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The Hon. Christian Porter MP
Attorney General and Minister for Industrial Relations
House of Representatives
PO Box 6022
Parliament House
Canberra ACT 2600

Christian

Dear Minister,

The re-election of the Morrison Government provides the opportunity to make further incremental changes to Australia's industrial relations framework. Such changes are directed towards improving relations between employers and employees, lifting business confidence, encouraging real wage rises and restoring Australia's reputation as an attractive place to invest and do business.

The industrial relations priorities identified by AMMA members and detailed in this briefing include:

1. **Pass the Ensuring Integrity Bill** to protect members of registered organisations from corruption, unlawfulness and misappropriate use of funds and positions of power.

2. **Restore common sense to casual employment** and avoid a potential multi-billion dollar cost exposure to businesses small, medium and large.

3. **Enable life-of-project greenfields agreements** to provide industrial certainty to major project investors and encourage the next wave of project development.

4. **Address the rapid decline in enterprise agreement making** due to unnecessary complexities and onerous Fair Work Commission approval processes.

5. **Reform the Adverse Action provisions** and remove a growing area of legal complexity and cost, clogging up our courts with vexatious claims and encouraging employers to pay settlements for claims without merit.

6. **Restore balance to unfair dismissal laws** including that employers should be supported in terminating employees found to have breached safety and/or community standards of conduct.

7. **Improve the performance of the Fair Work Commission** through carefully selected appointments, structural improvements and addressing process inefficiencies.

To build the evidence base supporting these critical reforms, AMMA has provided a business case for each area, complete with practical feedback and experiences of our members. We are available to provide, forwarded for your consideration, additional details, case studies or any other relevant information should that assist.

Yours sincerely

Steve Knott
Chief Executive

1. Pass the Ensuring Integrity Bill

Overview:

AMMA and our members encourage the Morrison Government to seek the support of the 46th Australian Parliament for the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* ("Ensuring Integrity Bill").

The Ensuring Integrity Bill is good Australian public policy that has been stalled before the Senate since October 2017. It seeks to restore regulatory balance and, in turn, regenerate public confidence in relation to the conduct and operation of Registered Organisations in Australia.

Applying equally to all Registered Organisations, including trade unions and employer groups, its provisions are well-balanced and consistent with a number of key recommendations of the Royal Commission into Trade Union Governance and Corruption.

Business Case:

The cost impact of continuing and expanding lawlessness is of great concern for resources and energy employers. Since the Heydon Royal Commission handed down its findings, Australia's most recidivist law-breaking union, the Construction, Forestry, Mining and Energy Union (CFMEU), was allowed to merge with another highly militant law-breaking union, the Maritime Union of Australia (MUA), in the absence of a public interest test which the Ensuring Integrity Bill would have introduced.

The CFMMEU now wields unprecedented power for a private sector trade union in Australia, with its amalgamated resources including:

- around 145,000 members;
- approximately $310 million in assets; and
- more than $146 million in annual income.

Such significant resources have emboldened the CFMMEU to be even more brazen in its law-breaking, disregard for the Courts and rule of law, and in wielding political power. Its size and financial backing in part reflect current penalties that pale in comparison to the organisations income and are not an effective deterrent.

Members of AMMA are concerned by the imminent escalation of unlawful conduct which this union, in their own public statements, have promised will result from this merger. Action that can be coordinated across the entire resources supply chain – "from pit to port" – servicing many of Australia's largest and most important resources projects.

The international reputation of Australia's ports and resources supply is at stake, as is the global trade of Australian commodities which is a key pillar of our national economy and living standards - the industry paid an estimated $177 billion in company tax and royalties in the decade to 2015-16.

Recommendation/s:

The measures within the Ensuring Integrity Bill is an effective mechanism available to the Australian Government to safeguard the community against this threat. It is critical that the Australian Parliament's support for these measures be reached.

2. Restore common sense to casual employment

Overview:

Casual employment plays an important role in providing flexible employment options for both employers and employees. However, thousands of Australian businesses remain exposed to billions of dollars of claims, after the Federal Court last year issued a decision overturning the long-held interpretation of casual employment.

The Full Federal Court decision in *WorkPac v Skene* effectively overturned the common understanding of the entitlements afforded to casual employees. While there were unique circumstances to this matter, the Court reversed the general principle that where an employee had accepted a higher rate of pay for being casually engaged, they should not be able to also claim for back-paid permanent entitlements such as annual leave and redundancy.

