



CCIWA Submission

Project Life Agreements

1 November 2019

We stand for business

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Introduction

1. The Chamber of Commerce and Industry of Western Australia (CCIWA) is the leading business association in Western Australia (WA) and has been the voice of business for more than 125 years. CCIWA represents employer members from across all regions and industries in Western Australia, including private sector businesses in the resources, construction and manufacturing industries.
2. CCIWA welcomes the opportunity to make a submission on the project life greenfield agreements discussion paper.
3. CCIWA has extensive experience in providing industrial relations management and advice throughout the lifecycle of major construction projects. These services include:
 - 3.1. Support for contractors with agreement making, onsite support, advocacy and representation;
 - 3.2. Helping deliver construction projects on time and on budget by reducing the risk of industrial disputes and increasing workforce productivity and engagement;
 - 3.3. Providing industrial relations advice and assistance to clients, service providers, fabricators, and contractors;
 - 3.4. Training supervisory and management personnel in industrial relations matters;
 - 3.5. The establishment of industrial relations management committees.
4. CCIWA has been providing these services since the mid 1970s and has been involved in all major resources projects in Western Australia, including more recently the:
 - 4.1. Wheatstone and Pluto LNG Plant Projects;
 - 4.2. Rio Tinto Iron Ore Expansion Project;
 - 4.3. Inpex Browse Ichthys Gas Field Development; and
 - 4.4. BHP Billiton Iron Ore Asset Development Projects.
5. International and domestic investment in major resource projects has delivered significant and ongoing economic benefits that positively impact on the standard of living for all Australians.
6. Having appropriately skilled employees and workforce management is a significant factor in determining the attractiveness of Australia for major projects. Considerable attention is therefore given to the effectiveness of our industrial relations system in providing stability and certainty for the project.

7. CCIWA supports the establishment of enterprise agreements that can operate for a period of longer than four years, to coincide with the duration of the development or construction of a major project. We believe that life of project agreements can be established both in the case of greenfield agreements and enterprise agreements made with existing employees.
8. In responding to the questions raised in the discussion paper, we have addressed the issues through the prism of major resource projects. However, we recognise that many of the issues and concerns faced by the resource sector are shared by other industry sectors with respect to the development of major projects.

Importance of major resource projects to the Australian economy

9. The resources sector is integral to the Australian economy, accounting for 9% of the nation's gross domestic product.¹
10. For the WA economy, the mining sector accounted for nearly a third (\$79 billion) of WA's gross state product in the 2017-18 financial year.² Almost \$18 billion in capital expenditure was invested in WA's resources industry in 2018, representing more than half of national capital expenditure.³ WA's economy has a strong export focus and contributes substantially to Australia's merchandise exports, accounting for nearly half (42 per cent) of Australia's \$344 billion merchandise exports in 2018. Minerals and petroleum accounted for 91 per cent (\$131.4 billion) of WA's merchandise exports last year.⁴
11. Investment in the resources industry also has direct benefit to relevant state and federal governments in terms of income from royalties and grants. In 2018-19 the royalties for all minerals and petroleum produced on WA state lands and waters (including the Commonwealth's share of royalties) equated to \$6.5 billion, representing a 12.3% increase from the \$5.8 billion collected in 2017-18. This income is essential in allowing relevant Governments to invest in infrastructure and provide services that benefit the general population.

¹ Reserve Bank of Australia (2 October 2019) Composition of the Australian Economy – Snapshot. Available: <https://www.rba.gov.au/education/resources/snapshots/economy-composition-snapshot/>

² Department of Jobs, Tourism, Science and Innovation, *Western Australia Economic Profile*, July 2019. Available: https://www.jtsi.wa.gov.au/docs/default-source/default-document-library/wa-economic-profile-0719.pdf?sfvrsn=d8e6701c_4 [accessed 13 August 2019]

³ Department of Mines, Industry Regulation and Safety, *Industry Activity Indicators*. Available: <http://www.dmp.wa.gov.au/About-Us-Careers/Latest-Resources-Investment-4083.aspx>

⁴ Department of Jobs, Tourism, Science and Innovation, *Western Australia Economic Profile*, July 2019. Available: https://www.jtsi.wa.gov.au/docs/default-source/default-document-library/wa-economic-profile-0719.pdf?sfvrsn=d8e6701c_4 [accessed 13 August 2019]

12. The jobs and spending generated as a result of the construction and operational phases of major resource projects flows to other sectors of the economy. This effect was highlighted in a report released by the Reserve Bank of Australia, which identified that the recent mining sector boom is estimated to have:
 - 12.1. raised real per capita household disposable income by 13 per cent;
 - 12.2. raised real wages by 6 per cent; and
 - 12.3. lowered the unemployment rate by 1.25 percentage points.⁵
13. As of March 2019, WA has an estimated \$113 billion worth of major resources projects in the pipeline, including \$25 billion in the construction or committed stage and \$88 billion worth of planned or possible new projects.⁶ These projects will be a crucial source of future economic growth and jobs creation.

