

# SUBMISSION TO THE GREENFIELDS AGREEMENTS REVIEW

Operation of Part 5 of Schedule 1 of the  
*Fair Work Amendment Act 2015* and the  
changes made to greenfields agreement  
making under the *Fair Work Act 2009*

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AMMA is Australia's national resources and energy employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 99 years, AMMA's membership spans the entire resource industry supply chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

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

The resources and energy industry is, and will remain, a major pillar of the national economy. Its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resources industry directly generates over 8 per cent of Australia's GDP. In 2015-16, the value of Australian resource exports was \$157.1 billion. This is projected to increase to \$232 billion in 2020-21<sup>1</sup>. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Approximately 50 per cent of the value of all Australian exports is from the resources industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserve.

AMMA members across the resources industry are responsible for a significant level of employment in Australia. The resources extraction and services industry directly employs 222,300 people. Adding resource-related construction and manufacturing, the industry directly accounts for four per cent of total employment in Australia. Considering the significant flow-on benefits of the sector, an estimated 10 per cent of our national workforce, or 1.1 million Australians, are employed as a result of the resources industry.

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<sup>1</sup> Office of the Chief Economist – Resources and Energy quarterly publication.

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## Executive Summary

AMMA supports the retention of the changes made by the operation of Part 5 of Schedule 1 of the *Fair Work Amendment Act 2015* that support effective greenfields agreement making under the *Fair Work Act 2009*. These changes must, as a minimum, be retained.

In its submission, to assist the reviewer's understanding of the importance of effective greenfields agreement making provisions, AMMA has provided some further industry context. The intention of this is to give broader context to reasons why the Fair Work Commission may have received fewer applications to approve greenfields agreements since the amendments were introduced.

In accepting the invitation to provide submissions as part of this review process, the submission below highlights that:

- The changes made by the *Fair Work Amendment Act 2015* were welcomed by employers in the resources and energy sector;
- A number of employers reported that their experiences when bargaining for greenfields agreements improved when compared against the situation in place prior to the amendments which are the subject of review;
- There are further, additional improvements to the greenfields agreement making process that would improve outcomes for both employers and employees in the resources and energy sector;
- The Final Recommendations of the Productivity Commission should be considered as part of any recommendations to government arising out of this review, including why consideration of these recommendations is appropriate in the context of Australia's current investment climate.

## 1. Introduction

1. AMMA welcomes the opportunity to make this submission in relation to the independent review of the operation of Part 5 of Schedule 1 of the *Fair Work Amendment Act 2015 (2015 amendments)* and the changes made to greenfields enterprise agreement making under the *Fair Work Act 2009 (FW Act)*.
2. AMMA holds the strong view that the changes introduced by the 2015 amendments, should, as a minimum, be retained. AMMA is a member of the Australian Chamber of Commerce and Industry (**ACCI**) and, having had the opportunity to review its submission, supports the comments made therein.
3. AMMA welcomed the 2015 amendments as a positive improvement to the FW Act. It made a comprehensive submission at the time the Fair Work Amendment Bill 2014 (**Original Bill**) was introduced, which relevantly stated:
  - a) AMMA strongly supports applying good faith bargaining principles to greenfields agreement making;
  - b) AMMA strongly supports enabling employers to notify a three-month deadline (as was in the Original Bill) for negotiations to help ensure the timely resolution of bargaining.
4. As part of its submission to the Original Bill, AMMA did flag some concerns with the insertion of the 'prevailing industry standards' assessment to be undertaken by the Fair Work Commission (**FWC**) in the event of an impasse.<sup>2</sup> This is discussed in greater detail later in this submission.
5. AMMA notes that the reviewer has requested that submissions seek to address a number of issues that have been identified in the Greenfields Agreements Review Background Paper prepared by the Department of Employment (**Background Paper**). For ease of reference, AMMA has addressed each of the eight issues on which specific comment is invited, as listed on page 19 of the Background Paper.

