

AUSTRALIAN BUSINESS INDUSTRIAL

# Greenfields Agreements Review

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## Submission

DATE 25 October 2017

## About ABI and the NSW Business Chamber Ltd

Australian Business Industrial is registered under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members.

The NSW Business Chamber Ltd is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009*.

The NSWBC has some 19,000 members.

ABI comprises those NSWBC Ltd members who specifically seek membership of a federally registered organisation.

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## Introduction

The *Fair Work Amendment Act 2015* (FWA Act) received Assent of 26 November 2015. Part 5 of Schedule 1 of the act amended provisions applying to the making and approval of greenfields agreements. These amendments commenced on 27 November 2016. Section 4 of the FWA Act requires the Minister to cause an independent review of the amendments and other matters within 2 years of their commencement.

Australian Business Industrial and the NSW Business Chamber (**ABI/NSWBC**) are pleased to submit to the review.

Under the *Fair Work Act 2009* (FW Act) greenfields agreements can be made between the employer, or multiple employers, for a new enterprise and one or more relevant unions. The review is assessing the operation of two key changes made to the FW Act's existing greenfields agreements provisions – the introduction of a six month notification period and the introduction of the good faith bargaining rules to greenfields agreements.

The review may also consider issues related to the making and operation of greenfields agreements including

- their nominal term;
- the impact of the FWA Act on greenfields negotiation times;
- views about behavioural outcomes and effects of the FWA Act greenfields amendments;
- whether the provisions are appropriate to Australia's current investment climate.<sup>1</sup>

The Background Paper to the review poses eight specific questions and also invites other relevant comments.

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<sup>1</sup> P 4, *Greenfields Agreements Review - Background Paper*, October 2017

# Submissions

## About greenfields agreements

The capacity to make greenfields agreements, that is, agreements which are made and can be approved or certified before anyone who is to be covered by the agreement is employed, was introduced into the *Workplace Relations Act 1996* with the commencement of the *Workplace Relations and Other Legislation Amendment Act 1996* on 31 December 1996.

Greenfields agreements were introduced in the context of a series of amendments to the existing certified agreements provisions. These amendments were directed at both spreading the reach of agreement making by drawing on the corporations power and providing for direct employee voting for certified agreements. The policy objective was to support greater local determination of terms and conditions. Locally determined terms and conditions improves the likelihood of working arrangements which are more appropriate to the circumstances of the particular enterprise and its workforce.

These provisions were amended in 2006 by the *Workplace Relations Amendment (Work Choices) Act 2005* to clarify the “new business” leg and also to allow greenfields agreements to be made by the new business/enterprise employer with unions or without (employer greenfields agreements). An employer greenfields agreement was made when it was lodged with the Commission for approval and had a maximum one year life before being open to bargaining with employees and their representatives.

These amendments commenced on 27 March 2006.

In common with other workplace agreements, the approval of greenfields agreements was modified with the re-introduction of the no disadvantage test under the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. This commenced on 28 March 2008.

Access to employer greenfields agreements was removed and the no disadvantage test substituted by the better off overall test by the *Fair Work Act 2009* with effect on 1 July 2009.

## Reviews of the greenfields provisions

The FW Act’s greenfields provisions were reviewed by the Expert Panel (**Panel**) whose report also became the post implementation review of the FW Act and related legislation. The economic data before the Panel at that time was buoyant, particularly data concerning the resource projects sector.

*The somewhat wider gap [the gap in AAWI between greenfields agreements and all agreements] may reflect the increasing number of remote minerals and energy construction projects in recent years. From the beginning of 2009 to the end of 2011 the volume of engineering construction completions rose by over 40 per cent. Over the same period the value of engineering construction work yet to be done by the private sector rose two and a half times. These were much greater increases than in previous years<sup>2</sup>.*

<sup>2</sup> P 82, *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012

The Panel’s report also drew attention to the fact that access to employer greenfields agreements coincided with an increase in the number of greenfields agreements, and also that wage outcomes under employer greenfields agreements were not unfavourable.