Australia's competitiveness in attracting major resource projects

14. The benefits to the economy derived from our resources sector can only be realised through significant business investment in developing the infrastructure required to support these operations.
15. The presence of suitable mineral or petroleum resources does not guarantee that investment will occur. There are multiple factors that are taken into consideration when assessing the viability of potential resource projects, many of which relate to Government policy. This had led to a focus by many governments globally to *"introduce new mining laws"* which are *"motivated by a desire to encourage greater mining investment..."*⁷
16. Consequently, Australia is in a competitive international environment seeking investment in major resources projects, in which respective State and Federal Governments have a significant ability to influence investment outcomes.
17. A survey of the mining companies has identified the Investment Attractiveness Index of various regions by considering both the geological desirability of the region along with the Policy Perception Index that measures the effect of government policy on investment decisions.

⁵ Tulip, P (2014) The effect of the mining boom on the Australian economy. Reserve Bank of Australia. Bulletin December Quarter 2014. Available <https://www.rba.gov.au/publications/bulletin/2014/dec/3.html>

⁶ Department of Mines, Industry Regulation and Safety, *Industry Activity Indicators*. Available: <http://www.dmp.wa.gov.au/About-Us-Careers/Latest-Resources-Investment-4083.aspx> [accessed 13 August 2019]

⁷ Mitchell, P (2009) Taxation and Investment issues in mining, published in Advancing the EITI in the Mining Sector. Extractive Industries Transparency Initiative. Available: <https://www.oecd.org/site/devaeo10/44282904.pdf>

18. This index identifies that when compared to 83 other regions:
 - 18.1. Western Australia is ranked number 2;
 - 18.2. Queensland is ranked number 13; and
 - 18.3. Northern Territory is ranked number 23.⁸

19. The report also identifies that approximately 40 per cent of the investment decision is based on policy factors. When comparing Australian regional investment attractiveness based solely on policy factors, the attractiveness ranking shifts, with:
 - 19.1. Western Australia ranking falling to number 5;
 - 19.2. Queensland ranking falling to number 31;
 - 19.3. Northern Territory ranking falling to number 41.⁹

20. The above list shows that the attractiveness of Australia's key mining states is negatively affected by public policy factors when compared to their geological advantages.

21. The industrial relations system, both in terms of the relevant legislation and practices, also impacts on the attractiveness for investment in major projects. The following graph¹⁰ identifies the extent to which mining companies view a region's labour regulation and level of work disruptions as either encouraging investment or not being a deterrent to investment.

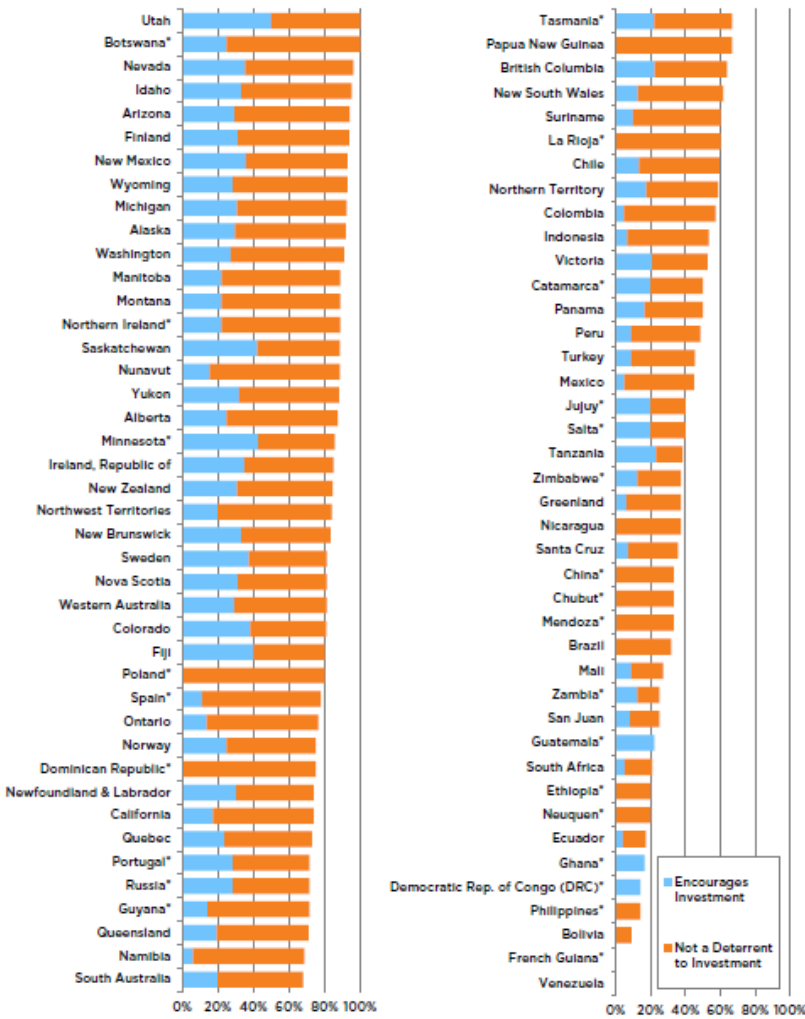
22. The graph below shows that in this respect, the competitiveness of Australian jurisdictions falls below that on many other developed nations, including New Zealand.