## 2. Industry Context

6. The list of greenfields agreements made between 2013-2017 provided by the Department of Employment to assist industry in making a submission for the purposes of this review is provided in an aggregate form. It is difficult for AMMA to differentiate industries for the purposes of conducting an in-depth analysis of the various sub industries defined under the Australian and New Zealand Standard Industry Classification Code. We note the observation in the Background Paper highlighting that the statistics related to greenfields agreements in construction, which likely includes mining and resource development work, is consistent with AMMA's understanding of the industries most likely to require certainty of costs and labour prior to any employees being engaged. AMMA represents a broad range of employers across the resources and energy sector. There could be any number of reasons why AMMA members are involved in greenfields agreement negotiations (or are not so involved), making it difficult to generalise across all industries.
7. New projects are important to the resources industry and the nation. As highlighted in an economic analysis by KPMG, investment in major resource projects has historically been

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<sup>2</sup> See AMMA's Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment Bill 2014, April 2014, pp. 3-23.

a major driver of economic growth.<sup>3</sup> Given the benefits that flow to the Australian economy from investment in, and the timely completion of, major resource projects, it is imperative that an effective suite of options are available for greenfields agreement making under the FW Act.

8. Increasing confidence to invest in Australia's resources sector is an important counter-cyclical measure which can improve economic and living standards and create job opportunities. A key driver in creating investor confidence is policy certainty. The correlation between policy certainty and increasing investor confidence is best explained in AMMA's *Resource Industry Market Outlook*,<sup>4</sup> which provides a market outlook taking into account a number of economic factors.
9. Effective greenfields agreement making provisions are critical to ensuring this confidence. The Regulation Impact Statement (**RIS**), which accompanied the Explanatory Memorandum to the Original Bill, goes into some detail about the importance of the resources industry and the criticality to major projects of the capacity to efficiently and effectively enter into greenfields agreements.<sup>5</sup> In particular, this is necessary to:
  - a) Secure investor funding which will not be provided without cost certainty;
  - b) Ensure projects are not delayed or abandoned due to economically unsustainable outcomes;
  - c) Avoid situations where projects commence without industrial certainty, leading to industrial action early in the life of an enterprise, leading to scheduling and cost blowouts.
10. As also noted in the RIS, greenfields agreement negotiations (in the context of major projects) are most likely to occur in the feasibility stage of projects. The current market experience is that of maintaining existing assets rather than developing new ones. In this climate, greenfields agreement making will be reduced.
11. Jobs in the resources and energy sector are generally highly sought after. This is because they offer terms and conditions well above the national average<sup>6</sup> and offer significant development and training opportunities for Australian workers. In order to continue to provide the some 223,000 direct jobs<sup>7</sup>, an effective greenfields agreement making process is critical. While significant commentary around the need for greenfields agreements to support major projects exists, other industries which provide support services to resource industry projects, equally as critical to the economy and jobs, ought not be neglected.

### 3. Alteration of bargaining behaviour

12. The 2015 amendments saw the extension of good faith bargaining rules to greenfields enterprise bargaining negotiations.
13. Applying the good faith bargaining provisions to greenfields agreement making is something AMMA has advocated for since its 2012 submission to the Fair Work Act Review Panel as part of the post-implementation phase of the FW Act. AMMA argued for

<sup>3</sup> KPMG Report, *Workplace relations and the competitiveness of the Australian resources sector*, prepared for AMMA, 12 March 2015 <[http://www.amma.org.au/wp-content/uploads/2015/03/KPMG\\_WR\\_and\\_the\\_competitiveness\\_of\\_the\\_Australian\\_resources\\_sector.pdf](http://www.amma.org.au/wp-content/uploads/2015/03/KPMG_WR_and_the_competitiveness_of_the_Australian_resources_sector.pdf)>.

<sup>4</sup> AMMA *Resource Industry Market Outlook Autumn 2017* <<http://www.amma.org.au/wp-content/uploads/2017/03/AMMA-RIMO-Autumn-2017.pdf>>.

