



# Securing the next wave of major project investment

**Submission to the Attorney-General's  
Project Life Greenfields Agreements  
Discussion Paper**

November 2019

## About AMMA

Australian Resources and Energy Group AMMA has provided a unified voice for employers on workforce and other industry matters for more than 100 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

Whether it is through our advocacy to government on key policy issues, or expert guidance from our specialist workforce consultants, AMMA greatly assists Australia's resources and energy employers in the productive, competitive and socially inclusive running of their businesses, creating a brighter future for all Australians.

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## Summary: The Case for Project Life Agreements

Australian Resources and Energy Group AMMA strongly supports proposed reform to the national industrial relations system to facilitate enterprise agreements that operate for the life of major new project construction (“**Project Life Agreements**”).

Facilitating Project Life Agreements is a critical and urgent reform that would significantly improve Australia’s ability to attract global investment into new major resources and energy projects – the likes of which will grow the Australian economy, create tens of thousands of highly-paid jobs, encourage real wage rises and lift national revenues and living standards.

### Resources and energy investment is overwhelmingly good for the nation...

The recent Australian resources and energy investment boom saw almost \$400 billion of major project capital injected into the nation between 2003 and 2012.

This directly created 161,000 new resources jobs, saw the sector support about 1.1 million jobs throughout the economy, increased real wages by 6 per cent and raised household disposable income by 13 per cent<sup>1</sup>.

The contribution of the resources and energy industry is now at record levels due to the projects approved and completed during the previous investment phase. In 2019 the sector accounts for one-third of all growth in Australia’s GDP, \$282 billion in export earnings and \$35 billion in company taxes and resources royalties.

This income helps fund federal and state government programs to protect vulnerable people in the community; assists in building roads, schools, hospitals and other public infrastructure; and is a significant contributor to the Australian Government bringing the Federal Budget back to surplus.

### A new wave of opportunity is at Australia’s fingertips...

Australia has a significant opportunity to secure the next wave of major resources and energy project investment. There is approximately **\$250 billion** of new project capital in the national investment pipeline. If all was to be committed, this would directly create an estimated **101,000 new jobs**.



The mining industry has 57 new or expansion projects, worth \$41 billion in value, either *committed* or considered *likely* to proceed by 2024. AMMA conservatively forecasts these projects will create about 21,000 new jobs directly in the industry<sup>2</sup>.



The oil and gas industry has 23 projects, worth up to \$36 billion, either *committed* or considered *likely* to proceed by 2027. The Australian Government very conservatively estimates these projects would create 6,500 new jobs<sup>3</sup> directly in the industry.



An additional 167 major resources and energy projects, worth more than \$172 billion, are considered *possible* to proceed. These projects would create an estimated 42,000 construction phase jobs, and 32,000 long-term operating phase jobs<sup>3</sup>.

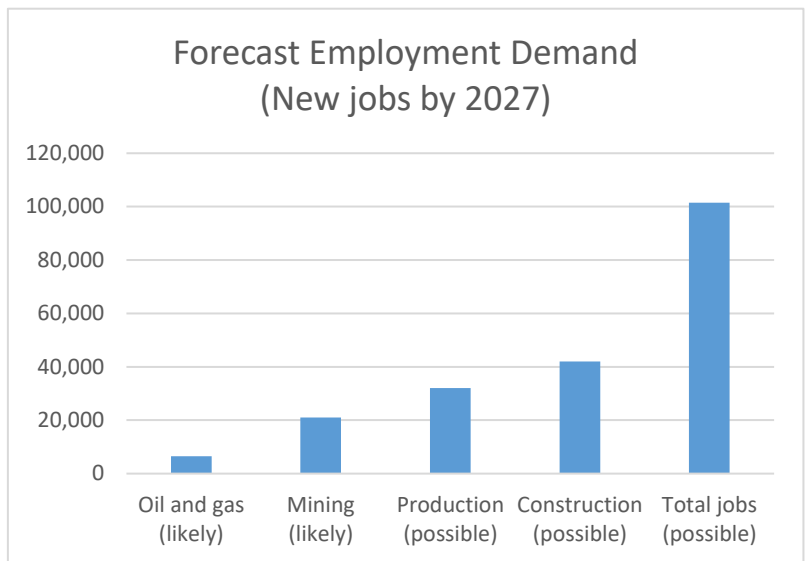
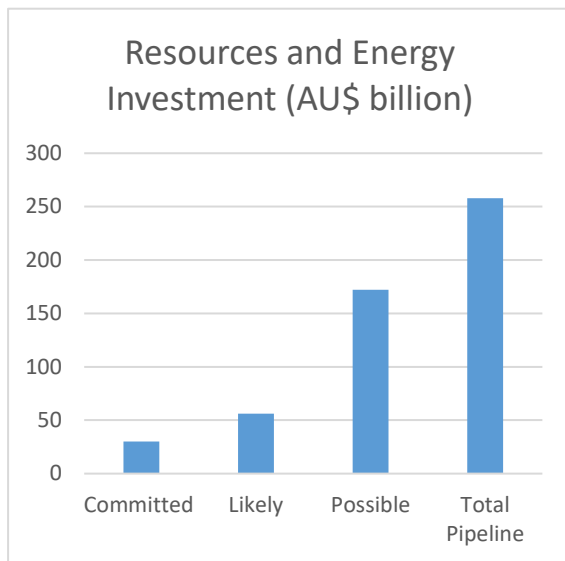


During the previous investment wave it was found that each direct job in the resources industry supported another two-to-three indirectly through economic flow-on effects<sup>1</sup>. Thus, Australia’s present resources and energy investment pipeline conceivably presents a **300,000 new job opportunity** for the nation.

<sup>1</sup> Raynor, V. and Bishop, J. 2013 [Industry Dimensions of the Resource Boom: An Input-Output Analysis](#), RBA Research

<sup>2</sup> AMMA (2019) *2019-2024 Mining Workforce*, an industry forecasting project

<sup>3</sup> Office of the Chief Economist (September 2019) [Resources and Energy Quarterly](#) (Major Projects Data)



### Industrial relations is holding Australia back...

To secure the next wave of major resources and energy project investment, Australia must present the most globally competitive regulatory framework possible. A plethora of evidence suggests Australia’s industrial relations system is a particular area for improvement if the nation is to lift its competitive standing in the global investment community.

The World Economic Forum’s *Global Competitiveness Report* has consistently rated Australia’s industrial relations system as the most uncompetitive aspect of its regulatory framework. In 2014 one-in-four business leaders ranked industrial relations as the biggest impediment to doing business in Australia. In 2019, Australian labour-employer relations rated just 53rd in the world and flexibility in wage determinations ranked 95th in the world.

“...Australia’s performance shows room for improvement. The functioning of its labour market (22nd in the world) is notably affected by its rigidity.”<sup>4</sup>

Working in a high-paid, innovation-driven industry, Australia’s resources and energy employers have often led the criticism of Australia’s current restrictive approach to industrial relations. A 2018 survey of more than 100 resources and energy executives found:

- 92% believed work regulation could be better utilised as a source of competitive advantage;
- 95% agreed Australia's approach to work regulation doesn't provide necessary flexibility;
- 97% said the ‘one-size-fits-all’ approach to workplace regulation is increasingly outdated;
- 94% said the system should allow for a wider range of agreement making options; and
- 100% said flexibility, productivity and competitiveness should have greater emphasis.<sup>5</sup>

“Australia is now a high-cost and high IR risk environment. Other countries will overtake us due to our restrictive and high-cost IR systems. We should benchmark Australia against other countries in terms of cost of productivity and industrial risk / threat to investors.”<sup>6</sup>

<sup>4</sup> Schwab, K. (2018) *The Global Competitiveness Report 2018*, World Economic Forum

<sup>5</sup> Online survey conducted September to November 2018, *Guiding Principles for Future of Work Regulation*, AMMA

<sup>6</sup> Kates, S. (2013) *The AMMA Workplace Relations Research Project – A Survey Based Analysis*, RMIT University

## Mid-project industrial action is a serious deterrent to investment...

In the construction of major resources and energy projects, an especially uncompetitive aspect of Australia's current industrial relations system is the inability to secure employment terms and conditions beyond a four year timeframe.

Major resources projects are of such vast scale that they take an average of seven years to build and commission, however the maximum duration of all enterprise agreements under the Fair Work Act 2009 ('**FW Act**'), including 'greenfields agreements' for new projects, is four years.

The absence of a mechanism enabling enterprise agreements to match the duration of project construction exposes major resources and energy developments to the threat of protected industrial action midway through, and often at critical points, in the project's construction schedule:

- In 2015, with work 87% completed, employees on the \$55 billion Gorgon LNG Project gave notice of their intent to take protected industrial action unless their roster demands were met.
- In 2017, with less than 12 months remaining, the \$34 billion Ichthys LNG Project was threatened with industrial action by unions campaigning to reduce the construction roster.
- In 2014, the three LNG processing plants being built on Queensland's Curtis Island were simultaneously threatened with industrial action until the contractor agreed to a 13% pay increase for construction employees already earning in excess of \$160,000 per annum.
- In 2010, the \$15 billion Pluto LNG project was subject to protected industrial action being taken by subcontractor employees that cost the operator \$3.5 million in damages per day.



*The threat of protected industrial action is particularly impactful on the resources industry, given the disproportionate damage that can be afflicted by strategically targeting bottlenecks in the supply chain. The capital costs in the daily operating of our business mean even minor disruptions can cause damages of millions of dollars a day.”<sup>7</sup>*

While not the only factor, these damaging impacts of Australia's industrial relations framework is widely considered to have contributed to the sudden decline in the nation's attractiveness as a place to invest and build major resources and energy projects.

In the 12 months to April 2013, Australia lost around \$150 billion worth of resources and energy investment when projects slated for development were suddenly cancelled or deferred indefinitely. By April 2018, committed project investment had dropped from \$268 billion to just \$30 billion<sup>8</sup>.

## Project Life Agreements would provide certainty and stability...

The merit of facilitating Project Life Agreements has been identified through multiple reviews into the competitiveness and operation of the FW Act, including:

- In 2015, the Productivity Commission found that “(existing) bargaining arrangements for greenfields agreements pose risks for large capital-intensive projects with urgent timelines”, and recommended amending the FW Act to allow for enterprise agreements to match the duration of a greenfields project.
- In 2012, the former Labor Government found in its review of the FW Act that “there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia”.

<sup>7</sup> Online survey conducted September to November 2018, *Guiding Principles for Future of Work Regulation*, AMMA

<sup>8</sup> Historic data available via the Office of the Chief Economist's [Resources and Energy Quarterly](#) series

Project Life Agreements again became a policy focus in the lead-up to the 2019 Federal Election, with then-Opposition Leader Bill Shorten committing to the reform should the ALP win the election:



*We would look at companies undertaking these mega projects and the multiple billions of dollars... we will be competing with the rest of the world for that investment. We want to look at the ability for companies to negotiate with unions for extended greenfields agreements, project life, (so they) can go to the global investors who will back it.”<sup>9</sup>*

Given the significant opportunity at Australia’s fingertips, it is prudent and appropriate for the Morrison Government to pursue Project Life Agreements as a necessary improvement to the FW Act. This reform should also have bipartisan support if the Federal Opposition is genuine about attracting new job-creating capital to Australia.

In effect, Project Life Agreements would deliver increased confidence to major project investors and significantly increase the prospects of new projects receiving final approval by:

- ✓ 1. Providing certainty over total expected labour costs which comprise a significant portion of total project development budgets;
- ✓ 2. Providing protection for investments, often of multi-billions of dollars, from the threat of disruption and delays arising from the potential for mid-project industrial action;
- ✓ 3. Providing international commodity customers with greater certainty on first cargo of resources delivery, thus facilitating the early reaching of supply contracts necessary for final investment approvals;
- ✓ 4. Providing greater flexibility for employers to negotiate greenfields agreements early in the feasibility and approvals stages, delivering certainty and stability to investors as early as possible without unnecessary time pressures to commence construction works; and
- ✓ 5. Encouraging greater cooperation between employers, employees and employee representatives on long-term, high-paid major project employment arrangements.

### Workers would benefit through high-earning job opportunities...

Project Life Agreements would also be of huge benefit to Australian workers through the creation of thousands of new highly-paid jobs. Major resources and energy projects involve by far the most highly-paid construction jobs in the country, and among the highest paid of any industry in Australia.



