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Greenfields Agreement Review: Response to Consultation Paper

25 October 2017



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1. Introduction

1. The Australian Chamber welcomes this opportunity to input the independent review of the operation of Part 5 of Schedule 1 of the *Fair Work Amendment Act 2015* (the 2015 Amendments) and the changes made to Greenfield (GF) enterprise agreement making under the Fair Work Act 2009 (FW Act).
2. The Australian Chamber and its members have long been strong supporters of avenues for GF agreement making to be included in our workplace relations legislation. Clear, accessible and outcome oriented scope to secure GF agreements prior to hiring/mobilisation must form part of our workplace relations system if we are to secure essential investment to develop new industries, new projects and new work in this country. Investors, contractors, employees and unions need to have the security and certainty GF agreements provide.
3. Without GF agreements, and without a GF system that works, we would see:
 - a. Employers rapidly exposed to protected industrial action as unions come in and organise their new workforces, and pursue enterprise agreements. This would see strikes and bans precisely as new projects were being constructed or scaling up, and at the point at which investor sensitivity is greatest.
 - b. Employers offering contracts of employment to hire, based on their assessment of market rates (which is not in itself problematic), but without any security or protection from additional claims or becoming exposed to exogenous union agendas that have nothing to do with their nascent workplace. This would include for example anti-contracting or anti-labour hire claims of the type the Productivity Commission (PC) recently recommended be eliminated from our agreement making system entirely¹.
 - c. Unions incentivised to bid up wages beyond sustainable levels, and beyond the market rates upon which employers would naturally hire employees.
 - d. More likely, investors avoid investing in Australia or attaching an additional workplace relations risk premium prior to injecting essential capital into this country (thereby reducing our competitiveness as an investment destination)

¹ Productivity Commission (2015) *Final Inquiry Report – Workplace Relations Framework*, Recommendations 20.2 and 25.2.

- e. An unbalanced approach in which unions would hold the whip hand in negotiations and be able to act capriciously and extortionately, reducing certainty and confidence to those seeking to undertake essential project work in this country.
4. The Australian Chamber and its member organisations have long engaged with the Parliament and other reviewers to:
 - a. Champion the need for a GF agreement making stream or options under the FW Act and its predecessors.
 - b. Ensure GF agreements are able to be finalised in a timely and reliable manner that advances rather than places at risk incentives to invest, create jobs, deliver infrastructure etc in Australia.
5. The Australian Chamber and its members strongly supported the 2015 amendments as essential to ensure the GF pathway under the FW Act remains useable, relevant and accessible.
6. As developed throughout this submission, this remains the case.
7. This review should conclude / recommend:
 - a. The 2015 amendments were valid and relevant, and remain valid and relevant, notwithstanding that the economic imperatives and drivers for GF agreements fell away markedly with the end phase of the resource investment boom.
 - b. The validity and relevance of the 2015 GF amendments cannot and should not be assessed by crude measures of their direct usage or application numbers. The GF provisions of FW Act provide an integrated system for GF agreement making, which has been improved overall by the 2015 amendments.
 - c. The 2015 amendments should be retained, and there should be no recommendation to reverse or retreat from them.
 - d. Government should, in addition to the 2015 changes, implement the further recommendations on GF agreement making from the PC review (December 2015).
8. Other input will come from Australian Chamber network members with direct experience negotiating GF agreements.