<sup>5</sup> Explanatory Memorandum, Regulation Impact Statement Fair Work Amendment Bill 2014, pp. ix - xxvii.

<sup>6</sup> See Annexure A: ABS Annual Wage Data 2015-16.

<sup>7</sup> Office of the Chief Economist – Resources and Energy quarterly publication.

it again in our initial submission to the Productivity Commission, as a logical step in introducing more rigour and broader options into the making of greenfields agreements.

14. AMMA strongly supports the retention of the good faith bargaining provisions to greenfields agreement making.
15. Previously, a criticism of greenfields agreement making was that unions would simply refuse to negotiate with a particular employer, fail to respond to proposals, or fail to meet in a timely fashion. In the context of project work, unions know employers need to get labour arrangements in place rapidly to secure investment into projects, which is a disparity of bargaining power in favour of unions. The good faith bargaining obligations act as an incentive to ensure that the parties behave as they would in trying to reach any enterprise agreement. Certainly, they in no way adversely affect bargaining behaviour such that any consideration should be given to removing them.
16. The 2015 amendments also made the following changes to the FW Act:
  - a) Introduced the ability to notify each employee organisation bargaining representative of a six-month 'notified negotiation period' for proposed single-enterprise agreements, where the agreement is a greenfields agreement;<sup>8</sup>
  - b) Introduced an optional six month 'circuit breaker', where the employer can take the agreement to the FWC for approval if agreement cannot be reached with a union or unions within the six-month period;<sup>9</sup>
  - c) Provided that where the employer takes an agreement to the FWC after six months of failing to reach 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.<sup>10</sup>
17. Large capital-intensive (and other) projects require some certainty about the start date of the project to secure finance, to plan the project, and to more generally manage risk. In many cases international investors are circumspect about investing without a level of certainty about the labour costs of the project and certainty industrial disputation will not occur. AMMA supports the retention of a 'circuit breaker' provision where negotiations have reached an impasse.
18. AMMA notes the following comments of Productivity Commission in its final report:<sup>11</sup>

Unions' capacity to hold out in their negotiations provides them with potentially excessive bargaining power, and risks stripping some of the needed returns from inherently risky projects. Unlike other enterprise bargaining processes, the usual disciplines for speedy bargaining — the absence of pay increases for an existing workforce — are not present.
19. There is a clear need for some form of 'circuit breaker' to assist negotiations to proceed in a timely and constructive fashion. In feedback sought in response to this review, one AMMA member observed:

*"knowing that there was a timeframe where arbitration could be utilised, the closer it came to six months, the union was held to meaningful conversations."*
20. This observation is a reflection that, in the experience of that member, bargaining behaviour was positively affected by the 2015 amendments. Other feedback received by

<sup>8</sup> Fair Work Act 2009, s 178B.

<sup>9</sup> Fair Work Act 2009, s 182(4).

<sup>10</sup> Fair Work Act 2009, s 187(6).

<sup>11</sup> Productivity Commission Final Report into the Workplace Relations Framework, p. 36.



AMMA expressed similar sentiments, although not all of AMMA’s members have seen a positive improvement in bargaining behaviour on the part of unions, with feedback noting that the process for greenfields negotiations is often still heavily weighted in favour of unions. This is particularly the case where a contractor is obliged to have an agreement in place prior to mobilising labour, and there is a lead in time of less than 6 months before work is scheduled to commence. As greenfields agreements must be made with a union, the leverage exercised remains significant.

- 21. It is AMMA’s view that further amendments are necessary to ensure a system that is effective and fair.

