his submission to the 2015 Productivity Commission review, Professor Bradon Ellem of the University of Sydney Business School considered the problems which arose on Chevron's Gorgon Project[15]. He concluded:

> If the delays and cost pressures in the resources sector and, in this example, on the Gorgon project are to be properly understood, then, plainly, the issue that needs to be understood is causation and, with that, remedy. Most of the discussion thus far in Australia itself has concentrated on labour – be it labour law, labour unions, labour costs or labour effort. This is more of than not the case whether it is LNG, the resources sector or even low-wage industries. In this case – and this is part of a wider matter – there are problems with most of these criticisms. Not only are wages a small part of the costs, but most of the figures used in public debate are misleading. The massive blow-out in costs simply must be explained by other components of the project. Part of the answer is in fact the other much-discussed problem: delays. Obviously enough, as with other megaprojects, delays in themselves are expensive.
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> Even if the details of the dominant narrative about Gorgon could be substantiated, then 'fixing' workplace relations – be that through legislative change or attacking the MUA – would not solve the problems. The logic and the end-point of this submission is, instead, to insist that focussing so heavily on 'labour' is part of the problem: that mindset is, in itself, evidence that the real issues are simply not being addressed. To repeat: if this mindset occurs in site after site then we have not only a management problem but a public policy one – albeit a very different one from how it is usually framed.
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> (Emphasis added)

43. Professor Ellem went on to summarise four major conclusions, in relation to the problems which plagued Chevron's Gorgon Project. They were:

    a. the need for further investigations into a pattern of problems that are evident in 'megaprojects', including in relation to the nature of the contracts; the relationship between project principles and those contractors; the 'red tape' imposed not by

[14] *Bad Customers: The Billions going missing from infrastructure investment in Australia*: see https://www.cfmmeu.org.au/sites/www.cfmmeu.org.au/files/uploads/bad-customers.pdf

[15] *Workplace Relations and Resources Productivity: At work on Chevron's Gorgon Project*, Bradon Ellem, Professor of Employment Relations, the University of Sydney Business School, March 2015, available at: https://www.pc.gov.au/__data/assets/pdf_file/0005/187565/sub0045-workplace-relations.pdf

governments or unions, but by relationships within construction and production networks; and lack of incentive to complete the project;

b. a lack of accountability from Chevron for its own contracting chains, despite it being best positioned to inquire into, and address, the problems in the project;

c. the need for closer engagement with the workforce, including between workers, their unions and project managers; and

d. that the commonly accepted assumptions about the problems on the project (which are directed at labour) were "so unhelpful that they must be addressed". As Professor Ellem noted, "[i]t is in the interests of shareholders and investors, workers, managers and policy-makers to have a better informed discussion of the issues".

44. Professor Ellem's submission can be read in full here.

45. What is clear from the above examples is that any policy approach to large infrastructure projects must be based on genuine analysis, rather than blame-shifting. The Discussion Paper fails entirely to frame any such genuine analysis.

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?

46. The current 4-year maximum term for greenfields agreements does not pose a significant problem for employers. Rather, it favours them.

47. The 4-year term is already generous to employers. The 2017 Review noted that a majority of "workplace relations professionals involved in the resource development and infrastructure construction projects" observed that:

a. most contractors complete their work within a four-year time frame;

b. in most instances greenfields agreements applying in both resources projects and infrastructure projects operate so that they expired at differed times over the life of a project, and thereby minimised the potential for disruption associated with the renegotiation process[16].

48. Similarly, the 2015 Productivity Commission report noted:

a. almost half of projects in construction (the sector where greenfields agreements are primarily used) have durations of less than two years;

b. the average duration of current greenfields agreements is 3.2 years[17].

[16] At 46

[17] At 21.2, page 713

49. Further, and in our experience, longer-term projects are usually broken into stages. It is not uncommon for new greenfields agreements to be negotiated at the beginning of each stage. Often a head contractor will deliberately contract a different corporate entity who has entered into a fresh greenfields agreement at the beginning of each new stage. The new contractor can, and often does, engage the same workers who had previously worked on the project to work under a new greenfields agreement, for the new corporate entity. This is yet another way that employers are able to abuse the current statutory framework; it perverts the very essence of the greenfields concept, undermines wages and entitlements, and creates less secure work for employees.

50. Seen in this context, the Government's implication that delays in projects relate predominantly to the re-negotiation of expired greenfields agreements simply cannot be sustained.

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

51. As stated elsewhere in this submission, the fact that greenfields agreements may be imposed unilaterally by an employer, and without the involvement of a workforce, requires particular care to be taken from a policy perspective.

52. The idea that there could be no maximum length for greenfields agreements is alarming. It means that workers would be deprived of the ability to bargain and take protected industrial action *indefinitely*. The proposition also needs to be seen in the context that some large projects – such as the Gorgon LNG project – have projected lives of up to *45 years,* which are inclusive of several stages.

53. Rather, serious consideration should be given to *reducing* the maximum length of greenfields agreements where they are made without the agreement of the relevant union(s). This would not only protect workers' rights, it would also be consistent with the recommendation of the 2015 Productivity Commission Report that - where a greenfields agreement is not made with the agreement of the relevant union(s) - it should be limited to 12 months operation[18].

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

54. There is no benefit to workers.

55. The Discussion Paper cites "better wages and conditions for employees" as a "potential benefit" of longer project agreements; this is a glib assertion that we utterly reject. It is entirely unclear how it could be said that longer project agreements would improve wages and conditions for employees.