⁸ Stedman, A and Green, K (2018) *Fraser Institute Annual Survey of Mining Companies 2018*, pp10-12. Available at <https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2018.pdf>

⁹ Ibid, pp 14-16

¹⁰ Ibid, p73.

Figure 25: Labor Regulations/Employment Agreements and Labour Militancy/Work Disruptions



23. CCIWA believes that implementation of life of project agreements will assist in increasing Australia’s level of competitiveness in this regard.

Managing industrial relations on resource construction projects

24. Given their size, and the potentially high costs associated with industrial disputation, considerable attention is given to developing an industrial relations management plan aimed at minimising the level of risk associated with major resource projects.

25. Enterprise agreements are currently the preferred means of regulating terms and conditions of employment for major projects given the certainty that they provide for both employers and employees.

26. Typically, the resource company and relevant union(s) seek to negotiate site specific terms and conditions of employment during the planning phase of a new project.
27. The agreed terms and conditions are generally applied by relevant contractors to their employees engaged on the project. However, the manner in which these terms and conditions are established will vary. The most common approaches include the employer:
 - 27.1. entering into a greenfield agreement with the relevant union(s);
 - 27.2. making an enterprise agreement with existing employees which is specific for that project;
 - 27.3. utilising flexibility provisions within an existing enterprise agreement.
28. With respect to the approaches outlined in 27.1 and 27.2, these agreements are made before employees commence work on the new project.
29. Contractors working on a major project frequently operate under an enterprise agreement made with existing employees. This arises as a result of many contractors having a substantial permanent workforce who move between various projects.
30. As such CCIWA believes that it is appropriate for life of project agreements to be available both in the case of greenfield and non-greenfield agreements where the agreement is designed to apply solely to work undertaken as part of a major project.
31. We are concerned that where life of project agreements are limited only to greenfield agreements it may disadvantage those employers and employees who are not able to enter into a these arrangements, taking into account the limited circumstances in which greenfield agreements can be made under the Fair Work Act (FW Act).

Implication of projects exceeding nominal expiry dates

Question 1 - Are there examples or case studies where projects have been delayed or deferred because a greenfields agreement has reached its nominal expiry date, and there is difficulty in negotiating a new agreement?

Question 2 - What are the implications of this occurring?

32. There are a number of potential implications that arise out of projects lasting longer than the nominal expiry date of the relevant enterprise agreement, largely associated with difficulties associated with negotiating new terms and conditions of employment.
33. The expiry of an enterprise agreement is frequently seen by unions as an opportunity to pursue additional claims. In the case of major projects, this is of particular concern where the claims being sought are significantly different to those negotiated prior to the commencement of the project.
34. This occurred with respect to the Gorgon Barrow Island LNG Project. At the time, key enterprise agreements were due to expire when the project was 90% complete and had suffered several delays. This made the project vulnerable to industrial action, which was capitalised on by three unions who sought significant changes to the roster arrangements and resulted in employees working less hours for more money. In turn, this outcome had the potential to further delaying the project. The unions' push for their claims was accompanied by planned industrial action and significant media attention aimed at applying pressure to the respective employer to accede to their claims.
35. In these situations, the way negotiations occur generally have a more significant impact on productivity than any resulting industrial action. This occurs through employees becoming distracted and disengaged as a result of the lobbying activities by their respective unions, which is aimed at promoting discontent within the workforce. Ultimately, it is the unions who seek to benefit from such activities with the membership strategy for most unions premised on encouraging disputation in order to establish relevance.