2. Background paper questions

9. Eight (8) “issues on which specific comment is invited” are listed on page 19 of the Background Paper.

Changes to bargaining behaviours

10. The first issue on which specific comment is invited is:

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

11. Direct feedback on this issue is best provided by our members who work directly with GF negotiations with unions, and who are responsible for the lodgement and advocacy in making of GF agreements.
12. However, we can usefully recall that:
- a. We understand the majority of GF agreements to have always been successfully negotiated between prospective employers and trade unions, and agreed consensually to proceed for approval.
 - b. Thus, in most industries and circumstances, the 2015 changes will not have altered, or not have altered markedly, bargaining behaviours. This does not however diminish their importance, and their utility cannot be usefully assessed by solely focussing on simple measures of direct usage.
 - c. The focus of the 2015 changes was the minority of situations in which negotiations protract, are not conducted in good faith, or are being gamed to place investment pressures on employers to agree to overinflated terms. This is why we describe the 2015 amendments as a circuit breaker / safety valve for the minority of GF negotiations that protract and thereby endanger critical, job creating investment.
 - d. Even where behaviours do change, the impact may have been subtle and difficult to observe. The existence of the safety valve provided by s 182(4) is likely to ensure more GF negotiations proceed consensually and constructively, and yield GF agreements supported by both prospective employers and unions. Thus, much of the actual behavioural change may be observable through more GF agreements being successfully negotiated between employers and unions.

- e. However this is something of a counterfactual which is difficult to measure, and it certainly does not come out in the agreement data provided to support this review.
 - f. What is really needed to assess any change in behaviours is a “realisation rate” and an assessment of what proportion of negotiations towards a GF agreement actually yield a GF agreement that is made consensually, and how this changes over time. We don’t understand this data to be available, and the review needs to rely instead on the views of those most experienced in making GF agreements.
 - g. However, the Australian Chamber is not aware of:
 - i. Examples following the introduction of the 2015 amendments, of employers embarking towards GF agreements they judge to be necessary for investment / the commencement of work, only to abandon them as too difficult.
 - ii. Any genuine union grievance with the process post-2015, or examples of unions being forced to agree to a GF agreement that ‘sells their members short’ for fear of being drawn into the process under s 182(4). This was one of the professed concerns in 2014 and 2015, but we do not understand it to have been borne out in practice following the amendments.
13. Noting that GF agreements do continue to be successfully negotiated, albeit in reduced numbers due to cyclical and demand factors rather than the impact of the amendments, the review should conclude that any changes to bargaining behaviours that may have occurred do not warrant any changes to or departures from the 2015 amendments.
14. Further changes are required, as the PC has recommended, but this is not triggered by particular changes in bargaining behaviours.
15. If any party asserts any GF agreement has been finalised in unduly pro-employer or unfair terms as a direct function of the 2015 amendments:
- a. Such concerns should be particularised in the submission making such an assertion, with detail on how a union claims it was forced into an outcome and how that outcome underserved that union’s members.
 - b. The Australian Chamber and our members would like an opportunity to respond. We appreciate this is a very rapid review, but it would be ill-served if any claims on specific agreements and negotiations (involving member companies within our network) were not able to be responded to.

Impact of the 2015 changes on bargaining / number of applications

16. The second issue on which specific comment is invited is:

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

17. The Australian Chamber remains a strong supporter of the 2015 amendments, and considers further changes are needed to better deliver on the role GF agreements need to play in our system, as has been recommended by the PC. The need for change has become more imperative as foreign investment and new project demand has become more scarce.

18. We supported the 2015 changes on the basis that they would yield improvements for not only employers and investors, but also for job seekers and communities.

19. The Australian Chamber knows of no concerns that should lead to any questioning of, or consideration of reversing the 2015 changes. This is hardly surprising:

- a. Ensuring negotiations are conducted in good faith should not create concerns or prejudice for any party.
- b. The Background Paper indicates that no application has been made for approval of a GF agreement under s 182(4) of the FW Act². If the agreements are not being made, they cannot be presenting direct concerns.
- c. The 58 GF agreements approved during the first 6 months of 2017 will have passed the BOOT test and will have left employees better off, generally by a considerable margin.

20. The review should conclude that there are no germane concerns that warrant any change to or departure from the 2015 changes.