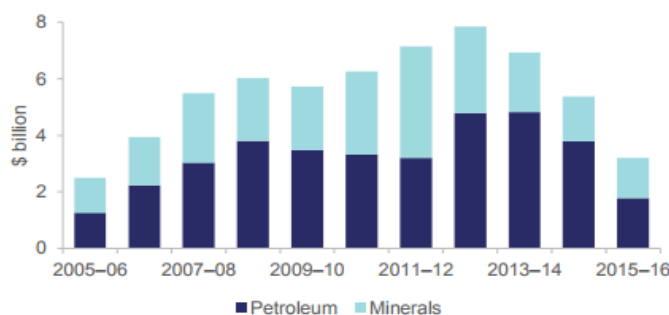
#### 4. Concerns relating to effects on bargaining behaviours & outcomes

- 22. AMMA is not aware of any examples where the 2015 amendments had a negative effect on bargaining outcomes and behaviours. AMMA notes in ACCI’s submission reference was made to union concerns expressed prior to the 2015 amendments taking effect about unions being forced into agreements that “sell their members short” for fear of being subject to the procedure under s182(4) of the FW Act. It is unclear why the unions would fear this to be the case, due to the required consideration of prevailing industry standards under s187(6) of the FW Act.

#### 5. Relationship between amendments & approval applications

- 23. The 2015 amendments commenced when the decline in overall demand for greenfields agreements had already commenced.
- 24. The Office of the Chief Economist, in its 2016 report, noted that Australian exploration expenditure recorded its largest ever annual decline in 2015–16, falling by 40 per cent to \$3.2 billion.<sup>12</sup> Exploration is a key stage in the mining project development cycle. It is an investment in knowledge about the location, type, quantity and quality of deposits, which helps to inform future development.
- 25. The following Figure 1.3 demonstrates decline in exploration expenditure:

Figure 1.3: Exploration expenditure



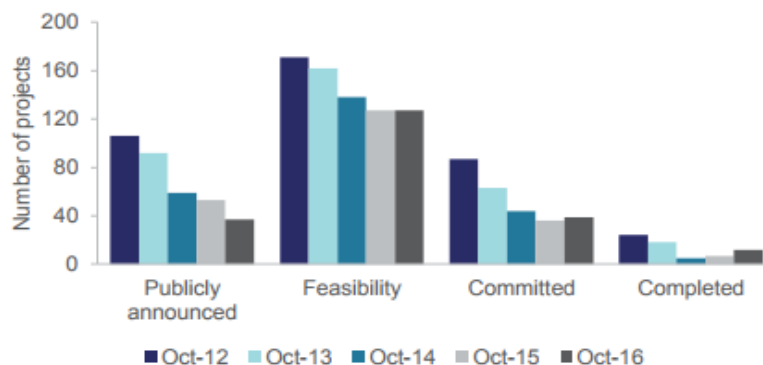
Source: ABS (2016) Mineral and Petroleum Exploration, Australia, 8412.0

<sup>12</sup> Office of the Chief Economist – Resources and Energy Major Projects, December 2016.



26. The Office of the Chief Economist also points out, in its 2016 report, that projects advancing from the feasibility stage to the construction stage have slowed.<sup>13</sup> Some of the reasons for this are considered to be:
- a) Producers are diverting their focus from developing new projects to reducing costs and ensuring the commercial viability of existing assets;
  - b) Final investment decisions for many projects have been delayed to 2017 or later, with producers weighing up factors such as the price cycle, access to infrastructure, business conditions, and cost competitiveness in Australia;
  - c) A combination of low commodity prices over much of the past 12 months, as well as expectations of growth in supply in a number of markets, have created a more difficult outlook for investment across the resources and energy sector;
  - d) The number of projects advancing from the feasibility stage has slowed. Current market conditions have led to a backlog of projects at the feasibility stage of the investment pipeline, as companies delay decisions to see how market conditions unfold.
27. This is consistent with feedback received from industry.
28. The following Figure 1.1 demonstrates number of projects in the investment pipeline from 2012 to 2016:

**Figure 1.1: Number of projects in the investment pipeline, 2012 to 2016**



Source: Department of Industry, Innovation and Science (2016)

29. In addition to the changed investment climate, businesses face a variety of other situations where a greenfields agreement cannot be made under the FW Act. Businesses may not need a greenfields agreement where, for example, it already has in place an agreement with a broad enough scope that enables it to tender for other work that falls within that scope.
30. AMMA has not been able to identify any clear link between the 2015 amendments and the decrease in greenfields approval applications and suggests for the resources and energy sector at least, the current investment climate has impacted on the need for new greenfields agreements to be made.