36. Where industrial action occurs, both the employer and the employees suffer a financial detriment. In the case of employees, the cost is lost wages for the period of industrial action. Industrial action only becomes financially viable for employees where the benefits gained as a result industrial action is greater than the income lost to achieve them. This is determined by the size of the benefit gained and the expected duration of the employee's employment. Consequently, in many cases employees may not be financially advantaged by the industrial action, either because the benefit (if any) derived from the industrial action is less than the wages lost or the employee does not remain employed on the project long enough to recoup the lost income.

Calculating the employee benefit of industrial action.

For an employee on a major project earning \$200,000 per annum, the cost of taking one week's industrial action to the employee is approximately \$5,100 (based on a 3 week on, 1 week off roster). This equates to 2.5% of his/her annual earnings. For the employee to derive a financial benefit as a result of the industrial action within a 12-month period, the industrial action will need to result in the employer increasing its overall offer to employees by more than 2.5%. Where the employer is offering an overall increase of 3% this would require the industrial action to result in the business increasing its offer to over 5.5% in order for employee to receive a benefit within a 12-month period. If the increase is less, the employee would be financially worse off over the initial 12 months of the new entitlements.

In the case of employees whose remaining employment on the project is less than 12 months, the value of any benefit derived from industrial action will need to be significantly higher than 2.5% (using the above example) in order to obtain any financial advantage over the period of their remaining employment. For example, an employee expected to remain employed for a further 6 months would be disadvantaged if the resulting benefit achieved as a direct result of the industrial action was less than 5%.

37. The threat of industrial action also has a significant impact on Australia's global reputation as a secure environment in which to make significant investment decisions. Organisations seeking to invest in major projects pay considerable attention to assessing the costs and potential risks attached to investing in particular locations. As identified in paragraph 22 of this submission, internal perceptions of Australia's industrial relations system and practices are considered a greater deterrent on investment than in other developed countries. This is reinforced where there are threats of industrial action, even where the proposed action does not occur.
38. Ultimately it is the community who suffers as a result of delays to major resource projects, either due to industrial action or lost productivity arising from enterprise bargaining, through delayed royalty payments which are relied upon by government to provide services and infrastructure investment.

Impact of four-year maximum terms

Question 3 - Does the current 4-year maximum term for a greenfields enterprise agreement represent a significant problem for employers, workers and proponents of, or investors in, greenfields projects?

39. As previously identified in this submission, the industrial relations system impacts on Australia's attractiveness for investment decisions in major resource projects, with considerable attention given workforce risks.
40. Enterprise agreements are an attractive strategy in managing this risk as it locks in the labour costs for the duration of its nominal term and reduces the risk of disputes and industrial action.
41. For major projects which are anticipated to last less than four years, the existing maximum term poses no detriment.
42. Issues arise for projects which are anticipated to last more than four years, or where there is a risk that delays may result in the project exceeding this timeframe.
43. In these situations, organisations need to factor in additional costs that may arise out of industrial action, lost productivity and/or unknown changes to employment conditions. Factoring in these additional risks make the project less attractive when compared to smaller projects.
44. Ultimately these factors may have a negative impact on investment decisions or alternatively encourage organisations to consider alternative construction practices that result in a smaller component of the project being constructed within Australia.

Should there be a maximum length to enterprise agreements?

Question 4 - Should there need to be a maximum length to a greenfields enterprise agreement at all, and if so what should it be and why?

45. CCIWA believes that life of project agreements should be established for a nominal term of no longer than the date in which work undertaken by the employer in connection with the major project ends.
46. We believe that this can be effectively achieved by amending s186(5) of the FW Act to the following:
Requirement for a nominal expiry date, etc.
186(5) *The Fair Work Commission must be satisfied that:*
- (a) *The agreement specifies a date as a nominal expiry date; and*
 - (b) *The date will not be more than:*
 - (i) *In the case of an agreement which applies to a major project, no longer than the duration in which work is undertaken by the employer in connection with that project; or¹¹*
 - (ii) *in all other cases, 4 years after the day on which the Fair Work Commission approves the agreement.*
47. We support the maximum duration of an enterprise agreement being determined in accordance with when an employer's work in connection with that project ceases, which will take into account that the actual date on which that occurs cannot be accurately determined at the time that the agreement is made.
48. Consequently, the maximum nominal expiry date of a life of project agreement should not be tied to a specified date, rather the date should be determined by the completion of work.
49. However, this should act as a maximum nominal term, with the parties to an enterprise agreement having the opportunity to agree upon an alternative earlier date. Consequently, where it suits the parties to do so they may negotiate a shorter duration based on a specified date. For example, the parties may agree to the nominal expiry date being 9 years from the day in which the Fair Work Commission (FWC) approves the agreement or the date in which work undertaken by the employer in connection with the nominated project ends, whichever is the earliest.

