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29 April 2013

Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Current inquiry into the *Fair Work Amendment Bill 2013*

Thankyou again for inviting AMMA to appear before the committee on Monday 22 April 2013 to provide further information in support of our written submission.

During Monday's hearings, Senator McKenzie asked AMMA which of the 53 recommendations of the Fair Work Review Panel we thought should have been included in this latest tranche of amendments to the *Fair Work Act 2009*.

We undertook to provide that information to the committee as soon as possible.

Please find detailed over the page 10 recommendations from the Review Panel that AMMA believes should have been prioritised in any 2013 tranche of amendments to the *Fair Work Act 2009*.

Please keep in mind that the 10 reforms identified are not necessarily those that AMMA would suggest if we had a blank sheet of paper in terms of what our workplace relations system should look like in order to boost Australia's productivity and competitiveness.

Rather, the 10 recommendations identified are those we believe are the most urgent to enact within the current Fair Work architecture, drawing from the recommendations of the Review Panel.

In some cases, AMMA's support for the Review Panel recommendations is conditional on modifications being made as detailed, such as in relation to recommendation 30 which proposes a limited form of arbitration for greenfield (new project) agreements.

We hope the committee finds this extra information useful. Please don't hesitate to contact me should you require any further information on (07) 3210 0313 or at scott.barklamb@amma.org.au.

Yours sincerely

SCOTT BARKLAMB
Executive Director - Industry

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AMMA priorities for yet to be implemented Fair Work Act Review Panel recommendations

Below are AMMA's Top 10 priorities from the Fair Work Act Review Panel's 53 recommendations that are yet to be implemented in the first two tranches of amendments to the Fair Work Act as of April 2013.

Priority	Recommendation	Why this recommendation is important
GREENFIELD (NEW PROJECT) AGREEMENTS		
1	**Review panel recommendation 27** The panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s228 to the negotiation of a s172(2)(b) greenfields agreement, with any necessary modifications.	At present, the good faith bargaining requirements do not apply to greenfield (new project) agreements. This has led to unions simply refusing to negotiate at all with some employers for this type of agreement, thereby jeopardising billions of dollars of potential investment. AMMA supports a form of the Fair Work Act's good faith bargaining obligations applying to the negotiation of greenfield agreements in order to compel unions to negotiate in good faith with employers. However, some necessary modifications to the existing good faith bargaining obligations would be required: • Employers should only be required to notify and negotiate with the union that represents the majority of workers to be covered by a project, not all unions with coverage of potential workers; • The good faith bargaining obligations should only be triggered after an employer has initiated negotiations with the relevant union(s). Employers should not be forced to the negotiating table before they are ready to mobilise;

Priority	Recommendation	Why this recommendation is important
		• If, upon application from an employer, the Fair Work Commission finds a union is not bargaining in good faith as per the proposed requirements, the employer should have the option of initiateing negotiations with an alternative union; • If bargaining for a greenfield agreement completely breaks down, the employer should be able to apply to the Fair Work Commission for a 'greenfield determination' *(see below for further details)*.
2	**Review panel recommendation 30** The panel recommends that the FW Act be amended to provide that, when negotiations for a s172(2)(b) greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party, conduct a limited form of arbitration, including 'last offer' arbitration, to determine the content of the agreement.	As mentioned above, there is currently no requirement that unions negotiate in good faith with employers for greenfield (new project) agreements. This has led to unions simply refusing to negotiate at all with some employers. While the application of good faith bargaining requirements to greenfield agreements as proposed above will go some way to ensuring unions have to negotiate with employers, a circuit breaker is needed for those situations where negotiations completely break down. Given the importance of mobilising projects swiftly to secure investment dollars, AMMA supports a limited 'determination' power being given to the Fair Work Commission in the case of intractable disputes in greenfield negotiations. However, AMMA supports recommendation 30 only in a modified form. AMMA and its members remain strongly opposed to any compulsory arbitration of these or any other types of disputes.

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		Some important conditions must apply to the review panel's recommendation in this area if the legislation is to fix the current problems: • Employers should be the only parties with the ability to trigger the greenfield determination power in acknowledgment of the fact that the union monopoly is leading to adverse outcomes and employers need some leverage against unreasonable union conduct and claims; • A determination, if one is made, should be made within one month of an employer bringing an application, including any conciliation that may have taken place before the commission; • If the commission believes that the employer's latest offer is reasonable and that it satisfies the Better Off Overall Test (BOOT), the employer's final offer should be ratified and certified as an agreement.