*In 2004–05, under the WR Act, the greenfields average annualised wage increase (AAWI) was 4.5 per cent, compared to 4.4 per cent for all agreements. They made up 5.4 per cent of all agreements. In the period 2006–08, 57 per cent of greenfields agreements were employer greenfields agreements and 43 per cent were union greenfields agreements. The AAWI for non-union greenfields agreements was 4.1 per cent and for union greenfields was 4 per cent, compared with all agreements, which were 4.1 per cent and 3.8 per cent union/non-union respectively. Greenfields made up 9.2 per cent of all agreements. In 2009–11, under the FW Act, greenfields AAWI was 4.7 per cent compared to 3.9 per cent of all agreements and 4.0 per cent for all agreements that cover a union. They made up 6.4 per cent of all agreements. Source: DEEWR Workplace Agreements Database<sup>3</sup>.*

These figures clearly owe something to the growing capital investment in resource projects in that era, and Australia’s comparative performance out of the global financial crisis. The disparity between union and employer greenfields AAWIs may owe something to the sectors in which these two classes of greenfields agreements were made, but it may also owe something to the motivation of unions in at least some greenfields negotiations.

The Panel made a number of recommendations concerning greenfields agreements, some of which, such as the introduction of good faith bargaining rules, informed the *Fair Work Amendment Act 2015*.

Greenfields agreements were also addressed by the Productivity Commission’s inquiry into the workplace relations framework. This is discussed further below.

## The experience of greenfields bargaining

In the period 1 November 2013 to 30 June 2017 a total of 1235 greenfields agreements were approved.<sup>4</sup> Of these approximately 800 (65%) were allocated to the construction sector and another approximately 25 mining (4%)<sup>5</sup>. The table below, taken from the Department’s spreadsheet, shows the distribution of approval timing by financial year. Unfortunately neither the Background Paper nor the spreadsheet show the allocation of agreements into industries, which precludes financial year breakdown by industry on the same basis as Figure 1 of the Background Paper.

Nor is it possible to ascertain when negotiations began for the agreements.

<sup>3</sup> Footnote 97, p 82, *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012

<sup>4</sup> Department of Employment workplace agreement database spreadsheet accessed at <https://docs.employment.gov.au/documents/list-greenfield-agreements-made>

<sup>5</sup> P 9, *Greenfields Agreements Review - Background Paper*, October 2017. The Department’s spreadsheet does not identify the industry into which each of the agreements was allocated.

Approval date	Number of greenfields agreements
1 Nov 2013 – 30 June 2014	432
1 July 2014 – 30 June 2015	396
1 July 2015 – 30 June 2016	257
1 July 2016 – 30 June 2017	150
1 Nov 2013 – 30 June 2017 (total agreements)	1235

Between 1 November 2013 and 30 June 2014 there were 432 only been 150 greenfields agreements approved since 1 July 2016. 1 July 2016 could serve as a rough proxy for approved agreements commenced after the start of the FWA Act amendments<sup>6</sup>, but little can be made of this aside from the trite point that the new greenfields regime has not been associated with a pick-up in greenfields agreements.

The Table below<sup>7</sup>, shows non-adjusted capital investment in \$b in selected industries by quarter from the September quarter 2013, just ahead of the FWA Act commencement. The non-mining figures do not easily link to industries where greenfields agreements are typically made.

Quarter ending	Mining	Manufacturing	Other selected Industries
Sep-2013	24203	2211	14250
Dec-2013	24707	2544	15160
Mar-2014	19092	2132	12814
Jun-2014	22390	2343	16133
Sep-2014	20807	1956	16276
Dec-2014	21257	2535	17865
Mar-2015	16811	1957	13779
Jun-2015	17242	2180	17989
Sep-2015	14888	2095	15426
Dec-2015	16227	2378	17689
Mar-2016	11400	1740	14485
Jun-2016	10874	2354	18137
Sep-2016	10069	1916	15898
Dec-2016	10582	2420	17774
Mar-2017	8591	2085	14397

Construction agreements have also given rise to much of the case law and also to many of the problems associated with making greenfields agreements for new enterprises and projects. There are three main reasons for this.