<sup>13</sup> Office of the Chief Economist – Resources and Energy Major Projects, December 2016.

## 6. Systemic issues or impediments to the making of greenfields agreements

31. AMMA, while supportive of the 2015 amendments, considers that there are still barriers to effective greenfields agreement making. In this response, AMMA is limiting its comments to the specific changes introduced by the 2015 amendments.

### Six-month notification period

32. Without extracting the provisions of the FW Act verbatim, the 2015 amendments introduced the capacity for an employer to notify a negotiation period, after which point an application can be made for approval of the agreement with the FWC. While AMMA is supportive of the retention of a 'circuit breaker' type provision, AMMA is of the view that the option should be available after three months rather than six months, consistent with the Productivity Commission's recommendation,<sup>14</sup> and the Original Bill.
33. Member feedback revealed that 85 per cent of employers who negotiate greenfields agreements for new projects are concerned about the time taken to reach a greenfields agreement.<sup>15</sup> This is not just due to the resources taken to engage in bargaining, but also the realities of timeliness between the requirement to reach an agreement, engage a workforce and commence work on some projects will be less than 6 months.
34. Members report concerns that the six-month period is unrealistic in terms of time from successful tendering for work, and the need to mobilise labour. One member reported:
- "In reality, you rarely have six months up your sleeve. Mobilisations are often six months in total, meaning that you have to have the agreement in place inside of six months."*
35. It also should be noted that the notification period of six months is a trigger for an application to be made to the FWC. The ultimate outcome, including final costs liabilities of the enterprise, will not be known for some time. Notwithstanding that an agreement is made when s 182(3) or s 182(4) are satisfied, the agreement is still subject to formal approval.
36. Under the FWC's timeliness benchmarks, it aims to finalise all agreement approval applications within 12 weeks. It notes that the timeliness benchmarks are aspirational, and it expects that there will be circumstances where the FWC cannot meet its timeliness goals for a variety of reasons.<sup>16</sup> The most recent FWC Annual Report reveals that 90 per cent of greenfields agreements were finalised by the FWC within 59 days in 2016-17.<sup>17</sup>
37. AMMA suggests that a three-month notification period is a more appropriate timeframe, and is in line with the Productivity Commission's recommendation and feedback from employers involved in greenfields agreement making.

<sup>14</sup> Recommendation 21.1. See Annexure B, Productivity Commission Recommendations.

<sup>15</sup> AMMA 2016 Federal Election Survey, <http://www.amma.org.au/wp-content/uploads/2016/04/2016-04-AMMA-Pre-Election-Survey-Full-Report-Final.pdf>.

<sup>16</sup> Fair Work Commission, Agreements in progress <<https://www.fwc.gov.au/awards-and-agreements/agreements/agreements-progress>>.

<sup>17</sup> Fair Work Commission Annual Report 2016-17, p. 59.

