



MINERALS COUNCIL OF AUSTRALIA

SUBMISSION ON ATTORNEY-GENERAL'S DISCUSSION PAPER ON PROJECT LIFE GREENFIELDS AGREEMENTS

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EXECUTIVE SUMMARY

The MCA supports the proposal of the Attorney-General and Minister for Industrial Relations to encourage investment in new projects by extending the nominal expiry date of greenfields enterprise agreements to cover the life of major projects.

A greenfields agreement is a unique industrial instrument because it is established with no workforce on site. It is vital to providing investors with certainty about employment conditions and projected labour costs. Further, an employer who commenced a new project without having a greenfields agreement in place would be exposed to protected industrial action in support of a new agreement.

Under the *Fair Work Act 2009*, employers can only pursue greenfields agreements for genuinely new enterprises and they must negotiate with one or more trade unions who are able to represent the majority of employees to be covered by the agreement. All parties must sign the agreement before it can be submitted to the Fair Work Commission for approval.

An employer can unilaterally apply for the approval of a single-enterprise greenfield agreement where negotiations have proceeded without conclusion for at least six months. Such agreements are subject to existing approval tests under the Fair Work Act and an additional requirement that the agreement is consistent with the prevailing pay and conditions within that industry for equivalent work.

As with all enterprise agreements, the duration of greenfields agreements is limited to four years from the time of approval. The current duration of greenfields agreements is out of step with the realities of major project work in the resources sector, which can extend beyond four years. After a greenfields agreement has passed its nominal expiry date, industrial action may be taken. Consequently, employers may be subject to significant uncertainty and additional costs at a critical time of project construction, and be compelled to agree to uncompetitive wages and conditions in the replacement agreement to keep the project going.

One MCA member had a greenfields agreement expire six months before the completion of a major project in the Northern Territory. The company was exposed to the threat of industrial action because the unions involved wanted to change rosters. This project was completed using template major construction project lead-agreements.

In addition, the effective duration of greenfields agreements may be less than four years, owing to the gap between the approval of the agreement and the decision of investors or the parent company to progress the project.

When an Australian division of a global company makes the case for progressing a local project to its board, demonstrating the cost and continuity of labour supply (as embodied in the greenfields agreement) is crucial to defining that project's risk relative to other projects in the company's international portfolio or other investment opportunities under review. Accordingly, the clock can start running on a greenfields agreement well before the project is executed and construction has commenced, exacerbating the risk of uncertainty and disruption mid-project.

One MCA member entered into greenfields agreements with relevant unions in anticipation of proceeding with a \$700 million minerals project in Queensland. Yet by the time the company was authorised and ready to execute the project, one year had already passed.

The resources sector has undertaken unprecedented investments over the past two decades, increasing the net capital stock more than threefold between 2000 and 2019. Over the same period, direct employment in the resources sector grew from around 80,000 to 240,000.

Yet the economic benefits that the mining industry delivers for all Australians are not guaranteed. The industry requires a constant flow of investment, both to sustain existing operations and to finance exploration and the development of new mines. Mining companies are competing for a limited pool of global capital to develop new projects in Australia. The MCA understands that mining finance is getting harder to obtain and that the take-up of greenfields agreements in the minerals industry is low, partly owing to the disproportionate power that unions wield in negotiations at critical phases.

All governments, whether federal, state or local, should be aiming at fewer and better regulations and better performance by regulators. The COAG Energy Council has committed to attracting investment in Australia's resources sector and improving policies and regulations. Reforming greenfields agreements is a positive first step to improving the regulatory environment for mining in Australia.

Recommendations

- The MCA supports the reform proposal of the Attorney-General and Minister for Industrial Relations to extend the allowable duration of a greenfields agreement from the current maximum of four years (from the time of approval by the Fair Work Commission) to a period that covers the life of the project.
- The MCA submits that the government should not seek to prescribe a project lifespan, either in terms of years or the construction of certain pieces of infrastructure. Rather, the definition of project completion should be a compulsory matter for the parties to a greenfields agreement to negotiate. In the minerals industry, project completion generally means that a certain production target has been achieved, so that the life of the project extends into the operational phase.
- As mining projects may last for many years, the MCA recommends that parties to a greenfields agreement be required to consider likely future conditions in the labour market and agree to a schedule of wage increases. This would avoid both cost blowouts for the proponent and negative real wages growth for workers.
- The MCA recommends the Fair Work Commission (FWC) be provided with a more precise and balanced test for approving a single-enterprise greenfields agreement, as the breadth of the current test focuses attention at the top end of the payment range. The requirement that:
[T]he 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
should be amended to:
[T]he FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are at least at the level of similar work currently performed at another enterprise covered by an enterprise agreement.
- To encourage greater take-up of greenfields agreements by minerals companies, the government should restore the previously available option of allowing an employer to make a greenfields agreement of 12 months' duration without union involvement.