<sup>6</sup> 27 November 2015 was the first day which could be a specified day to notify a negotiation period.

<sup>7</sup> Table 1A, *Private New Capital Expenditure and Expected Expenditure, Australia, Actual Expenditure by Type of Asset and Industry – Current Prices, ABS 5625.0, 2017*

1. The logic of major private sector construction project financing means that delaying or prolonging negotiations maximises the pressure for concessions on the project employer by increasing delay-based project costs. This is a rational strategy for unions which seek to maximise employee remuneration and conditions on any project. It is a less rational long term strategy over a series of projects because the costs and the delays begin to impact investment decisions. In the area of natural resource projects the impact on investment decisions is exacerbated by the effect of resource demand/price cycles.
2. Major construction projects typically require a workforce which is able to be represented by a number of unions. Increasing the number of negotiating unions can complicate agreement making. Further, in construction there are areas of demarcation overlap. There are also bitter long running demarcation differences which affect negotiations. The fact of overlapping, or potentially overlapping eligibility, and the ongoing coverage between unions discourages any particular union from being the first to agree, or to sign a completed agreement in the absence of the other unions.

The capacity to take collective action to pursue workplace outcomes is designed to address the conceptual imbalance between capital and those selling their labour. In practice the capacity of capital to dictate terms of employment varies in different cultural settings and according to the actual economic circumstances of the venture. Taking collective action, or in going enterprises responding with restrictions on employees, usually imposes costs on the initiator as well as the target over the long term. This is an important aspect of the underlying policy of protected industrial action under the FW act.

Where there are no costs to a bargaining party the economic driver to reach some form of accommodation dissipates.

Greenfields agreements do not give rise to collective action or the threat of it. For unions there is no direct cost on the members or potential members (to be) covered by the enterprise agreement. Nor do the (potential) members who will work under the agreement impact the range of subject matter of negotiations and priority given to different issues. They do not press on their timing. Negotiating unions are conceptually free to follow their own interests.

## The review questions

### Question 1

*The extent to which the 2015 Greenfields agreement amendments have altered bargaining behaviour on the part of either employers or unions.*

This is a difficult question for ABI/NSWBC to answer with direct experience. Neither its industrial group nor its members have been involved in large numbers of greenfields bargaining. ABI/NSWBC experience has been in a small number of construction project agreements. As discussed above, there is good reason to believe these, particularly those which involve major investment projects, may not be typical of greenfields bargaining for other types of new enterprise, such as agreements covering an urban post construction manufacturing workforce or a new theatrical production.

There appear to have been no applications for approval of a greenfields agreement which have not been signed by relevant unions<sup>8</sup>. There is no available evidence of how long each greenfields agreement before the Commission for approval took to negotiate, nor whether there is widespread practice of notifying a negotiation period. There is evidence of reduced numbers of greenfields agreements, due at least in part to reduced investment levels, but perhaps also due to a view on the part of those in some sectors who are investing in a new enterprise that greenfields agreements do not efficiently bring the certainty about labour costs that they should.

It is clear that there has also been a reduction in the number of major projects, but less clear which industries have suffered a disproportionate fall in the number of greenfields negotiations attempted. There is no available evidence that the FWA Act changes have brought unfairness into greenfields agreements outcomes, and the relative speed in their approvals compared with non-greenfields agreement approval applications suggests otherwise<sup>9</sup>.

## Question 2

*Any concerns relating to the effect of the 2015 greenfields agreement amendments on bargaining outcomes and bargaining behaviour.*

This question was in part addressed above. It is, however, worth remarking that the absence of any s 182(4) applications means that all greenfields agreements which were approved satisfied the better off overall test, consistent with the test for all other forms of enterprise agreement.

Applications made under s 182(4) must satisfy s 187(6). These agreements must provide pay and conditions which are consistent with prevailing terms and conditions for the relevant industry and area for equivalent work. This is a requirement imposed on no other type of enterprise agreement, is onerous to prove in the event that it is contested – a typical scenario given the agreement was not signed by the participating unions, and is at odds with the policy of determining terms and conditions which are enterprise specific.