## ‘Prevailing Industry Standards’ Test

38. AMMA’s members are concerned that in the event that a ‘circuit breaker’ is needed, the ‘prevailing industry standards’ test does little to militate against unsustainable terms and conditions being decided by the FWC.
39. Applying the ‘prevailing industry standards’ test threatens to entrench inflated, non-competitive terms and conditions that are no longer relevant to the market conditions of the day, for example, terms and conditions that were formed during the mining investment boom. This period of significant investment and growth also correlates with a time prior to the 2015 amendments. The findings of the Fair Work Review Panel from 2012 noted that “some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia.”<sup>18</sup>
40. In a cyclical industry where global commodity prices greatly influence investment decisions, employers have expressed concern that the application of the prevailing industry standards test provided for in s187(6) of the FW Act will not achieve sustainable terms and conditions, which in turn affects the ability of major projects to attract investment. This may ultimately affect whether or not a project proceeds, affecting Australian jobs.
41. This concern appears to be borne out in statistics provided in the Background Paper showing that no approval application has been made by an employer after the six-month negotiating period. Agreements with unsuitable terms and conditions should not be used as a basis for sensible, competitive labour cost structures going forward in a more competitive global resource industry. If this test is retained (despite the concerns expressed by AMMA) it is suggested that industry be provided with some guidance of how the FWC will make this assessment. Presently, according to the Background Paper, the provision is untested.
42. Australia’s workplace relations framework includes modern awards which provide a safety net for terms and conditions in a particular industry, and the Better Off Overall Test (BOOT) operates to ensure workers do not receive less than the award. All enterprise agreements, including greenfields agreements, must pass this test.
43. In terms of an appropriate test where an arbitrated outcome is called for, if not the prevailing industry standards test that currently exists in the FW Act, AMMA supported the Productivity Commission’s recommendation of a requirement to pass the no-disadvantage test. This recommendation was made in the context of a suite of other recommendations about agreement making, so may be beyond the scope of this review. Failing that, the two existing tests (the BOOT and the public interest test) are adequate to protect employees’ interests.

## Wider options needed

44. The FW Act centralised the role of unions in greenfields agreement making. Employers will attempt to negotiate greenfields agreements in good faith with a view to reaching an outcome in the best interests of the enterprise, and that is appropriate having regard to its future workforce.
45. In an AMMA membership survey conducted in 2016, nine out of ten employers who negotiate greenfields agreements for new projects indicated that they are concerned

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<sup>18</sup> Fair Work Act Review Panel’s final report, *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, p. 171.

about the lack of options where a union refuses to progress negotiations on greenfields agreements.<sup>19</sup>

46. AMMA supports the comments in the Productivity Commission's final report:
- A limited menu of bargaining options would address the worst deficiencies, while taking account of the different nature of greenfields projects.<sup>20</sup>
47. AMMA and its members are also supportive of the Productivity Commission's recommendation 21.1, which recommends providing a suite of options where parties are not able to reach agreement after three months of negotiating.<sup>21</sup> Importantly, the recommendation included options:
- a) To continue to negotiate with the union;
  - b) To request the FWC undertake a "last offer" arbitration by choosing between the last offers made by the employer and the union;
  - c) To submit the employer's proposed greenfields agreement for approval with a limited (12 month) nominal expiry date.
48. In AMMA's view, these options will have a moderating effect on union demands and a positive effect on seeing more greenfields agreements successfully negotiated between employers and unions. It will be hard to judge the success or otherwise of such adjustments in the short to medium term due to the current uncertainty in investment. However AMMA suggests that adoption of these additional suggestions is likely to be viewed positively by employers in the resources and energy sector and encourage the proactive pursuit of greenfields agreements.
49. Greenfields agreement making is critical in the major project context, but not exclusively so. The Department of Employment made available a list of greenfields agreements made between 2013-2017. While this is not divided into industries such that it is clear which agreements apply to which industries, there are a number of different industries represented. The graphic contained in the Background Paper and the associated commentary suggests that a large number of greenfields agreements described as construction are considered to include mining and resource development work.<sup>22</sup> The time allowed for this review prevented AMMA from undertaking a detailed analysis of this. We understand that the submission of ACCI contains some further insights. However, in AMMA's experience, smaller projects, and contractors engaged to perform work on them, would also benefit from greenfields agreement making provisions that encourage negotiations for those agreements concluding in a shorter period of time than they currently do.

## 7. Productivity Commission Recommendations

50. While not addressing all of AMMA's concerns, AMMA welcomed the recommendations of the Productivity Commission<sup>23</sup> and remains of the view that they should be adopted.
51. AMMA made detailed submissions in response to the Productivity Commission's draft report, which it invites this current review to consider. While AMMA does not intend to

<sup>19</sup> AMMA 2016 Federal Election Survey, <http://www.amma.org.au/wp-content/uploads/2016/04/2016-04-AMMA-Pre-Election-Survey-Full-Report-Final.pdf>.