Impact of the 2015 changes on the number of GF applications

21. The third issue on which specific comment is invited is:

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

² Australian Government (2017) [Greenfields Agreement Review, Consultation Paper](#), p.17

22. We note Table 1 in the Background Paper, but chose to use the agreement list provided for this review³ to look at agreement making per calendar year. This showed approvals of GF agreements have trended as follows:

	2013	2014	2015	2016	2017 ⁴
Approvals	112	558	303	204	58 (116 ⁵)

23. As set out below in relation to the seventh issue, we see this as illustrating:
- a. A reduction in GF numbers from a peak driven by massive investments in resources construction, which required multiple contractors, each with separate GF agreements.
 - b. Perhaps a reversion towards a longer-term mean level of demand for GF agreements following a peak driven by major resource projects (of around 100-200 agreements per year).
24. We say, and our members will expand upon this, that the reduction in GF agreement approvals is largely a function of the downturn in resource investment from peak levels, rather than any negative consequence of the 2015 amendments.
25. On the data as we understand it, peak demand for GF agreements had already been reached and numbers were already coming off when the 2015 amendments commenced. This is not to in any way question the relevance or utility of the 2015 changes, but to note that their final timing (which was politically determined and unduly delayed in Parliament) saw them commence when the decline in overall demand for GF agreements had already commenced. This includes for example entering the final stages of major resource projects involving comparatively fewer new contractors and new staff compared to earlier stages of work.
26. We also note that:
- a. We are broadly on track in 2017 for an equivalent number of GF agreements as we had in 2013.

³ <https://docs.employment.gov.au/documents/list-greenfield-agreements-made>

⁴ To June (i.e. half year data)

⁵ Extrapolation

- b. Logically, there is nothing in the 2015 changes that could have discouraged or disincentivised the use of GF agreements. As we understand union submissions in 2014 and 2015, unions were concerned about too many GF agreements being made too easily following the 2015 changes, which hasn't come to pass.
 - c. Labor Senators previously expressed concern that:

...the changes to the way Greenfields agreements are made essentially pave the way for employers to make agreements with themselves, and seek only to remove unions from the bargaining table.⁶
 - d. This has not come to pass, and GF agreements have in fact successfully proceeded via agreement between employers and unions, albeit in reduced numbers.
27. This further underscores that it is not the 2015 changes that have driven changing demand for GF agreements; rather the changing geopolitical and investment climate, and reduced resource investment has led to fewer new GF agreements.
28. The review should conclude that:
- a. Changing numbers of GF approvals, whilst concerning, do not warrant any change to or departure from the 2015 changes.
 - b. The 2015 changes are more important than ever for Australia to successfully gather its share of future investment opportunities.

Impediments to making Greenfields agreements

29. The fourth issue on which specific comment is invited is:
- The extent to which there may be systemic issues or impediments to the making of Greenfields agreements.*
30. Employers strongly supported the 2015 GF amendments. However, other impediments to making GF agreements need to be addressed, and the importance of addressing these impediments has increased as appetite for investment has waned and as Australia must fight harder to secure future waves of resource investment.

⁶ Senate Education and Employment Committee (2014) Report on the Fair Work Amendment Bill 2014 [Provisions], 5 June 2014, p.5

31. We have the prescriptions to start to address the further key impediments to GF agreement making, through the recommendations of the PC (Attachment A).
32. This review should recommend to government that it implement what the PC recommended on GF agreements, in addition to maintaining the 2015 changes.

PC Recommendations⁷

33. The fifth issue on which specific comment is invited is:

Recommendations of the Productivity Commission relating to Greenfields agreements.⁸

34. The PC was aware of the 2015 amendments when it made its final recommendations, stating:

While the recent amendments are likely to result in more expedient and balanced Greenfields negotiations, the Productivity Commission continues to see merit in further changes...⁹

35. The Australian Chamber and its members agree, and support the PC recommendations to further reform GF agreement making, to better support new investment and new employment (with some nuances as set out in member submissions).
36. The PC recommendations and current GF provisions could be melded, with a three rather than six month negotiation period, into a more useful, relevant and practical range of options. It appears absolutely clear that this is what the PC envisaged.
37. The PC recommendations on GF agreements (Attachment A) are fourfold:
 - a. Three month negotiation period (down from 6 months). [Recommendation 21.1¹⁰]
 - b. Wider options at the end of the negotiating period. [Recommendation 21.1]
 - c. An option for 'last offer' arbitration for FWC determinations after the negotiating period. [Recommendation 21.1]
 - d. Project proponent GF agreements for major projects. [Recommendation 21.2¹¹]

⁷ See Attachment B

⁸ Department of Employment (2017) Greenfields Agreements Review: Background Paper, p.19

⁹ Productivity Commission (2015) Final Inquiry Report – Workplace Relations Framework, Vol 2, p.713, *emphasis added*

¹⁰ Productivity Commission (2015) Final Inquiry Report – Workplace Relations Framework, Vol 2, p.719

38. The Background Paper¹² seems to focus on the draft recommendations from the PC (August 2015) rather than the final recommendations (December 2015). Respectfully, we think this is misguided, and note that the final PC recommendations are those which have been formally commended to government and reflect the full exchange of views between submitting parties, and with the PC.