- A labourer on a major resources project will typically earn around \$114,000 to \$120,000 per annum, or over \$2200 per week. This is 260% above the on-site building award rate<sup>10</sup> (\$821 per week or \$42,700 annually) and 280% greater than the average labourer wage across all industries (\$782 per week or \$40,700 annually)<sup>11</sup>.
- A tradesperson (i.e. electrician) will typically earn \$120,000-\$160,000 per annum, or over \$2300 per week, on a major resources project. This is 230% above the award (\$1,009 per week or \$52,500 annually)<sup>12</sup> and 180% greater than the average wage for technicians and trades workers across all industries (\$1,266 per week or \$65,800)<sup>13</sup>.

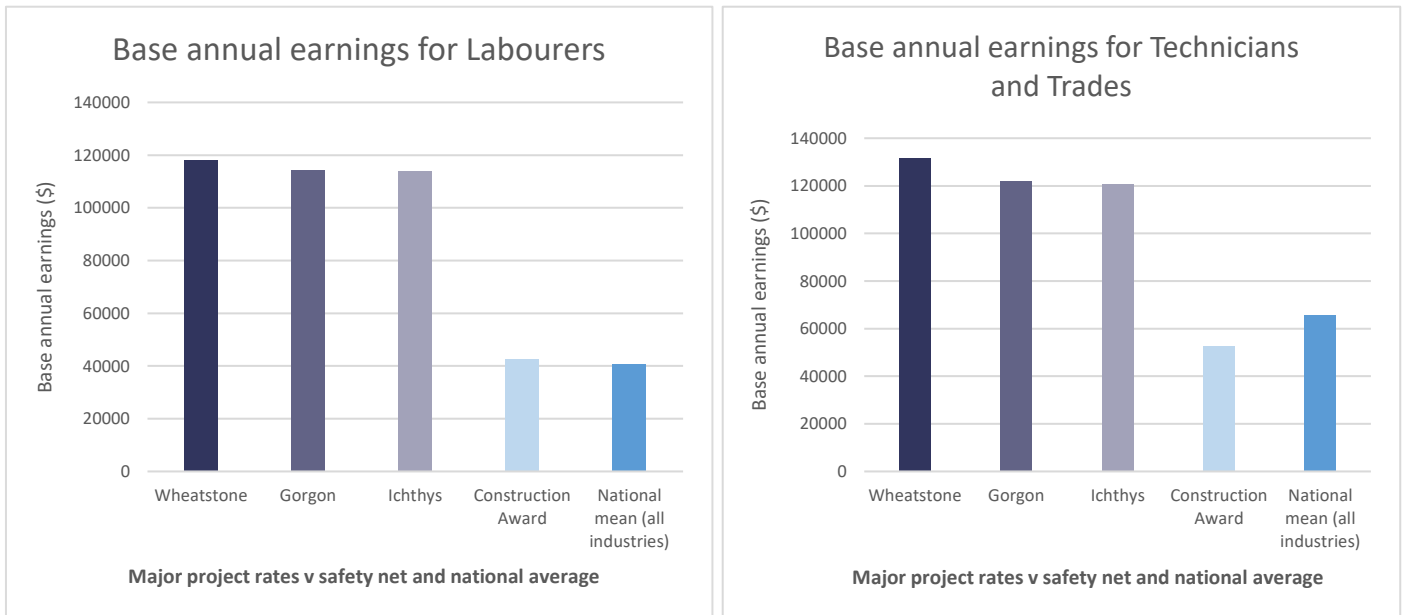
<sup>9</sup> Shorten, B (15 May 2019), [Address To The Western Australian Leadership Matters Breakfast](#), Perth

<sup>10</sup> Pay Guide - Building and Construction General On-site Award 2010 (Level 1 (CW/ECW 1 (level d))) [fwo.gov.au](http://fwo.gov.au)

<sup>11</sup> Australian Bureau of Statistics, Characteristics of Employment, Australia, Table 4, August 2018 [abs.gov.au](http://abs.gov.au)

<sup>12</sup> Pay Guide - Building and Construction General On-site Award 2010, (Level 9 (ECW 9)) [fwo.gov.au](http://fwo.gov.au)

<sup>13</sup> Australian Bureau of Statistics, Characteristics of Employment, Australia, Table 4, August 2018 [abs.gov.au](http://abs.gov.au)



With major resources and energy projects providing Australian construction workers with earnings more than double the industry average and the award pay rates, there is no risk that Project Life Agreements could ever result in people being paid below the FW Act’s safety net.

The biggest risk to these workers is in Australia failing to secure the potential new major resources and energy projects in its investment pipeline, and thus foregoing the opportunity to provide construction employees with the highest paid job opportunities in the country.

Further, the specialised nature of major project contract work means individual employees rarely work on any one project for more than 3-5 years. Project Life Agreements are designed to provide the contractors and project investors with certainty over labour costs and construction schedule – any suggestion they would see individual employees “locked-in” to work for several years would be a misunderstanding of the characteristics of work in this unique and highly-paid sector.

### Project Life Agreements align to our national goals...

Project Life Agreements align to various national goals supported by all sides of politics and especially prioritised by the Morrison Government during the 46<sup>th</sup> term of the Australian Parliament.

Such goals include attracting global investment into primary Australian industries, creation of high-paid and technology-driven jobs, opening up new resources and energy basins to development, and reducing the level of red-tape and regulatory burden to doing business in Australia.




*...we are really focusing on the barriers that matter to business in getting investments and projects off the ground... by focusing on regulation from the viewpoint of business, we will identify the regulations and bureaucratic processes that impose the largest costs on key sectors of the economy and the biggest hurdles to letting those investments flow.”*  
– Prime Minister Scott Morrison<sup>14</sup>

<sup>14</sup> [Address](#) to the Chamber of Commerce and Industry Western Australia (CCIWA), 24 June 2019




In relation to the resources and energy industry specifically, Project Life Agreements significantly support the five key goals of the Australian Government's *2019 National Resources Statement*:

- ✓ 1. Deliver the most globally attractive and competitive investment destination for resources projects.
- ✓ 2. Develop new resources, industries and markets.
- ✓ 3. Invest in new technologies and approaches, especially to deliver better environmental outcomes.
- ✓ 4. Create well paid, secure jobs.
- ✓ 5. Support communities to ensure they receive benefits from the development of Australian resources.

 *This statement sets out a vision to have the world's most advanced, innovative and successful resources sector that delivers sustained prosperity and social development for all Australians... In particular, it responds to the need identified... to maintain our investment attractiveness and competitiveness against emerging competitors.*<sup>15</sup>

Resources Minister Matthew Canavan has further made the moral case for development and export of Australian resources, including to assist with the broader Asia Pacific region's economic growth, lifting communities out of poverty, improving lives and providing for more equal societies<sup>16</sup>.

Project Life Agreements also support the Federal Opposition's vision for jobs and the future of work, with Opposition Leader Anthony Albanese declaring "Labor is proudly and resolutely pro-growth", and noting the significant role resources industries will play in renewable energies:

 *Our traditional industries are also poised to benefit from a low-carbon future... it takes more than 200 tonnes of metallurgical coal to produce one wind turbine. According to forecasts of global growth in wind power capacity to 2030, Australia could be exporting 15.5 million tonnes of coking coal to build these turbines.*<sup>17</sup>

The goals being pursued by Australia's decision makers, much of which are firmly bipartisan, further strengthen the case for Project Life Agreements.

Australian Resources and Energy Group AMMA strongly recommends the Morrison Government pursue reform of Australia's industrial relations system to facilitate Project Life Agreements for major projects.

<sup>15</sup> [Extracts](#) from Minister for Resources, Matthew Canavan's foreword to the National Resources Statement 2019

<sup>16</sup> [Address](#) to the International Mining and Resources Conference, Senator the Hon. Matthew Canavan

<sup>17</sup> [Speech](#) – Jobs and the Future of Work, 29 October 2019

## Recommendations

AMMA recommends the following in relation to Project Life Agreements:
<p><b>Recommendation 1</b></p> <p>The <i>Fair Work Act 2009</i> must allow for Project Life Agreements to operate for a period which matches the life of construction for eligible major projects.</p>
<p><b>Recommendation 2</b></p> <p>Project Life Agreements should extend to <u>all</u> types of enterprise agreements used in eligible major resources and energy project construction phase, including both major new projects (greenfields) and large-scale expansions (brownfields).</p>
<p><b>Recommendation 3</b></p> <p>Eligibility for Project Life Agreements should be determined by a set minimum value and minimum expected duration for construction period, for example, where the project:</p> <ol style="list-style-type: none"> <li>a) is expected to take more than four years to build; and</li> <li>b) the estimated investment value is more than AU \$50 million, aligned to the Australian Government's Major Project Status recognition.</li> </ol>
<p><b>Recommendation 4</b></p> <p>Project Life Agreements should contain a clause which specifies when project construction is deemed complete and the agreement is no longer legally binding, and thus the agreement is automatically terminated, should joint applications from all parties to the agreement not have applied for its extension or modification of those terms.</p>
<p><b>Recommendation 5</b></p> <p>A mechanism should exist allowing parties to a Project Life Agreement to agree upon and apply for extensions or slight variations to the expiry terms.</p>
<p><b>Recommendation 6</b></p> <p>Project Life Agreements should allow for parties to negotiate and agree upon annual increases to pay rates as per the existing FW Act agreement making process. Project Life Agreements should not be subject to any new or additional statutory requirements in relation to wage increases.</p>
<p><b>Recommendation 7</b></p> <p>Project Life Agreements should not contain agreement content outside of the FW Act's current permitted matters. Allowing enterprise agreements to operate for the full length of project construction should not be a concession to broaden permitted agreement content.</p>
<p><b>Recommendation 8</b></p> <p>Project Life Agreements should have access to a priority approval system through the Fair Work Commission's agreement approval process, with a benchmark of approving all Project Life Agreements within 21 days of lodgment if all statutory tests are met.</p>
<p><b>Recommendation 9</b></p> <p>If parties to Project Life Agreements have not reached a negotiated outcome after three months, an employer should request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union.</p>

## 1. Introduction

1. AMMA welcomes the opportunity to respond to the Attorney-General and Minister for Industrial Relations' discussion paper on 'project life greenfields agreements' (19/09/19).
2. AMMA members hold the strong view that there is a significant need for reform of the *Fair Work Act 2009 (FW Act)* in relation to greenfields agreement making.
3. In AMMA's view, the key benefit of allowing enterprise agreements to match the life of major project construction is eliminating exposure to mid-project construction protected industrial action. This would provide certainty and stability to project proponents, allowing them to lock-in labour costs for the duration of the project construction and thus provide greater certainty on overall project costs and completion timeframes.
4. Critically, agreements that run the duration of project construction also provide this certainty and stability to the global investment community, of whose capital is vital to securing new major resources and energy projects and the enormous benefits they bring to Australia in terms of employment, regional development, national revenues and high living standards.
5. Investors committing billions of dollars into job-creating projects only do so with certainty that such feasibility and planning efforts will produce long-term stability, sound investment returns and predictable outcomes. Further, with multi-billion dollar resource export deals typically signed with international customers well before project construction commences, certainty on final completion timeframes is critical to seeing Australia's natural resources potential actually translate to tangible projects, jobs and national revenues.
6. It is clear that the FW Act's existing greenfields agreement making provisions fail to provide this stable investment environment. In this submission, AMMA outlines how the existing process has contributed significantly to delays and cost escalations on major Australian resources and energy projects and must be improved to secure the next wave of investment opportunities and maximize their potential contribution to the nation.
7. For the purposes of this submission AMMA provides the following clarifications:
  - a) AMMA uses the simplified term "**Project Life Agreements**". This term refers to all agreements that may be used on a greenfields project which, importantly, are not limited to greenfields agreements. AMMA's position is that enabling agreements to extend beyond four year terms and match the duration of major project construction should extend to all agreements in use on that project (position justified on page 28).
  - b) The term "project" when used in Project Life Agreements refers to the *construction* phase of a major resources and energy project – which takes on average seven years in Australia. This should not be confused with the *production* phase of a major resources and energy project, which in some cases can be several decades.
8. To the global investment community Australia remains one of the most promising destinations to invest in new natural resources mega-projects. The nation has enormous untapped reserves, world-class commercial and technical capacity, and a track record in bringing new resources and energy projects from feasibility to full production.
9. Providing a more competitive industrial relations framework for major project construction will significantly improve Australia's competitiveness in translating this potential into job-creating resources and energy project investment. It is appropriate and sensible that this reform be of the highest priority for the Australian Government.

