AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

Fair for Who?

The rhetoric versus the reality of the Fair Work Act

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Three years on – how many of Labor's IR promises have been broken?

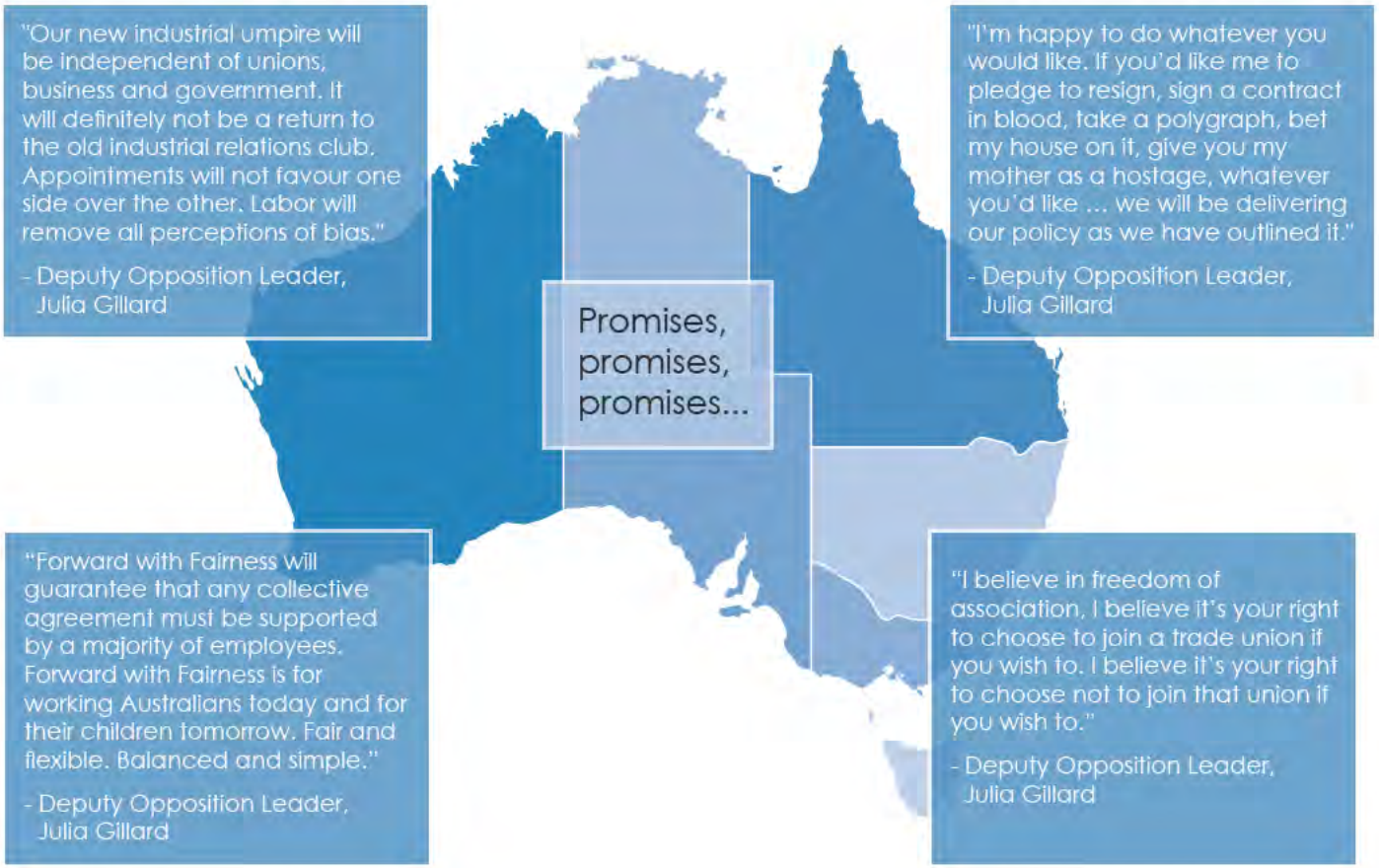
With the Federal Government having just announced its response to the Fair Work Act review panel's recommendations, it is timely to reflect on the practical realities of the industrial relations (IR) legislation and how it is playing out for Australian businesses.