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3	**Review panel recommendation 29** The panel recommends that the FW Act be amended so that s240 (as with our Recommendation 22) applies to the negotiation of a s172(2)(b) greenfields agreement.	This recommendation would allow the parties to greenfield agreement negotiations to apply to the Fair Work Commission for bargaining orders in the event that a bargaining dispute arose in the context of negotiations. AMMA supports this recommendation but, in the same way as we believe employers should be the only party able to trigger a greenfield determination, we believe employers should be the only ones able to apply for bargaining orders. This is in acknowledgement of the fact that employers are incentivised to reach agreement as soon as possible while no such incentive exists for unions. AMMA believes that unions do not need yet another weapon in their arsenal when it comes to greenfield agreement making and that the ability to bring applications for bargaining orders should rest with employers.

Priority	Recommendation	Why this recommendation is important
PROTECTED INDUSTRIAL ACTION		
4	**Review panel recommendation 31** The panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.	This recommendation is important because it would close the loophole left open by the series of decisions in the *JJ Richards* matter. Those decisions left open the ability for unions to apply to take protected industrial action in cases where employers had not yet agreed to bargain and a majority support determination had not been obtained to prove employees supported collective bargaining. In AMMA's view, this recommendation would require an amendment to s443 of the Fair Work Act which specifies when the Fair Work Commission must make a protected action ballot order in relation to a proposed enterprise agreement. In addition to the other pre-requisites, the recommendation once enacted would require the following conditions to apply before a protected action ballot order application was granted: • The employer(s) have agreed to bargain or have initiated bargaining for the agreement; • A majority support determination in relation to the agreement is in operation; • A scope order in relation to the agreement is in operation; • All of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Priority	Recommendation	Why this recommendation is important
ADVERSE ACTION / GENERAL PROTECTIONS		
5	**Review panel recommendation 47** The panel recommends that Division 7 of Part 3-1 be amended so that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action.	While not addressing the many other problems with the operation of the Fair Work Act's adverse action /general protections provisions, this recommendation would clarify the outcome of the High Court in relation to the Barclay v Bendigo Regional Institute of TAFE matter. That High Court decision, and this recommendation, would confirm that no subconscious motivations could be attributed to decision-makers who take adverse action against individuals. The decision makers' direct testimony about their motives and direct evidence should be all that is taken into account.
INDIVIDUAL FLEXIBILITY ARRANGEMENTS		
6	**Review panel recommendation 24** The panel recommends that s203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph (1)(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties.	This recommendation would make the model flexibility clause the minimum level of flexibility contained in mandatory flexibility clauses in enterprise agreements, as is already the case in most modern awards. This would go a long way to circumventing unions' opposition to negotiating meaningful and sufficiently broad flexibility clauses in enterprise agreements. If a too narrow clause is included in an enterprise agreement, it severely restricts the flexibilities that an employer and individual employee can agree on down the track. This recommendation is therefore extremely important.

Priority	Recommendation	Why this recommendation is important
7	**Review panel recommendation 11** The panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s145(3) or s204(3) where an employer had complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.	While AMMA opposes the notification requirements in recommendation 10 that would require the employer to notify the Fair Work Ombudsman in writing of every Individual Flexibility Arrangement (IFA) made, AMMA supports the rest of this recommendation (Recommendation 11). Where employers believe the IFA meets all the statutory requirements, including the Better Off Overall Test, that should be a complete defence against any alleged transgression in relation to compliance requirements for IFAs.
TRANSFER OF BUSINESS		
8	**Review panel recommendation 38** The panel recommends that s311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.	AMMA supports this recommendation as it would remove the need for parties under the current system to apply to the Fair Work Commission for an exemption from coverage by a transferring industrial instrument. This recommendation, once implemented, would have the added benefit of encouraging the employment of existing employees of the old employer by the new employer given that the new employer would not be forced to take on an unworkable industrial instrument at their enterprise.

Priority	Recommendation	Why this recommendation is important
MINIMUM STANDARDS		
9	**Review panel recommendation 6** The panel recommends that s90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.	This issue is the subject of a case currently before the NSW Industrial Magistrates Court. If this recommendation is adopted, it will mean that unless an award or enterprise agreement explicitly states that annual leave loading is payable on termination, the employer will not have to pay it. The Fair Work Ombudsman's latest advice is that where an award or agreement is silent on the issue, the employer must pay leave loading on termination if they would have paid it when the leave was taken during employment. This advice is contrary to AMMA's view of the requirements and is contrary to longstanding practice in the resource industry. The government has promised for several years to clarify this important issue for employers and should adopt this recommendation as a matter of urgency.
10	**Review panel recommendation 25** The panel recommends that the government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.	AMMA believes this recommendation should be prioritised given the subjective and sometimes conflicting decisions being made by the Fair Work Commission in relation to whether an enterprise agreement meets the Better Off Overall Test.