## 2. Industry & Economic Context

Discussion paper question 5: What benefits are likely to arise for employers, workers and the community if length of project greenfields agreements were possible?

### 2.1 The effects of the ‘resources investment boom’

10. The resources and energy industry is, and will remain, a major pillar of the Australian economy, driving national prosperity, employment and regional development.
11. In the year to June 2019 the resources and energy industry directly accounted for a third of the growth in Australia’s GDP. Resources and energy export earnings are expected to reach a new record \$282 billion in 2019–20<sup>18</sup>. Aggregate company tax and royalties (including both minerals royalties and the Petroleum Resources Rent Tax) presently contribute a combined \$35 billion to national revenues, annually.
12. Direct employment in the resources industry presently accounts for around 240,000 employees and has been estimated by Reserve Bank of Australia research to account for 9.75% of the total national workforce or more than 1.1 million employed people<sup>19</sup>.
13. While the industry has grown significantly since the mid-20<sup>th</sup> Century, the most recent ‘resources investment boom’, generally acknowledged as having taken place in the decade from 2003-2012, saw unprecedented growth that has left Australia a far richer and more prosperous nation. Described as ‘one of the largest shocks to hit the Australian economy in generations’<sup>20</sup>, the previous resources investment boom is estimated to have provided a number of massive benefits to the Australian economy including:
  - increased the population by approximately 1 per cent, reflecting net migration flows responding to employment opportunities and wage growth;
  - increased employment by 3 per cent through an increase in demand;
  - increased real wages by approximately 6 per cent;
  - increased the tax base; and
  - raised household disposable income by 13 per cent<sup>21</sup>
14. Such a significant and sustained contribution to Australia’s prosperity and living standards did not come by chance. The industry is heavily reliant on foreign capital to invest in major resources and energy projects that, after feasibility and planning taking up to 10 years and construction which averages seven years, contribute ongoing economic returns for the nation for many decades. In 2003-2012, around 390 resources and energy major projects progressed to the committed stage requiring a combined \$394 billion of capital investment<sup>22</sup>.

<sup>18</sup> Department of Industry, Innovation and Science, Office of the Chief Economist, *Resources and Energy Quarterly September 2019* accessed 3 October 2019

<sup>19</sup> Raynor, V. and Bishop, J. 2013 *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RBA Research

<sup>20</sup> Downes, P., Hanslow, K. and Tulip P. 2014, *The Effect of the Mining Boom on the Australian Economy*, RBA Research

<sup>21</sup> Downes, P., Hanslow, K. and Tulip P. 2014, *The Effect of the Mining Boom on the Australian Economy*, RBA Research

<sup>22</sup> Bureau of Resources and Energy Economics (2013) *Resources and Energy Major Projects – April 2013*

15. In the absence of foreign capital injection, economic activity, wages and government tax receipts would be far lower, and living standards greatly diminished. KPMG describes the resources sector as a model example of the benefits to the Australian economy of accessing foreign capital to generate private sector activity that would otherwise not exist<sup>23</sup>.
16. Securing foreign investment into resources and energy projects is also a complex and extremely competitive process. Global investment capital is highly mobile and while Australia is an attractive first-world market for investment, the nation has a limited amount of the world's resources and is increasingly competing with lower-cost emerging resource markets.

## 2.2 The sudden decline in major project investment

17. Evidence the global investment community was beginning to look elsewhere for their major project capital began to emerge in early-to-mid 2012. Until this point, the resources investment boom showed little signs of slowing, with a large number of new major resources and energy projects remaining in Australia's development pipeline and little reason to predict they would not advance from feasibility to committed stage.
18. During 2012-2013, the Australian Government's Bureau of Resources and Energy Economics would record an emerging and highly concerning trend – project proponents were postponing (often indefinitely) or outright cancelling high value resources and energy projects flagged for Australia. In total around \$150 billion of prospective projects were either delayed, cancelled or had re-assessed development plans in the 12 months to April 2013, including:<sup>24</sup>

Cancelled or Deferred Project	Company	Estimated Value (\$b)
Browse LNG	Woodside	36
Outer Harbour	BHP Billiton	30
Olympic Dam Expansion	BHP Billiton	20
Sunrise LNG	Woodside	12
Abbot Point T4-9	NQBP and partners	11
West Pilbara Iron Ore	Aquila Resources	7.4
Wandoan coal mine	Xstrata	6.0
Kooragang Island Coal Terminal 4	PWCS	5.0
Anketell Point Port	Fortescue / Aquila	4.0
Cape Lambert Magnetite project	MCC Mining	3.7
Southdown Magnetite Project	Grange Resources	2.9
Yarwun Coal Terminal	Metro Coal	2.2
Mount Pleasant coal mine	Rio Tinto	2.0
Weld Range iron ore project	Sinosteel Midwest	2.0
Balaclava Island coal terminal	Xstrata	1.5
Fisherman's Landing LNG	LNG Limited	1.1
Surat Basin Rail	Aurizon / Xstrata	1.0
Wilkie Creek coal mine	Peabody Energy	1.0
<b>Total</b>		<b>149</b>

<sup>23</sup> KPMG (2015) [Workplace Relations and the Competitiveness of the Australian Resources Sector](#)

<sup>24</sup> Bureau of Resources and Energy Economics (2013) [Resources and Energy Major Projects – April 2013](#)

19. As a result, the ‘second wave’ of major resources and energy project investment, expected to continue the significant employment and economic benefits of the industry’s unprecedented construction phase, was largely foregone to Australia. With very few new mega projects to replace the first wave once construction was complete, the value of committed new resources and energy projects decreased from a peak of \$268 billion in April 2013 to \$195 billion at the end of October 2016, and then to about \$30 billion by end of 2018.
20. The cancellation and delay of these multibillion dollar resources and energy projects was a significant blow to the national economy with thousands of Australians missing out on new job opportunities, the forfeiture of tax and royalties and national export earnings.
21. Despite retaining some of the world’s most promising resources deposits and having built significant workforce and technical capabilities, Australia had seemingly lost its mantle as the destination of choice for new major resources and energy projects. It is imperative that national policy makers discover why this occurred and seek to rectify any regulatory factors.

### **2.3 The impact of an uncompetitive IR framework**

22. A key consideration for this discussion paper is to what extent the sudden decline in committed resource and energy projects in Australia’s investment pipeline can be attributed to the nation’s industrial relations framework being far from ‘fit for purpose’? In any reasonable analysis of the below plethora of evidence on this subject, the answer must be ‘significantly’.
23. Firstly consider the broader view of the competitiveness of Australia’s industrial relations framework. Since 2014 the World Economic Forum’s (WEF) annual *Global Competitiveness Report* has ranked Australia anywhere from 14<sup>th</sup> to 22<sup>nd</sup> in the world in terms of its overall competitiveness compared with the world’s 141 established national economies. The 2019 report ranks Australia’s global competitiveness 16<sup>th</sup> overall below fellow western economies including the USA (2<sup>nd</sup>), Netherlands (4), Switzerland (5), Germany (7), the United Kingdom (9) and Canada (14). Each year, various sub-categories under the ‘labour market’ pillar consistently rank as Australia’s least competitive components for doing business<sup>25</sup>.
24. Specifically, the 2019 report ranks the following aspects of Australia’s labour market regulation as follows<sup>26</sup>:
  - a) “Hiring and Firing Practices” – 111<sup>th</sup> in the world
  - b) “Cooperation in labour-employer relations” – 53<sup>rd</sup> in the world
  - c) “Flexibility of wage determination” – 95<sup>th</sup> in the world
  - d) “Active labour market policies” – 17<sup>th</sup> in the world
  - e) “Internal labour mobility” – 94<sup>th</sup> in the world.
25. In past reports the WEF has singled out “restrictive labour regulations” as the most problematic factor for doing business in Australia, with the 2014 survey seeing one-in-four business leaders rank industrial relations as Australia’s biggest problem<sup>27</sup>. The conclusion

<sup>25</sup> Schwab, K. (2019) [The Global Competitiveness Report 2019](#), World Economic Forum

<sup>26</sup> Schwab, K. (2019) [The Global Competitiveness Report 2019](#), World Economic Forum

<sup>27</sup> Schwab, K. (2014) [The Global Competitiveness Report 2014](#), World Economic Forum

from this is that Australia's overall competitiveness ranks within the world's top 20 economies, with its macroeconomic stability, financial systems, skills capacity and trade openness often ranked with the top echelon of the world's economies. However, it is clear that restrictions, inflexibilities and overregulation in industrial relations consistently pulls Australia down below many of the nation's OECD competitors.

*"...Australia's performance shows room for improvement. The functioning of its labour market (22nd in the world) is notably affected by its rigidity."<sup>28</sup>*

26. In relation to the resources and energy industry, AMMA has long contended that uncompetitive aspects of Australia's approach to industrial relations under the FW Act has been a significant contributing factor to a loss of investment attractiveness in the nation's resources and energy industry. This view has been consistently backed by a range of credible AMMA research projects commencing each year from shortly after the FW Act was introduced in 2009.
27. From 2010-2012, a collaboration project between AMMA and RMIT University captured the ongoing experiences of resources and energy employers with the FW Act every six months. The report series documented a rapid decline in employers' satisfaction with the industrial relations environment during this timeframe, with common grievances including the imbalance in bargaining power leading to uncompetitive outcomes; problems with the greenfields agreement making system leading to cost and scheduling challenges; and the inability to negotiate productivity offsets in exchange for significant wage increases<sup>29</sup>.
28. Specific employer feedback captured in the sixth and final report related to investment in greenfields projects include:

*"Australia is now a high-cost and high IR risk environment. Other countries will now overtake us due to our restrictive and high-cost IR systems. We should benchmark Australia against other countries in terms of cost of productivity and industrial risk/threat to investors."*

*"The issues are around the cost of our labour as compared to overseas, the increase in union activity which is impacting on business i.e. unions now have greater power to disrupt business. Changes to the Fair Work Act [are needed] to facilitate fairer greenfields negotiations."*

*"Unions were bold enough in two instances to make it clear in meetings that they would block our (greenfields) agreement, to give an advantage to another contractor who would accede to their demands for a closed shop, nominated labour, union-appointed supervisors and safety reps."<sup>30</sup>*
29. More recent AMMA research has not shown any softening of employer attitudes about the competitiveness of Australia's industrial relations framework. In 2018 AMMA surveyed more than 100 resources and energy executives to inform its research for its *New Horizon* report, developing guiding principles for future workplace regulation.

<sup>28</sup> Schwab, K. (2018) *The Global Competitiveness Report 2018*, World Economic Forum

<sup>29</sup> Kates, S. (2013) [The AMMA Workplace Relations Research Project – A Survey Based Analysis](#), RMIT University

<sup>30</sup> Kates, S. (2013) [The AMMA Workplace Relations Research Project – A Survey Based Analysis](#), RMIT University

30. Feedback on Australia's industrial relations system generally included:

- 92% of resources and energy employers believed work regulation could be better utilised as a source of national competitive advantage;
- 95% of employers agreed Australia's current approach to work regulation doesn't provide the necessary flexibility;
- 97% said the 'one-size-fits-all' approach to workplace regulation is increasingly outdated;
- 94% said the system should allow for a wider range of agreement making options; and
- 100% agreed flexibility, productivity and competitiveness should have much greater emphasis in future approach to workplace regulation<sup>31</sup>.

31. Anecdotal evidence recorded in the 2018 industry survey project included:

*"As the Australian division of a global business, we're competing for capital allocation internally. The perception of our industrial risk is as high as I can remember in more than 40 years in this industry. It disincentivises investment and it disincentivises us to hire more people. Unless we can be competitive, the market will take opportunities elsewhere."* - Global multi-national energy company executive.