It is now clearer than ever that key promises have been broken in the IR area that the government has no intention of fixing.

This has led many resource industry employers to fear the ongoing re-regulation of the labour market, enhanced union power and falling productivity as the next big issues.

This document identifies some key IR promises made by the Federal Government before it won office, contrasting them with the practical realities employers are dealing with two years on.

In key areas such as right of entry; appointments to the federal industrial tribunal; regulation of the building and construction industry; workplace flexibility; enterprise bargaining; and freedom of association, the practical realities are not at all what industry was promised.



Labor's pre-election promise: APPOINTMENTS TO FAIR WORK AUSTRALIA WILL NOT FAVOUR ONE SIDE OR THE OTHER

'I will not be Prime Minister of this country and appoint some endless tribe of trade union officials or ex-trade union officials to staff the key positions in this body. I will not stand by and have this body become the agency of ex-trade union officials. People will be appointed on their merit…'
Opposition Leader Kevin Rudd, The 7.30 Report, 30 April 2007

'Our new industrial umpire will be independent of unions, business and government. It will definitely not be a return to the old industrial relations club. Appointments will not favour one side over the other. Labor will remove all perceptions of bias.'
Deputy Opposition Leader Julia Gillard, National Press Club address, May 2007

The process of appointing new members to the federal industrial tribunal Fair Work Australia will be 'rigorous and provide for bi-partisan involvement. It will ensure that all appointments made to FWA are themselves fair, balanced and made on merit alone. Never before in Australian politics has a political party volunteered to take the bias out of the industrial relations system as we are proposing to do … It's time to achieve better than a neutered industrial umpire and a tawdry system of appointing political mates.'
Deputy Opposition Leader Julia Gillard, National Press Club address, May 2007

What actually happened

The reality is that 12 out of 17 full-time appointees to Fair Work Australia under Labor have had union backgrounds. These are:

- Anna Booth (appointed in February 2012);
- Bernie Riordan (appointed in February 2012);
- Suzanne Jones (appointed in September 2011);
- Tim Lee (appointed in September 2011);
- Chris Simpson (appointed in May 2010);
- John Ryan (appointed in December 2009);
- Julius Roe (appointed in December 2009);
- Anne Gooley (appointed in December 2009);
- Danny Cloghan (appointed in December 2009);
- Michelle Bissett (appointed in December 2009);
- Commissioner Ian Cambridge (appointed from the NSW IRC); and
- Commissioner Donna McKenna (appointed from the NSW IRC).

The successor to former Fair Work Australia president Justice Geoffrey Giudice, Iain Ross, also has a union background, as does the new general manager Bernadette O'Neill, both appointed in February 2012.

Dual appointments from state industrial relations commissions under Labor have also included two former representatives of the Australian Industry Group.

With more than two million actively trading businesses in Australia (i.e. higher than the 1.8 million trade union members), it belies belief that under the Rudd/Gillard government they could not find more people from private sector businesses to appoint to Fair Work Australia.

Practical Implications

While appointed members of Fair Work Australia strive to maintain a high degree of independence and objectivity in the course of their duties, when new appointments so clearly weigh in favour of those with a union background, it undermines employers' confidence in the system.

With the greatly enhanced role of Fair Work Australia under the current system compared to its predecessor, the Australian Industrial Relations Commission, appointments to the independent body have a much more profound impact on Australian businesses than was the case under previous IR laws.

With Fair Work Australia continuing to hand down decisions that are causing unease in the business community, these seemingly partisan appointments are in danger of further undermining business confidence in the new IR laws.