<sup>20</sup> Productivity Commission Final Report into the Workplace Relations Framework, p. 3.

<sup>21</sup> See Annexure B: Productivity Commission Recommendations.

<sup>22</sup> Greenfields Agreement Review Background Paper, p. 9.

<sup>23</sup> See Annexure B: Productivity Commission Recommendations.

repeat those submissions, we do wish to draw the review's attention to a few key areas, in addition to the comments already made about recommendation 21.1, above.

## Duration

52. AMMA supports the Productivity Commission's recommendation 20.4 in relation to the duration of a greenfields agreement.<sup>24</sup> It was recommended that enterprise agreements be permitted to specify a nominal expiry date that:
- Can be up to five years after the day on which the FWC approves the agreement; or,
  - Matches the life of a greenfields project. The resulting enterprise agreement could exceed five years if the business satisfied the FWC that the longer period was justified.
53. In AMMA's view, a key benefit of this is reducing exposure to protected industrial action and providing the capacity to lock in business costs for the duration of a project phase, leading to greater certainty of costs and timeframes critical to feasibility decisions made long before the construction phase of a project commences.
54. AMMA welcomed the Productivity Commission's acknowledgement that there should be the capacity for an employer to enter an enterprise agreement where the duration matches the life of the construction phase.<sup>25</sup> Australia has the commercial, technical, legal and national security imperatives to justify the construction of further nation building projects in our resources sector. The national workplace relations framework must support investment in this country.
55. In the event that the Productivity Commission's recommendation were to be implemented, practical considerations should be had as to how the FWC may be satisfied so as to justify a longer duration. AMMA does not propose to detail those in this submission, suffice to say that it is important that if such a test is applied, the bar not be set so high that no projects can access the longer agreement duration.

## Project Proponent

56. AMMA strongly supports the Productivity Commission's recommendation 21.2, which would allow the ability for a head contractor to negotiate a "project proponent" agreement that other contractors could sign up to if they so choose, and do not already have an agreement applying to the work that is to be performed.<sup>26</sup>
57. The productivity benefits of having such an agreement available would be huge when considering that some major resource construction projects have upwards of 250 greenfields agreements in place. AMMA refers to its submission in response to the Productivity Commission's draft report in relation to this.<sup>27</sup>
58. The safeguards included in the Productivity Commission's recommendation will ensure that a subcontractor would not be coerced into agreeing to project terms and its employees would not be disadvantaged when compared to the relevant award. This

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<sup>24</sup> See Annexure B: Productivity Commission Recommendations.

<sup>25</sup> Productivity Commission Final Report into the Workplace Relations Framework, p. 37.

<sup>26</sup> See Annexure B: Productivity Commission Recommendations.

<sup>27</sup> AMMA Submission in Reply to the Productivity Commission's Draft Report on Australia's Workplace Relations Framework, paragraph 103.

observation is made with the understanding that the no disadvantage test is not the relevant test currently under the FW Act in relation to agreement making.

59. It would simplify things greatly where it was feasible for projects not to have the delays incurred by negotiating hundreds of agreements, and potentially waiting six months (or more) for each of those, if project proponent greenfields agreements could be rolled out easily across a project. It is of course a matter for those involved in any such project to adopt the industrial arrangements most suitable to the needs of that enterprise.

## 8. Anticipated effects of returning to pre-November 2015 legislative arrangements

60. It is AMMA's view that returning to the legislative arrangements which applied to greenfields agreements making prior to November 2015 will have a negative effect on bargaining behaviour and have the potential to bring negotiations to a standstill.
61. Removal of the good faith bargaining provisions would send a message to unions and businesses that is counter to the objects of the 2015 amendments and the objects of the FW Act more generally.<sup>28</sup>
62. Removal of a 'circuit breaker' provision for protracted negotiations would likely have the effect of increasing delays and uncertainty around when a greenfields agreement may be reached, endangering investment and jobs for Australians. Even in the absence of the provision being utilised, anecdotal responses from AMMA's members are that they perceive this acts as an incentive to bring parties to the table.
63. Feedback from AMMA members strongly supports the retention of these amendments, as a minimum. AMMA sees no justification for a return to the pre-November 2015 legislative arrangements.