*"The inability to accurately determine the cost of a major investment project and subsequent return on capital due to uncontrollable workplace relations is seriously impacting the projects built in Australia. This has led to the premature contraction of resources sector growth."* – Mining industry executive.<sup>32</sup>

32. The ability to provide certainty around industrial arrangements, workforce stability and labour costs is an essential piece in the global competitiveness puzzle. Major project proponents and their consortiums of global investors simply do not provide final investment decision to major projects where industrial and labour cost uncertainty resides. The options available under any nation's industrial relations system to determine wages and conditions must provide employers the utmost certainty about project construction costs and scheduling.
33. Increased regulatory burden, delays to projects and complex workplace relations processes does little to support the competitiveness and sustainability of existing resources and industry operations let alone assist in attracting future investment. Workplace relations uncertainty or instability resulting from the industrial relations framework has the very real potential to impact the investment pipeline, which has flow-on effects onto the broader economy.<sup>33</sup>
34. This is precisely what Australia witnessed through the sudden contraction in new major resources and energy projects committed to its shores from 2012, and what the Australian Government needs to urgently address to place Australia in a competitive position to secure the next wave of investment opportunities.

<sup>31</sup> Online survey conducted September to November 2018, *Guiding Principles for Future of Work Regulation*, AMMA

<sup>32</sup> Reid, T. (2018) *A New Horizon, Guiding Principles for the Future of Work*, AMMA

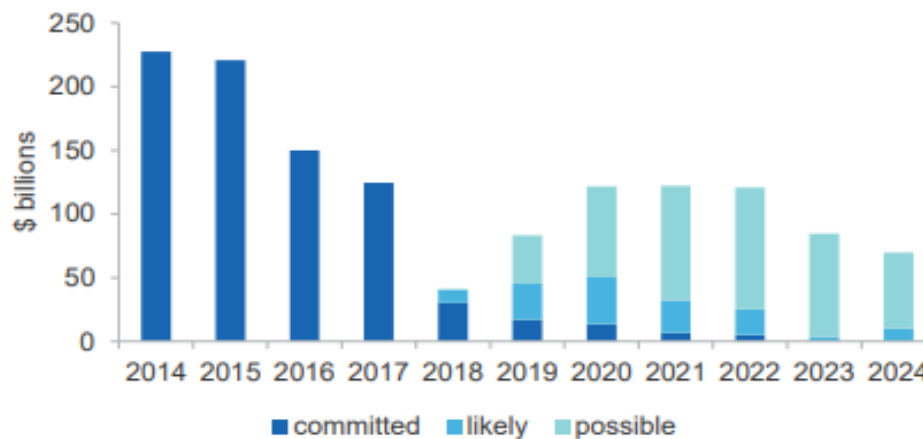
<sup>33</sup> KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*



## 2.4 The next wave of resources investment

35. The urgency for implementing a more competitive agreement making system for greenfields projects is highlighted by the impending wave of potential new project capital in Australia’s investment pipeline.
36. The Department of Industry’s Office of the Chief Economist collates on an annual basis major resources and energy projects data<sup>34</sup>. The most recent data reports the Australian investment pipeline, between 2019-2024, contains about \$250 billion in major projects capital:
  - 39 ‘committed’ projects worth \$30 billion in capital investment;
  - 46 ‘likely to proceed’ projects worth \$56 billion in capital investment;
  - 167 ‘possible’ projects worth \$172 billion in capital investment; and
  - 10 projects, worth \$16 billion considered ‘unlikely’ to proceed.

**Figure 16.3: Outlook for committed project investment**



Source: Department of Industry, Innovation and Science (2018)

**Table 16.1: New and expansion projects by rating**

	Unlikely	Likely	Possible	Committed	Completed
<b>New project</b>					
A\$ billion	16	40	153	11	101
Number	10	35	149	19	11
<b>Expansion</b>					
A\$ billion		16	19	19	4
Number		11	18	20	5

Source: Department of Industry, Innovation and Science (2018)

37. This potential improvement in Australia’s investment outlook points to significant emerging opportunities for Australia’s resources and energy sector and thus the broader economy and labour market.

<sup>34</sup> Office of the Chief Economist, Resources and Energy Quarterly December 2018 Major Projects

38. In particular the number of major projects considered ‘possible’ to proceed suggests rising confidence in future commodity prices and global demand for Australia’s vast resources:

*“The value of projects currently at the feasible stage and rated as ‘likely’ and ‘possible’ to proceed to the construction phase — worth around \$170 billion — suggests the potential for a significant rebound in committed investment.”<sup>35</sup>*

39. This potential investment pipeline would bring with it an extraordinary number of high-paying jobs. The following provide an indication of the level of employment impact that would arise in the scenario Australia was to secure all of these investment opportunities:

- Where it has some indication from project owners, the Department lists in its data an estimate for both construction phase and operational phase workforces. Given the data is incomplete, this provides for a very conservative outlook. The most recent data shows:
  - 42,000 estimated construction phase jobs
  - 32,000 estimated long-term operating phase jobs.<sup>3</sup>
- In its *2019-2024 Mining Workforce* modelling report, AMMA forecasted that the 57 onshore mining projects either ‘committed’ or considered ‘likely to proceed’ would create an additional 20,767 on-site workforce demand by 2024, lifting Australia’s direct mining workforce by approximately 12%.<sup>36</sup> The occupational breakdown of this demand includes:
  - 8660 mining plant operators
  - 2847 heavy diesel fitters
  - 970 other trades (electrical, mechanical, maintenance)
  - 4110 supervisor, management, administration
  - 4180 mine engineering, technical, geology roles
- The past peak investment phase provides some level of indication. From 2003-2012 almost \$400 billion was invested in major resources and energy projects. This created 161,000 direct jobs across the resources and energy industry, and saw each direct job in the industry support another two-to-three in the broader economy<sup>37</sup>. Using this as a guide, the present resources and energy pipeline could conceivably create more than 100,000 direct new jobs in the industry and support 300,000 directly and indirectly through economic flow-on effects.

40. Given the regulatory environment is a major consideration for international investors, it is imperative that Australia has an industrial relations system that makes for an attractive scenario to secure this pipeline of potential resources and energy major project investment.

41. Unless reforms are secured in the interest of providing greater security and certainty around labour costs for major resources and energy (and other infrastructure) projects, Australia could likely miss out on future investment opportunities critical to the nation’s economic wellbeing.

<sup>35</sup> Office of the Chief Economist, Resources and Energy Quarterly December 2018 Major Projects

<sup>36</sup> Reid, T. (2019) *Mining Workforce 2019-2024*, AMMA.

<sup>37</sup> Raynor, V. and Bishop, J. 2013 [Industry Dimensions of the Resource Boom: An Input-Output Analysis](#), RBA Research

### 3. Failings of current greenfields agreement making

Discussion paper questions addressed in this chapter:

1. 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?
2. What are the implications of this occurring?
3. 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?
6. Are there any known risks that might arise for employers, employees, promoters 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?

42. The concerns and challenges faced by resources and energy employers in securing predictable and stable industrial arrangements for greenfields projects has been well-documented. There is a plethora of evidence which highlight the limited agreement making options under the FW Act are not adequate to provide investors the certainty on labour costs and arrangements required for final investment approval.

#### 3.1 Major project workforce characteristics

43. Fundamentally, the failures of greenfields agreement making under the FW Act is reflective of the gross inflexibility of the system more broadly and its poor application to the highest-paying sectors of the Australian economy.
44. Resources and energy employers have long been frustrated that Australia's approach to workplace regulation, since 2009, has been based on the outdated notion that all employees are at bargaining disadvantage to employers and must be propped up and protected by the legislative system. Australia's industrial relations approach applies a one-size-fits-all system to all industries, employers and employees and expects this to operate effectively with little real-world competitive impacts.
45. The overwhelming purpose of the current industrial framework, to provide a multilayered safety net designed to protect vulnerable groups of Australian workers, has very little relevance to the resources and energy industry; Australia's highest paying industry by far with an average weekly wage in excess of \$2,500.
46. According to data from Australian Bureau of Statistics<sup>38</sup>, as of August 2018, the average earnings for labourers across all industries nationally was \$782 per week or around \$40,700 per year. The same data found the average earnings for technicians and trades workers (including electricians) across all industries nationally was \$1,265 per week or around \$65,800 per year.
47. In comparison, under the *Building and Construction General On-site Award 2010*<sup>39</sup> full-time labourers at the lowest award classification earn a minimum of \$821 per week or around \$42,700 per year. Under the award safety net, full-time tradespersons in the building and

<sup>38</sup> Australian Bureau of Statistics, Characteristics of Employment, Australia, August 2018.

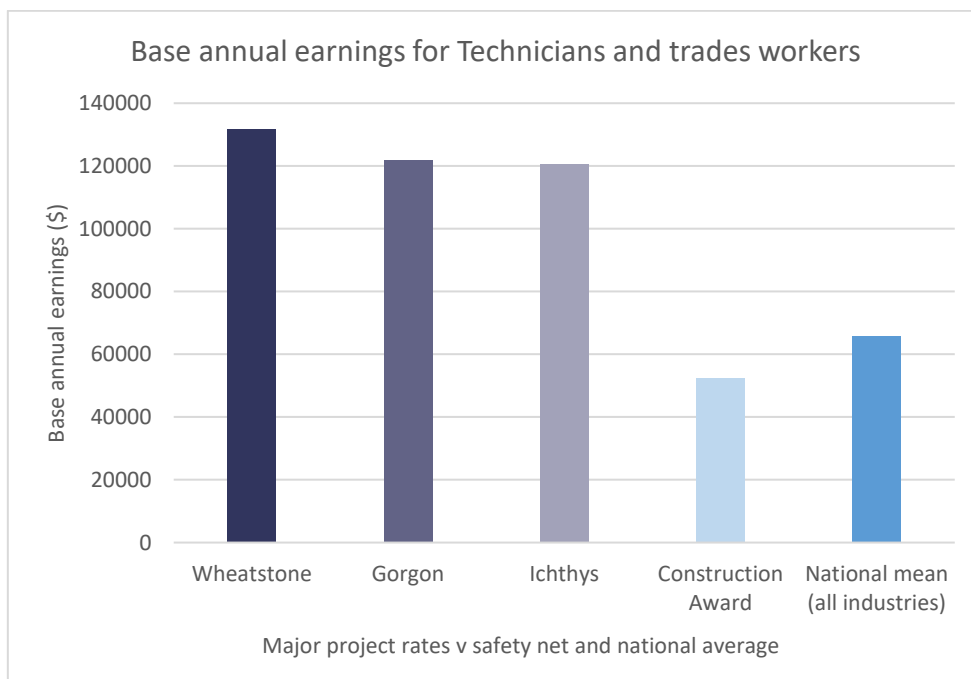
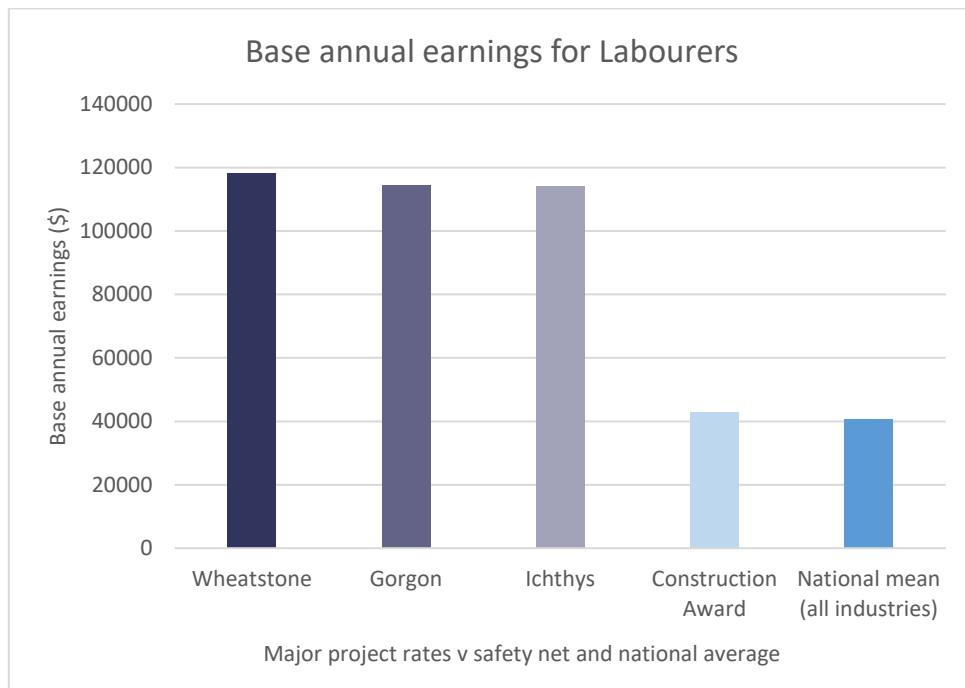
<sup>39</sup> Pay Guide - Building and Construction General On-site Award 2010 [fwo.go.au](http://fwo.go.au).

construction industry at the highest classification earn a minimum of \$1,009 per week or \$52,500 per annum.