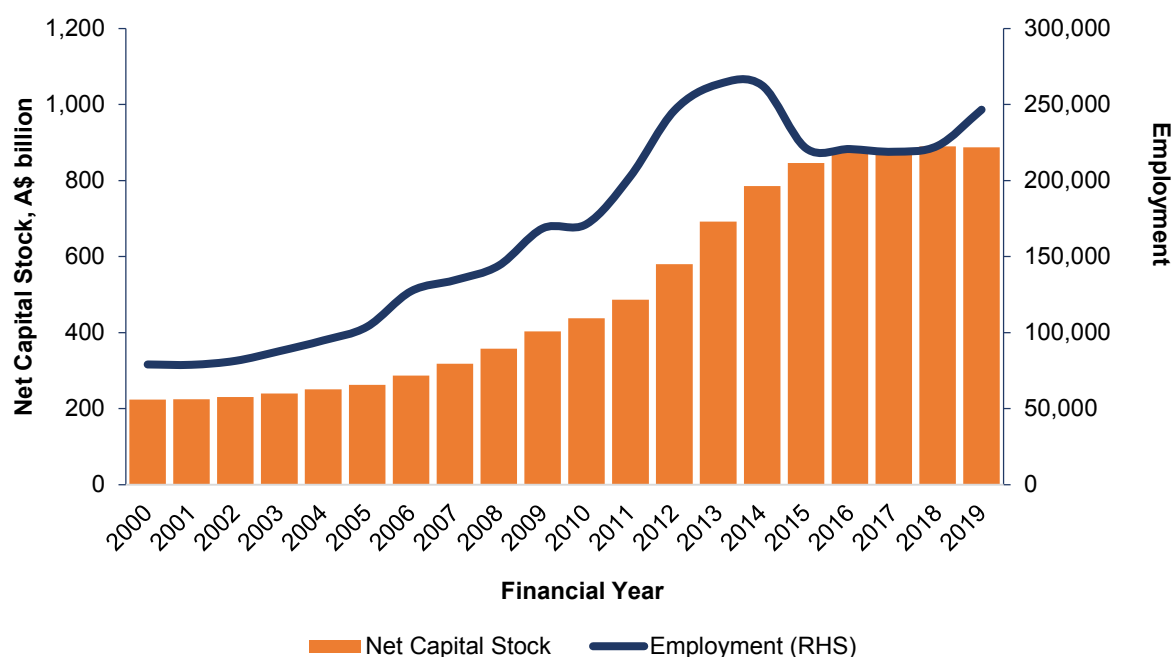
1. WHY MINING INVESTMENT MATTERS

- Mining uses complex production techniques to transform natural endowments into valuable exports. The resources sector is Australia's largest source of export revenue, provides high-paid jobs for thousands of people and pays billions of dollars to governments each year in taxes and royalties.
- International investment has long provided the capital that helps make Australia a world-leading exporter of minerals. Without international investment, Australia would otherwise need to take on additional debt or forgo inflows of finance and technology.
- The Productivity Commission has found that mining investment has made regions in Australia substantially better off and that mining regions have generally had the highest rates of employment growth. The industry is increasingly focused on long-term community partnerships and strategic investment to support community priorities and aspirations for sustainable long-term development outcomes.

Mining investment underpins exports, employment and national prosperity

Positive net investment is a prerequisite to the expansion of production and employment. The resources sector has undertaken unprecedented investments over the past two decades, increasing the net capital stock more than threefold between 2000 and 2019. Over the same period, the number of Australians employed directly in the resources sector grew from around 80,000 to 240,000 (Chart 1).

Chart 1: Mining industry capital stock and employment



Sources: Australian Bureau of Statistics, [Australian System of National Accounts 2018-19](#), cat no. 5204, released 25 October 2019; [Labour Force, Australia, Detailed Quarterly, Aug 2019](#), cat no. 6291.0.55.003, released 26 September 2019.

Australia is usually a net importer of capital, requiring international investment to fill the gap between domestic saving and investment. This capital shortfall has been on average about 4 per cent of GDP over the last decade.¹ Without international investment, Australia would otherwise need to take on additional debt or forgo inflows of finance and technology.