39. We suggest the following comment misunderstands the relationship between the PC recommendations and the 2015 amendments:

The Productivity Commission noted the amendments to the Fair Work Act but proceeded to make the following recommendation:¹³

40. The “but” is inaccurate. We commend to the review the following from the final PC report which makes clear that the PC were well aware of the November 2015 amendments in making its final recommendations on GF which were specifically intended to be in addition to the November 2015 changes :

While the recent amendments are likely to result in more expedient and balanced Greenfields negotiations, the Productivity Commission continues to see merit in further changes...¹⁴

41. The review should endorse the final analysis and recommendations of the PC (December 2015), and urge government to implement the final PC recommendations on GF agreement making (Attachment A), in addition to the 2015 amendments.

Reverting to pre-2015 arrangements

42. The sixth issue on which specific comment is invited is:

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

43. The Australian Chamber strongly opposes any reversal of the 2015 changes, and knows of no evidence or policy basis to pursue such a reversal.

¹¹ Productivity Commission (2015) Final Inquiry Report – Workplace Relations Framework, Vol 2, p.721

¹²Department of Employment (2017) Greenfields Agreements Review: Background Paper, pp.13-16

¹³Department of Employment (2017) Greenfields Agreements Review: Background Paper, pp.15

¹⁴ Productivity Commission (2

015) Final Inquiry Report – Workplace Relations Framework, Vol 2, p.713

- a. The continuing opposition of those who opposed the passage of the 2015 amendments, or a rehashing of the basis for such opposition cannot provide a basis to reverse the amendments.
 - b. The paucity of use of s 182(4) means there logically cannot be direct evidence of misuse or negative impacts. Opponents of these provisions cannot have it both ways; they are either not used, or are having a negative impact, it cannot be both.
44. As to the impact of such a misguided course of action (reversing the 2015 amendments):
- a. It cannot be assumed that the impact of reversing the 2015 changes would be a simple reversion to the directly preceding situation. Rather it would create a third scenario in which rules were changed to remove key avenues to successfully ensuring GF agreements are concluded.
 - b. Such a scenario would not only change laws and processes, but it would send clear, negative signals to unions, employers and investors on GF negotiations.
 - c. It would send a signal to unions and employers that they no longer need to negotiate in good faith, and that it is acceptable to protract negotiations and endanger investments that will generate jobs for Australians.
 - d. Incentives to invest in Australia / investment competitiveness would be diminished.
45. This review should conclude that there is no basis to reverse the 2015 changes, or to attempt to return to the legislative arrangements that applied to GF agreement making prior to November 2015.

Impact of the reduction in project numbers

46. The seventh issue on which specific comment is invited is:

*The impact of the reduction in the number and scale of capital development projects on Greenfields agreement making since 2015.*¹⁵

¹⁵ Department of Employment (2017) [Greenfields Agreements Review: Background Paper](#), p.19

47. ACCI member organisations with direct membership in resources and resources construction, who are themselves principal practical negotiators and policy interlocutors on GF agreements, are best placed to address the causes and impacts of the reduction in resource project investment and the needs of the industry for access to a useable GF agreement stream.
48. However, the Australian Chamber wishes to make the following points to complement to those from our members with direct membership in resources and construction:
 - a. An increasingly diverse range of industries are using GF agreements. Looking at GF agreements approved during 2016 and the first half of 2017 we see a diverse range of industries represented, including:
 - i. Construction – non-resources
 - ii. Correctional services
 - iii. Healthcare / nursing
 - iv. Manufacturing
 - v. Private education
 - vi. Resources construction
 - vii. Security
 - viii. Theatrical productions
 - ix. Transport and logistics
 - x. Warehousing and distribution
 - xi. Waste services
 - b. It should be very clear that GF agreements are:
 - i. Being used by, and are relevant to, employers, employees, unions and industries well beyond resources and resource construction.
 - ii. GF agreements are an important and essential avenue to secure working arrangements and investment in industry generally.