¹¹ On major project work individual contractors may be awarded multiple parcels of work which may be undertaken at different periods of time. CCIWA believes that a life of project agreement should be able to operate across different parcels of work performed in connection with a single major project.

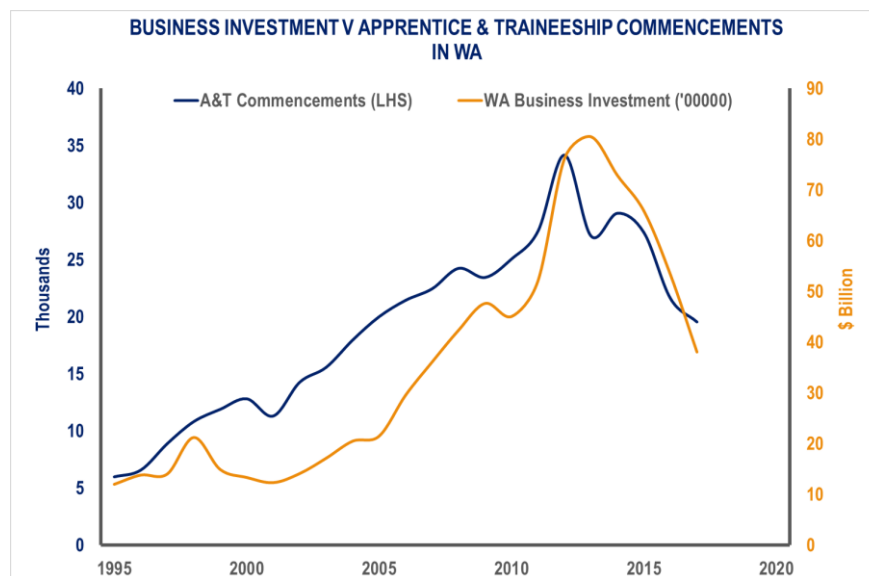
50. CCIWA believes that the imposition of an arbitrary maxima for life of project agreements potentially creates a similar problem as the existing 4 year maximum in that there may well be major projects that are likely to exceed that timeframe. We therefore believe that it should be left to the respective parties to determine the nominal term of the agreement.
51. In negotiating the duration of an enterprise agreement there are a range of practical considerations that are taken into consideration by employers, employees and unions. For all parties there are potential risks attached to fixing terms and conditions of employment beyond a period in which they can reasonably forecast economic, market and business conditions. Consequently, there are likely to be situations in which the respective parties negotiate an agreement where the term is less than the maximum possible.

Potential benefits of life of project agreements

Question 5 - What benefits are likely to arise for employers, workers and the community if length of project greenfields agreements were possible?

52. Decisions to commit to major projects involve a detailed analysis of both the potential benefits and risks. Risks involve significant consideration to determine the potential impact they may have on the success of the project and how they may be eliminated or controlled.
53. For entities seeking to invest in the development of major project, a key benefit of life of project agreements would be the capacity to lock in business costs for the duration of a project.
54. In addition to providing greater certainty for investors, it also removes the risks associated with protected industrial action that can act as a significant disincentive to investment. As demonstrated at paragraph 22 of this submission, Australia's industrial relations framework and practices means that we are less competitive in this regard when compared to other developed countries. Investors in major projects are mindful of Australia's industrial relations reputation, both in terms of the complexity of the system and the potential for industrial disputation.
55. Life of project agreements will help to reduce concerns related to risk of industrial action, which may in turn encourage investment in longer term projects.
56. For employees who will work on these major projects, it also provides certainty on terms and conditions of employment, which are usually significantly higher than non-project work.

57. This has a corresponding effect on wage growth in other sectors which are competing for the same skills, inevitably increasing the rate of pay for employees as the supply of skilled labour becomes scarcer.
58. The increased demand for labour also benefits unskilled workers as a result of increased traineeship and apprenticeship opportunities. As can be seen in the graph below there is a strong correlation between the number of apprenticeships and traineeship commencements and the level of business investment. The higher level of business investment associated with major projects provides increased opportunity for employees to develop transferrable qualifications that result in improved employment opportunities for the duration of their working life.



Potential risks of life of project agreements

Question 6 - Are there any known risks that might arise for employers, employees, promoters of, and investors in, greenfields projects if greenfields agreements were allowed to operate for a project's length, and how might any risks be mitigated?