Labor's pre-election promise: RIGHT OF ENTRY LAWS WILL NOT CHANGE

Asked what she would do if Labor failed to deliver on its pledge to retain identical right of entry provisions under the Fair Work Act to those under the Workplace Relations Act, then-Deputy Opposition Leader Julia Gillard said:
'I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like … we will be delivering our policy as we have outlined it.'
Deputy Opposition Leader Julia Gillard, National Press Club debate, 8 November 2007

What actually happened

Despite the Labor Government's promises to the contrary, the Fair Work Act on 1 July 2009 made significant changes to right of entry laws by:

- Linking right of entry to union eligibility rules rather than the previous requirement for a union to be covered by an agreement or award at a worksite in order to have entry rights.
- Abolishing the ability to make new Australian Workplace Agreements (AWAs) with the introduction of the Workplace Relations Amendment (Transition to Forward with Fairness) Act in March 2008.
- Introducing the ability to include clauses in enterprise agreements conferring additional entry rights on unions. This was not possible under the Workplace Relations Act. Clauses have recently been approved by Fair Work Australia in the ADJ Contracting case that broaden the allowable matters in enterprise agreements. The tribunal has endorsed the inclusion of several clauses negotiated by the ETU in Victoria, including one allowing union officials to enter workplaces without a valid entry permit, without notice, outside of meal times, and without having to abide by any of the right of entry provisions of the Fair Work Act.

Practical Implications

- As of 1 July 2009, unions have been able to enter worksites where there is no award or agreement in place to which the union is a party, and also where the union has no members onsite. As long as the union has potential members onsite (those able to be members based on its eligibility rules) it can enter a worksite to hold discussions. This has led to increased demarcation issues between unions that were avoided under the previous legislation by the fact that one union would often have an industrial agreement in place with the employer, meaning no other unions had entry rights.
- As of March 2008, new employees have had to be employed on collective agreements because they could not be hired on new AWAs. This effectively opened up previously non-unionised worksites to union entry visits for the first time. Previously, where an entire workforce was employed on AWAs, unions had no rights to enter. An example of this was the Pluto LNG project where the entire site was covered by AWAs for the first two years of its construction. There had been no union visits on the entire project, but once the Fair Work Act took effect the site received 217 right of entry requests in the first few months which later peaked and tapered off at around 450 requests.
- The ADJ Contracting decision means that unions can neatly sidestep any right of entry restrictions applying under the Fair Work Act. They only have to say they are entering a workplace to 'assist with representing an employee under the dispute resolution clause' to sidestep the provisions. If unions say they are entering to investigate a suspected breach of the Fair Work Act or to hold discussions with eligible members, they will be bound by the right of entry requirements of the Act. The incentive is clear for unions to say the right words upon entering, regardless of their true purpose.
- Further, making right of entry clauses allowable matters in enterprise agreements means unions can now apply to take protected industrial action over the clauses where employers refuse to accede to them.

All of these factors mean that union entry rights have been completely opened up under the Fair Work Act, contrary to the promises made by the Labor Government. There are now virtually no restrictions or limits on union access to worksites and virtually no similarity between the previous right of entry requirements under the Workplace Relations Act and those applying at the present time. AMMA members have told us that a greater number of different unions are now able to enter their premises under the Fair Work Act and the unions that are able to enter are requesting entry more often. These exponentially increased levels of site visits and requests mean the diversion of management resources in order to process requests and escort union officials around sites. There is also the disruption to business that comes from increased meetings with workers, not to mention the safety issues involved in having groups of workers moving around a site at any given time.

Labor's pre-election promise: A TOUGH COP WILL REMAIN ON THE BEAT IN THE BUILDING AND CONSTRUCTION INDUSTRY

'Obviously, what the building and construction sector is looking for is that they want a tough cop on the beat. They want to make sure there is strong compliance in the building industry with industrial law and we will be ensuring that by keeping the ABCC until January 2010 and then ensuring a seamless transition to a specialist division of Fair Work Australia which would be tough on compliance. We want to make sure that no-one is engaged in improper conduct in the building industry, whether employer, union, or employee.'
Deputy Opposition Leader Julia Gillard, ABC News Radio – Batholomew, 2 August 2007

"Labor can guarantee that not one project will suffer from unlawful strike action."
Spokeswoman for Julia Gillard, West Australian – Labor may water down building watchdog after 2010, 08 / 06 / 2007

What actually happened

In reality, the Rudd/Gillard Government has made substantial changes to the Building & Construction Industry Improvement Act that have significantly watered down the building industry regulator's powers by replacing the ABCC with Fair Work Building & Construction.