48. It is safe to say the award rates are no comparison to the exorbitant wages set by greenfields agreements with labourers on major resources projects earning more than 260% above award rates and national averages while tradespersons (including electricians) on major projects earn 230% above the award safety net. A comparison of these rates compared to major project earnings is illustrated by the below annualised earnings for a spread of classifications on a selection of major resources and energy projects.
- a. Bechtel Construction (Australia) Pty Ltd Wheatstone Project Agreement 2013
    - i. \$118,046 per annum for labourers
    - ii. \$129,480 per annum for machine and crane operators
    - iii. \$131,680 per annum for electrical tradespersons
    - iv. \$139,228 per annum for tower crane operators
  - b. Workpac Pty Ltd Roy Hill AWU Greenfields Agreement 2014
    - i. \$97,356 per annum for riggers/scaffolders
    - ii. \$105,868 per annum for carpenters
    - iii. \$110,459 per annum for electrical tradespersons
    - iv. \$125,104 per annum for crane operators
  - c. Monadelphous Engineering Pty Ltd QGC Curtis Island Greenfields Agreement 2014:
    - i. \$147,100 per annum for riggers/scaffolders
    - ii. \$152,490 per annum for welders
    - iii. \$157,206 per annum for tradespersons
    - iv. \$159,358 per annum for electrical tradespersons
  - d. MAS Australasia Pty Ltd (Woodside) Onshore and Offshore Agreement 2014
    - i. \$150,847 per annum for riggers/scaffolders
    - ii. \$153,831 per annum for storepersons
    - iii. \$156,756 per annum for tradespersons
    - iv. \$162,723 per annum for welders
  - e. Leighton Contractors Pty Ltd – Gorgon Project – Barrow Island Enterprise Agreement 2015
    - i. \$114,252 per annum for labourers
    - ii. \$121,900 per annum for tradespersons
    - iii. \$122,408 per annum for machine and crane operators
    - iv. \$137,015 per annum for tower crane operator
  - f. EnMerch Pty Ltd Ichthys Onshore Construction Enterprise Agreement 2019
    - i. \$114,097 per annum for labourers
    - ii. \$116,251 per annum for forklift operator
    - iii. \$118,445 per annum for rigger/scaffolders
    - iv. \$120,644 per annum for tradespersons
49. It is imperative to note that the above annual earnings for various resources greenfields projects are based on a 38-hour week and inclusive of site or project specific allowances.

The above figures do not however factor in the considerable shift penalties, allowances and overtime rates that are applied on these types of projects.

50. The stark comparison between building and construction award rates and the annual earnings of labourers and trades workers on three major LNG projects is further demonstrated in the below graphs. For example, the annual earnings for labourers on these major LNG projects is 275% above the minimum rates in the general building and construction award and 290% greater than the average labourers wage across all industries.



51. An additional consideration is that while resources sector greenfields projects take on average seven years to complete, it is uncommon for individual employees to be working on any one major project for more than a three-to-five year duration. Greenfields agreements typically cover multiple classifications allowing for contractors to mobilise specialised skilled labour as required by different phases of construction and engineering works.
52. The unique characteristics of major resources and energy greenfields project workforces provide important considerations when considering the ethics of Project Length Agreements:
  - a) The employees that would work under Project Length Agreements typically earn multiple times over award rates, especially when factoring in overtime, allowances and penalties. They are the least vulnerable employees in the Australian labour market and therefore the underlying principles of the FW Act in relation to protecting the vulnerable are largely irrelevant.
  - b) Given the enormous chasm between award rates and major resources greenfields project rates, there is simply no conceivable way that any length of Project Life Agreement would see employees eventually become at risk of being paid under award minimums.
  - c) Due to high labour mobility and the specialised phases of major project engineering and construction, it would be rare for any individuals to be employed under a Project Life Agreement for longer than the current four-year maximum agreement duration. Any attempts to characterise Project Life Agreements as a mechanism to “trap” employees for an excessive number of years, would be unrealistic and disingenuous.
53. To support the competitiveness of high-paying sectors, Australia must recognise that the level of regulation, compliance, protections and government-forced industrial organisation required for lower paying industries, need not apply universally to high paying industries.

### **3.2 Threat of mid-project industrial action**

54. The most damaging aspect of the current agreement making framework is that it exposes major greenfields projects to mid-project industrial action. That multibillion-dollar capital investment projects can effectively be held to ransom midway through their construction, and be subject to significant industrial disruption, cost blow-outs and delays, is a massive area of failure for Australia’s approach to industrial relations under the Fair Work Act.
55. Under the current framework, enterprise agreements, including greenfields agreements, have a maximum duration of four years following approval by the Fair Work Commission. The life of enterprise agreements is “nominal” in the sense that once the expiry date is passed, the agreement continues to exist until it is terminated (in rare circumstances), or more usually, replaced by another agreement.
56. The nominal expiry of a greenfields agreement provides employees the right to take protected industrial action in support of a replacement agreement. This exposes employers, and the industry as a whole, to the threat of industrial action during the construction phase of a major project; and after the final investment decision has been made and the project developer has sunk capital into the project.
57. Major resources projects are of such vast scale that they take an average of seven years to build and commission. To provide confidence to investors and increase the probability of

project approval, it is necessary for project owners to have approved greenfields agreements in place months and sometimes years prior to project construction works commencing.

58. This however creates a strategic trade-off for employers. While establishing an agreement early provides certainty in relation to labour costs and employment terms, once a greenfields agreement is approved, in effect the 'clock starts ticking'. With final approvals and early construction works required before they can commence on-site, it is common for contractors to have an effective greenfields agreement life of three years or less.
59. As a result, major resources and energy projects often experience the first wave of greenfields agreements expiring only a few years into a seven-year average construction schedule. This provides an opportune trigger point for employees and their representatives to bargain hard for increases in wages and conditions that would set the rates for the remainder of the project, leveraging the threat of industrial disruption after construction had already commenced to their advantage.
60. It is similarly very common to see enterprise agreements negotiated and approved early in a greenfields resources project life to then expire within the final year or two of the project, often when critical completion and hook-up and commission works is taking place to finalise works just in time to meet tight project completion timeframes. The impact this can have on increasing labour costs in the final stage well beyond the pre-project forecasts can, and has proven to be, highly unpredictable and disastrous for investor confidence.
61. A further damaging feature of employers being required to re-negotiate expired agreements mid-project construction, is that bargaining around the renewal period can very easily become protracted, often taking one to two years to negotiate a replacement agreement that can take months to be approved by the Fair Work Commission and then may only be relevant for a very short period (i.e. within one year) before the construction works are complete.
62. It is these risks to renewing a nominally expired greenfields agreement midway through project construction that create a massive exposure to employers and a vulnerability to additional costs and delay, which is well-understood and actively exploited by trade unions. The fact re-negotiations often occur at the most critical stage of major project construction unequivocally hampers the delivery of critical nation-building resources, energy and infrastructure projects to expected project budget and schedule.
63. In recent years the resources and energy industry has seen the full effects of greenfields agreement making under the current system with a number of recent mega projects having suffered cost blow-outs and completion delays due to unnecessary industrial action, both threatened and taken, mid-to-late in the construction phase.
  - a. The Chevron-operated **Gorgon LNG Project** was subject to a number of concerted union campaigns that leveraged the current framework to threaten disruption at critical points near the end of project completion.

In November 2014, with construction 87% completed, negotiations with three construction unions for a new enterprise agreement broke down and industrial action was threatened unless their demands for significant roster changes were met.

In August 2015, almost 2000 workers gave notice of their intention to take protected industrial action. Gorgon was eventually completed two years later than expected (in 2017 rather than 2015) and at \$20 billion over-budget (\$55 billion final cost).

- b. A similar scenario impacted the \$34 billion INPEX-operated **Ichthys Project**. Again, with less than 12 months until construction was forecast to be completed, the project was threatened with industrial action by unions seeking to reduce the roster of the construction workforce, which would impact both the costs of project development and timeline for completion. Multiple Protected Action Ballot Orders (PABOs) were issued in the final phase of construction, with the company ultimately reaching agreement for a reduced rostered cycle in order to avert industrial action.
- c. In July and August of 2014, looming protected industrial action threatened the timely completion of three substantial LNG projects being built simultaneously near Gladstone, Queensland. This was made possible by enterprise agreements covering construction employees for all three processing plants reaching their nominal expiry dates shortly prior to project completion.

After lengthy negotiations an agreement was reached, requiring huge unplanned pay increases. The stoppages were both legal and disruptive and the outcome had a significant impact on projects that were already facing considerable cost pressures. To avoid delays on project schedules, the contractor was forced to offer a 13% pay rise to some of the best paid tradesmen in Queensland, with electricians already earning \$160,000 per annum.<sup>40</sup>

- d. In an earlier example from 2010, **Pluto LNG** project owner Woodside applied to stop protected industrial action being taken by employees of one of its subcontractors during project construction. Woodside applied as a third party experiencing 'significant harm' as a result of the strike, revealing that each day the Pluto project was delayed due to industrial action would cost the company \$3.5 million due to the extension of time claimed by contractors and additional resources required to finish the work within the allocated contract dates.<sup>41</sup>

- 64. Highly-publicised cases such as these not only impact individual projects, but ultimately diminish Australia's reputation as a stable and attractive place to build world-class resources and energy projects. Minimising this unnecessary risk is critical to securing the next wave of major project investment.
- 65. AMMA's 2018 *New Horizon* survey queried over 100 resources and energy employers about the competitive impacts of Australia's workplace regulation. 69% of resources and energy employers identified the threat of protected industrial action midway through project construction as adversely impacting their workplaces.
- 66. Of the resources and energy executives surveyed, 87.5% agreed or strongly agreed that the potential for protected industrial action in the middle of new project construction presented a serious risk / deterrent to investors, with 62.5% strongly agreeing and 25% agreeing. Many major resources and energy projects became exposed to protected industrial action only 12 months or less from construction completion.

<sup>40</sup> APPEA (2015) Submission to Productivity Commission Review into Australia's Industrial Relations Framework

<sup>41</sup> KPMG (2015) [Workplace Relations and the Competitiveness of the Australian Resources Sector](#)



67. Anecdotal evidence included:

*“The threat of protected industrial action is particularly impactful on the resources industry, given the disproportionate damage that can be afflicted by strategically targeting bottlenecks in the supply chain. The capital costs in the daily operating of our business mean even minor disruptions can cause damages of millions of dollars a day. The numbers get big really fast.”* – Hard rock mining executive.

*“Life-of-project employment agreements would create a level of certainty, particularly toward the end of a construction project. In the recent past we’ve seen projects with only 6-12 months left until completion heading into a negotiation period and the subject to the threat of industrial action.”* – Energy sector executive.<sup>42</sup>

68. In a typical business environment, employers have little to no option when threatened with industrial action other than to initiate employer response action in the form of a lockout. This option is unviable on major greenfields projects as employers are faced with a far more complex commercial environment with significantly greater consequences for locking out employees. This includes huge capital costs associated with even small delays and pressure from investors and international commodity customers to meet strict completion deadlines. The stakes are simply too high to risk ongoing protected industrial action.
69. One AMMA member company in metalliferous mining estimated that if operations were disrupted on one major greenfields project alone it would cost up to \$10 million a day, \$70 million a week, or \$3.6 billion a year<sup>43</sup>. These are the choices businesses are forced to weigh up under the current system, and it is readily apparent why patently inflated union demands have been agreed to on past projects.
70. Clearly, the requirement to renew and renegotiate nominally expired greenfields agreements at critical stages in the project life is detrimental to the competitiveness of the resources and energy industry to secure future new project investment. In addition to the direct implications for the industry, this competitive impact also effects other sectors that support major projects including subcontractors, labour hire, manufacturing, catering and accommodation companies and other support services.
71. For all of their economic benefit and national value, major resources and energy projects in Australia are unduly exposed to being delayed and subject to unplanned labour cost increases by unions leveraging the nation’s poor industrial relations practices and regulation of greenfields agreement making specifically.