56. There is also no benefit to the public interest. The only benefit is to employer, who will be able to avoid bargaining with their workforces, undermining both collective bargaining and freedom of association. We discuss this further below.

[18] See recommendation 21.1 of the 2015 Productivity Commission Report, at page 719

Are there any known risks that might arise for employers, employees, promotors 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?

57. Wages and conditions will be driven down.

58. There is no valid reason to believe that the extension of greenfields agreements would lead to "better wages and conditions for employees", as asserted by the Discussion Paper; there would simply be no incentive for employers to do so in the complete absence of any genuine bargaining.

59. It is a fundamentally unfair proposition to seek to fix the price of labour over long periods of time. Inflation, interest rates and other cost of living changes will affect workers over the life of any project. Employers would retain the ability to pay more than an agreement provides if the labour market tightens and labour is in short supply. However, workers could not demand a higher price for their labour in those circumstances, nor could they seek cost of living adjustments even if there are significant cost of living pressures on them. It is an entirely one-sided equation.

60. We are not alone in having this view. Indeed, the 2017 Review expressed a concern that "wages and conditions agreed at the commencement of one project could adversely affect other projects, commenced in entirely different commercial circumstances"[19].

61. The idea that employers would incorporate competitive or high wages in a greenfields agreement in order to attract workers to a project is also a nonsense. The more likely outcome would be the continued proliferation of so-called "baseline" agreements which set wages and conditions that are at, or only very slightly above, minimum award requirements. The rationale that is commonly put forward by employers engaging in this practice is that these arrangements provide "certainty", and the ability to tender for projects (or stages of projects), while allowing employees to contract above those rates and conditions *individually*. This practice completely undermines the scheme for collective bargaining set out in the FW Act, and intentionally deprives workers of the ability to take protected industrial action in support of their own wages and conditions.

62. The setting of conditions via greenfields agreements not only has the potential to drive down the wages and conditions of employees who are covered by the particular agreement, but also the wages and conditions of contractors and sub-contractors down the chain. This is because competitive pressure is placed on them to adopt similar, or less beneficial conditions. Employers then say to their employees that – in order to win the work - they have to accept a cut in conditions. This rationale is also used to dissuade employees from taking strike action in furtherance of their own interests.

63. Even before the proposed reform, the landscape for the making of enterprise agreements already works to disenfranchise workers. The proliferation of so-called 'brownfield agreements' in recent years has been startling.[20] These are enterprise agreements that are voted on by a very small, often hand-picked cohort of usually casual employees but which cover a very large cohort of employees and a broad geographic scope. The most common practice is that an employer will deliberately 'negotiate' such an agreement prior to engaging a substantive workforce. These

[19] At 47

[20] See, e.g., Senate Standing Committee on Education and Employment, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, ch 3

'brownfield agreements' are being used to avoid coverage of existing agreements and to prevent workers from being able to bargain when existing agreements nominally expire (often by transferring those employees to a different corporate entity), as well as being used to avoid the greenfield agreement making obligations in the FW Act. It is a practice that ought to be condemned. While the CFMEU has had some success in challenging these types of agreements, the proposal contained in the Discussion Paper would work to further undermine the ability of workers to collectively bargain for their own wages and conditions.

64. The gulf between the conditions in the agreement and the relevant award would also narrow. This is because the "Better Off Overall Test" is applied only at the time an agreement is approved, meaning that – the longer the agreement lasts – the more likely that the wages and conditions in the agreement will fall below the minimums in the relevant awards. In usual circumstances, this risk is mitigated by the fact that employees are under no obligation to agree to an enterprise agreement during the bargaining process. However, in the case of greenfields agreements, neither the employees nor their unions would have any choice, or any say whatsoever (where the employer does not reach agreement with a union(s) within six months, which employers would be positively incentivised to do).

65. Our members who work on large infrastructure, resources and energy projects often work in remote areas, on a fly-in, fly-out (**FIFO**) basis, under dangerous safety conditions and to almost around-the-clock shifts. They deserve their share of the profits generated by these projects.

66. By contrast, the profits on these large infrastructure, resources and energy projects are enormous. For example, in February 2019, Chevron (who operate the Gorgon and Wheatstone projects) reported a fourth quarter net income of $3.7 billion, with annual earnings of $14.8 billion[21]. Indeed, ABS statistics indicate that the growth in profits within the construction industry have grown by 6.1% in the financial year ending June 2019. At the same time, salary and wages in the industry have *decreased* by 0.6%. In the mining industry, corporate profits have grown 25.5%, but salary and wages have only grown by 5.8%[22].

67. The overall outcome of the proposed reform is that a small number of employers with substantial market power would be able to use greenfields agreements to drive industry wide wages and conditions down well below the competitive market level.

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

68. Consistent with the primacy that the FW Act gives to collective bargaining, the most appropriate way to set wage rates is via bargaining supported by the legislated right to take protected industrial action.

[21] https://www.chevron.com/stories/chevron-reports-fourth-quarter-net-income-of-3-7-billion-annual-earnings-of-14-8-billion
[22] ABS 5676.0 (June 2019)

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

69. Existing greenfields agreements should not be extended; rather, and consistent with the FW Act, they ought to be replaced by enterprise agreements properly negotiated with employees.

70. Existing greenfields agreements may already be shortened by the negotiation of a replacement agreement, and the subsequent termination of the original greenfields agreement (noting that, under this arrangement, employees are precluded from taking industrial action).