- c. Fewer projects / reduced resource investment seems to have diminished aggregate demand for GF agreements. Using the data provided for this review, we see that approvals of GF agreements have trended as follows:

	2013	2014	2015	2016	2017 ¹⁶
Approvals	112	558	303	204	58 (116 ¹⁷)

- d. Looking at the specific question, the primary impact of the reduction in the number and scale of capital development projects on Greenfields agreement making seems to be reduced aggregate demand for GF agreements. This does not seem remarkable, mega projects involving hundreds of different contractors are going to give rise to multiple specific workplace relations arrangements for the life of work on such projects. As the projects complete, there will logically be fewer GF agreements in total – regardless of the policy settings in the FW Act.
- e. There are a number of ways this could be interpreted, including as the peak of the resources investment boom being something of an outlier, following which numbers of GF agreements have returned to more typical levels. Cautiously, there may be something of a reversion to a longer term mean level of GF agreement making.
- f. Practical, useable capacity to make GF agreements is critical to securing future resource investment. As resource industry employers have repeatedly stressed, the world will have continuing appetite for resource commodities, including those Australia has in natural abundance.
- g. Future waves of resource investment will be made globally, and new project opportunities will be available to Australia, but we will need to compete with other economies with deposits LNG, oil, iron ore and coal, amongst others.
- h. We know that the costs and risks of doing business in Australia, including workplace relations risks, impact on investment decision making.
- i. Australia's success in attracting future job creating investment, new projects and project expansions will depend on a range of factors that include our cost competitiveness, and relative investment certainty.

¹⁶ To June (i.e. half year data)

¹⁷ Extrapolation

- j. This in turn includes capacity to have workplace relations arrangements in place prior to final investment decisions, hiring and commencement and minimised risk of disruptive industrial action (which is precisely what a GF agreement stream should provide).
 - k. The fact that Australia is in somewhat of an investment lull after an investment boom need not be permanent. Returning to trend or above trend levels of resource investment will be a function of our regulatory system and market attractiveness, which must include as an essential plank, useable, reliable scope to make GF agreements.
49. The review should conclude that the reduction in the number and scale of capital development projects is a concern, and warrants:
- a. Retention of the 2015 amendments.
 - b. Further reform of GF agreement making as recommended by the PC.

Other matters

50. The eighth issue on which specific comment is invited is:
- Any other matter relating to the negotiation of, and the approval process for Greenfields agreements.*¹⁸
51. Australian Chamber member organisations work directly with their employer members in negotiating, applying for, and having approved GF agreements. It is their more direct experiences that are going to yield useful additional considerations.
52. We also commend the following detailed analyses and input to this review, along with additional considerations raised by our members for this 2017 review:
- a. Submissions from ACCI and its member organisations to the 2015 PC Review, including:

¹⁸Department of Employment (2017) Greenfields Agreements Review: Background Paper, p.19

- i. Australian Chamber, pp.102,
 - ii. AMMA, pp.93-128
 - iii. MBA, pp.29-33
 - iv. Chamber and Commerce of Industry of WA, pp.45-48
- b. Submissions from ACCL and its member organisations to the 2012 Fair Work Act Review, including:
- i. Australian Chamber, p.12
 - ii. AMMA, pp.98-103
 - iii. MBA, paragraphs 3.6, 4.1-4.3,
 - iv. Chamber and Commerce of Industry of WA,
- c. Submissions from ACCL and its member organisations to the Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment Bill 2014 [Provisions]¹⁹, including:
- i. Australian Chamber, pp.22-26
 - ii. AMMA, pp.3-23
 - iii. MBA, pp.7-13
 - iv. Chamber and Commerce of Industry of WA, pp.4-5 (which raises additional considerations regarding union entry powers).
 - v. AFEI, paragraphs 24-25
53. We also recall that Australia's workplace relations system has previously provided very simple mechanisms for GF agreements, including s.330 of the former Workplace Relations Act 1996:

¹⁹ Passed as the *Fair Work Amendment Act 2015*.