The changes made included:

- reducing the current fines available under the Building & Construction Industry Improvement Act to the same level as in the Fair Work Act (e.g. $33,000 maximum fines per breach by a corporation under the Fair Work Act compared to $110,000 under the BCII Act);
- allowing the inspectorate to 'switch off' its compulsory examination powers on construction projects that exhibit 'good behaviour'; and
- requiring a magistrate's authority before the inspectorate exercises its compulsory examination powers under s52 of the BCII Act.

An eleventh-hour amendment to the legislation has further damaged the building industry regulator's ability to prosecute unlawful industrial action.

The amendment prevents the new building industry inspectorate from prosecuting building workers for taking unprotected industrial action if the other parties to the dispute have reached a settlement or decided to discontinue their own court action.

Practical Implications

The amendments to the building industry legislation represent a massive downgrading of the inspectorate's power and is unwarranted given there are all sorts of commercial pressures placed on employers to settle disputes with unions and employees, which should have no bearing on the inspectorate's ability to bring legal action over the same conduct. The industry regulator will not be able to start new prosecutions and will have to abandon those that are already on foot once the other parties, ie the employer and employees, enter into a settlement.

Despite the Labor Government's assurances it would retain a tough cop on the beat in the building and construction industry, the changes will act as less of a deterrent to unlawful industrial conduct in the industry.

Former ABC Commissioner John Lloyd in June 2011 said the consequences for the industry, the economy and taxpayers would be damaging if the ABCC was neutered. He said Queensland had already experienced a ramping up of union activity, and an increase in industrial action, intimidation and inappropriate practices. The $1.7 billion Gold Coast hospital project was recently plagued by unlawful industrial action over allegations of sham contracting. 'There are a few examples reflecting the belief by the building unions that they have regained the ascendancy,' Lloyd said. 'A tough regulatory regime applied with rigour is required to prevent abuse of WR laws. Instead, we are heading for a dangerous relaxation of the controls over abuse of the law in the building and construction industry.'

Unlawful industrial action, such as that taken on two occasions by hundreds of workers on the Pluto Project run by Woodside Burrup Pty Ltd, would not be able to be prosecuted by the regulator under the changes to the legislation. In the Pluto prosecution, it was nearly two years after the original strikes took place that businesses were compensated for the damage caused.

Following the two unlawful stoppages in December 2009 and January 2010, the ABCC and Woodside both launched legal proceedings against the CFMEU and its official Joe McDonald. Several of the project's contractors also launched court action against the more than 1,300 individuals who took part in the second strike in January 2010, with those workers later ordered to pay thousands of dollars each in fines.

Under the amendments to the legislation, once Woodside abandoned its prosecution of the CFMEU, the building industry regulator would not be able to continue with its separate legal proceedings.

Labor's pre-election promise: COMMON LAW CONTRACTS WILL OFFER THE SAME FLEXIBILITY AS AWAS

'When it comes to the future, we don't see the need for individual statutory agreements. We think there is sufficient flexibility within the common law arrangements, and/or enterprise arrangements, but we've still got a lot of talking to do with business.'
(Opposition Leader Kevin Rudd, *Sky News*, 10 / 05 / 2007)

"One option of course is common law contracts. Common law contracts are individual agreements which give a great deal of flexibility. There are other options like very flexible enterprise awards, and indeed some of our mining companies work with those today."
(Deputy Opposition Leader Julia Gillard, *612 ABC – 9 AM News*, 02 / 05 / 2007)

What actually happened

New AWAs were outlawed in March 2008, with the Labor Government promising that employers would get the same level of flexibility from common law contracts underpinned by modern awards. The flexibility of modern awards was expected to come to a large degree from mandatory flexibility clauses included in each modern award. However, the reality is that the mandatory flexibility clauses are not sufficiently flexible to enable employers to negotiate with an individual employee for an individual flexibility arrangement (IFA). Thus, a large degree of flexibility promised to come from common law contracts underpinned by modern awards has been lost from the new system.