### **3.3 Mandated union involvement in greenfields agreement making**

72. One of the earliest identified challenges of the enterprise bargaining provisions of the FW Act was the mandated involvement of unions in greenfields agreement making.
73. By providing only one option for employers seeking to develop new projects – to agree with unions on wages and conditions before that project could commence – meant the FW Act was far more restrictive than previous workplace relations systems, ultimately providing unions with veto power over projects until their demands were met.

<sup>42</sup> Online survey conducted September to November 2018, *Guiding Principles for Future of Work Regulation*, Australian Resources and Energy Group AMMA.

<sup>43</sup> AMMA (2015) [Getting Back on Track: Delivering the Workplace Relations Framework Australia Needs](#)

74. While the government tried to resolve this through the amendments in 2015 which introduced a 'circuit breaker' type provision allowing employers to notify a negotiation period of six months, this has done little to allay concerns of employers regarding the power imbalance that arises from mandated union involvement in greenfields agreement making.

### *3.3.1 Unions hold the monopoly over greenfields agreements*

75. The FW Act granted unions, for the first time in Australia's history, a legal monopoly or veto right over greenfields agreements. This new and unprecedented power was actively exploited by unions during the tail-end of the previous resources investment boom following the introduction of the FW Act in 2009.
76. Unions' capacity to hold out in their negotiations provided them with excessive bargaining power. Unlike other enterprise bargaining scenarios, where protracted bargaining or union intransigence would result in employees being delayed pay rises, there appeared little to lose for unions playing 'hard ball' with their wages and conditions claims when negotiating a greenfields agreement.
77. The only real choice for employers seeking to negotiate the necessary greenfields agreements for new project approval was to agree to unions' often exorbitant wage and conditions demands, or risk huge costs associated with delays to commencing construction.
78. The competitive impacts most typically caused by union-mandated involvement in greenfields negotiations, include:<sup>44</sup>
- a) delays in project completion and commencement of production;
  - b) cost of idle capital (e.g. machinery and equipment);
  - c) extension of time claims by contractors;
  - d) inability to meet future contracts of sale; and
  - e) investor uncertainty resulting in decision not to invest (as seen most dramatically in the 12 months to April 2013).
79. The Productivity Commission, in its 2015 Inquiry into Australia's Industrial Relations Framework, also highlighted the issue that any delays in negotiating a greenfields agreement can lead to underutilised capital and may cause the contractor to incur a penalty for delays in the delivery of the project. It also highlighted that even if employees do not actually use this leverage, the ex-ante risk of it raises investor risk and may add to project costs.<sup>45</sup>
80. In effect, the FW Act mandating unions as parties to greenfields agreements meant employees and their bargaining representatives essentially held the key to new major resources and energy projects. This has even seen some unions refuse entirely to negotiate

<sup>44</sup> KPMG (2015) [Workplace Relations and the Competitiveness of the Australian Resources Sector](#)

<sup>45</sup> Productivity Commission (2015) [Review of the Workplace Relations Framework](#), Final Report

greenfields agreements with some businesses, depriving them of the commercial opportunity to tender for work on major projects.

### 3.3.2 Reducing the six-month bargaining period would largely address this issue

81. In 2015, the Coalition Government attempted to address the significant issues associated with union-mandated greenfields negotiations by legislating for a six-month notification period for employers and unions to negotiate terms, after which the employer could apply to the Fair Work Commission (FWC) for a determination on its proposed agreement.
82. While AMMA is supportive of the retention of a ‘circuit breaker’ type provision, AMMA is of the view that the option should be available after three months rather than six months, consistent with the Productivity Commission’s 2015 recommendation<sup>46</sup> and the government’s original proposed amendment prior to being watered down through negotiations with the Senate Crossbench.
83. AMMA member feedback has revealed that 85% of employers who negotiate greenfields agreements for new projects are concerned about the time taken to reach agreement<sup>47</sup>. Contracting and sub-contracting members reported concerns that the six-month period is unrealistic in terms of time from successful tendering for work from primary EPC management companies, to the need to mobilise labour.
84. One AMMA member in the construction contracting sector reported:

*“In reality, you rarely have six months up your sleeve. Mobilisations are often six months in total, meaning that you have to have the agreement in place inside of six months.”*
85. It also should be noted that the notification period of six months is a trigger for an application to be made to the FWC. The ultimate outcome, including final cost liabilities of the enterprise, will not be known for some time. Notwithstanding that an agreement is made when s 182(3) or s 182(4) are satisfied, the agreement is still subject to formal approval.
86. Under the FWC’s timeliness benchmarks, it aims to finalise all agreement approval applications within 16 weeks. The FWC has noted in the past that these timeliness benchmarks are aspirational, and it expects that there will be circumstances where the FWC cannot meet its timeliness goals for a variety of reasons<sup>48</sup>.
87. AMMA’s view is that if the government deems a union-mandated role in greenfields agreement making remains an appropriate feature of the system when setting employment terms prior to employees being engaged for a project, a three-month notification period is a more appropriate timeframe than the present six-month period.
88. Such a reform would effectively halve the potential maximum delays experienced in each step of the contracting supply chain as labour is mobilised to build significant new resources and energy mega-projects.

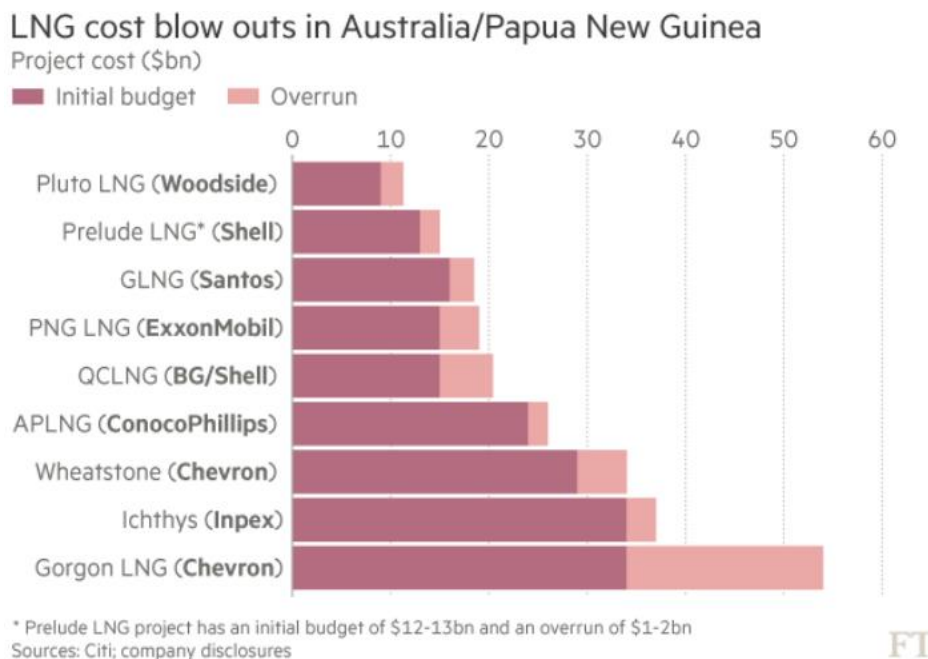
<sup>46</sup> Productivity Commission (2015) [Review of the Workplace Relations Framework](#), Final Report, recommendation 21.1

<sup>47</sup> [AMMA 2016 Federal Election Survey](#)

<sup>48</sup> [Fair Work Commission, Agreements in progress](#)

### 3.4 The ‘leap frogging’ of wages and conditions

89. With multi-billion dollar export deals at stake and their investment being placed at risk, the current greenfields agreement system effectively forces project owners to accept inflated and uncompetitive union demands or risk further delays to project approval.<sup>49</sup> Many resources employers have reported they have agreed in the past to certain conditions just to obtain an initial agreement and ensure that the project progresses to construction commencement.
90. Similarly, during negotiations occurring mid-project construction, employers have admitted to agreeing to demands in excess of ‘average increases’, even taking into consideration reasonable adjustments for the work conditions and activities, in order to avoid delays and additional costs in the completion of a project<sup>50</sup>. Not only does this have the potential to result in higher labour costs for individual projects, but such an environment can entrench non-competitive labour arrangements including wages and conditions across the industry that are not relative to the market conditions of the day<sup>51</sup>.
91. Resources and energy employers have indicated that when negotiating greenfields agreements, the most recent agreements from other major projects in the same commodity group is generally used as a benchmark and starting point by unions for negotiations. As a result, under the current system, greenfields agreements are not “new” agreements at all but are heavily influenced by other projects with little regard for specific enterprise or project considerations and/or changing economic and labour market conditions.
92. This practice of taking other agreements as the new base has had the effect of significantly inflating the wages and conditions for projects. This was evident in the most recent phase of investment which saw several LNG mega-projects suffer significant cost overruns<sup>52</sup>.



<sup>49</sup> Reid, T. (2018) *A New Horizon, Guiding Principles for the Future of Work*, AMMA

<sup>50</sup> KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*

<sup>51</sup> KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*

<sup>52</sup> [Institute](#) for Energy Economics and Financial Analysis, Australia’s Export LNG Plants at Gladstone: The Risks Mount.

93. The “leapfrogging” effect of terms and conditions from agreement to agreement, project to project, with no regard to changing global markets, circumstances or pressures on the economics of new projects does little to enhance Australia’s competitiveness.
94. If Australia is to compete to secure the next wave of investment for critical resources project the system for making greenfields agreements must avoid situations where past project agreements are used as a minimum starting point for negotiations for future projects.
95. Such a practice is not the intended purpose of the greenfields agreement making provisions and rapidly led to unsustainable terms and conditions across the industry.
96. Using existing agreements as the benchmark for future agreements also neglects to take into account the circumstances of the enterprise and the economy at the time the existing agreements were made, leading instead to the wholesale ratcheting up of pay rates on projects with no regard to how our economy or markets are changing.

#### **AMMA Recommendation 1**

The *Fair Work Act 2009* must allow for Project Life Agreements to operate for a period which matches the life of construction for eligible major projects.

## 4. Design of Project Life Agreements

### 4.1 Project Life Agreements should not be restricted to “greenfields agreements”

97. Given the FW Act’s greenfields agreement making stream is far from the only option utilised by employers on major resources and energy projects, AMMA is firmly of the view that for Project Life Agreements to deliver the intended certainty and stability for major projects, this concept must be extended to all types of enterprise agreements used solely in eligible projects’ construction phase.
98. In this context it is very important to consider the distinction between *greenfields agreements* and *greenfields projects*:
- a) A *greenfields agreement* is defined by the Fair Work Commission as: “an enterprise agreement relating to a genuine new enterprise (including a new business, activity, project or undertaking) which is made at a time when the employer or employers have not yet employed any of the persons who will be necessary for the normal conduct of the enterprise and who will be covered by the agreement (emphasis added)”.<sup>53</sup>
  - b) *Greenfields project* is a commonly used term simply referring to a new project, not building on top of, or extending, any existing project or commercial works. In the construction and resources sectors the term typically refers to greenfield land where there is no need to work within the constraints of existing buildings or infrastructure.
99. In the resources and energy sector, and indeed the major project infrastructure sector more broadly, there is a wide range of commercial and strategic reasons as to why a ‘standard’ enterprise agreement is the preferred employment option for works on greenfields projects.
100. The significant challenges experienced with the FW Act’s greenfields agreement making provisions undoubtedly provides a deterrent. However more fundamentally, it is very common for contracting and sub-contracting companies to seek to make an agreement with existing employees to take-on new work opportunities on a new or expansion major project.
101. In AMMA’s view it would be a significant mistake to restrict the well-reasoned and evidence-backed Project Life Agreement reform to only one type of enterprise agreement used in the construction of major resources and energy projects. To do so would risk creating the following hypothetical scenarios:
- a) A major project expected to take seven years to build has a number of greenfields agreements that cover the “life of project” and therefore present no risk of mid-project industrial action. However, this risk is not fully averted as a number of other contractors, critical to project completion, are operating under standard enterprise agreements that have four year maximum durations.
  - b) Contractor A has an opportunity to tender for a five-year contract on a major new resources greenfields project. The firm has an existing ready-made workforce working under a broad enterprise agreement that could be applied to the new project. However this would provide for only a short period of certainty on the project before a replacement agreement would be required. Similarly, negotiating a new project-specific enterprise agreement with the existing employees would only provide a maximum four-year term. To secure a ‘project life’ agreement delivering the safety from mid-project industrial action demanded by the project operator, Contractor A must negotiate a greenfields

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<sup>53</sup> Enterprise Agreements Benchbook: Greenfields Agreements, [FWC website](#).

agreement with at least one union party and then transfer its existing workforce from their non-union agreement to the new union-backed greenfields agreement.