330 Employer Greenfields agreements

An employer may make an agreement (an *employer Greenfields agreement*) in writing if:

- (a) the agreement relates to a new business that the employer proposes to establish, or is establishing, when the agreement is made; and
 - (b) the agreement is made before the employment of any of the persons:
 - (i) who will be necessary for the normal operation of the business; and
 - (ii) whose employment will be subject to the agreement.
54. Without restarting the debate on the merits of Employer Greenfields Agreements, the simplicity and clarity of this previous generation of GF legislation should inform how we proceed in the future.

3. Additional considerations

55. Under “Scope of this review” the introduction to the Background Paper²⁰ identifies four (4) “other matters”. We presume these are “additional matters” identified by the Minister under s 4(2)(b) of the *Fair Work Amendment Act 2015*.

The length of GF agreements²¹

56. The table of GF agreements approved since 2013²² did not include anything on their duration. This may have been useful in helping to address this question.
57. We however caution that the nominal duration set out in the text of a GF agreements and their operative or actual duration may differ markedly. Three examples:
- a. A resource construction contractor may make a GF agreement for an extended period (perhaps for four years) in full cognisance that:
 - i. They don’t actually know when they will get on site to commence work, which may often depend on other preceding works.
 - ii. Their anticipated period of actual work onsite may be far briefer than the total duration of the GF agreement, but they need to account for contingencies and delays.
 - iii. They are often likely to mobilise a workforce, do the work, and demobilise again all within the nominal or stated duration of the GF agreement, which in many cases will expire without any actual application to extant work (and is in fact designed to do so).
 - b. Equally, we saw in relation to the mega projects of recent years that programs of works can extend beyond the four year maximum period for GF agreements, and the unacceptable situation of renegotiation and threats of industrial action occurring as project finalisation was becoming urgent and as costs of days lost or disruption would be greatest.
 - i. This has led the Chamber and its members to support PC Recommendation 20.4 on life of project GF agreements, and Recommendation 21.2 for project proponent agreements.

²⁰Australian Government (2017) [Greenfields Agreement Review, Consultation Paper](#), p.4

²¹Australian Government (2017) [Greenfields Agreement Review, Consultation Paper](#), p.4

²² Provided for the review on its website as an Excel file.

RECOMMENDATION 20.4

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or
- matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where it does so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

- c. From a completely different direction, the nominal date or duration of a GF agreement for a theatrical production is less important than its “run” in determining how long the agreed terms will actually apply for. The nominal duration of the GF agreement could be extended or truncated, but the period for which it will actually apply is ultimately a function of the success of the production.
58. It should also be recalled that agreements, including GF agreements, continue until terminated, replaced or varied.
59. It is not clear what can be made of the duration of GF agreements or how this may be changing, or what any changes may show. We suspect that both the operative life and nominal life of GF agreements may have become shorter, essentially as a function of the mega resource projects completing or nearing completion. If correct, this would not provide any basis to re-evaluate the current GF provisions of the FW Act.

The length of GF negotiations²³

60. The second “other matter” the review is to consider is:

the average timeframe for concluding a Greenfields enterprise agreement prior to the commencement of the Amendment Act and what impact the provisions of the Amendment Act may have had since;

²³ Australian Government (2017) Greenfields Agreement Review, Consultation Paper, p.4

61. This is a very difficult matter to get to empirically, particularly as prior to the 2015 amendments, there was no “Notified negotiation period” under s 178B of the FW Act, and even following the amendments such notifications appear to not be being made regularly (e.g. prospective employers assess they are likely to reach agreement with a union and embark on that course).
62. The only evidence which could assist the review on this consideration is experiential reflection from those experienced in negotiating GF agreements, and we commend to you the experiences of our members in this regard.