59. In negotiating an enterprise agreement, the primary issue for the bargaining parties is determining what terms and conditions of employment are needed to meet current requirements of the enterprise, as well as estimating how these may change in the future.
60. In the case of major resource projects, the level of planning undertaken in the preparatory stages reduces the level of uncertainty as to how working arrangements are best structured in order to efficiently and effectively complete the project.

61. The greatest level of uncertainty arises in determining appropriate wage increases for the duration of the agreement. Difficulty in predicting future wage growth is a primary reason why the nominal term in the majority of enterprise agreements is three years, despite the FW Act providing a maximum nominal term of 4 years.
62. Consequently, in seeking to negotiate an enterprise agreement for a greenfield project that may operate for nine or more years, the difficulty for the respective parties will be in determining an appropriate mechanism for increasing wages.
63. CCIWA submits that the manner in which this occurs is best determined by the bargaining parties taking into account matters such as the expected duration of the projects, market forecasts, and anticipated competition for labour through other major projects.
64. The risk is the establishment of rates of pay which are not aligned with the labour market and broader economic conditions. However, we perceive that the risk is low and that it is the employer who bears the primary risk.
65. Employees engaged in major projects are generally skilled workers who are highly mobile. Consequently, if the rates of pay for a project fall below market rates, then employers are compelled to increase these rates in order to retain suitable workers. Employees engaged in project work are well versed in the employment standards applicable between different projects and will readily change employment where these arrangements are perceived as more beneficial.
66. The employer also bears the initial burden where, as a result of changing economic conditions, the employment conditions established at the commencement of the project are no longer viable. Should this occur, s207 of the FW Act allows an employer and the employees¹² to agree to vary the enterprise agreement, which may result in terms and conditions being agreed upon that are better aligned to the economic conditions. Such variations would only be agreed to by employees, and their representatives, where the maintenance of existing employment conditions threaten the viability of the project. The risk of this occurring is low, with CCIWA unaware of variations to major projects agreements for these reasons.

¹² Where in accordance with s208 the majority of affected employees who cast a vote approve the proposed variation.

Wage escalation

Question 7 - Should longer project agreements be required to allow some form of escalation in wage rates over the period of the agreement?

67. CCIWA believes that a system for life of project agreements do not require additional approval obligations beyond those currently prescribed by the FW Act. In making this comment we note that it is our view that the requirements for making an enterprise agreement are overly prescriptive and the manner in which the Better Off Overall Test (BOOT) is currently being administered has resulted in an essentially line by line assessment against the relevant award with very limited flexibility. To impose additional approval requirements on a system which is already overburdened by unnecessary regulations runs the risk of further eroding the value of enterprise agreements.
68. Further the difficulty in assessing enterprise agreements against future changes to award conditions has previously been considered by the FWC in the Loaded Rates¹³ decision in which the Full Bench determined that:
- "The statutory purpose of the requirement to assess the BOOT as at the test time is, we consider, to permit rates of pay and other conditions of employment in the agreement and the relevant award to be compared at a fixed point of time when the terms of both are known. Absent such a temporal requirement, the application of the BOOT would require speculation about future changes to the provisions of the award, in circumstances where the agreement to be assessed may also involve agreed changes such as increases in rates of pay at defined intervals, and would involve the impossible task of making multiple comparisons for the whole of the period in which the agreement remains in operation." (Emphasis added).*
69. The FWC has clearly identified that trying to apply the BOOT to take into consideration potential future changes to an award, where such changes can't reasonably be known, creates an impossible task.
70. In practice, we do not believe that there is a need to impose a requirement for agreements to provide for a means for wages to be increased for three key reasons.
71. In the first instance it is common practice in bargaining for an enterprise agreement for the parties to negotiate a mechanism for wage rates to be increased and or reviewed over the nominal term of an agreement. However, the manner in which this occurs may vary in terms of:
- 71.1. when pay increases and/or reviews will take place;
 - 71.2. the manner in which wage increases will occur;