102. Both scenarios would see contractors tendering for work on greenfields projects who seek to utilise standard enterprise agreements for any number of strategic reasons, put at a potentially significant competitive disadvantage to those who are willing or able to enter into a 'project life' greenfields agreement with unions.
103. A further issue is that having greenfields agreements only available via union consent effectively gives a union (or unions) veto over the contractors that can work on the project. If a union doesn't like a contractor, they simply refuse to sign a greenfields agreement with them. This practice is uncompetitive and contravenes the Building Industry Act and Code.
104. To level the playing field, properly avoid any threat of mid-project industrial action on nation-building projects, and provide the most flexible and competitive system for attracting new major project investment, the concept of "Project Life Agreements" must be extended to all enterprise agreements made, with or without union involvement, for specific works undertaken on new and expansion major resources and energy projects

#### *Application to Brownfields Projects*

105. Another important consideration is the potential application of Project Life Agreements to significant expansions of existing projects ("brownfields projects"), of which the construction phase may extend beyond four years. During the next phase of major project investment, it would be highly conceivable for significant expansions of existing projects to extend beyond a four-year construction period, and to require multi-billions of dollars in capital investment.
106. This is highlighted by the 29 expansion projects in Australia's investment pipeline, worth \$35 billion to the nation (see page 15). Allowing Project Life Agreements to extend to all types of enterprise agreements for projects afforded Major Project Status by the Australian Government, would provide confidence to investors looking to fund significant brownfields expansions, which may be of similar or greater value than some greenfields projects.

#### **AMMA Recommendation 2**

Project Life Agreements should extend to all types of enterprise agreements used in eligible major resources and energy project construction phase, including both major new projects (greenfields) and large-scale expansions (brownfields).

#### **4.2 Eligibility for Project Life Agreements**

107. There are a number of considerations that must be had to determine which major projects justify having an enterprise agreement with an extended period of operation.
108. To determine which major projects can have enterprise agreements operate for the length of project construction, consideration must be had to the length of project construction, the estimated investment value of the project and the economic benefits provided. The criteria for extending the nominal life of project agreements must be clear and objective to avoid further disputation about which agreement making option is most appropriate for new projects.

109. In AMMA's view, the eligibility for Project Life Agreements should be in terms of a set minimum value and minimum expected duration for project construction. For example, Project Life Agreements should be an available agreement making option where that project:
- is expected to take more than four years of on-site construction activity; and
  - the estimated investment value is more than AU \$50 million
110. AMMA submits that any greenfields project which is expected to take longer than four years to build should have certainty about the industrial arrangements that will operate over the course of construction.
111. Further, in order for enterprise agreements to run the full length of project construction, the estimated investment value of the project should exceed a specified minimum value. AMMA's view is that where a project's estimated investment value exceeds AU\$50 million, in line with the Australian Government's Major Project Status recognition, those projects should have access to agreements which operate for the life of the project.
112. Projects that receive Major Project Status are recognised by the Australian Government as having strategic significance through its contribution to economic growth, employment and regional development<sup>54</sup>. Projects are considered to have strategic significance where:
- the project's estimated investment exceeds AU\$50 million; and
  - makes a significant contribution to economic growth, exports, employment and/or infrastructure development; or
  - the project will have significant net economic benefit for regional Australia, taking account of a region's investment needs.
113. The Australian Government's recognition of the national significance many vital infrastructure projects has on our economy and regional development reinforces the need for these projects to operate without unnecessary delays and restrictive workplace regulation.
114. It is important to note that major projects of national significance are not only prevalent in the resources and energy industry. Other examples of current major construction projects across Australia include the \$4.5 billion Snowy Hydro 2.0 project and the \$6.7 billion West Gate Tunnel project – both of which are expected to take longer than four years to build.
115. It is essential that the test to be applied in determining which major projects and associated works can access Project Life Agreements that the bar not be set so high that no projects can access the longer agreement duration.

### AMMA Recommendation 3

Eligibility for Project Life Agreements should be determined by a set minimum value and minimum expected duration for construction period, for example, where the project:

- is expected to take more than four years to build; and
- the estimated investment value is more than AU \$50 million, aligned to the Australian Government's Major Project Status recognition.

<sup>54</sup> Australian Government, Major Project Status [website](#)



### 4.3 Duration of Project Life Agreements

Discussion paper question 4: Should there need to be a maximum length to a greenfields enterprise agreement at all, and if so what should it be and why?

116. AMMA and its members are firmly of the view that simply extending the maximum nominal term for Project Life Agreements is not the appropriate approach to designing and implementing this important reform. The term of Project Life Agreements should be just that – for the life of the greenfields project.
117. AMMA proposes that a Project Life Agreement should set out in its own terms as to when the agreement will cease to operate. The FW Act could require that Project Life Agreements must include a clause which specifies when the agreement is no longer legally binding on the parties to the agreement, and thus the agreement is required to be terminated, should joint applications from all parties to the agreement not have applied for its extension or modification of those terms.
118. Similarly to the requirement for all enterprise agreements to contain consultation, flexibility and dispute resolution terms, the FW Act could require the operative clause to specify at what point in the life of the project the agreement would conclude – rather than the requirement to specify a nominal expiry date no longer than four years from commencement.
119. The clause may specify that the enterprise agreement will expire after a particular contract or commercial milestone has passed, following the commissioning of the project or once the operational workforce has been engaged. The term must be clear and objective, free from ambiguity and interference by any third parties' subjective interpretation. Further, given the propensity for unions to challenge agreement termination applications under the current system, such termination clauses must not be open to unilateral challenge by any party to the agreement once set.
120. The term of the agreement would be a permitted matter of which the parties to the agreement can negotiate to determine how long the Project Life Agreement will operate. As with all permitted matters in enterprise agreements which can be negotiated and agreed to between the parties, so too should the period of which the Project Life Agreement will operate.
121. Allowing the nominal life of an enterprise agreement to be negotiated would require the parties to reach an agreement from the outset on the wages and conditions for the life of the project. Not only will Project Life Agreements set the wages and conditions for the duration of project construction, it provides certainty to the parties as to when the work covered by agreement is complete.
122. In the interests of providing as much flexibility to parties negotiating a Project Life Agreement, AMMA believes that the option of setting a nominal expiry date should remain available if parties choose to go down that path. This option may provide an important circuit breaker in protracted bargaining, such as in the case where unions are sufficiently concerned by the ambiguous scope of a Project Life Agreement.

123. Hypothetical examples of how these options may work in practice follow:

- a) Contractor A and Union B agree on a termination clause for their new Project Life Agreement that would see the agreement no longer in-term once final hook-up and commissioning of the project is complete. The terms of the agreement include 2.5% pay increases each year until that commercial milestone is reached and the contractor is no longer required on the project.
- b) Contractor B and Union C agree on a nominal expiry date six years from when their Project Life Agreement receives approval. Contractor B's work on the project is expected to take only three years, therefore the agreement provides significant buffer should there be any work overrun.

124. In considering these scenarios it will be important for mechanisms to exist for Fair Work Commission determination in cases where bargaining representatives and employers cannot agree on the duration or termination 'triggers' for Project Life Agreements. This is where the existing notification period (which AMMA proposes halving from six months to three months), will play an important role.

125. Again, the substantive issue with specifying a maximum duration for enterprise agreements is not that the nominal expiry date passes, it is that at that date employees and unions have the right to take protected industrial action and further delay negotiating a replacement agreement. Once the nominal expiry date passes, employees and unions have all the existing options available to frustrate the completion of major project construction.

126. Parties to an agreement place significant efforts and resources into negotiating conditions which they believe benefit them. Where parties have agreed to conditions of an enterprise agreement, the application of those conditions should not be limited by any arbitrary timeframe which does not properly cover the duration and scope of the work to be completed.

127. AMMA appreciates there will be alternative views to having an unspecified duration for Project Life Agreements, with some stakeholders likely to instead propose a new specified maximum term beyond four years. However, AMMA's view is that where Project Life Agreements must require a specified maximum term, employers must have certainty that employees or their representatives cannot organise or take protected industrial action until the project construction is deemed complete.

128. If a specified maximum nominal term is to be set for Project Life Agreements, there must be a mechanism that provides employers security that employees cannot take protected industrial action before completion of the project. This could be done through a carve out provision in the FW Act which excludes employees and their representatives covered by a Project Life Agreement from organising and taking protected industrial action before the end of the construction phase.

#### **AMMA Recommendation 4**

Project Life Agreements should contain a clause which specifies when project construction is deemed complete and the agreement is no longer legally binding, and thus the agreement is automatically terminated, should joint applications from all parties to the agreement not have applied for its extension or modification of those terms.

## 4.4 Amending Project Life Agreements

Discussion paper question 8: Should there be a mechanism to extend, or to shorten, an existing greenfields enterprise agreement? If so, how might this work?

129. Of the barriers resources and energy employers face when looking to secure investment for major projects in Australia, a significant challenge cited is the inflexibility of the existing workplace system. The FW Act provides limited flexibility to allow businesses to adapt to change before the expiration of an enterprise agreement.
130. While it is appropriate that no party can unilaterally apply to vary an agreement once it is made, where an employer requires an extension or variation of the expiry terms (being either a nominal expiry date or commercial or contract milestone) for legitimate commercial reasons, there should be a mechanism that allows for them to seek agreement of all parties. Consider, for example:
- a) **Where a nominal expiry date is set as triggering expiry:** Contractor A has a Project Life Agreement in place for six years. In the fifth year of its contract, it becomes evident that seven years will be required to complete its specialist work on the project. With the existing agreement providing for favourable terms and above-trend annual pay increases, the employees agree to extend the nominal expiry date by an extra year.
  - b) **Where a commercial milestone is set as triggering expiry:** Subcontractor B has a Project Life Agreement in place that reflects its initial scope of work and has expiry terms related to the start of hook-up and commission. Midway through its contract, the EPC Manager (i.e. the head contractor) notifies Subcontractor B that it intends to extend its scope through to the completion of hook-up and commissioning, due to the impressive productivity and expertise of its employees. The employees are very happy with the existing terms and conditions and agree to vary the expiry terms of the agreement to reflect the extension of work required.
131. Both scenarios reflect a “win-win” for both the employer and their employees. The project operator may not agree to extend the contracting terms of both hypothetical companies if industrial certainty cannot be guaranteed. Even where employees would be happy to continue working under an expired agreement, such a scenario would not provide protection from potential industrial action to the client/s. It would similarly be in no parties’ interests to have to go through the complex bargaining process just to end up with a replacement agreement with the same employment terms and conditions that may only be in-term for a short period of time.
132. Requiring agreement of the employees would mean that any variations to the expiry terms of a Project Life Agreement would only apply to scenarios of mutual benefit. Another example may be where an opportunity arises partway through construction of a major resources project to expand the initial capacity of the project, thus requiring more capital investment, a longer construction schedule and extensions to any existing Project Life Agreements.

### AMMA Recommendation 5

A mechanism should exist allowing parties to a Project Life Agreement to agree upon and apply for extensions or slight variations to the expiry terms.

## 4.5 Setting the terms and conditions for project life agreements

Discussion paper question 7: Should longer project agreements be required to allow some form of escalation of wage rates over the period of the agreement?