The mandatory flexibility arrangements in enterprise agreements are even less beneficial for employers, with unions running a concerted campaign during enterprise negotiations to reduce any genuine flexibility that could be achieved. There are many examples of mandatory flexibility clauses being reduced to the ability for employers to decide when employees take a paid tea break, or in relation to a protective clothing and boots allowance.

Practical Implications

When new AWAs were outlawed in March 2008, it opened up the prospect of industrial action being taken at worksites by those employees negotiating new collective agreements. The Rudd Government thereby removed one of the most significant benefits of AWAs for the resource industry, which was providing certainty that industrial action would not be taken by employees covered by AWAs.

Employers have far less flexibility and industrial certainty under common law contracts and modern awards than they ever did under AWAs, despite the Labor Government's promises.




Labor's pre-election promise: FREEDOM OF ASSOCIATION WILL BE UPHELD

"I believe in freedom of association, I believe it's your right to choose to join a trade union if you wish to. I believe it's your right to choose not to join that union if you wish to."
(Deputy Opposition Leader Julia Gillard, 3AW – Mitchell, 18 / 04 / 2007)

CALLER: 'I would just like to ask Ms Gillard if the ALP get in, if she would guarantee that they will not introduce a compulsory | unionism or preference to union people, as what they had when they were in the last time?'

GILLARD: 'I absolutely guarantee that. We will not be introducing anything like that, as I made clear when I answered the earlier talkback caller. I believe in freedom of association. If you don't want to be a union member, it is completely wrong for anyone, government or anyone, to try and make you be a union member. So our laws will make it very clear the choice is yours. If you want to join, that's good. If you don't want to join, that's good too. It's entirely up to you.'
(Deputy Opposition Leader Julia Gillard, 612ABC – King, 29 / 10 / 2007)

What actually happened

- In a recent decision by Fair Work Australia in ADJ Contracting Pty Ltd (FWA 2380, 28 April 2011), the tribunal endorsed the inclusion of clauses in enterprise agreements that require an employer to actively promote union membership to prospective and existing employees and to encourage employees to attend union meetings during work hours. Despite objections raised to the clauses by employer groups and the ABCC, the tribunal found the union 'encouragement' clauses did not breach s350 of the Fair Work Act (which says employers must not 'induce' employees to become members of a union). The tribunal made a distinction between the word 'induce' and the terms used in the clause - 'promote' and 'encourage'.
- The Federal Government, despite pre-election promises that its IR system would respect the right of employees not to join a union, has not objected to the inclusion of the above clauses and has been completely silent on the issue.

Practical Implications

The practical implications of the ADJ Contracting decision are that, while technically not requiring employers to coerce existing or prospective employees to join a union, there is a fine line between coercion and encouragement. Someone applying for a job whom the employer 'encourages' to join a union might take that as meaning they will not get the job unless they join. Also, the requirement to actively encourage union activity will divert important management resources away from the real job of doing business.

While unions should be free to represent members who have become members of their own accord, employers should not be required to further entrench unions' role in the workplace by actively promoting union membership.

Another issue is that under the Fair Work Act, unions tend to dominate enterprise bargaining whenever they are involved, despite the fact they might represent a very small minority of workers to be covered by the agreement. Again, the Fair Work Act gives primacy to union members over non-union members. This is unfair given that, according to the recent ABS statistics, 79% of the mining industry have chosen not to belong to a union along with:

- 50% in coal mining;
- 81% in oil and gas extraction;
- 86% in metal ore mining;
- 87% in non-metallic mineral mining and quarrying; and
- 85% in exploration and other support services.