Business Case:

Until recently, workers who were engaged and paid as casuals pursuant to an industrial instrument were considered "casual employees" for the purposes of the Fair Work Act (FW Act).

The *Skene* principle overturned this longstanding common understanding and instead emphasised the employment characteristics as the primary determinant of an employee's status. This has opened the door for widespread claims from current and former casual employees, often backed by class action law firms, to be back-paid permanent entitlements:

a) *In September 2018, it emerged that class action law firm Adero Law intended to use the* Skene *principle to target WorkPac, Programmed, Onekey Resources and Hays Recruitment for $325 million in unpaid entitlements. These companies are large providers of labour to Australia's resources industry, including the coal sector which is Australia's second largest exporter and employs 40,000 people. Such a law suit threatens the financial viability of these businesses, which are critical to the health of Australia's resources industry and related export revenues.*

b) *In the wake of the* Skene *decision, AMMA is aware of several employers who have received enquiries from long-term casual employees who believe they may be owed back-paid entitlements. This is despite, in many cases, those employees actively choosing to be casually employed and even rejecting past offers of conversion. The risk exposure for individual employers, both in the resources sector and the broader economy, can easily be multi-millions of dollars.*

The *Fair Work Amendment (Casual Loading Offset) Regulations 2018,* introduced in December 2018, partially addressed this area of huge uncertainty by allowing employers to offset casual loading paid in an employee's hourly rate against future claims for unpaid entitlements.

While important, this Regulation does not go far enough. A more permanent legislative solution is required to protect thousands of Australian businesses against potential claims and to restore the long-held common sense understanding of casual employment.

Recommendation/s:

Providing certainty to employers and employees about the rights and entitlements of casual employees should be an urgent priority for the 46th Parliament of Australia. This can be achieved by:

- Defending the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* against any challenge, including a possible Senate Disallowance Motion; and
- Amending the National Employment Standards in the FW Act to clearly define a casual employee as one that has been "engaged and paid as such".

3. Enable life-of-project greenfields agreements

Overview:

Future resources and energy investment is being impacted by unnecessary limitations in Australia's industrial relations system which leave multi-billion dollar projects exposed to industrial action in the middle of the construction period.

With nation-building resources and energy projects taking on average seven years to build, enabling greenfields (i.e. new projects) agreements to cover the life-of-project construction, instead of being limited to maximum terms of four years, would provide certainty around cost and timing and assist in securing the next wave of resources and energy project investment.

This reform was recommended by the Productivity Commission in its 2015 review of Australia's workplace relations system. In May 2019, then-Opposition Leader Bill Shorten announced the ALP's intention to consider supporting such a reform.

Business Case:

The case for 'life-of-project agreements' has been argued by employers since before the FW Act commenced in 2009. Industry foresaw that the ability for protected industrial action to be taken mid-construction would present significant risk and uncertainty around project costs and timeframes. This concern came to fruition, with several major resources and energy projects being exposed to threats of protected industrial action only 12 months or less from expected construction completion:

a) *The Chevron-operated Gorgon LNG Project represented the largest single natural resources project in Australia's history. Unfortunately, the project was also subject to a number of concerted union campaigns leveraging an imbalanced industrial relations system to delay and frustrate project completion. In November 2014, with construction 87% completed, negotiations with three unions for a new enterprise agreement broke down and industrial action was threatened, but eventually averted. In August 2015, almost 2000 workers threatened to strike unless its roster demands were met. Again this was ultimately avoided but not before delays and cost impacts to the project – Gorgon was eventually completed two years later than expected (in 2017 rather than 2015) and at $20 billion over-budget ($55 billion final cost).*

b) *A similar scenario was narrowly avoided at another multi-billion dollar LNG project. Again, with less than 12 months until construction was forecast to be completed, the project was threatened with industrial action by unions seeking to reduce the roster of the construction workforce, which would impact both the costs and timeline for completion. Multiple Protected Action Ballot Orders (PABOs) were issued in the final phase of construction, with the company ultimately reaching agreement with the unions averting significant impacts.*

Highly-publicised cases such as these not only impact individual projects, but ultimately diminish Australia's reputation as a stable and attractive place to build world-class resources and energy projects. Fixing this unnecessary risk is critical to securing the next wave of major project investment.