¹³ Loaded Rates Agreements [2018] FWCFCB 3610 at 111

- 71.3. conditions that may apply in determining whether wages will be increased and if so by what amount.
72. In seeking to establish requirements for an agreement to provide for wage escalation there is a high probability that any resulting regulation will impose, or be interpreted as imposing, conditions that direct how that is to occur. This will inevitably create restrictions on the parties in negotiating arrangements applicable to that particular project.
73. This is particularly relevant given that it is unlikely that agreements which operate in excess of 5 or 6 years will prescribe fixed increases beyond this period and will therefore rely on other mechanisms to increase or review rates of pay. These are likely to establish varying methodology to determine when these reviews occur and by what amount, if any, wage rates are to increase.
74. Secondly, it is appropriate to consider that employees engaged in major projects are highly paid skilled workers who have high job mobility. Further, major projects require a large number of employees to work in often isolated or remote parts of the country. This requires major projects to offer highly competitive terms and conditions of employment to attract suitably skilled workers.
75. By way of example, the project terms and conditions for onshore construction of the Ichthys project outside of Darwin, currently provides trades staff with an annual income in excess of \$200,000 per annum with:
- 75.1. an hourly tradesperson rate of \$57 per hour based on an average of 36 hours per week over a 3 week on, 1 week off cycle;
 - 75.2. The standard workday comprises of 10 hours per day, which is paid at:
 - 75.2.1. Ordinary time for the first 8 hours Monday to Friday and time and a half for the following two hours;
 - 75.2.2. Time and a half for the first two hours on a Saturday and double time thereafter;
 - 75.2.3. Double time on a Sunday.
 - 75.3. A tool allowance of \$53 per week;
 - 75.4. A tradesperson allowance of \$109.55 per week;
 - 75.5. A daily travel allowance of \$55 per day; and
 - 75.6. A Darwin allowance of \$4 per hour.¹⁴

¹⁴ As at 31 October 2018 based on *EnerMech Pty Ltd Ichthys Onshore Construction Enterprise Agreement 2019* (AG2019/1445).

76. The project terms and condition clearly provide for benefits that greatly exceed those prescribed by the relevant award, which currently establishes a tradesperson rate of \$23.76 per hour¹⁵. This reinforces that the employees engaged on major projects have significant bargaining power.
77. It is also noticeable that the current award rate is also significantly below the applicable rate for a tradesperson employed on the Ichthys project in 2012 of \$42.42 per hour.¹⁶ Consequently, had the project rates been frozen for seven years, they are still over \$18 per hour higher than the award rate, not taking into account the additional allowances prescribed for the project. It is therefore difficult to envision a situation in which employees engaged on a major project are likely to be disadvantaged as a result of establishing a life of project agreement.
78. We also note that s206 of the FW Act provides that where a modern award covers an employee to whom an enterprise agreement applies, their base rate of pay must not be less than that payable under the modern award, which provides further protection for employees covered by an enterprise agreement.
79. Finally, consideration also needs to be given to the length of time workers are likely to be engaged on a major project. These projects often involve over 150 contractors who are engaged to perform specific aspects of the projects. The majority of contractors are not engaged for the full duration of the projects, and consequently very few employees are employed on a project for its full duration. Consequently, fixing wages and conditions for the duration of a project does not generally equate to fixing terms and conditions of employment for a particular worker for the same period.

¹⁵ Based on a Tradesperson (CW3) rate under the Building and Construction General On-Site Award 2010 [MA000020] as at 1 July 2019. Rate includes Special Allowance and Industry Allowance which is payable to all employees covered by the award.

¹⁶ Rate as at 1 November 2012. Refer to *MJHJV (John Holland) Ichthys Onshore Construction Greenfields Agreement (AG2012/430)*.

Mechanism to extend or shorten project agreements

Question 8 - Should there be a mechanism to extend, or to shorten, an existing greenfields enterprise agreement? If so, how might this work?

Shortening a project agreement

80. With respect to shortening the duration of a life of project agreements, s219 of the FW Act currently provides opportunity for enterprise agreements to be terminated by agreement of the employer and employees. Termination of agreements under this provision can occur prior to the nominal expiry date, thus allowing the parties to agree to shortening its duration.
81. CCIWA believes that an enterprise agreement within its nominal term should only be terminated where there is consent between the employer and the majority of the employees covered by the enterprise agreement.¹⁷
82. We would caution against any attempt to allow an in-term enterprise agreement to be terminated other than by genuine agreement between the employer and relevant employees. Any benefits that may be derived from life of project agreements will be lost if an option is created for an in-term enterprise agreement to be terminated at the initiative of a union or an individual employee.
83. One of the key benefits of enterprise agreements is that it creates certainty for both the employer and employees regarding terms and conditions of employment for its nominal term. In particular, during the nominal term the FW Act then prohibits the taking of lawful industrial action to agitate for additional claims.
84. The establishment of a mechanism that would allow for an in-term agreement to be shortened without the employer's genuine consent would remove this certainty, thereby limiting the attractiveness of project agreements.

Extending a project agreement

85. To the extent that project agreements can be established for the life of the project, it is the view of CCIWA that there is limited need to establish a mechanism for the term of the agreement to be extended.
86. Simply put, this is because the agreement will naturally cease to have practical effect once work undertaken in connection with a project ends.