In the case of major resource construction projects this requirement will mimic the natural bargaining outcomes and is therefore not necessary. In times of downturn it provides an obvious inhibitor, placing investment in Australia at a disadvantage with external alternatives.

## Question 3

*The extent to which there may be a relationship between these amendments and the number of applications for approval of greenfields agreements.*

The reduction in construction projects, which was a major driver of greenfields bargaining, is primarily attributable to changed investment levels. Not only has investment reduced but it is increasingly directed to plant and equipment rather than building and construction. This does not suggest that the FWA Act amendments have been causal in driving the reduction in greenfield agreement numbers.

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<sup>8</sup> P 17, *Greenfields Agreements Review - Background Paper*, October 2017

<sup>9</sup> P 18, *Greenfields Agreements Review - Background Paper*, October 2017



It may be that the FWA Act amendments have not assisted the resolution of intractable negotiations, as suggested above, but these are a small proportion of greenfields negotiations. They are individually very important because characteristically they involve very large amounts of capital investment, much of it foreign sourced, which gives rise to a major and long term income stream for Australia, but they do not significantly impact the numbers of greenfields agreements attempted or made.

Consideration could be given to altering the approval process triggered by s 182(4) applications, to require the better off overall test. The reality is that new enterprises still need to attract employees, and investors do not seek to start with a disgruntled workforce, or one which quickly becomes disenchanted, because of its impact on the new investment's returns.

Given negotiations in this sector involve knowledgeable unions, proceeds without direct employee input, and any approval process for a s 182(4) application will be contested and therefore prolonged beyond a "normal" uncontested approval, consideration could be given to reducing the notified negotiation period to three months. There is no evidence to suggest that this would negatively impact the bulk of greenfields negotiations which are currently successful under the FWA Act amendments and such an outcome seems unlikely.

#### Question 4

*The extent to which there may be systemic issues or impediments to the making of greenfields agreements.*

ABI/NSWBC believes on the basis of its (limited) direct experience and the available evidence that the FWA Act amendments have not damaged the negotiation of greenfields agreements overall. Much of this is inferential, rather than demonstrably causal, but we believe the inference to be accurate. That said, we also believe that there is a small subset of (nationally important) agreements which has been impacted by aspects of the FWA Act changes.

ABI/NSWBC has identified the length of the notified negotiation period [s 178B(1)] and the approval process [s 187(6)] as likely impediments the greenfields bargaining in the sector.

The importance of this subset is recognised in both the debate about greenfields agreements and their evaluations. Much of the focus and evidence, as well as many of the contentions, have arisen from large scale, usually resource based, construction projects.

These problems should be addressed so that solutions do not negatively impact the bulk of greenfields bargaining which is working well. If it is concluded that remedial changes might negatively impact the mainstream greenfields bargaining – not ABI/NSWBC's contention – it would be possible to legislate specifically for major project contracts.

#### Question 5

*Recommendations of the Productivity Commission relating to greenfields agreements.*

The Productivity Commission made four relevant recommendations. These differed from its interim report in a number of ways, in part because of the passage of the FWA Act in the intervening period<sup>10</sup>. It recommended

1. Reducing the notified negotiation period to 3 months<sup>11</sup>
2. Using last offer arbitration for determinations after a failed negotiation period
3. Expanding the options at the end of the negotiation period
4. Providing for project proponent agreements for large scale projects.<sup>12</sup>

*Re: #1* ABI/NSWBC supports #1.

*Re: #2* ABI/NSWBC do not support the principle of involuntary arbitration to resolve bargaining impasses. Arbitration rarely rejects all of one party's claims and it does not present a credible threat of a nil outcome. This fact reduces the pressure to settle and can become a bargaining objective for one party. Whilst we do not strongly favour last offer arbitration we accept that it addresses our main concern with arbitration. It is an option for reform.

