GREENFIELDS AGREEMENTS – 'PROJECT LIFE AGREEMENTS'?

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Legal Briefings – By **Nick Ogilvie and Alexis Agostino**

The threat of unpredictable and escalating costs, and the risk of a major project being halted before completion by protected industrial action, plagues businesses considering to back major projects. It deters investment.

We know that 'Project Life Agreements' have previously been pursued by industry as a remedy to this issue, and calls for reform were supported by the Federal Government. But will the IR Working Groups reach agreement? Will we see this as a feature of the soon to be announced reforms?

THE PROBLEM WITH GREENFIELDS AGREEMENTS

Greenfields agreements are enterprise agreements negotiated between employers and unions, in relation to new projects, before employees necessary for the normal conduct of the business are engaged. This provides certainty in respect of labour costs and industrial arrangements for relevant stakeholders – most notably investors. However, this industrial certainty only lasts whilst the greenfields agreement is in term, that is, for a maximum of 4 years. After that, employees and unions are free to negotiate new terms and conditions, and may take protected industrial action in support of their claims.

Having regard to the lifespan of a major project (for example the projected time frame for the construction of Snowy 2.0 is 7 years), a greenfields agreement can expire and bargaining can occur before construction on the project's site has even commenced.

The threat of industrial action, which can cause significant delay and increase a project's costs, gives employees, and their representatives considerable leverage to alter working conditions and increase wage rates. This power imbalance, and significant uncertainty, is seen by many as a deterrent to investment in Australian projects. Investors only have to look to Chevron's Gorgon LNG project in Western Australia to be reminded of how expiring greenfields agreements can threaten to bring a project to a standstill.

The fix seems simple – extend the nominal expiry date of a greenfields agreement from four years to the life of a major project (i.e '**Project Life Agreements'**). In fact, this is the solution both industry at the Federal Government have pursued over the last 18 months, and the Opposition has previously considered. But will members of the working group recommend this amendment?

Whilst members of the IR working groups, comprised of industry and unions, are subject to confidentiality restraints, it's been reported that most have maintained their traditional viewpoints in relation to many contentious IR issues.

We consider these viewpoints below.

WHERE DO THE PLAYERS STAND?

FEDERAL GOVERNMENT

Late last year, the Federal Government announced its intention to introduce Project Life Agreements through legislative reform. It sought contributions from the community in relation to its discussion paper, "*Attracting major infrastructure, resources and energy projects to increase employment - Project life greenfields agreements*" **(Discussion Paper)**.

The Government's position hasn't changed – and if anything has presumably been emboldened by the COVID-triggered economic downturn. In May 2020, IR Minister, Christian Porter, expressed the Government's support of Project Life Agreements stating:

The businesses that generate those jobs say it is a very clunky system and it increases the cost of the construction and decreases the overall investment that can drive into Australia. I think [extending the maximum term] just makes sense, particularly given that we are going to rely so much on construction, mining, oil and gas projects to help drive our economy through the very difficult circumstances.

FEDERAL OPPOSITION

In the lead up to the last Federal election, the then Leader of the Opposition, Bill Shorten said:

We want to look at the ability for companies to negotiate with unions for extended greenfields agreements, project life, you can go to the global investors who will back it. They'll be good paying jobs. You get the certainty of the arrangement, the union gets the certainty of the arrangement, the workforce get the certainty of the arrangement.

However, following its election loss, the Opposition has cooled on the idea of reform, with Shadow IR Minister, Tony Burke, stating:

It's something we said we would consider, we'll have a look at what they come back with.

INDUSTRY

Unsurprisingly, reform has previously been backed by key industry players.

In its submission the Discussion Paper, AMMA said:

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

The Minerals Council's submission to the Discussion Paper echoes these sentiments:

"The current duration of greenfields agreements is out of step with the realities of major project work in the resources sector, which can extend beyond four years. After a greenfields agreement has passed its nominal expiry date, industrial action may be taken. Consequently, employers may be subject to significant uncertainty and additional costs at a critical time of project construction, and be compelled to agree to uncompetitive wages and conditions in the replacement agreement to keep the project going."

UNIONS

The ACTU has vehemently opposed Project Life Agreements, as it considers that any idea of reform is motivated by a desire to erode the rights of workers.

On 22 October 2019 the ACTU Secretary, Sally McManus, was reported to state that:

Greenfields agreements by their nature don't have any input from the workers covered. Extending the life of greenfields agreements is a denial of the right to collective bargaining. It serves just one purpose – to stop workers from negotiating pay rises.

In its submission to the Discussion Paper, the ACTU said:

The provision of "life of project" greenfields agreements would mark a further deterioration of labour rights in Australia.

…

Discussion Paper 2 appears to mount an argument that the denial of fundamental collective bargaining rights is justified by the assertion that this is necessary to secure investment in large infrastructure projects. There is no such justification and there is no evidence of significant risk to investment driven by uncertainty of labour costs…

Whilst it is possible in the current climate that unions could resile from this position, given that they have previously denied that a four year term hinders productivity, it is unlikely that we will see a complete shift.

WILL THE FW ACT BE AMENDED TO ALLOW FOR PROJECT LIFE AGREEMENTS?

Without being privy to the conversations of the greenfields agreement working group, it's difficult to say with any certainty whether they will recommend the introduction of Project Life Agreements. Whilst reform in this space to be achievable, it's more likely that any unanimous proposed reform will be to extend the maximum nominal term of greenfields agreements from the current 4 year term (rather than to introduce Project Life Agreements).

In terms of any extension to the maximum nominal term, we consider members could arrive at a period of 6 to 8 years. Whilst this reform would not necessarily allow for Project Life Agreements, it would have the effect of allowing some greenfields agreements to cover the lifetime of a project (particularly if the maximum nominal term is extended to the 8 year mark).

Another possibility, as observed by The Australian this week, is that Project Life Agreements could be made in respect of projects worth more than $500 million, or projects worth less than $500 million where they are deemed to be of "national significance" and create a certain number of jobs.

Notwithstanding the Federal Government's previous support of Project Life Agreements, we expect that the Federal Government would still welcome either a longer nominal term or a carve out for projects that do not fall within the definition of a 'major project'.

ARE OTHER REFORMS TO GREENFIELDS AGREEMENTS POSSIBLE?

Of course, we assume that the greenfields agreement working group has explored other possible reforms during the course of their discussions.

Again, whilst exercising some degree of speculation, we think other changes on the agenda could be to:

- **reduce the 'notified negotiation period' from 6 months to 3 months:** the Fair Work Amendment Act 2015, introduced, amongst other things, a six-month 'notified negotiation period' for greenfields agreements, which allows an employer to apply to the Fair Work Commission (**FWC**) for approval of the greenfields, if, at the end of the notified negotiation period, agreement isn't reached with the relevant union. This amendment has been largely ineffective (to date, only one application to the FWC has been made), as six months does not incentivise parties to reach agreement promptly. It's also unrealistic to expect parties to have 6 months up their sleeves when bidding for major project work. One option is to reduce the notified negotiation period to 3 months. This revised notified negotiation period is consistent with the Fair Work Amendment Bill 2014, as well as the recommendations of the 2015 Productivity Commission Inquiry Report 2015, and the 2017 Greenfields Agreement Review; and

- **include 'wage review' terms in greenfields agreements:** where the maximum nominal expiry date of a greenfields agreement is extended beyond 4 years, we consider that a provision allowing for wage increases to be reviewed before the nominal expiry date of the agreement could be recommended. This proposal would address union concerns about having wages 'locked in', while at the same time protecting businesses from negotiating an entire agreement and protected industrial action midway through a project.

Watch this space!

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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