International investment has long provided the capital that helps make Australia a world-leading exporter of minerals. The value of foreign direct investment (FDI) in Australia's resources sector increased eight-fold between 2001 and 2018, from \$36.8 billion to \$365.5 billion.²

The value created by FDI in minerals is overwhelmingly retained in Australia. 77 per cent of revenues earned by the nation's major iron ore producers stay in Australia as payments to suppliers or taxes and royalties to governments.³

Mining investment, production and exports generate substantial tax revenues. The Australia minerals industry paid \$18.6 billion in company tax in 2017-18 alone, accounting for 22 per cent of all company tax paid that year despite comprising less than 1 per cent of all companies. In addition, the minerals industry paid \$12 billion in royalties to state governments, helping to fund essential services and infrastructure.

Australia's resources sector is a global technology leader and one of the most productive industries in the world.⁴ Innovation enables Australian mining companies to extract and process ores at a competitive cost, and to extract deposits that are deeper or more remote. New techniques and technologies allow firms to increase productivity and remain internationally competitive. Innovation also supports improved safety, social and environmental outcomes by allowing impacts to be eliminated, better mitigated or managed.

Mining investments increasingly embody new tools of data analytics, automation, robotics and artificial intelligence, which will boost the productivity of the future minerals workforce. A report prepared by EY for the MCA indicates that productivity gains of up to 23 per cent are achievable through combined investment in a skilled workforce and digital innovations.⁵

Benefits of mining investment for regional communities

In its study report on *Transitioning Regional Economies*, the Productivity Commission concluded that the mining boom – despite some transitional pressures – has made regions in Australia 'substantially better off in the short term and over the long term'.⁶ The commission also observed that:

- Mining regions have generally had the highest rates of employment growth and mining employment is more than double what it was prior to the mining investment boom
- Incomes in mining regions grew rapidly during the investment phase of the mining boom and average personal income remains higher in mining regions than in non-mining areas
- The expansion of Australia's mining industry has led to higher average incomes, larger profits and increased revenues for federal and state governments.⁷

The minerals industry recognises its responsibility to support the socioeconomic development of the communities and regions in which it operates, including a commitment to environmental stewardship and building strong relationships with landholders and communities.

¹ Adam McKissack and Jessica Xu, [Foreign investment into Australia](#), Treasury Working Paper, January 2016.

² Australian Bureau of Statistics, [International Investment Position, Australia: Supplementary Statistics, 2018](#), ABS cat. no. 5352.0 released 8 May 2019.

³ Port Jackson Partners, [Iron ore: the bigger picture](#), policy paper commissioned by the Minerals Council of Australia, 7 July 2015, p. 22.

⁴ See Productivity Commission, [Shifting the Dial: 5 Year Productivity Review: Supporting Paper No. 1: Productivity and Income – The Australian Story](#), Canberra, 3 August 2017, released on 24 October 2017, pp. 24, 26.

⁵ EY, [Future of work: economic analysis of the implications of technology on mining](#), report commissioned by the MCA, 13 February 2019.

⁶ Productivity Commission, [Transitioning Regional Economies: Study Report](#), 15 December 2017, p. 2.

⁷ *ibid.*, pp. 79, 82, 85, 88, 94, 138.

Many companies take a broad view, seeking to ensure shared benefit from minerals development from both direct involvement (e.g. local employment, training and procurement) and voluntary social investment to support broader community development.

Over time, approaches to social investment have expanded from sponsorships and donations for community events and infrastructure to long-term partnerships and strategic investment to supporting community priorities and sustainable development. Such approaches focus on building long-term capability and resilience and addressing structural barriers to sustainable economic growth.

The industry joins with host communities to support economic development and is finding new ways to support local priorities and enhance long-term community resilience. This extends beyond the mine, as skills and experience at work are transferable to other community endeavours.

Companies are increasingly applying the United Nations' Sustainable Development Goals to the way they operate, integrating social and business outcomes. Using this approach, companies are able to better target investment to achieve shared value for the business and the community.

Mining activities are often long lived and are part of regional communities alongside other industries, including agriculture. In addition to formal conduct and compensation arrangements with landholders, agreements with farmers to manage non-mining land owned or managed by companies are becoming commonplace and an important income stream. Skill transfer between agriculture and mining will also become increasingly important.

The last two decades have seen thousands of land use agreements between Indigenous peoples and the mining industry delivering economic and social benefits and supporting the protection of cultural and environmental heritage.⁸ Partnerships are increasingly focused on supporting Indigenous Australians to preserve, strengthen and share culture within community and across generations.