Recommendation/s:

The Morrison Government should legislate to give effect to Recommendation 20.4 of the Productivity Commission's review into Australia's workplace relations framework which says:

- *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 matches the life of a greenfields project.*

AMMA further recommends that if the completion of a project extends beyond the nominal expiry date of the project agreement, the parties should be able to apply to the Fair Work Commission (FWC) to arbitrate for an extension of the project agreement, during which the protection from industrial action would remain.

4. Address the rapid decline in agreement making

Overview:

Many AMMA members consider addressing the rapid decline in the relevance, utility and application of enterprise agreement making to be the most significant challenge and opportunity for the Morrison Government in the area of industrial relations.

The primary issues with agreement making can be summarised in the following two points:

I. To enter into an enterprise agreement today, employers and employees must navigate an absurdly complex bargaining framework that provides fewer productivity gains, allows higher levels of third party involvement in business management and/or operational matters, requires numerous complicated procedures and results in higher costs.

II. The complexity of the framework is being compounded by an overly-technical, unduly strict and highly inefficient application of the approvals process by the FWC, leading the average timeframe for enterprise agreement approvals to be 76 days – and in many cases several months as experienced by AMMA members.

The Morrison Government should focus reform efforts on ensuring enterprise agreement making is retained as a preferred mechanism to facilitate the employment relationship within Australia's industrial relations system. To achieve this, the process needs to be dramatically simplified.

Business Case:

There is no doubt the FW Act's over-complication of the agreement making process has led to less employers and employees pursuing enterprise agreements.

There has been a shocking 52% decrease in the number of enterprise agreements current in the private sector since the FW Act was enacted in 2009. Most of this decline has occurred in the past five years (44% decline):

Agreements current in the private sector at year end		
2009	**2014**	**2018**
21,620	18,460	10,391

The number of private sector employees covered by enterprise agreements has seen a correlated decline – down 41% over the past five years.

Private sector employees covered by EAs at year end ('000)		
2013	**2015**	**2018**
1,956	1,570	1,152

Today, 10.7% of Australia's total private sector workforce is covered by an enterprise agreement, despite enterprise-level bargaining supposedly being a fundamental principle of a productive and mutually-rewarding Australian industrial relations system since the early 1990s.

Common grievances about the agreement making process reported by AMMA members include:

a) **"Genuinely agreed":** The FWC taking an overly-stringent approach to assessing whether an employer took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the relevant employees. This is particularly the case where there is no union party seeking to be bound by the agreement. Specific examples include:

- Numerous reports of members of the FWC going on a 'fishing exercise' to find out what hasn't been explained to employees – requiring every single item that is less beneficial to be explained, despite the legislation not requiring that. To demonstrate the impracticality, the Building and Construction Award has 146 pages and over 80 allowances.

- One employer provided a 10-page summary of each individual EA clause and its effect, which was rejected by the FWC finding the employer was required to explain exactly which provisions of the EA were better than the award and which were not.
- A large engineering and construction member of AMMA is facing rejection of its EA, on appeal by a union not a party to the agreement, because it did not have an employee that fell within each classification under several awards its new agreement was seeking to cover, and did not explicitly explain each provision of each relevant award in detail to employees.

b) **The better off overall test (BOOT)**: Another reason why employers are choosing to abandon enterprise bargaining is the application of the BOOT. In its current form the BOOT creates uncertainty during the agreement approval process and there are calls to replace it with a no-disadvantage test, including a recommendation in the 2015 Productivity Commission Inquiry. AMMA members are reporting:

- The FWC requiring undertakings about hypothetical, highly unlikely scenarios, and about matters that employers are already required to comply with under the law (such as undertakings that employers will comply with the National Employment Standards).
- One employer, which does not employ casuals, was required by the FWC to include a part-time clause in its EA in case an employee requested flexibility under s.65 of the FW Act; and then was later required to provide undertakings about casual employment.
- The FWC regularly asking for more information or undertakings to be provided by an employer on three days' notice, despite the agreement sitting in the FWC for weeks.
- Sporadic requesting of undertakings or information, such as the FWC raising a number of issues with an agreement in the first round of approval, and then finding further issues requiring information or undertakings in subsequent rounds.

c) **Prohibited Content:** Employers remain highly concerned about the very few limitations on enterprise agreement content, with unions often pushing content that infringes on operations, such as:

- Restrictions on the manner in which employers utilise labour or engagement of casuals, contractors or labour hire, and the rates that are payable.
- Requirements in enterprise agreements that an employer must reach agreement (as opposed to consult) with employees/unions before it is entitled to introduce change e.g. hours of work/rosters.