Labor's pre-election promise: ENTERPRISE BARGAINING WILL LEAD TO INCREASED PRODUCTIVITY

The Fair Work Bill 'aims to achieve productivity and fairness through enterprise level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action.'
Fair Work Bill 2008, Second Reading Speech, 4 December 2008

'Enterprise collective bargaining is an important driver of productivity and a key feature of our policy.'
Deputy Opposition Leader Julia Gillard, Speech – Melbourne Press Club – 25 June 2007

'Labor's industrial relations policies will be focused on the big drivers of productivity.'
Deputy Opposition Leader Julia Gillard, Australian Workplace Relations Summit, 14 March 2007

What actually happened

The reality is there is no requirement under the Fair Work Act to link any enterprise agreement outcomes to productivity improvements. Nor is there any requirement for Fair Work Australia to ask the parties to an enterprise agreement whether productivity improvements have been considered during bargaining before approving an agreement.

As demonstrated in the 2009/10 vessel operator's dispute, maritime unions including the MUA were able, through ongoing strike action, to secure more than 30 per cent pay rises plus a construction allowance of $200 for each day worked in return for absolutely no productivity offsets and no changes to their duties.

Practical Implications

The overwhelming majority of resource industry employers have not been able to achieve any productivity increases in exchange for wage increases during enterprise bargaining, even where those wage increases are exorbitant.

In February 2010, Maritime Union of Australia (MUA) national secretary Paddy Crumlin bragged that massive pay rises won by offshore oil and gas workers were secured without productivity trade-offs. Crumlin was quoted in The Australian newspaper as saying that employer groups like AMMA who suggested productivity should have been part of the deal were 'dinosaurs'.

Crumlin has since said he was misquoted in the article and actually meant that productivity improvements were built into everything the maritime workers did, and to relegate it to something the parties traded off during bargaining was an antiquated concept.

However, the fact remains that productivity improvements are often not even able to be put on the table by employers during enterprise bargaining rounds.

Productivity improvements are particularly elusive when it comes to negotiating greenfield agreements with unions, with many employers saying they have agreed to things they otherwise would not have in order to secure an agreement with a union.

This is contrary to what the Labor Government promised would be the case in the lead-up to the Fair Work Act being introduced and the new system of bargaining taking effect that was supposed to result in increased productivity.




AMMA's Policy Development and Lobbying

Building a Better Policy and Legislative Environment

AMMA's policy development and lobbying opens doors to the nation's key influencers and industry stakeholders, delivering effective workplace relations legislative and policy outcomes to the industry. We do this through bipartisan representation of our members' interests to government, media and other stakeholders.

Benefits of a unified voice include:

- **strength in numbers** - by presenting a unified industry front to government, members achieve greater influence than they can individually;
- **influence where it matters** - AMMA has 'a seat at the table' in terms of input into government policy, which allows us to make a difference on behalf of the industry;
- **credibility** - we know what we're talking about - AMMA not only develops policy positions on various legislative issues, but also has a hands-on role in assisting resource employers with their workforce issues, thereby representing a point of view to government and other stakeholders on these issues with authority;
- **independence and objectivity** - by representing the industry collectively, AMMA helps individual members overcome the appearance of pursuing an agenda based purely on self interest;
- **a whole of industry perspective** - AMMA pursues the collective and long-term interests of the industry;
- **AMMA personnel have contacts and relationships at all levels of government** which members are able to utilise;
- **distance from sensitive issues** - there are times when members want issues addressed, however, would prefer not to be publicly associated with those viewpoints - in such circumstances, it is useful to have AMMA acting as their voice; and
- **effective and contemporary methods of communication** - AMMA strategically utilises modern lobbying and campaigning techniques in conjunction with traditional stakeholder and government communication to effect maximum influence and industry pressure.

Together with our members, AMMA actively influences and changes the industry and workplace policy environment to the benefit of the industry.

Over recent years, AMMA's lobbying role has expanded to include a broader number of issues, including superannuation, safety, training, skills, workplace taxation issues and skilled migration. AMMA's policy development and lobbying activities have achieved benefits and cost savings worth hundreds of millions of dollars each year for our members and the resource industry.

For detailed policy documents and examples of our achievements for the resource industry visit www.amma.org.au

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