*Re: #3* ABI/NSWBC has proposed that non-agreed greenfields agreements should be subject to the better off overall test, but we accept that the Productivity Commission did not adopt this as a recommendation. Without ruling out moving to assessment with the better off overall test ABI/NSWBC would support #3 and we would seek to be involved in consultations regarding its consideration.

*Re: #4* There is a tension between terms and conditions which apply to a particular project and the terms and conditions applying to an employer whose work derives serially from different projects. It is also the case that major projects carry special problems because of the amounts of and costs of non-earning capital. ABI/NSWBC support investigation of this recommendation.

## Question 6

*The anticipated effects of returning to the legislative arrangements which applied to greenfields agreement making prior to November 2015.*

ABI/NSWBC does not support abandoning the FWA Act amendments, and as discussed above does not see any evidence to make a case for repeal. As noted, the fact that there have been no s 182(4) applications is not evidence of the amendments not working, and there is no direct evidence that the reducing numbers of greenfields agreements is because of the FWA Act amendments.

There is a question about whether the FWA Act amendments should be themselves amended to improve the usefulness of greenfields bargaining for major projects.

<sup>10</sup> P 712, *Workplace Relations Framework – Productivity Commission Inquiry Report, Vol 2*, 30 November 2015

<sup>11</sup> P 713, *Workplace Relations Framework – Productivity Commission Inquiry Report, Vol 2*, 30 November 2015, and discussion on pp 711 – 712.

<sup>12</sup> Recommendation 21.1, P 719, *Workplace Relations Framework – Productivity Commission Inquiry Report, Vol 2*, 30 November 2015

### Question 7

*The impact of the reduction in the number and scale of capital development projects on greenfields agreement making since 2015.*

A growing stream of greenfields agreements is a positive outcome and indicates a vibrant economy. The FW Act should, consistent with equity, support the greenfields stream. A downturn is less good, but the evidence is that this seems mainly attributable to the amounts of and types of new capital investment.

There has been some recent growth in foreign direct investment but also something of a turn around in the composition of investment away from direct investment and also in the direction of net direct investment flow in sectors such as mining<sup>13</sup>. Not much more than inferences can be drawn from this.

In the resource sector this impact is clear. International investment in mining projects has significantly declined – there are few new major projects being commenced anywhere. Those in Australia are moving to completion. Many of these projects are in remote areas and it is not unusual for some of those involved in the construction phase to stay on for operational jobs. Resource state policies may increase this tendency. Operational start-up is therefore not likely to yield a second round of greenfields agreements.

### Question 8

*Any other matter relating to the negotiation of, and the approval process for greenfields agreements.*

As discussed above access to employer greenfields agreements was removed with the commencement of the FW Act. The FW Act was introduced as part of the incoming government's election policy and was in this respect consistent with it. It was also introduced at a time when Australia's economy was doing well against international standards.

However there was no evidence of unfairness to support the removal of employer greenfields agreements at that time, and more recently Australia's economy has fared less well against international comparisons. Capital, including local capital in the superannuation system, has become more globally focussed.

*There is some empirical evidence that employer greenfields agreements under WorkChoices led to overall reductions in wages and conditions. In a study of employer greenfields agreements in the first year following the introduction of WorkChoices, Gahan (2007) revealed a significant reduction in entitlements for employees, particularly through the removal of protected award conditions, with employees generally not receiving equivalent compensation for the loss of these conditions. However, these agreements were made in the absence of a no-disadvantage test and, as noted by Gahan, it is likely that most of them would not have been approved were such a test in place<sup>14</sup>.*

<sup>13</sup> ABS Cat 5352.0, *International Investment Position, Australia: Supplementary Statistics, 2016*, (released 10 May 2017), Analysis and Comments, accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0>. In the year ended 31 December 2016 direct external investment into Australia increased to \$796.1b (up 5% on the previous year) and direct investment out of Australia increased to \$554.9b (up 4%).

<sup>14</sup> P 716, *Workplace Relations Framework – Productivity Commission Inquiry Report, Vol 2*, 30 November 2015