Recommendation/s:

Unnecessary complexity and inefficiencies have greatly contributed to the rapid decline in the utilisation of enterprise agreements. These issues can be largely addressed through relatively straight-forward, common-sense improvements to the agreement making process, including:

- Amend or clarify section 180(5) of the FW Act regarding "genuinely agreed" to simplify the process for employers, employees and the FWC in approving agreements.
- Replace the BOOT with a simplified "no disadvantage test" that is a truly global test, not a line-by-line exercise in pedantry.
- Allow additional discretion for agreement approvals taking into account the vote, views of all parties and the need to provide timely certainty to the business and its employees.
- Fast track approval for agreements covering a majority of employees over a prescribed wage level / percentage above the safety net.
- Enforce stricter adherence for the FWC benchmark to approve agreements (i.e. 14 days).
- Consider reinstating the prohibition of certain content ("prohibited content") in enterprise bargaining that existed under the *Workplace Relations Act 1996.*

5. Reform the Adverse Action provisions

Overview:

The Adverse Action provisions of the FW Act (Part 3-1) are creating serious and escalating challenges for employers through excessive risk exposure and associated costs of managing vexatious and unmeritorious claims. They are also placing significant pressure on the Federal Court system due to the failure of the FWC to effectively manage growing numbers of claims at conciliation.

Business Case:

The Adverse Action provisions introduced by the former Labor Government in 2009 was a vast and unjustified extension of employee protections that existed under previous Australian workplace laws. They appear to have no economic or social purpose, outside of creating a growing field of litigation.

The provisions have, however, become very attractive to applicants due to the unlimited compensation, difficulty in defending a claim and orders that can be made by the courts. AMMA members are increasingly reporting the following concerning experiences:

- **An escalation in speculative claims** as employees and their trade union representatives become increasingly familiar with attractive elements of the provisions, including the broad base and timeframe in which to bring a claim and the propensity for employers to settle rather than defend even the most unmeritorious of cases.
- **The stymying of effective performance management** as employees increasingly use the concept of "workplace rights" to prevent individual accountability for behaviour and performance. Every employer action must now be assessed against potential for a claim, which can be brought up to six years in the future.
- **Growing legal and transactional costs** due to the multiple actions and legal representation required by employers to properly respond and deal with Adverse Action claims.

Recommendation/s:

AMMA encourages the Minister to investigate two areas of response to these issues that would significantly lift the burden of Adverse Action claims on employers, the economy and the Courts. Firstly, it is recommended the government pursue the following reforms to Part 3-1 of the FW Act:

- Clearly define how exercising a "workplace right" applies in relation to Adverse Action claims and amend the FW Act to introduce exclusions for complaints that are frivolous and vexatious.
- Introduce a high income threshold for General Protections claims as well as a cap on the compensation that can be awarded.
- Introduce a "genuine reasons" defence to relieve risk and uncertainty for employers seeking to undertake appropriate and genuine employee performance management.
- Remove the reverse onus of proof for Adverse Action claims and the additional protections covering anti-discrimination (more than adequately covered by anti-discrimination law).

The second area AMMA recommends the Minister address is ensuring the FWC is appropriately dealing with Adverse Action claims as intended under the FW Act. This should involve instructing the FWC President to cease the tribunal's practice of outsourcing Adverse Action claims to public servant conciliators, and allocate all matters to appropriately qualified statutory-appointed tribunal members, to resolve them at the FWC level instead of seeing them reach the costly Court jurisdiction.

Further information and data supporting these reforms can be provided at the Minister's request.

6. Restore balance to unfair dismissal laws

Under the FW Act employers are not able to dismiss employees for serious misconduct without fear of them seeking compensation and/or winning their jobs back. This has seen ludicrous outcomes at the FWC where employees dismissed for serious matters including safety breaches, assault, distributing pornography, being alcohol or drug impaired, and / or verbally abusing supervisors, have been reinstated and / or awarded compensation.

Business Case:

Businesses need to be able to take action to protect their employees, customers and the general public. There should be no question of reinstatement where an employee is terminated for serious misconduct, including for example after operating heavy machinery whilst under the influence of drugs, or for proven allegations of sexual harassment or violence in the workplace.

