Australian Government
Attorney-General's Department

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Regulatory Impact Statement: Greenfields Agreements Reform

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The problem

What is a greenfields agreement?

A greenfields agreement is 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(s) have not yet employed any of the employees who will be necessary to conduct the enterprise and will be covered by the agreement.[1]

Typically, greenfields agreements are made between the relevant employer or employers and the relevant union or unions. When agreement is reached, in the majority of circumstances, the relevant union(s) will sign the agreement.

In approving the agreement, the Fair Work Commission (FWC) must be satisifed that the agreement relates to a genuine new enterprise and that the unions to be covered by the agreement (taken as a whole) are entitled to represent the industrial interests of the majority of employees who will be covered by the agreement. The FWC also applies the Better off Overall Test and other tests for single enterprise agreements, except the requirement for genuine agreement.[2] Relevant unions who were bargaining representatives for the agreement have standing in the FWC to oppose the agreement if they wish.

However, a greenfields agreement can be made without union agreement. At the end of a six-month notified negotiation period, and if the employer(s) gave each of the unions that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement, the employer(s) can apply to the FWC for approval of the agreement without the union(s) having signed the agreement.[3] To date, no agreements have been approved under these provisions.

Greenfields agreements are used extensively on major projects in industries such as construction, mining, infrastructure, and oil and gas production. The current maximum nominal expiry date of a greenfields agreement is four years from the day the FWC approves the agreement, consistent with arrangements for all enterprise agreements.

The current four year limit means agreements can expire mid-construction

Following the nominal expiry of a greenfields agreement, and if bargaining has commenced for a replacement enterprise agreement, employees can access protected industrial action subject to certain requirements being met (i.e. legal industrial action as permitted under the *Fair Work Act 2009* (FW Act), that may be taken by employees in support of their claims under a proposed enterprise agreement).

The current four year limitation on the term of greenfields agreements means that agreements can nominally expire part way through the construction of a major project, which often lasts longer than four years. According to Deloitte Access Economics' *Investment Monitor* (June 2020), 27 per cent of projects

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[1] See s. 172(2) and s. 12 of the *Fair Work Act 2009*.

[2] See s.188 of the Fair Work Act 2009 – which applies only when bargaining for an eneterprise agreement occurs with employees who will be covered by the proposed agreement.

[3] See s.182(4) of the *Fair Work Act 2009* for provisions relating to greenfields agreement approvals using a notified negotiation period.

categorised as 'under construction' and 'committed' are projected to have construction lives of five or more years.[4]

The risk of agreements nominally expiring during the construction of a major project introduces uncertainty for investors by potentially exposing parties to unexpected delays caused by protracted negotiations for a new enterprise agreement and potential exposure to protected industrial action. Overall, the risk of exposure to renegotiating wages and other conditions during the critical build of a project, introduces cost and timing uncertainty, which can affect the project's ability to attract investment.

While not specific to industrial relations, a 2019 survey of infrastructure market participants indicates concern about the level of regulatory burden in Australia. Specifically, 79 per cent of investors said North America provides compelling investment opportunities, whereas only 49 per cent said the same about Australia, and 83 per cent agreed uncertainty in Australia's policy and regulatory settings is limiting their willingness to invest.[5] Similarly, in submissions responding to a 2019 discussion paper[6] on longer greenfields agreements, employer groups emphasised the strong global competition for major project investment and their concerns that publicised cases of industrial disputes diminish Australia's reputation as an investment destination for new major projects.

The need for government action

Opportunities for improved productivity

In addition to increasing investment and facilitating job creation, changes to industrial relations policy settings on major projects will also encourage improvements in productivity. Increased foreign direct investment (FDI) in high productivity sectors can support wages growth and generally improve the technical capability of a sector. The Productivity Commission has observed that FDI:

> benefits Australians … through 'spillover' benefits that ultimately improve living standards. This is particularly the case with commercial direct investment, which comes with greater engagement from multinationals, including use of their intellectual property, international logistics networks and management expertise. The technology, innovation and technical know-how of these multinationals tends to leak into the rest of the economy as a spillover effect, leading to improved productivity for local firms through the direct transfer of advanced technology, enhanced competitive pressures on domestic firms, and greater human capital development. Although these spillover benefits are hard to accurately quantify, decades of economic research suggest they are significant.[7]

Hence, policy settings aimed at attracting investment will in turn encourage higher productivity and higher living standards. The Productivity Commission has also noted the high level of inward FDI in the mining sector. For example, 'the largest stock of inward FDI in 2018 was in mining ($365 billion, or 38

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[4] Deloitte Access Economics, Investment Monitor, June 2020 [NOTE: data on construction length is not publically available]
[5] Australian Infrastructure Investment Report 2019, pp.3-4.
[6] This discussion paper is accessible at: https://www.ag.gov.au/industrial-relations/consultations/attracting-major-infrastructure-resources-and-energy-projects-increase-employment-project-life-greenfields-agreements.
[7] Productivity Commission 2020, *Foreign Investment in Australia*, Commission Research Paper, Canberra, p. 7.

per cent of the economy-wide total)'.[8] However, while mining and quarrying increased its share of total FDI stocks over the past decade, 'FDI inflows to the mining and quarrying sector have recently slowed, from a peak inflow of $55 billion in 2014 to only $17 billion in 2018.'[9] While this is likely influenced by the completion of construction associated with the mining boom of the early 2000s, the Government intends to create the optimal regulatory settings to support the next wave of major resource project investment, which is particularly critical in Australia's recovery from the economic impacts of COVID-19.

