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Attorney-General's Department
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To whom it may concern

Project Life Greenfields Agreements – Call for submissions

1 Purpose of this submission

- 1.1 The Government's call for submissions appears to focus on the need for project-life greenfields agreements to be available only at the contractor level on 'major projects'.
- 1.2 The purpose of this submission is to raise, at first instance the concept of a 'Project Owner Agreement' as part of the Government's consideration of project-life greenfields agreements.
- 1.3 This is based on the concept of the *project owner* being able to apply for and set in a project-life greenfields agreement (as proposed) for its specific infrastructure, resources or energy project (**Project Owner Agreement**).
- 1.4 In my view, Project Owner Agreements will provide much greater certainty for project owners, investors and businesses on 'major projects' requiring capital investment (including foreign investment) to ensure the project is delivered on time and on budget. Project Owner Agreements will also ensure that wages and conditions of workers are protected and maintained at sustainable levels for the life of the 'major project'.
- 1.5 A Project Owner Agreement could become another stream of enterprise agreement under the *Fair Work Act 2009* (Cth) (the **Act**), utilising the existing legislative framework, with some required changes by one piece of amending legislation.
- 1.6 Further consideration around the operation of Project Owner Agreements and compliance/interaction with the current *Code for Tendering and Performance of Building Work 2016* (Cth) may need to be had.

2 When should a Project Owner Agreement be available?

- 2.1 A Project Owner Agreement should only be available to 'major projects' which are of significant importance to the Australian or relevant State/Territory economy (or a part of it).
- 2.2 In my view, it should be open to the relevant project owner (if they wish) to make an application to the relevant Commonwealth or State/Territory Minister for designation as a 'major project', subject to meeting criteria set out in the *Fair Work Regulations 2009* (Cth) as detailed below.

- 2.3 In the event the relevant Minister is satisfied the project meets the relevant criteria to be a 'major project', as per the Regulations, the Minister must declare the project a 'major project' for the purposes of the Act.
- 2.4 If the project falls short of the prescribed value, but meets the other criteria (which the Minister must consider when making a determination), then the Minister should have a discretion to declare the project a 'major project'. Any decision to declare, or not declare, a project to be a 'major project' should be subject to both merits (under the ADJR Act), and judicial review (through the Federal Court). Some possible criteria the Minister must consider should include:
- (a) declared capital value of the project – i.e. above \$500M;
 - (b) the project's contribution to the Australian and/or State/Territory economy and GDP; and
 - (c) the project's ability to create jobs; both immediate and over the project's life.
- 2.5 Upon declaration by the relevant Minister that the project is, or will be, 'a major project' (as defined above), a six (6) month 'notified negotiation period' will commence as per section 178B of the Act. This period will allow the project, and relevant union(s) to then start to negotiate the terms and conditions of the Project Owner Agreement.

3 The making of a Project Owner Agreement

- 3.1 As set out above, once a project is declared a 'major project' by the relevant Minister, a six (6) month 'notified negotiation period' will commence. It will be open for the project owner to negotiate for a longer period with the relevant union(s) if it wishes to do so. Particularly, if the project owner commences the negotiation process well in advance of the anticipated construction start date.
- 3.2 If, at the conclusion of the six (6) month 'notified negotiation period', no agreement has been reached between the project owner and the union(s), as to the terms of the Project Owner Agreement, a process similar to that prescribed by section 182(4) of the Act should allow for the project owner to make an application to the Fair Work Commission for arbitration of the terms of the Project Owner Agreement (if it wishes to). The requirements of sections 187(5) and (6) will apply in this circumstance, which include that:
- the FWC must be satisfied that the agreement, 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*
- 3.3 In terms of agreement content, a Project Owner Agreement will be subject to the same tests required under the Act and applied by the Fair Work Commission for greenfields agreements, including the better off overall test.
- 3.4 Once in operation, the Project Owner Agreement will apply to any:
- (a) direct employee of the project owner who is covered by the Project Owner Agreement; and
 - (b) employee who is employed by a contractor engaged by the project owner (directly or indirectly through a sub-contract arrangement) who is covered by the Project Owner Agreement (subject to the interaction rules below).
- 3.5 The nominal life of a Project Owner Agreement should be up to six (6) years, with an additional twelve (12) month grace period from any applications for protected industrial action (by direct employees or contractor employees). This would essentially enable a 'major project', which obtained a six (6) year Project Owner Agreement, not to be

subject to the threat of protected industrial action from any employee working on the 'major project' for a maximum period of up to seven (7) years.