Education and training is often a shared priority, with many mining companies investing in employment and training programs to support employment of Indigenous peoples, particularly in regional and remote communities. As a result, the minerals sector now directly employs around 6,600 Indigenous Australians – 2.5 times more than in 2006 and significantly greater than the 1.5 times growth in non-Indigenous employment.⁹ Approximately 20 per cent of Indigenous mining employees are women.¹⁰

The minerals industry's longstanding focus on Indigenous business engagement has been integral to the growth of the Indigenous business sector, reflected in the significant growth of Indigenous business diversity and incomes during the mining investment phase.¹¹

⁸ Marcia Langton, '[No one has done more for indigenous Australians than the mining industry](#)', *The Australian*, 26 July 2017.

⁹ Department of Prime Minister and Cabinet, [Closing the Gap Report](#), Australian Government, Canberra, 2018, p.78.

¹⁰ Australian Bureau of Statistics, [2016 Census – Employment, Income and Education, Indigenous Status \(INGP\) by industry of employment \(INDP\)](#).

¹¹ Department of Prime Minister and Cabinet, [Indigenous Business Sector Strategy](#), Australian Government, Canberra, December 2018, p. 22.

2. THE CASE FOR REFORMING GREENFIELDS AGREEMENTS

- Extending the nominal expiry date of greenfields enterprise agreements to cover the life of major projects will encourage investment in new projects. The definition of project completion should be a compulsory matter for the parties to the agreement to address prior to approval. Parties should also be required to agree to a schedule of wage increases, both to avoid cost blowouts for the proponent and negative real wages growth for workers.
- The current ‘prevailing industry standards’ test for single-enterprise greenfields agreements goes against the spirit of enterprise bargaining by directing the Fair Work Commission to consider a broad range of agreements rather than a targeted number of comparable ones. It should be replaced by a more precise and balanced test.
- To encourage greater take-up of greenfields agreements by minerals companies, the government should restore the previously available option of allowing an employer to make a greenfields agreement of 12 months’ duration without union involvement.

Successive governments have recognised that flexible workplace relations, underpinned by a strong safety net, are critical to a dynamic economy and future growth in living standards. In mining, workforce flexibility and choice have delivered greater productivity, more jobs, higher wages, and greater capacity to adapt and compete in world markets.

Separate reviews by the Fair Work Act Review Panel (2012) and the Productivity Commission (2015) have identified a number of areas in which the *Fair Work Act 2009* could be improved. In 2017 the Productivity Commission estimated that implementing its reform proposals would add \$850 million a year to the Australian economy.¹² The Federal Government’s decision to review elements of Australia’s workplace relations system, and pursue incremental reforms, is a positive development.

The MCA supports the reform option proposed by the Attorney-General and Minister for Industrial Relations to extend the nominal expiry date of greenfields enterprise agreements to cover the life of major projects.¹³ This change was also recommended by the Productivity Commission.¹⁴

Four-year duration of greenfields agreements can complicate mining projects

Capital-intensive industries such as mining make large, decades-long investment decisions, which entail complex construction projects and long lead times before cash flows are generated. A degree of certainty about the industrial environment – including employment conditions and projected labour costs – over the life of a project is vital to providing investors with confidence and making Australia an attractive destination for new capital investment.

The Productivity Commission has emphasised the importance of greenfields agreements for providing certainty of project budgets and timelines:

Greenfields agreements can be important for negotiating finance, as project risk is influenced by labour costs and any barriers to the efficient and speedy completion of projects. Accordingly, any weaknesses in the arrangements have potentially large impacts on major project investment in Australia. The 2012 review of the Fair Work Act 2009 (Cth) (FW Act) shared these concerns.¹⁵

As with all enterprise agreements, the duration of greenfields agreements is limited to four years from the time of approval. The current duration of greenfields agreements is out of step with the realities of major project work in the resources sector, which can extend beyond four years (see appendix).

¹² Productivity Commission, [Shifting the Dial: 5 Year Productivity Review](#), Report No. 84, Canberra, 3 August 2017, released 24 October 2017, p. 233.

¹³ Attorney-General’s Department, [Attracting major infrastructure, resources and energy projects too increase employment – Project life greenfields agreements](#), Canberra, 19 September 2019.

¹⁴ Productivity Commission, [Workplace Relations Framework: Inquiry Report, Volume 2](#), Canberra, 21 December 2015, p. 691.

¹⁵ *ibid.*, p. 691.

After a greenfields agreement has passed its nominal expiry date, industrial action may be taken. Consequently, employers may be subject to significant uncertainty and additional costs at a critical time of project construction, and be compelled to agree to uncompetitive wages and conditions in the replacement agreement to keep the project going.

One MCA member had a greenfields agreement expire six months before the completion of a major project in the Northern Territory. The company was exposed to the threat of industrial action because the unions involved wanted to change rosters. This project was completed using template major construction project lead-agreements.