Issues with greenfields agreement making

Employers and employer groups have over many years and in various forums raised concerns that the construction of new large scale projects often lasts longer than the four-year maximum nominal expiry date for greenfields agreements.

The Productivity Commission's Inquiry Report into the Workplace Relations Framework (2015) noted the significant risks associated with greenfields agreements that have a nominal expiry date that occurs earlier than the expected completion date of the project. It stated that, 'where an employer can demonstrate that a project will take longer than five years to complete the construction, there are clear grounds for the FWC to approve greenfields agreements with an expiry date that matches the construction of a major project. This proposal was supported by numerous employer participants.'[10]

In consultation undertaken in 2019 via the public release of a discussion paper[11] on longer greenfields agreements, submissions from employer groups argued that Australia would be a more attractive place to invest if greenfields agreements for major projects had a nominal duration that covered the length of the construction of a project, so that certainty of labour arrangements – and ultimately of the length and cost of the project overall – could be guaranteed.

Benefits from major projects

A key part of Australia's recovery from the economic impact of COVID-19 will entail attracting investment in major projects, which create thousands of jobs, and make large contributions to GDP, as well as considerable contributions through state and federal taxation and royalties.

In September 2020, mining made up 247,300 jobs,[12] many of those located in our regional and rural communities, and accounted for 8.9 per cent of Australia's GDP over the year to June 2020.[13] Over the 2019-2020 financial year, the resources and energy sector accounted for 59 per cent of Australia's good and services exports and 74 per cent of Australia's merchandise exports.[14] Additionally, over 2017-18,

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[8] Productivity Commission 2020, *Foreign Investment in Australia*, Commission Research Paper, Canberra, p. 34.
[9] Productivity Commission 2020, *Foreign Investment in Australia*, Commission Research Paper, Canberra, p. 34.
[10] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 690.
[11] Ibid 4.
[12] ABS, 6291.0.55.003 – Labour Force, Australia, Detailed, Quarterly, Sep 2020 – Seasonally Adjusted.
[13] ABS, 5206.0 – Australian National Accounts: National Income, Expenditure and Product, Jun 2020 – Seasonally Adjusted.
[14] Resources and Energy Quarterly, Department of Industry, Science, Energy and Resources, September 2020

the minerals sector contributed 'about $19 billion in company taxes and $12 billion in royalties', while the 'oil and gas sector contributed about $5 billion in taxes, royalties and other fees in 2016-17'.[15]

There are around 1.2 million people employed in construction, which is 9.2 per cent of all people employed in Australia.[16] The Gross Value Add of the construction industry is $130.3 billion per year and the industry is the fourth largest contributor to GDP at 6.9 per cent.[17]

Major projects in these sectors inject money into local economies, boost economic productivity and create thousands of high quality jobs. For example, the WestConnex project is expected to deliver around 16,000 jobs during construction and deliver more than $20 billion in economic benefits to NSW.[18]

In the resources sector, Chevron Australia estimates that its Wheatstone natural gas project in Western Australia will create 30,000 direct and indirect jobs over its 2009-2040 life cycle at a rate of 1,000 jobs per year.[19] The project will also add $180 billion to GDP over the same period.[20] Similarly, Woodside's Burrup Hub natural gas project is estimated to support the creation of an average of 4,000 full-time equivalent jobs per annum over a 40-year timeframe, while boosting GDP by $414 billion between now and 2063.[21] However, the future pipeline of major projects is at risk due to the global economic downturn and uncertainty created by the COVID-19 pandemic.

Attracting investment

In a competitive global market for capital, Australia must have appropriate regulatory settings to attract investment and create jobs. Industrial relations arrangements are an important factor in investment decisions. At a global level, Australia's industrial relations policy arrangements are more complex and rank in the bottom half of countries. For example, the World Economic Forum's Global Competitiveness Report 2019 ranked Australia 57th in labour market flexibility, 95th in flexibility of wage determination and 53rd in cooperation between employers and employees.[22]

Most specific investment decisions are made at board level and are commercial in confidence, which restricts the department's ability to provide forensic analysis of the drivers behind individual scenarios. However, in submissions to the 2019 greenfields agreements discussion paper, employers and employer groups emphasised that uncertainty around costs, such as labour costs, and timing of major projects can cause significant damage to Australia's reputation and attractiveness as an investment destination.