Just a few of many examples of ludicrous decisions of the FWC include:

- In *Hartwell v Esso Australia Pty Ltd* (2/10/2018) an employee was dismissed after he made abusive comments to a contractor (who later attempted suicide), including saying "You're a fucking scab". On appeal the Full Bench found the termination was clearly" harsh, as his scab comment was only one act of harassment, and occurred in the context of a protracted industrial dispute that had resulted in significant tension in the workplace. He was awarded over $68,000 in compensation.

- In *Murray v Reliable Petroleum Pty Ltd* (20/07/2017), a fuel tanker driver was dismissed for driving his 14.5 tonne tanker 28 km/h above the speed limit on a noted high-risk stretch of road. The FWC found there was a valid reason for the dismissal however reinstated the driver for reasons including due to his contrition and the likely impact of dismissal given his age (65) and length of service (39 years).

- In *Rust v Farstad Shipping* (5/07/2017) a Master of a vessel was dismissed for attending for work with a blood alcohol reading over twice the prescribed limit (0.047), in breach of drug and alcohol policies. The FWC found there was a valid reason but the dismissal was harsh due to the Master's 16 years of service. The decision was overturned on appeal but not before the employer incurred significant costs and disruption in defending the case.

- In *Croft v Smarter Insurance Brokers Pty Ltd* (28/09/2016) an employee was dismissed for poor performance, and was later found to have downloaded "hardcore" pornographic material on his work mobile and laptop repeatedly. The FWC found there to be no valid reason for the dismissal, in part because the employer had no explicit policy telling employees they should not access pornography, and awarded the employee $10,000.

Where a business has made the decision to terminate an individual's employment based on the facts and circumstances at hand in the wake of serious misconduct that decision should stand. The FWC should not, as it did in the examples above, substitute its own decision for that of the employer.

Recommendation/s:

Amend the unfair dismissal provisions of the FW Act to:

- Exempt terminations for serious offences and misconduct from contesting dismissal.
- Provide that where a valid reason for termination exists, the termination should stand.
- Ensure each unfair dismissal application is determined on its merits only, not influenced by employee circumstances (such as age, length of service, personal circumstances etc.).
- Preclude workers earning above a high income threshold from unfair dismissal claims.
- Increase application and hearing fees.

7. Improve the performance of the Fair Work Commission

It is clear from the experiences and frustrations of employers including AMMA members that longstanding concerns about the structure, operation, processes and performance of the FWC are far from resolved.

In light of continued concerns about its performance – including in many areas covered in this briefing such as agreement approvals, unfair dismissal and general protections matters - AMMA encourages the Minister to undertake a full review of the performance of the FWC to ensure it is properly administering the objectives of the FW Act.

Questions the Minister may seek to investigate include:

- To what extent is the FWC's approach to agreement approvals facilitating the decline in employers and employees pursuing enterprise agreements?
- What is causing the FWC to so badly underperform on its own target for average agreement approval timeframes (76 days instead of the target of 32 days)?
- Why are 65% of enterprise agreements approved by the FWC requiring undertakings, when just two years ago this number was 35%?
- What justification is there for the FWC requiring employer undertakings in agreement approvals that exceed the compliance requirements of the FW Act?
- Why is the FWC failing to effectively mediate Adverse Action matters at the tribunal level, instead seeing a record number of matters reach the costly Federal Court jurisdiction?
- On what grounds can members of the FWC substitute their decisions for those of business managers in unfair dismissal matters?
- Why is it so difficult for the FWC to provide consistent decision making in areas such as agreement approvals and unfair dismissal claims?
- Why has the FWC President abolished the Industry Panel system?
- How are key test case full benches determined? Is the current approach working effectively?

Recommendation/s:

While AMMA does not wish to pre-empt the findings of a possible Ministerial review, the following recommendations are longstanding areas in which AMMA believes would greatly improve the performance of the FWC:

a) Create a new specialist industrial relations appeals jurisdiction within the Federal Circuit Court. A separate, specialist appeals body would be a more appropriate jurisdiction in which to deal with the appeal process. It would provide essential clarity and consistency to stakeholders and be consistent with the process in many other courts and tribunals.

b) Continue appointing new tribunal members with real-life business experience to restore confidence in the FWC as an administrative tribunal that is in touch with the practical realities of running a business in the 21st Century global economy.