In addition, the effective duration of greenfields agreements may be less than four years, owing to the gap between the approval of the agreement and the decision of investors or the parent company to progress the project.

When an Australian division of a global company makes the case for progressing a local project to its board, demonstrating the cost and continuity of labour supply (as embodied in the greenfields agreement) is crucial to defining that project's risk relative to other projects in the company's international portfolio or other investment opportunities under review. Accordingly, the clock can start running on a greenfields agreement well before the project is executed and construction has commenced, exacerbating the risk of uncertainty and disruption mid-project.

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The MCA submits that the government should not seek to prescribe a project lifespan, either in terms of years or the construction of certain pieces of infrastructure. Rather, the definition of project completion should be a compulsory matter for the parties to a greenfields agreement to negotiate. In the minerals industry, project completion generally means that a certain production target has been achieved, so that the life of the project can extend into the operational phase.

As mining projects may last for many years, the MCA recommends that parties to a greenfields agreement be required to consider likely future conditions in the labour market and agree to a schedule of wage increases. This would avoid both cost blowouts for the proponent and negative real wages growth for workers.

The prevailing industry standards test is too broad and results in uncompetitive outcomes

A 2015 amendment to the Fair Work Act introduced a new process for negotiating single-enterprise greenfields agreements. The amendment provided an optional six-month negotiation timeframe for the parties to reach agreement. If this negotiation period passes without agreement being reached, the employer may ask the Fair Work Commission to approve the agreement, subject to existing approval tests under the Fair Work Act and an additional requirement that the agreement is consistent with the prevailing pay and conditions within that industry for equivalent work. In applying these tests, the commission may also take into account the prevailing pay and conditions in the geographical area.

The Productivity Commission warned in 2015 that:

[A]n industry-based benchmark carries the risk of undermining the decentralised and enterprise oriented focus that underpins the enterprise bargaining framework ... A prevailing industry wages and conditions test is also backwards looking – by definition, it is a test that compares a proposed greenfields agreement with wages and conditions in agreements that have already been struck in the past. This may pose a barrier to downward moderation of wages and conditions in industries where economic circumstances are beginning to worsen (for example, as a resource or construction boom winds down).¹⁶

¹⁶ *ibid.*, p. 714.

Certainly, the current prevailing industry standards test for greenfields agreements has allowed the Fair Work Commission to take evidence on a range of other enterprises and focus on those at the higher end if pressed to do so by the union. Arguments about whether another agreement is in a comparable industry have tended to be resolved in favour of including a broader range rather than excluding other agreements.

A more fair and balanced formulation needs to be developed. One option is to simplify the test so that the terms are at least at the level of similar work performed at another enterprise covered by an enterprise agreement. In other words, the agreement could be in line with acceptable comparable rates rather than the current provision which is likely to require payment at the top of the range. This would provide a real incentive for a union to agree on a reasonable alternative. It also has the added advantage of providing more certainty because the employer need only bring evidence of the other agreement and demonstrate how the work is similar.

Mandatory union involvement in greenfields agreements is discouraging their use

The Fair Work Act removed options previously available to employers seeking a greenfields agreement, notably the ability to negotiate employer-only agreements or to offer individual statutory agreements at greenfield sites. The trade-off for not having to negotiate with unions was that the greenfields agreement had a limited duration of 12 months.

Under the current regulatory framework, a greenfields agreement can only be made prior to project commencement with one or more trade unions who are able to represent the majority of employees to be covered by the agreement.

The Australian experience shows that mining companies generally prefer to acquire existing mines and undertake brownfields expansion than to pursue greenfields agreements. The power wielded by unions in negotiating greenfields agreements – as well as replacement enterprise agreements – makes mining companies, particularly smaller players, wary of entering into greenfields agreements.

The adverse effects of mandatory union involvement in greenfields agreements in the minerals industry have included:

- Refusal by a union to settle a greenfields agreement in an attempt to pressure a contractor to relinquish its discretion over the establishment of work rosters
- Refusal by several unions to conclude a greenfields agreement until an unrelated dispute in the commercial construction industry was resolved
- Placing an unreasonable burden on employers to determine which unions are eligible to represent a majority of the workforce and to manage unproductive standoffs between competing unions.

To encourage greater take-up of greenfields agreements by minerals companies, the government should restore the previously available option of allowing an employer to make a greenfields agreement of 12 months' duration without union involvement.

APPENDIX: INDICATIVE TIMELINE OF GREENFIELDS AGREEMENT AND EXECUTION OF NEW MAJOR MINING PROJECT