The Australian Chamber of Commerce and Industry, for example wrote in its submission, "[a]ny agreement with a life less than the expected duration of the construction of a particular project exposes

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[15] Draft Report into Resource Sector Regulation, Productivity Commission, March 2020.
[16] ABS, 6291.0.55.003 – Labour Force, Australia, Detailed, Quarterly, Sep 2020 – Seasonally Adjusted.
[17] ABS, 5206.0 – Australian National Accounts: National Income, Expenditure and Product, Jun 2020 – Seasonally Adjusted.
[18] https://investment.infrastructure.gov.au/projects/ProjectDetails.aspx?Project_id=048726-12NSW-NP.
[19] Economic forecasts are based on the period 2009 – 2040. Source: ACIL Allen Consulting independent research report October 2015 / https://australia.chevron.com/our-businesses/wheatstone-project.
[20] Economic forecasts are based on the period 2009 – 2040. Source: ACIL Allen Consulting independent research report October 2015 / https://australia.chevron.com/our-businesses/wheatstone-project.
[21] Economic forecasts are based on the period 2019-2063. Source: ACIL Allen Consulting independent research report June 2019 / https://files.woodside/docs/default-source/news-and-media-documents/speeches/coo-speech-at-amcham-perth.pdf.
[22] Schwab, K. (2019) *The Global Competitiveness Report 2019*, World Economic Forum

the business to substantial risks, and risks the negative implications for investment, job creation and the community".[23]

Similarly, AMMA (Australian Resources and Energy Group) noted in its submission that it "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." [24]

Policy Options

Options for consideration

Option one

Option one would introduce a mechanism in the FW Act to allow extended term greenfields agreements on major projects. This would allow parties to make a greenfields agreement with a nominal duration longer than the current maximum of four years, subject to certain criteria being met and with safeguards for employees to ensure their interests are protected.

If the FWC is satisfied that the work to be performed under a greenfields agreement relates only to the construction of a major project, parties to the agreement would be able to agree a maximum nominal expiry date of up to eight years from the commencement of the agreement. Eight years was chosen as the maximum nominal expiry date as it provides greater flexibility for parties to cover the full length of construction of major projects without unduly limiting an individual's right to bargain.

A major project would be defined as (a) any project where the total expenditure of a capital nature that is being incurred, or is reasonably likely to be incurred, in carrying out the project is at least $500 million, or (b) any project declared by the relevant Minister to be a major project.

The Minister could only declare a project to be a major project if satisfied that the total expenditure of a capital nature that has been incurred, or is reasonably likely to be incurred, in carrying out the project is at least $250 million and less than $500 million. In deciding whether to make a major project declaration, the Minister would be required to take into account the following matters:

- the national significance (if any) of the project
- the regional significance (if any) of the project
- the contribution the project is expected to make to job creation, and
- any other matter considered relevant.

Where an agreement with a nominal life of longer than four years is made, there will be a requirement that the agreement includes annual increases to the base rate of pay for each employee over the nominal life of the agreement.

[23] Australian Chamber of Commerce and Industry "Submission to Greenfields Discussion Paper" 2019
[24] AMMA (Australian Resources and Energy Group) "Submission to Greenfields Discussion Paper" 2019

When approving an extended term greenfields agreement, the FWC would still need to be satisfied that the agreement meets all existing approval tests that apply to greenfields agreements (e.g. the better off overall test).

Option two

Option two would maintain the status quo. This would mean that all greenfields agreements, including greenfields agreements on major projects, would continue to have a maximum nominal expiry date of four years. This option fails to mitigate the risk of disruptive and potentially costly industrial action and protracted bargaining during the construction of major projects, which will be key to Australia's post-COVID-19 recovery. Businesses will also continue to incur administrative costs from having to re-negotiate an agreement that has expired and support the approval process through the FWC.

As noted above, the risk of mid-project disruptions is one factor that influences decisions about whether to invest in major projects in Australia.

Option three

Option three is a non-regulatory option that would involve providing additional resources to enhance the FWC's major project national practice area. The FWC's eight national practice areas cover specialist case types and are overseen by a national practice leader. The practice leader has responsibility for allocating cases that fall within their practice area. For the purposes of the major projects national practice area, a major project is a project with a value of at least $1 billion. However, projects of particular regional significance may be allocated to the practice area despite falling below the $1 billion threshold.

Additional funding could be allocated to the FWC to enhance the services it provides to projects in the major projects national practice area, with the following features:

- A dedicated outreach program to assist employers and employee organisations on major projects in negotiating greenfields agreements and enterprise agreements.
- Increased FWC support to resolve disputes between parties during agreement renegotiations.
- A specific target for the approval time for greenfields agreements and replacement enterprise agreements on major projects, for example, of 21 days.

To enable this, the FWC would need to adjust the criteria it currently uses to determine major projects that fall into this major project national practice area. Given these criteria are not legislatively prescribed, this option could be achieved without regulatory change.

Net benefits of policy options

Option one

This option will increase the attractiveness of Australia as a destination for major project investment, particularly for major resources and construction projects. Encouraging increased investment in major projects in these sectors makes it likely that more will go ahead, with the benefits flowing to the communities and governments that benefit from such projects.