4 Interaction with other workplace instruments

- 4.1 It should be the goal of Project Owner Agreements to supplement the existing (and renewed) in-term enterprise agreements of the different contractors looking to mobilise on to the 'major project'.
- 4.2 Subject to section 206 of the Act, once in operation, a Project Owner Agreement will provide a 'floor' to applicable terms and conditions of employment for any directly employed project owner employee or any contractor employees working on the 'major project' for the life of the Project Owner Agreement (until terminated or replaced).
- 4.3 In this regard, it will be similar to a Modern Award, however, instead of catering for the industry at large, it will be 'major project' specific, and allow tailoring of the agreement to the needs of the 'major project'.
- 4.4 The circumstances of interaction between contractor workplace instruments and the Project Owner Agreements may be as follows:
- (a) Contractor mobilises labour with current in-term enterprise agreement that applies to it and its employees, where it pays above the Project Owner Agreement:
The contractor must pay terms and conditions in accordance with its in-term enterprise agreement (where they are more favourable) until it expires, at which point terms and conditions of the contractor employees will default to the Project Owner Agreement terms and conditions.
 - (b) Contractor mobilises labour with current in-term enterprise agreement that applies to it and its employees, where it pays below the Project Owner Agreement:
The contractor must provide terms and conditions at least in accordance with the Project Owner Agreement.
 - (c) Contractor mobilises labour with an expired enterprise agreement that pays above the Project Owner Agreement:
The contractor must provide terms and conditions at least in accordance with the Project Owner Agreement.
 - (d) Contractor mobilises labour with an expired enterprise agreement that pays below the Project Owner Agreement:
The contractor must provide terms and conditions at least in accordance with the Project Owner Agreement.
 - (e) Contractor mobilises labour with no enterprise agreement and employees subject to applicable Modern Award(s):
The contractor must provide terms and conditions at least in accordance with the Project Owner Agreement.
- 4.5 Maintaining clear interaction rules between contractor workplace instruments and a Project Owner Agreement will ensure that the Project Owner Agreement can achieve its purpose of ensuring certainty for costs of the 'major project' and also for employees in respect of their terms and conditions for the life of the 'major project'.
- 4.6 This will, however, ensure that it remains open for contractors to set in place single-enterprise agreements with its employees whilst working on 'major projects'. The

threat of protected industrial action by those contractor employees in enterprise bargaining for a replacement agreement will not, however, exist.

5 Expiry, variation and termination of a Project Owner Agreement

- 5.1 As set out above, the nominal life of a Project Owner Agreement should be up to six (6) years. The Project Owner Agreement should terminate on its nominal expiry date and never operate again. There should however be an additional twelve (12) month grace period from any applications for protected industrial action (by direct employees or contractor employees). This would enable some time to negotiate a replacement Project Owner Agreement, if one was required.
- 5.2 The ability of the project owner to terminate the Project Owner Agreement prior to its nominal expiry date should be an essential component of the framework.
- 5.3 Given the potential length of a 'major project', there are market uncertainties that can cause significant disruption to long-term construction projects. The resources sector is particularly sensitive to these changes, as the market is largely influenced by global trends, and forces outside the project owner's control (such as the price of oil and gas).
- 5.4 In the event that the Project Owner Agreement becomes uncompetitive, the project owner should have the ability, on six (6) months' notice to the Fair Work Commission, and having produced evidence of changed market conditions, to apply to vary Project Owner Agreement (including wage rates). The changed market conditions that allow for variation should be carefully considered, and evidence as to whether these are long-term shifts, or short term drops should be an important criteria.
- 5.5 A project owner should also be able to apply to the Fair Work Commission to terminate the Project Owner Agreement in the following ways:
- (a) unilaterally by the project owner giving 60 days' notification to the Fair Work Commission of the completion date of the 'major project'; or
 - (b) automatically on the expiry of its nominal term.
- 5.6 The ability to unilaterally terminate the Project Owner Agreement is an important aspect if, for example, the construction phase of the 'major project' is set ahead of schedule and the project owner needs to move to hook-up and commissioning phase (or operational phase) which attracts different contractors and terms and conditions of employment than construction phase.

6 Conclusion

- 6.1 The purpose of this submission is to raise at first instance the concept of a Project Owner Agreement as an option to the Government's consideration of project-life greenfields agreements.
- 6.2 Even the most highly resourced project owners, with teams of highly skilled industrial relations personnel and consultants, have been unable to demonstrate to me that the contractor-focused industrial relations model is fool-proof and cannot present significant risks to the 'major project'. A number of examples come to mind, including the Woodside Burrup Project.
- 6.3 Base on my experience in Western Australia, on large hydrocarbon and metalliferous construction projects, Project Owner Agreements will enable project owners to exercise greater control over the industrial relations on their project and provide greater certainty for project milestones, rather than having to push down and manage industrial relations responsibilities to hundreds of contractors.

- 6.4 Choice in industrial relations is key. Providing project owners with the ability to use Project Owner Agreements, along with the existing suite of industrial relations options to manage the project, and the contractors on it, is important in order for project owners to structure and manage their industrial relations to satisfy a range of project stakeholders (including investors).
- 6.5 We would be happy to discuss or explore any aspect arising from this submission further with the Government.

If you have any questions or require further information, please do not hesitate to contact Daniel White on +61 8 6167 9845 or dwhite@millsoakley.com.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Daniel White', with a long, sweeping underline that extends to the right.

DANIEL WHITE
PARTNER