¹⁷ Noting that s221 provides that a decision to terminate an agreement is agreed to by employee when a majority of employees who cast a valid vote approve the termination.

87. However, should there be a prescribed maximum duration established for life of project agreements (e.g. 9 years), then CCIWA supports the ability for the employer and employees to vary the enterprise agreement to extend its duration to accommodate delays to the anticipated completion date. We believe that it should be left to the parties to determine the extent of any such extension.

Recommended approach to establishing life of project agreements

88. In establishing life of project agreements, CCIWA would recommend that the Government take a light-handed approach to amending the FW Act.

89. The requirements for making and approving an enterprise agreement are currently overly prescriptive which has been a contributing factor in the decline in the number of enterprise agreements following ongoing decisions of the Fair Work Commission and Federal Court that have interpreted these requirements in an increasingly onerous manner.

90. There is a significant risk that amendments to incorporate life of project agreements may compound the regulatory burden.

91. We believe that life of project agreements can be most effectively established by amending s186(5) of the FW Act, which deals with the nominal expiry date, in the manner outlined in paragraph 46 on this submission.

92. The FW Act would also need to include a definition of major projects. We would recommend that the threshold for a major project be established as a project with a capital investment exceeding \$50 million, with life of project agreements being available for the duration of its development or construction. This would accord with the eligibility criteria used by the Federal Government in determining Major Project Status.

Making greenfield agreements more accessible

93. In 2015 the Federal Parliament passed the *Fair Work Amendment Act 2015 (Cth)* which established changes to greenfield agreements provisions to:

93.1. extend good faith bargaining provisions to greenfield agreements;

93.2. provide for a six-month negotiation time frame, after which an employer will be able to seek approval of its proposed agreement by the FWC;

93.3. in assessing such agreements the FWC would have to be satisfied that it provides for pay and conditions that are consistent with the prevailing standards within the relevant industry for equivalent work, in addition to the other requirement for approval.

94. The intention of these amendments were to ensure that greenfield agreements were negotiated in a reasonable time frame and to prevent unions from frustrating the process.
95. These arose out of the very real concern that greenfield agreements created a monopoly situation in which unions are provided with a significant bargaining advantage over employers given the lack of alternative arrangements.
96. However, we do not believe that these amendments have delivered upon their objectives, which is demonstrated through no greenfield agreements having been made under these provisions despite having been in operation for almost four years.
97. There are two key barriers to these provisions being workable.
98. The first barrier is the time frame for negotiations. The six-month period is excessive and imposes an unnecessary delay on finalising an agreement. When the relevant Bill was introduced it proposed a three-month period, which we believe is an appropriate timeframe.
99. Six months is out of step with the process for making commercial decisions, both in terms of:
 - 99.1. negotiating project terms and conditions; and
 - 99.2. formalising employment conditions for individual contractors:

which allows unions to engage in protracted negotiations in order to impose additional pressure for excessive claims.
100. This is further exacerbated by the requirements under s187(5) of the FW Act which provides that relevant union(s) who are party to the greenfield agreements must be entitled to represent to majority of employees covered by the agreement. This often requires negotiations with multiple unions which makes the process both more complex and protracted.
101. Secondly, the requirement that the agreement provide for pay and conditions that are consistent with the prevailing standards creates a number of practical considerations. The most significant of these is that it does not take into consideration that changes in economic conditions may mean that the prevailing standard (assuming this is assessed against other major project agreements) are no longer relevant.

102. The test is also a subjective one, providing no clear basis by which the FWC is to assess whether the pay and conditions are consistent with prevailing standards. While the provisions state this should be done on an overall basis, we note that similar wording is used in s193 of the FW act in relation to the BOOT. As previously identified, the manner in which the FWC is currently applying the BOOT is essentially on a line by line basis. Taking this approach, we believe that any assessment of prevailing standards is likely to result in the FWC expectation of agreements being largely in identical terms.
103. Not only does this fail to consider that all major projects have unique characteristics that limit comparison, it also provides substantial basis for unions to challenge these agreements both through the FWC and Federal Court where these differences are reflected in the terms of the agreement. Consequently, such an arrangement will not provide the surety sought from greenfield agreements.
104. In the event of life of project agreements being established, their effectiveness is likely to be diminished as a result of these concerns. We would therefore recommend that consideration also be given to changing the negotiation period prescribed by s178B(1) to three months and removing the requirement for the agreement to be assessed against prevailing standards prescribed by s187(6) of the FW Act.