For the 191 projects in the database for the September 2020 release of Deloitte Access Economics' *Investment Monitor* with a cost of at least $500 million, and listed as 'committed', 'under consideration' and 'possible', the total value of projects is $437.866 billion. For the 133 projects with a cost of at least

$250 million and less than $500 million, and listed as 'committed', 'under consideration' and 'possible', the total value of projects is $46.147 billion. This does not include those projects for which a predicted cost is not currently available.[25]

This pipeline represents significant potential investment in Australia's economy, with large employment creation potential. The reform is aimed at ensuring those projects listed as 'under consideration' and 'possible' ultimately receive financing and become large job creators across Australia's cities and regions. Expert evidence obtained by the department during this year's Industrial Relations Reform Working Group process suggests that potential Australian projects are competing for finance with comparable projects in other jurisdictions, and that concerns about Australia's industrial relations settings could tip the balance in favour of investments outside Australia when companies are making investment decisions.[26] The department has considered the potential for comparisons of the proposed greenfields agreement arrangements with comparable international jurisdictions. We note, however, Australia's industrial relations system is highly unique comprising a multi-tier system of awards and enterprise-based bargaining, underpinned by a set of 10 national employment standards. In particular, no other OECD country contains an award system that is used as the comparator in the assessment and approval of any form of collective agreement. For this reason, a comparison of greenfields like arrangements across comparable international jurisdictions is not possible.

In addition to the benefits associated with increased investment, and therefore increased economic activity, employment growth and productivity, the reform would also likely create savings for businesses that operate under greenfields agreements on major projects. This is because major project employers will be able to enjoy the benefits of having a greenfields agreement without needing to bargain multiple times.

Hence, the compliance and administrative costs associated with the bargaining process will be lessened. The reform will ensure that staff otherwise involved in protracted bargaining can be productively engaged elsewhere in the organisation. Other bargaining costs will also be reduced, such as the cost of hiring industrial relations practitioners or more generally, costs associated with lost production while bargaining is on foot. Potential administrative cost savings associated with staff wages are calculated below.

<u>Administrative cost savings</u>

The administrative costs identified by the Attorney-General's Department are based on a calculation of the average length of time it takes for a nominally expired greenfields agreement to be replaced by an enterprise agreement. This was calculated by extracting relevant data from a sample of Form F17 declarations completed by employers at the time of lodgement. The bargaining period is calculated as the difference between the notification time (the time the employer initiates, agrees to or is compelled to bargain) and the date the replacement agreement was voted up.

[25] Meaning the potential total value of the pipeline of projects is likely to be higher.

[26] Evidence from experts as part of the Industrial Relations Working Group process, provided on a confidential basis.

According to the WAD, there were 404 approved enterprise agreements that replaced greenfields agreements between 2011 and 2019. Of these 404 agreements, a total of 215 had recorded notification dates (and thus the bargaining period could be calculated).

For these 215 enterprise agreements, the average bargaining period was 146 days (a little under five months). Broken down by the size of the agreement (using the number of employees), the average bargaining period was:

- 236 days – 100+ employees
- 155 days – 20 to 99 employees
- 105 days – less than 20 employees

While it took about five months on average to negotiate the replacement agreements, it took a further two months on average for FWC approval.[27] Thus, it took a total of 210 days, or around 7 months, to negotiate and have approved a replacement agreement.

It is expected that the proposed reform, by extending the maximum nominal agreement duration to eight years, would allow an employer to avoid (at least) one round of bargaining for a replacement agreement, saving costs in resources, particularly labour, devoted to bargaining for each agreement. Based on this data, we can calculate the administrative cost savings based on one business avoiding the replacement of one nominally expired greenfields agreement.

Using the methodology developed in the RIS for the Fair Work Amendment Bill 2014[28] as the basis for these calculations, the department has estimated that each staff member on a bargaining team would spend approximately 23 hours per week on the negotiations. Twenty-three hours a week is commensurate to about 60 per cent of an employee's ordinary weekly working hours and is a reasonable assumption based on the labour intensive nature of enterprise bargaining. In effect we are assuming based on observations of the bargaining process that a relevant participant is likely to spend at least 50 percent (and more like 60 percent of their time) attending to the bargaining process, with the remainder of their time spent on attending to usual work duties. This estimated figure takes into account not just the direct negotiations, but also the planning, preparation and costing required to negotiate and conclude a replacement agreement. Furthermore, organisations making greenfields agreements tend to be large, often multinational or joint venture corporations. In these circumstances, while this has not been specifically costed, it is likely that considerable time and resources would be devoted to additional tasks such as meeting with senior executives, liaising with representatives of parent companies and seeking finance and approval from board members.

Table 1 below sets out the average weekly earnings before tax for a number of roles expected to be involved in negotiations for major mining and construction projects. The department has used ABS ANZSCO 4-digit Classifications and corresponding before tax earnings drawn from the latest available May 2018 ABS Employee Earnings and Hours publication (unpublished Tablebuilder data). Weekly earnings have been calculated at 37.5 hours per working week (5 days).

[27] The FWC approval time is based on the difference between the date the replacement agreement was voted up and the approval date by the FWC. The business is required to lodge the enterprise agreement no later than 14 days after it was successfully voted up.
[28] Fair Work Amendment Bill 2014, Explanatory Memorandum.

Table 1 – Employee earnings

Classifications	Hourly full-time ordinary cash earnings**
1323 - Human resource managers	$80.67 ($141.17 incl. non-wage labour costs)
2231 - Human resource professionals	$47.02 ($82.29 incl. non-wage labour costs)
2336 - Mining engineers	$79.94 ($139.89 incl. non-wage labour costs)
1331 - Construction managers	$62.47 ($109.32 incl. non-wage related labour costs)

* Source: ABS Employee Earnings and Hours, May 2018, unpublished Tablebuilder data

** Hourly earnings for each occupation were calculated by dividing average weekly earnings by average weekly hours worked.