### 4.5.1 Wage rates and increases

133. The most appropriate safety net for minimum standards of pay and conditions is one that both protects the most vulnerable in the labour market while enabling high-paying industries to flourish and compete. While Australia's workplace relations framework includes modern awards, which provide a safety net for terms and conditions in a particular industry, the application of the better off overall test (BOOT) operates to ensure workers do not receive less than the award. All enterprise agreements, including greenfields agreements, must pass this test.
134. The terms and conditions of enterprise agreements set the minimum that employers must pay employees for the work covered by the enterprise agreement. The Productivity Commission reported there is little risk that longer agreement periods could lead to a gulf between award and agreement conditions as enterprise agreements that are close to award conditions are not the norm<sup>55</sup>. This is particularly the case for resources and energy industry employees who receive pay and conditions well above and typically multiple times the relevant awards.
135. The Productivity Commission also noted the absence of a limit on agreement life may allow parties to exploit short term disparities in bargaining power to "lock in" favourable terms for longer periods<sup>56</sup>. This exploitation is evident of employees and bargaining representatives leveraging the threat of industrial action and prolonging negotiations to influence the wage and conditions for greenfields projects<sup>57</sup>. It is business that bears the costs of the disparities in bargaining for a greenfields agreement through cost blowouts and scheduling delays on critical infrastructure projects.
136. Employers pay a premium to provide investors industrial certainty by agreeing to excessive union demands for wages and conditions during the bargaining process. The wages and conditions set by project agreements typically start from a point well above market rates. This is in part due to the fact that businesses will pay higher rates to attract labour to these often remote and specialised projects. The nature of construction work often requires highly skilled and sought after workers who are more than compensated for their skills and expertise.
137. Employers are not restricted by the rates and conditions set in an agreement and can always pay more than the minimum set in the agreement if circumstances in the labour market require it. The wage rates set by enterprise agreements are not the ceiling. The circumstances which would warrant employers paying above the agreed rates may involve some form of productivity offset during project construction.
138. Employers can also continue to provide for wage increases past the nominal expiry date of an enterprise agreement where applicable and necessary. The ability to continue to pay wage increases beyond the nominal expiry date is evident by a recently proposed Construction,

<sup>55</sup> Productivity Commission (2015) [Review of the Workplace Relations Framework](#), Final Report

<sup>56</sup> Productivity Commission (2015) [Review of the Workplace Relations Framework](#), Final Report

<sup>57</sup> KPMG (2015) [Workplace Relations and the Competitiveness of the Australian Resources Sector](#)

Forestry, Maritime, Mining and Energy Union (CFMMEU) pattern agreement in the New South Wales' construction industry:

*The militant construction union is pushing for 5 per cent pay increases a year every year indefinitely, in an unprecedented new agreement that employers say is the most restrictive they have ever seen.*

*The Construction, Forestry, Maritime, Mining and Energy Union's draft NSW pattern agreement, obtained by The Australian Financial Review, is the first major agreement pushed by the union following Labor's shock loss at the federal election.*

*Under the deal, workers would receive two 2.5 per cent pay rises every six months for the next four years, or more than three times the current annual inflation rate of 1.6 per cent.*

*The 2019-2022 agreement also includes an unheard-of provision that locks-in the 5 per cent pay rises for as long as the agreement is not terminated or replaced.<sup>58</sup>*

139. There is no obvious requirement for an employer to prescribe or specify that wage rates must increase or alter during the life of the agreement. In doing so, there is a risk that employers lose the capacity to adapt to adverse economic shocks where they have prescribed wages and conditions in an agreement which would operate over an extended period.
140. Under the current framework, the better off overall test is the test that applies to determine that the agreed wage and conditions set by an enterprise agreement are not less than those under the award. Employers who agree to an extended agreement life continue to conduct the BOOT over the life of the agreement as an overall assessment that the wages and conditions do not fall below the award rates and conditions.
141. AMMA and its members submit that undermining wages is not the goal of employers in advocating improved processes for setting wages and conditions for new projects. It is to promote both balanced and beneficial outcomes for employers and employees which flow-on to the broader economy.

#### **AMMA Recommendation 6**

Project Life Agreements should allow for parties to negotiate and agree upon annual increases to pay rates as per the existing FW Act agreement making process. Project Life Agreements should not be subject to any new or additional statutory requirements in relation to wage increases.

#### **4.5.2 Permitted matters**

142. Despite the overwhelming benefits of allowing Project Life Agreements to run for the life of major project construction, there should be no concession for expanding the already broad range of permitted matters in enterprise agreements.

<sup>58</sup> Australian Financial Review, '[CFMMEU seeks to lock in pay rises forever](#),' published 15 August 2019

143. There are already very few limitations on permitted agreement content with unions often pushing for content that produces no measurable benefit or enhanced productivity for the business.
144. Unions often push for content which infringes on operations and has little relevance to the employment relationship between the parties covered by the agreement. Restrictive content often seeks to hamstring employers' prerogative to manage the critical construction phase of major infrastructure projects.
145. With Project Life Agreements being set to operate for extended periods, some up to seven or eight years long, it is even more critical that employees and their representatives are only allowed to bargain on wages and conditions.
146. Some of the common union bargaining demands seek to impose restrictions on the manner in which employers utilise labour and engage casuals, contractors, labour hire or skilled migrants on major projects. Unions also seek to negotiate the rates that are payable to contractors and require that an employer must reach an agreement (rather than consult) with unions before it is entitled to introduce changes to working hours and rosters.
147. While some have argued employers should push back harder against excessive union claims, no matter how outrageous union claims may be, the timelines for these projects are such that employers are exposed to massive costs arising from any delays in finalising an agreement. There must be a mechanism that allows employers to avoid having to succumb to union demands that are outside already generous permitted matters.
148. This could involve amendments to the FW Act to provide a check on the excessive demands which include the capacity for employers to seek the review of the proposed agreement by the FWC against a set of criteria including the relevant award, National Employment Standards and the BOOT. Subject to the agreement meeting these criteria the FWC should then have the power to approve the agreement for the duration of the project.
149. This safety net review should consist of giving employers the option of registering a Project Life Agreement without the need to obtain consent from unions. As part of the process, the FWC would have the power to determine that such demands by unions are not in the public interest and issue a determination if agreement is not reached between the parties.
150. It would be a huge step backwards for the resources and energy industry to allow trade unions the power to bargain over how employers arrange labour. The significant contribution major project development has on the Australian economy supports employers and employees to once again bargain over matters that will directly improve productivity and deliver wage increases at the business level.

#### **AMMA Recommendation 7**

Project Life Agreements should not contain agreement content outside of the FW Act's current permitted matters. Allowing enterprise agreements to operate for the full length of project construction should not be a concession to broaden permitted agreement content.

## 4.6 Approval of Project Life Agreements

151. The imbalance created by the FW Act in its approach to regulating enterprise bargaining has imposed significant and undue burden and risk exposure on resources and energy employers. Those burdens are imposed on businesses not only while making an agreement but again when seeking its approval by the FWC.
152. To alleviate some of the risk exposure to these major projects, employers must maintain the capacity to notify a negotiation period as a mechanism to prevent further delaying the commencement of project construction. As mentioned earlier in this submission, it is AMMA's view that the notified negotiation period should be available for a period of three months rather than six months, consistent with the Productivity Commission's recommendation<sup>59</sup>.
153. AMMA members have long raised concerns about the amount of time taken to secure industrial arrangements for greenfields projects. This is not just due to the resources taken to engage in bargaining, but also the realities of timeliness between the requirement to reach an agreement, engage a workforce and commence work on some projects will be less than six months. The ultimate outcome, including final costs liabilities of the enterprise, will not be known until the agreement has been assessed by the FWC.
154. Under the FWC's timeliness benchmarks, it aims to finalise all agreement approval applications within 16 weeks in 2019-20 financial year<sup>60</sup>. It notes that the timeliness benchmarks are sustainable following significant improvements in the timeframes for an agreement application to be dealt in the six months to August 2019<sup>61</sup>. The most recent FWC Annual Report reveals that greenfields agreements which require undertakings were approved by the FWC within 48 days in 2018-19<sup>62</sup>.
155. AMMA submits there should be a priority approval system for Project Life Agreements to prevent further costs and delays to the construction of nationally significant major projects. Where Project Life Agreements have been agreed between the parties and lodged with the FWC for approval, these agreements must be urgently approved to ensure critical infrastructure projects can progress. AMMA proposes that such a priority approvals system should aim to have all Project Life Agreements processed by the Fair Work Commission and approved within **21 days of lodgement** if all statutory tests are met.
156. AMMA and its members are also supportive of the Productivity Commission's recommendation 21.1, which recommends providing a suite of options where parties are not able to reach agreement after three months of negotiating. Importantly, the recommendation included the option to request the FWC undertake a "last offer" arbitration by choosing between the last offers made by the employer and the union.
157. AMMA's view is that after three months of negotiations for a greenfields agreement where parties have not reached an agreement, an application can be made to the FWC for approval of the enterprise agreement based on the final offers made by each party. The FWC will consider the last offers put forward by each of the parties during negotiations and issue its decision on the approval of the Project Life Agreement.

<sup>59</sup> Productivity Commission (2015) [Review of the Workplace Relations Framework](#), Final Report, recommendation 21.1

<sup>60</sup> Fair Work Commission, '[Enterprise agreement updated](#)' published 16 August 2019

<sup>61</sup> Fair Work Commission, '[Enterprise agreement updated](#)' published 16 August 2019

<sup>62</sup> Fair Work Commission, Annual Report 2018-19 published 22 October 2019

158. While AMMA and its members support the need for some sort of decision-making power where negotiations have reached an impasse, this should under no circumstances extend to arbitration of an outcome. The FWC must only consider the final positions put forward by each of the parties to determine the final outcome for agreement approval.
159. AMMA and its members are reluctant to have third parties, particular those with little knowledge and expertise on the commercial sensitivities and decision making of major project construction, determine the wages and conditions for critical resources and energy projects. It is precisely the third-party involvement that continues to hinder the flexibility and competitiveness of resources and energy sector workplaces.
160. The FWC must still be satisfied that the agreement meets the requirements in ss 186 and 187 of the FW Act (excluding the current nominal expiry date of no more than four years) to approve the agreement. The existing tests (the National Employment Standard safety net, the better off overall test and the public interest test) are more than adequate safeguards of the minimum standard of pay and conditions without the need for an additional or further test.

#### **AMMA Recommendation 8**

Project Life Agreements should have access to a priority approval system through the Fair Work Commission's agreement approval process, with a benchmark of approving all Project Life Agreements within 21 days of lodgment if all statutory tests are met.

#### **AMMA Recommendation 9**

If parties to Project Life Agreements have not reached a negotiated outcome after three months, an employer should request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union.



## 5. Conclusion

161. The Morrison Government has made no secret that any reforms it may pursue to Australia's industrial relations framework must be practical, sensible and evidence based. Given the benefits that flow to the Australian economy from investment in, and the timely completion of major resources and energy projects, the pursuit of Project Life Agreements clearly meets this criteria and is a necessary early priority for the 46<sup>th</sup> term of Parliament.

162. Should the government pursue this important reform, AMMA will play a strong role in advocating for bipartisan support. It should be noted that the issues concerning greenfields agreement making under the current system have been widely recognised since the commencement of the FW Act, including under Labor Government reviews. Notably, the ALP in its 2012 review into the FW Act noted:

*“... based on the evidence we have received in submissions and consultations, and a review of the data associated with greenfields agreements ... we consider that there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia.”*<sup>63</sup>

163. Australia must heed lessons from the last investment phase to ensure Australia reaps the benefits of a strong resources and energy industry as one of the major contributors to our economic growth and wellbeing. This includes establishing a workplace relations system that is flexible and fit for purpose which provides employers, workers and investors certainty in order to secure the next wave of investment opportunities.

164. The outlook for Australia's investment opportunity is positive however the nation risks losing these opportunities to other countries if it cannot facilitate workplace regulation that supports productive and harmonious workplaces. Investors will look to send their capital elsewhere despite the attractiveness of Australia's critical resources and energy reserves.

*“A workplace relations system that drives investment to other countries is in nobody's interest...” – former Australian Labor Party Minister for Resources and Energy Hon Martin Ferguson, AM*<sup>64</sup>

165. **AMMA firmly supports amendments to the industrial relations framework which allows enterprise agreements to run for the life of major project construction to ensure Australia remains an attractive place to do business, invest and employ people.**

166. AMMA would be pleased to elaborate, clarify or provide supporting information or evidence related to any of the contents of this submission.

<sup>63</sup> Fair Work Act Review (2012), Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation, 2 August, p. 171 (available at [www.employment.gov.au/fair-work-act-review](http://www.employment.gov.au/fair-work-act-review)).

<sup>64</sup> Hon Martin Ferguson AM, (2014), Competitiveness of the Australian gas industry, Speech to CEDA (28/02/2014).