Behavioural and practical effects of the 2015 GF amendments²⁴

63. The third “other matter” the review is to consider is:

the views of stakeholders regarding behaviours and practical effects of the Greenfields provisions of the Amendment Act;

64. We commend to you the views of our member organisations that have direct experience in negotiating GF agreements, prior to and following the 2015 amendments.
65. In doing so, we recall:
 - a. The importance of the 2015 amendments introducing a circuit breaker/safety valve to ensure negotiations towards GF agreements deliver useable, economically competitive agreements in a timely manner.
 - b. The success of the current GF provisions of the FW Act (including the 2015 amendments) being demonstrated not only in the direct usage of the new 2015 provisions, but also in the use of existing avenues such as GF agreements successfully negotiated with unions.

Appropriateness to Australia’s current investment cycle²⁵

66. The fourth and final “other matter” the review is to consider is:

Whether the provisions are appropriate to Australia’s current investment climate.

67. It is important that the GF provisions be appropriate to the prevailing or current investment climate at all points of the global economic cycle, and both peaks and troughs in appetite to invest in Australia.

²⁴ Australian Government (2017) [Greenfields Agreement Review, Consultation Paper](#), p.4

²⁵ Australian Government (2017) [Greenfields Agreement Review, Consultation Paper](#), p.4

68. Our understanding is that:
- a. The 2015 amendments improved the appropriateness and utility of GF agreement making to the investment climate facing Australia at that time, and today.
 - b. The 2015 amendments created disincentives to protract and deliberately game GF agreement negotiations, and have seen more employers and unions successfully 'getting the job done' to finalise GF agreements that go forward with employer and union support.
 - c. Giving effect to the remaining PC recommendations on GF agreement making, and proposals being advocated by Australian Chamber members would further improve the appropriateness and utility of GF agreement making to the investment climate facing Australia.
 - d. Any reversal of the 2015 amendments would diminish the appropriateness and utility of GF agreement making to the investment climate facing Australia, and specifically make investment in this country less practical and desirable.
69. This is only half the consideration. It is not only the current investment climate that is relevant to how we shape our GF agreement making system. It is also the changed investment scenarios we may face in the future, including a scenario in which there are renewed major resource project opportunities globally which Australia could secure (with the right policy mix, including the right mix of WR policies for new projects).
70. Ensuring GF negotiations occur in good faith, and providing a circuit breaker/safety valve for protracted negotiations (a rough precis of the 2015 changes) appears essential to equip Australia to take advantage of not just the current investment climate, but also whatever the future holds for global investment opportunities. This will also be advanced by giving effect to the PC recommendations on GF agreement making.

Employers didn't get everything they wanted in 2015

71. In assessing the 2015 amendments, it should also be recalled that they were welcomed and strongly supported by employers, but did not deliver fully on what employers knew to be necessary to ensure GF agreements are useable, relevant and supportive of investment.
72. Key policy settings in the final amendments fell short of what employers advocated at the time, and what we maintain is necessary, to properly address concerns with GF agreement making and maximise incentives and capacities for new investments.

73. Two specific settings in the 2015 amendments were contrary to employer priorities and experiences:
- a. Employers supported scope to “circuit break” stalled bargaining after three months, rather than the six months ultimately included in s 178B(1)(b) of the FW Act.
 - b. Employers did not however support GF agreements made after the prescribed negotiation period being subject to the test set out in s.187(6):
 - (6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a Greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.
 - i. Employers have never supported the “prevailing pay and conditions” test. We were concerned in 2014 and 2015, and remain concerned, that this threatens to entrench preceding generations of wages and conditions outcomes and to reduce Australia’s capacity to compete for work on a contemporary commercial basis.
 - ii. This concern was sharpened by the end of the mining investment boom and rapid alleviation of labour scarcity in key resource states. Entrenching artificially inflated outcomes into changed labour market circumstances some period later seems set to have an impact on costs and competitiveness.
 - iii. Properly understood, the “prevailing industry” standards test creates an incentive for employers to negotiate an agreed outcome with unions and not rely on the process in s 182(4).
74. This points to a very important consideration. The impact of various parts of the GF provisions of the FW Act needs to be understood not only by looking at how the operative mechanics are designed, but also how they actually impact on behaviours, which may not be apparent from their direct usage levels. In this case, the circuit breaker in S182(4) actually leads to more successful negotiations with unions.