Savings from avoiding one bargaining round for a replacement agreement in mining

The department has assumed that for the replacement of one mining greenfields agreement, three employees (one Human Resource Manager, one Human Resource Professional and one Mining Engineer) would each undertake approximately 23 hours per week of work relating to the negotiation and development of a replacement agreement. The calculation of savings in wages is in Table 2 below. It shows that the total likely savings in wages from avoiding one round of bargaining for one replacement agreement is $244,024.

Table 2 – Savings from avoiding replacement of one mining greenfields agreement, 146 days bargaining period (29.2 working weeks), 23 hours per week per employee

Employee	Calculation	Savings
1 x Human Resource Manager	$141.17 x 23 x 29.2	$94,809 (a)
1 x Human Resource Professional	$82.29 x 23 x 29.2	$55,265 (b)
1 x Mining Engineer	$139.89 x 23 x 29.2	$93,950 (c)
Total (3 employees above)	(a) + (b) + (c)	**$244,024**

Savings from avoiding one bargaining round for a replacement agreement in construction/infrastructure

The department has assumed that for the replacement of one construction/infrastructure greenfields agreement, three employees (one Human Resource Manager, one Human Resource Professional and one Construction Manager) would each undertake approximately 23 hours per week of work relating to the negotiation and development of a replacement agreement. The calculation of savings in wages is in Table 3 below. It shows that the total likely savings in wages from avoiding one round of bargaining for one replacement agreement is $223,493.

Table 3 – Savings from avoiding replacement of one construction/infrastructure greenfields agreement, 146 days bargaining period (29.2 working weeks), 23 hours per week per employee

Employee	Calculation	Savings
1 x Human Resource Manager	$141.17 x 23 x 29.2	$94,809 (a)
1 x Human Resource Professional	$82.29 x 23 x 29.2	$55,265 (b)
1 x Construction Manager	$109.32 x 23 x 29.2	$73,419 (c)
Total (3 employees above)	(a) + (b) + (c)	**$223,493**

Savings from avoiding one bargaining round for a replacement agreement in mining, 100+ employees

As outlined above, according to the WAD, the average bargaining period for a replacement agreement for an employer with 100+ employees is 236 days (from a sample of 40 replacement agreements between 2011 and 2019). Using the same classifications as outlined in Table 1, Table 4 below shows that for these larger employers in mining the total likely savings in wages from avoiding one round of bargaining for one replacement agreement is $394,452.

Table 4 – Savings from avoiding replacement of one mining greenfields agreement with 100+ employees, 236 days bargaining period (47.2 working weeks), 23 hours per week per employee

Employee	Calculation	Savings
1 x Human Resource Manager	$141.17 x 23 x 47.2	$153,254 (a)
1 x Human Resource Professional	$82.29 x 23 x 47.2	$89,334 (b)
1 x Mining Engineer	$139.89 x 23 x 47.2	$151,864 (c)
Total (3 employees above)	(a) + (b) + (c)	**$394,452**

<u>Savings from avoiding one bargaining round for a replacement agreement in construction/infrastructure, 100+ employees</u>

Using the average bargaining period for a replacement agreement for an employer with 100+ employees, Table 5 below shows that for these larger employers in construction/infrastructure the total likely savings in wages from avoiding one round of bargaining for one replacement agreement is $316,265.

Table 5 – Savings from avoiding replacement of one construction/infrastructure greenfields agreement with 100+ employees, 236 days bargaining period (47.2 working weeks), 23 hours per week per employee

Employee	Calculation	Savings
1 x Human Resource Manager	$141.17 x 23 x 47.2	$153,254 (a)
1 x Human Resource Professional	$82.29 x 23 x 47.2	$89,334 (b)
1 x Construction Manager	$109.32 x 23 x 47.2	$118,677 (c)
Total (3 employees above)	(a) + (b) + (c)	**$316,265**

The likely savings in wages from avoiding one round of bargaining have been calculated for a *single* replacement agreement. Savings are likely to be larger on major projects where there is a high usage of greenfields agreements. Some of these major projects can be covered by dozens or even hundreds of greenfields agreements. If even a small number of these are replaced, then the savings across a single major project will be considerably larger than the calculations provided above.

The department has considered the extent to which robust data can be provided that might show for example, the average number of greenfields agreements by sector/project value which may provide more practical context to the given regulatory cost compliance analysis.

Due to the way agreement and project data are collected, however, it is not possible, with any level of consistency, to accurately identify the projects to which particular agreements apply, and therefore it is highly difficult to ascertain any meaningful and robust account of the average number of agreements on any particular project. For instance, the primary way of identifying the project to which an agreement might apply is by using the title of an agreement. However, not all agreement titles reflect the project to which they apply.

Moreover, some agreements may cover more than a single project. Further, there is no universal or agreed definition of what constitutes a "project", complicating any attempt to match agreements and projects. This is compounded by the fact that the average number of greenfields agreements likely differs on different types of projects by sector. For instance, anecdotally, it appears that mining construction projects use a much higher number of greenfields agreements than transport projects (although this is difficult to verify, due to the data issues already outlined above).