## 9. Impact of the reduction of capital development projects on greenfields making

64. As outlined above, there has been a reduction in major projects since the end of the mining boom, with many projects now in the consolidation phase which do not require greenfields agreements. AMMA refers to its comments in the "Industry Context" section of this submission in relation to this.
65. It is unsurprising that this may have had an effect on the number of greenfields agreements made since 2015.
66. This does not diminish the need for workable greenfields agreement making provisions. All political parties have long recognised that when starting a new enterprise with no current employees there needs to be a process to secure a greenfields agreement that will provide the certainty employers need and ensure employees who will be employed are not disadvantaged when compared with the safety net of modern awards and legislated minimums.
67. The resources industry in particular is susceptible to changing conditions and new participants and hence it is essential that a workable framework which facilitates industrial certainty for employers and cost certainty for investors is in place.

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<sup>28</sup> *Fair Work Act 2009*, ss3(a) and 3(f).

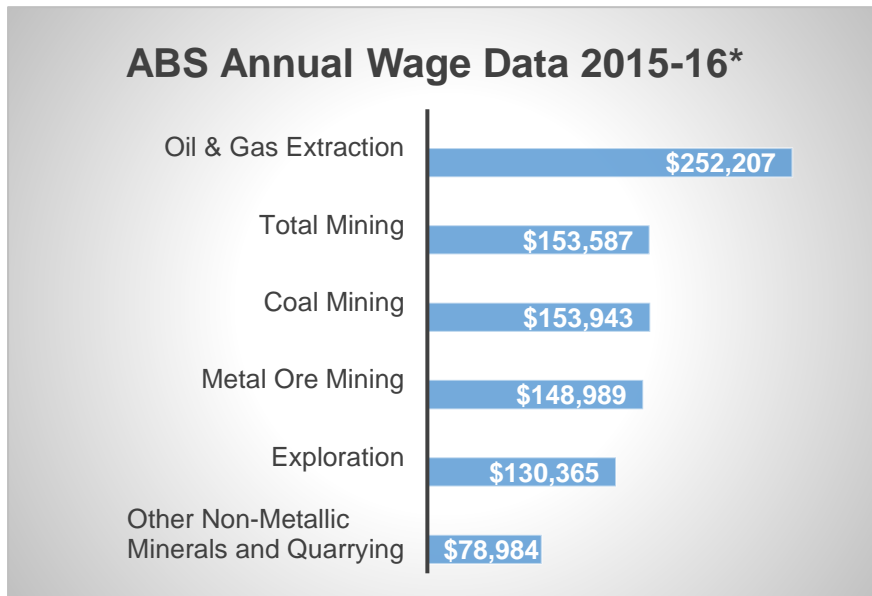


## 10. Other matters

68. In its responses to the questions posed by this review, AMMA has outlined areas for consideration in improving current arrangements for greenfields agreement making. Further detail on AMMA's position can be found at:
- a) [Submission to the Fair Work Act Review Panel on the post-implementation review of the Fair Work Act 2009](#), February 2012; pages 98-103;
  - b) [Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment Bill 2014](#), April 2014, pages 3-23;
  - c) [Submission to the Productivity Commission Review of the Workplace Relations Framework](#), March 2015, pages 93-128; and
  - d) [Submission in Reply to the Productivity Commission's Draft Report on Australia's Workplace Relations Framework](#), September 2015, pages 19-32.



## Annexure A: ABS Annual Wage Data 2015-16



\*Figures obtained from Australian Bureau of Statistics, 2015-16, *Australian Industry*, category 8155.0.

## Annexure B: Productivity Commission Recommendations

The following recommendations of the Productivity Commission are referred to in AMMA's submission, and are extracted in totality below:

### 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.

### 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.