Joint letter regarding proposed second tranche amendments to the Fair Work Act 2009

19 March 2013

Dear [Member/Senator]

The government's recently announced second tranche of amendments to the Fair Work Act 2009 fail to address the core issues that will enhance productivity and competitiveness so as to provide an environment where employers can grow their business and provide more jobs.

Instead, this tranche of amendments includes a number of provisions which are likely to be significantly detrimental to the economy, business and jobs. These include:

- introducing arbitration for intractable disputes
- introducing greenfields agreement arbitration to be initiated by either the union or employer
- inadequately responding to issues associated with rights of entry of trade union representatives and location of meetings with trade union representatives
- requiring that awards and agreements include a provision that employers consult with employees and their unions before changing rosters or working hours
- taking legislative action to entrench penalty and shift loadings in the cost of the labour market
- using the Fair Work Commission as a way to address workplace bullying.

These amendments should not be progressed.

In fact there is a need to start again. The approach proposed by the government will not address the core issues raised by the private sector, and almost all are entirely outside the considerations and recommendations of the review of the Fair Work Act in 2012. Many elements of the proposed amendments fail the test of good policy design and good regulation.

Arbitration

While welcoming the introduction of good faith bargaining when negotiating a greenfields agreement, the benefit of such a provision is compromised by the introduction of greenfields arbitration and the proposal to introduce arbitration more broadly – a proposal that was not endorsed by the Fair Work Act review panel in 2012.

There is no demonstrated need for arbitration provisions, especially in light of the fact that there has been only limited recourse to provisions already in the Fair Work Act for dealing with intractable disputes.

The suggestion that criteria may be included in the legislation to limit the availability of arbitration does not mitigate the adverse impact of this proposal.

The introduction of arbitration is a significant backward step and reflects a major reversal in workplace relations policy under Labour and Coalition governments. Successive legislative reforms have been designed to limit third party interventions in workplace relations. Third party arbitration compromises the bargaining autonomy of employers and employees to agree an outcome and adds greater uncertainty to the end result.

The proposed amendments will in effect encourage and reward behaviour that contravenes good faith bargaining – the opposite to what the legislation is meant to do.

The government should not pursue these amendments.

Instead, the government should address directly the core issue associated with the negotiation of greenfields agreements. Employers and head contractors are now dealing with unions who are increasingly seeking excessive pay and conditions well above market rates. Employers and head contractors have limited options when they require a greenfields agreement so they can progress financing and project commencement.

What is required is an amendment to the Fair Work Act which provides a check on excessive demands. The Act should include capacity for the head contractor facing excessive demands to seek the review of the proposed agreement by the Fair Work Commission against a set of criteria including the relevant award, national employment standards and better overall test. Subject to the agreement meeting these criteria the commission should then have the power to issue a greenfields determination for the duration of the project.

Rights of entry

The proposed changes to rights of entry fail to address the problems associated with excessive numbers of visits to workplaces by union officials – especially where the union does not have members at the site. The proposed change also severely limits the capacity for employers to exercise discretion as to where trade union representatives hold meetings and means of access to such places.

The arrangements that existed from 2006 should be reintroduced – where a union's right to enter a workplace is because:

- the union is covered by or is a party to an enterprise agreement that covers the site or be attempting to reach one
- the union can demonstrate that it has members on that site
- those members should have requested the union's presence.

Inclusion of model consultation clause on changes to rosters and working hours

The proposal to include a new model consultation clause in modern awards and enterprise agreements is excessive and will add new compliance obligations at a workplace level that are unnecessary. It will also distort settled arrangements in awards, many of which were implemented following the Family Provisions Test Case. The proposal to extend these new rights to any rostering change, and not just changes based on particular caring or family responsibilities, is unprecedented in an Australian industrial relations context.

Workplace bullying

Workplace bullying is of concern to us all. Our organisations are willing to develop, with government, appropriate pathways for individuals to seek redress. What is required is to ensure we have the right approach – poorly designed legislation will neither assist persons at risk of, or experiencing, bullying nor be supportive of good performance management practices within businesses.

The federal government should be working with state governments and business to build on the extensive and constructive work that has been underway across jurisdictions to address this issue.

We are of the view that rather than unilaterally establishing a new federal jurisdiction the government should work with all jurisdictions and business to identify a more appropriate way to provide people with protection from, and recourse, where workplace bullying occurs.

More broadly there is a need to address the unfinished business of amending the Fair Work Act to address broader issues of concern to business including:

- the need to reduce the range of matters that can be bargained over to ensure they truly pertain to the employment relationship

- enhancing the scope to agree flexibility arrangements with employees including through individual flexibility arrangements
- removing the capacity for unions to inappropriately use “aborted strike technique” (an issue acknowledged in the Fair Work Act review)
- amending the transfer of business arrangements to include a sunset clause after twelve months and to make it easier for employees within a corporate group seeking to transfer to a related entity to be employed under the conditions of the related entity.

Addressing these matters as a priority will assist businesses to adapt to change and be competitive. Resolving these issues will also contribute to Australia’s ability to capture the investment needed for the resources and infrastructure pipeline so essential to Australia’s economic growth and future jobs.

Yours sincerely

[signatures removed]

Peter Anderson	**Innes Willox**	**Steve Knott**	**Jennifer Westacott**
Chief Executive, Australian Chamber of Commerce and Industry	Chief Executive Officer, Australian Industry Group	Chief Executive, Australian Mines and Metals Association	Chief Executive, Business Council of Australia

Letter sent to:

The Hon. Julia Gillard MP, Prime Minister of Australia
The Hon. Tony Abbott MP, Leader of the Opposition
Senator the Hon. Eric Abetz, Shadow Minister for Employment and Workplace Relations
Mr Adam Bandt MP, Member for Melbourne
Mr Tony Crook MP, Member for O’Connor
The Hon. Bob Katter MP, Member for Kennedy
Senator Christine Milne, Leader of the Australian Greens
Mr Robert Oakeshott MP, Member for Lyne
The Hon. Bill Shorten MP Minister for Employment and Workplace Relations
The Hon. Peter Slipper MP, Member for Fisher
Mr Craig Thomson MP, Member for Dobell
Mr Andrew Wilkie MP, Member for Denison
Mr Tony Windsor MP, Member for New England
Senator Nick Xenophon, Senator for South Australia