For these reasons, this Regulation Impact Statement focuses on the savings associated with avoiding a round of bargaining for a single replacement agreement, rather than assessing the costs and benefits for a larger project. This is appropriate, as it may be somewhat misleading to discuss the potential benefits accruing to a project, as it is often individual subcontractors that undertake discrete packages of work on a project, who will most benefit from an extended agreement duration. If projects benefit, it would be primarily in the form of more easily being able to attract investment (consistent with the primary objective of the reform).

Other cost savings

In addition to the savings in wages outlined above, the reform will also minimise costs associated with industrial action, such as lost production, reputational damage and further interest payments on loans due to delays. (Notwithstanding the KPMG estimate below, the department notes the difficulty of accurately quantifying costs associated with industrial action.)

KPMG has reported that industrial action on large resource projects can have 'significant financial implications', with costs ranging 'from $1 million to $10 million per day of action.'[29] The KPMG report provides the example of a dispute on Woodside's Pluto project that potentially caused the loss of $3.5 million each day.[30] While industrial disputation remains at historic lows, disputes in the construction industry remain above the average for all industries. For example, ABS data shows that the rate of industrial disputation over the last two years was 41.0 days lost per thousand workers in the construction industry compared to 12.8 days lost per thousand workers across the economy.[31]

By enabling the nominal expiry date of greenfields agreements on major projects to be extended, the reform would avoid potentially costly industrial action mid-construction, minimising the costs associated with that industrial action for particular projects, but also ensuring Australia has a reputation as a good place to invest in major projects.

Minor regulatory burden

For those projects with a capital expenditure of at least $250 million and less than $500 million that seek a major project declaration, there will be some minor regulatory burden associated with the application process. Using CoreLogic's Cordell Connect project database (as at 10 November 2020), there are approximately 10 "firm" projects and 76 "possible" projects in the $250 - 500 million range due to commence each year in 2021 and 2022. However, as it is unlikely that all "possible" projects will commence in those years, the department for the purposes of these calculations, has estimated that approximately one third will not commence until a later date (if at all). This would leave an estimated 50 potential projects per year in the relevant cost range.

[29] KPMG, Workplace Relations and the Competitiveness of the of the Australian Resources Sector, 2015. Page 96.
[30] KPMG, Workplace Relations and the Competitiveness of the of the Australian Resources Sector, 2015, page 103.
[31] Australian Bureau of Statistics, Industrial Disputes (Cat No. 6321.0.55.001).

We assume that a further 10 projects will likely not use greenfields agreements (given that not all projects would be established in the absence of a workforce and therefore would not be genuine new enterprises), and an additional 15 projects will not pursue an extended term greenfields agreement (to allow for a proportion that would, through the bargaining process, determine a longer term agreement was not warranted/desirable for their project), leaving an estimated 25 projects per year that are likely to apply for a major project declaration.

There will be a very minor additional regulatory cost for proponents of the approximately 25 projects that apply for major project declarations. These include the time taken to prepare the application material, and the time taken (if any) to liaise with the relevant agency regarding the application and provide additional information as required. On the assumption that one Human Resource Manager prepares the application over eight hours, and then spends an additional four hours discussing the application with the relevant agency and preparing additional material, this will cost a business $1694.04 in wages. At 25 applications per year, this will result in an annual cost for employers of $42,350.00.

On the assumption that employers on projects subject to a major project declaration would also miss one round of bargaining as a consequence of being able to access extended term greenfields agreements, the savings calculations will be the same as those provided above. Assuming these projects are successful in their applications, these savings will far outweigh the minor costs associated with making a major project declaration application (noting that in many cases, employers working on major projects will benefit from the savings associated with extended term greenfields agreements without having to incur the minor costs associated with making a major project declaration, as these applications will likely be made by the project proponent or head contractor).

Benefits and costs for workers

Under this proposal, workers will not be able to bargain as regularly for improved pay and conditions. However, data from the WAD indicates that workers do not necessarily achieve wage benefits from negotiating a replacement enterprise agreement. Between 2011 and 2019, 404 nominally expired greenfields agreements were replaced by an enterprise agreement. The data shows no trend of spikes in Average Annualised Wage Increases (AAWI) when greenfields agreements nominally expire and are replaced by an enterprise agreement – for all industries, there is little difference between the AAWI for the original greenfields agreement and the replacement enterprise agreement.

In fact, workers in the construction and mining sectors between 2011 and 2019 have, on average, lower AAWIs in enterprise agreements that replace a greenfields agreement than in the initial greenfields agreement. Between 2011 and 2019, replacement enterprise agreements in construction have, on average, a 0.4 percentage point lower AAWI than the greenfields agreements they replace. Over the same period, replacement enterprise agreements in mining have, on average, a 1 percentage point lower AAWI than the greenfields agreement they replaced. If this trend were to continue, the reform would likely enable workers to lock in higher wage increases for an extended period of time.

Both construction greenfields agreements and construction enterprise agreements have consistently included above-average AAWIs in recent years. In 2019, the AAWI for approved construction greenfields agreements was 5.1 per cent, compared to 3.6 per cent for approved enterprise agreements in construction, and 2.7 per cent for approved enterprise agreements in all industries. Under extended term greenfields agreements, workers are likely to benefit from these higher wage increases for even longer.