Relevance of the 2012 Review

75. The Background Paper devotes some space to the analysis and recommendations of the 2012 Fair Work Review Panel²⁶.
76. We caution that:
- a. The 2012 review was undertaken during the midst or even prior to the peak of the resources investment boom, and prior to peak labour shortages in relation to the resources sector.
 - b. By contrast the 2015 amendments and the PC review were undertaken as it was becoming clear that demand and driving considerations for the majority of GF agreements was changing markedly. They are the more up to date developments, reflecting the past mining investment boom scenario we face today.
77. However, looking at the final FW Review Panel recommendations, we also note that:
- a. The FW Review Panel recommended that:

*...the FW Act be amended to apply the good faith bargaining obligations in s. 228 to the negotiation of an s. 172(2)(b) greenfields agreement, with any necessary modifications.*²⁷
 - b. This is essentially what the 2015 amendments did.
 - c. The FW Review Panel also acknowledged the problems that stalled or protracted GF negotiations were creating and recommended amendments to deal with bargaining that is at an impasse.
 - d. The 2015 amendments may not have been in the exact form recommended by the Fair Work Review Panel, but they ultimately:
 - i. Address the same concerns; impasses in negotiation and gaming that discourages agreed outcomes between employers and unions.
 - ii. Seek to deliver the same outcome, adding a circuit breaker or safety valve to alleviate and ultimately discourage bargaining impasses and deliberate gaming of the system.
78. A straight line can be drawn through the 2012 Fair Work Review Panel report and recommendations, the 2015 amendments, and the late 2015 recommendations from the

²⁶Australian Government (2017) [Greenfields Agreement Review, Consultation Paper](#), pp.9, 10-13

²⁷ Fair Work Review Panel (2012) [Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation](#), Recommendation 27, p.172

PC. At each point the concern has been to ensure Australia has useable, practical, accessible capacity to enter into GF agreements that support investment, development and job creation in this country

79. These considerations should continue to inform the outcomes of this review, and as with the preceding reviews any new recommendations should also seek to ensure Australia has a useable, practical and accessible capacity to enter into GF agreements. This means:
- a. Retaining the 2015 amendments without change.
 - b. Recommending implementation of the additional PC recommendations on GF agreements.
 - c. Engaging with the further ideas and input provided by members of the Australia Chamber network.

Attachment A: Productivity Commission Recommendations

RECOMMENDATION 21.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that if an employer and union have not reached a negotiated outcome for a Greenfields agreement after three months, the employer may:

- continue negotiating with the union
- request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union
- submit the employer's proposed Greenfields arrangement for approval with a 12 month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing Greenfields arrangement must pass the no-disadvantage test specified in recommendation 20.5.

RECOMMENDATION 21.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) to allow for the establishment of project proponent Greenfields agreements.

When seeking approval of a Greenfields agreement, a project proponent (such as a head contractor) could seek to have its agreement recognised as a project proponent Greenfields agreement.

Once a project proponent Greenfields agreement is in place for a project, subcontractors that subsequently join the project, and that do not have a current enterprise agreement covering their employees on the project, should have the option of applying to the Fair Work Commission to also be covered by the project proponent Greenfields agreement. To approve the application, the Fair Work Commission must be satisfied that:

- the subcontractor does not have an existing enterprise agreement that covers its employees on the project
- the subcontractor was not coerced by any party into joining the project proponent Greenfields agreement
- the project proponent Greenfields agreement would pass a no-disadvantage test for the employees of the subcontractor against the relevant award.

The Fair Work Ombudsman and Fair Work Building and Construction should periodically carry out investigations to audit compliance and ensure that parties are not being coerced into signing on to project proponent agreements. Sanctions should be put in place for parties found to be engaging in coercion, including financial penalties and exclusion from having future access to project proponent arrangements for a specified period of time.

About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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