While workers do not appear to achieve improved wage increases from agreement renegotiations, workers may achieve improved conditions from renegotiations that are not captured in wages data (e.g. improved roster arrangements).

The reform will require extended term greenfields agreements to contain annual wage increases for the nominal life of the agreement, which is an enhancement of the current provisions in favour of employees.

Additionally, unlike for enterprise agreements generally, there is a requirement that greenfields agreements are initially attempted to be made between unions and employers, meaning there is union oversight of the agreement's content and the interests of employees are represented.[32] Overall, the involvement of unions in negotiating greenfields agreements can act as a safeguard for employee pay and conditions – regardless of whether the agreement has a nominal life of four or eight years. It should be noted that eight years would be the maximum nominal expiry date for greenfields agreements on eligible major projects – parties to agreements can still agree to a reduced agreement length.

Option two

Maintaining the status quo will mean that greenfields agreements for all projects will continue to have a nominal expiry date that is not more than four years after the day of FWC approval. Employers undertaking time-sensitive major projects that take longer than four years will continue to be subject to the potential threat of protected industrial action and protracted bargaining periods once their greenfields agreements expire during the construction of the project, potentially making Australia a less attractive investment option in a competitive global market.

If an employer agrees to bargain to renegotiate the agreement or there is a successful majority support determination, employees will be able to engage in negotiations regarding their pay and conditions at a maximum of four years from the approval of the agreement. As outlined, this will not necessarily result in improved wage increases – and indeed the evidence suggests agreements replacing Greenfield agreements have reduced wage increases. However, outcomes regarding wages and conditions will depend on the circumstances of the particular negotiations and the prevailing economic conditions at the time negotiations are undertaken.

As noted above, under extended term greenfields agreements, workers are likely to benefit from the higher wage increases in greenfields agreements for even longer – a benefit they may not receive under option two. However, they may have less opportunity to renegotiate the conditions in their greenfields agreement.

Finally, the administrative savings associated with avoiding one round of bargaining under Option 1 will, under this option, continue to be costs associated with undertaking bargaining for a replacement agreement.

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[32] Note, this is subject to the employer option of seeking approval of a greenfields agreement following use a Notified Negotiation Period . Please refer to the more detailed discussion on this alternative approval process above at Page 3.

Option three

Option three would involve providing the FWC with additional funding to enhance the services it provides to projects in the major projects national practice area. The main benefit of this option is that it is non-regulatory and therefore does not fundamentally alter the bargaining framework with which stakeholders are familiar.

It also has the potential to improve workplace cooperation and productivity, as evidence suggests has been achieved through enhanced FWC support in its "New Approaches" program.[33] New Approaches is a program to help parties find ways to build cooperative working relationships. The program supports parties in reaching agreement and establishing processes for future negotiations through training, workshops, discussion and facilitation. It also includes the facilitation of "interest-based bargaining", which is an approach to bargaining in which the parties to a negotiation approach the process by identifying their individual or shared interests, rather than focusing on their positions or log of claims. By identifying individual or shared interests, the interest-based bargaining process uncovers ways that each party's interests can be met without disadvantaging the other party.

The services the FWC can provide via its New Approaches program include:

- training in interest-based bargaining
- help with enterprise bargaining
- help with developing joint processes to implement enterprise agreements
- training in interest-based dispute resolution
- training and assistance in collaborative workplace change, including training for consultative committees.

Cooperative workplace relationships and FWC-supported renegotiations could lead to more efficient agreement making and shorter approval processes. Research suggests that more cooperative approaches to workplace relations, such as those facilitated by the FWC's New Approaches program, can lead to mutual gains for employers and employees, as well as increased productivity, improved workplace culture, and more efficient agreement making.[34] However, it is difficult to quantify the likely impact of FWC support on the length of bargaining and frequency of industrial disputes due to a lack of quantitative data on the impact of cooperative approaches to workplace relations.

Accordingly, it cannot be said with certainty that increased FWC support would reduce the length of bargaining or by how much. Moreover, as it would be voluntary to seek these services provided by the FWC, there is no guarantee that the services would be used. Some stakeholders have concerns about third party involvement in their workplace relations, and these stakeholders are unlikely to voluntarily access the services of an industrial relations tribunal.

Moreover, this option is unlikely to meet the policy objective of delivering certainty for investors and therefore increasing major project investment and the associated jobs and economic growth. This is because greenfields agreements on major projects will continue to have a nominal expiry date that is not

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[33] Mark Bray, Johanna Macneil and Andrew Stewart, *Cooperation at Work: How Tribunals Can Help Transform Workplaces*, 2017, The Federation Press, Sydney.
[34] Ibid.

more than four years after the day of FWC approval, meaning employers will be subject to the potential threat of protected industrial action and protracted bargaining periods once their greenfields agreements expire during the construction of a major project. Accordingly, Australia will not be able to provide the cost and timeframe certainty needed to attract additional investment.

As with option two, the administrative savings associated with avoiding one round of bargaining will, under this option, continue to be costs associated with undertaking bargaining for a replacement agreement.

Consultation

On 19 September 2019, a discussion paper was released that sought views from stakeholders on a proposed reform to allow the duration of greenfields agreements to match the life of major infrastructure, resources and energy projects. The Attorney-General's Department received 18 submissions. Nine submissions were from employer groups and five were from unions. There were also submissions from an employer, a law firm, an industrial relations consultant and a former Fair Work Commissioner. All submissions are publically available on the Attorney-General's Department's website.[35]

On 11 June 2020, the Australian Government constituted five working groups to consider how to improve the operation of the industrial relations system, one of which related to greenfields agreements. The purpose of the Greenfields Agreements Working Group was to explore options for making Australian major projects more attractive to investors, by providing greater certainty of costs and delivery timeframes.

The Greenfields Agreements Working Group met seven times. Working group meetings lasted between two to four and a half hours, with additional out of session discussions held between working group members and with the Deputy Chair. In total, working group members spent approximately 18.5 hours in formal discussions (which does not include the time committed to the additional out of session discussions).

Membership of the working group

- **Employer organisations**: Australian Chamber of Commerce and Industry (ACCI), AMMA Australian Resources and Energy Group, Minerals Council of Australia (MCA), Australian Constructors Association (ACA), Master Builders Australia (MBA).
- **Unions**: Australian Council of Trade Unions (ACTU), Construction Forestry Mining Maritime and Energy Union (CFMMEU), Australian Workers' Union (AWU), Australian Manufacturing Workers' Union (AMWU), Electrical Trades Union (ETU).

[35] Accessible at https://www.ag.gov.au/industrial-relations/publications/submissions-received-project-life-greenfields-agreements-consultation

Principal views of stakeholders

The consultations undertaken as part of the working groups were held in-confidence to promote increased engagement and assist negotiations. In general, employer groups advocated for changes which would prolong the nominal life of greenfields agreements covering major projects to reduce investment uncertainty, while unions wanted to ensure that major project jobs remained of high quality and that workers were not disadvantaged. Unions, argue that the proposed reform is unnecessary as they indicate the majority of projects do not go over four years and industrial relations arrangements are not a determining factor in investment decisions. Union's also argue that the reform places a restriction on the ability of workers to bargain for better pay and conditions.

However, there was agreement that there was scope to extend the nominal duration of greenfields agreements on major projects, but differing views about how best to implement this change.

How views of the working group were taken into account

The views of the Greenfields Agreements Working Group were taken into account when developing final policy proposals. Where consensus was reached between Working Group members, this strongly influenced final proposals for reform. Where consensus could not be reached on a particular issue, the views of stakeholders were taken into account in the final reform design.

As the discussions of the Greenfields Agreements Working Group were held in-confidence and the final outcomes were non-binding, this RIS will not discuss in detail the proposals put forward, concessions made or agreement reached. This decision has been made to respect the confidentiality of members and not prejudice future discussions.

Preferred Options

For the reasons outlined in the assessment of benefits above, option one is the preferred option. The status quo, as outlined in option two, will not address the current problem regarding the nominal duration of greenfields agreements, and while the non-regulatory approach outlined under option three may have some positive impact, it fails to adequately mitigate the risks associated with exposure to mid-project agreement renegotiations – most notably, the potential to deter mega projects.

Option 1 reflects findings made during the 2019 discussion paper process and the 2020 Greenfields Agreements Working Group process. It strikes an appropriate balance by making the necessary changes to encourage investment, while maintaining existing safeguards in the current greenfields bargaining framework, and also introducing an additional safeguard (a requirement that annual wage increases must be included over the full term of any agreement with a nominal duration of longer than four years) to ensure employees' interests are protected.

Employees will retain access to all protections and rights under the FW Act, including general protections, freedom of association and right of entry provisions. As discussed above, greenfields agreements have tended to provide higher wage increases than other agreements in comparable industries, and equivalent or slightly higher wages than the agreements that replace them.

Implementation and Evaluation of Options

Implementation of the preferred option will require minimal legislative amendments to the FW Act.

Implementation risks

The most significant risk to successful implementation is that the necessary legislative amendments may not obtain passage through Parliament. The risk to legislative passage has been partly addressed through the industrial relations reform consultation process, which involved extensive consultation with key stakeholders to develop balanced recommendations.

There is also a possibility, as with any new amendment to the Fair Work Act, that there can be disputation in the Fair Work Commission which can contribute to delays. This is often the case until case law and precedents are developed, which provide more certainty to parties about the interpretation of the new amendments.

Transitional arrangements

The amendments will apply after the commencement of the amendments. The amendments will not change employment arrangements on existing major projects which are utilising in-term greenfields agreements.

Monitoring and evaluation

The Attorney-General's Department will monitor ABS and Deloitte Access Economics data on the uptake of major projects in conjunction with FWC data on the use of greenfields agreements on major projects with a nominal life of longer than four years. The department will also continue to engage in stakeholder consultation with employer and employee groups to gauge the impact of the reform. In particular, consultation can be undertaken through the regular meetings of the National Workplace Relations Consultative Council (NWRCC). The NWRCC is a forum for employer and employee representatives to consult on workplace relations and labour market matters of national concern, and meetings are chaired by the Minister for Industrial Relations.