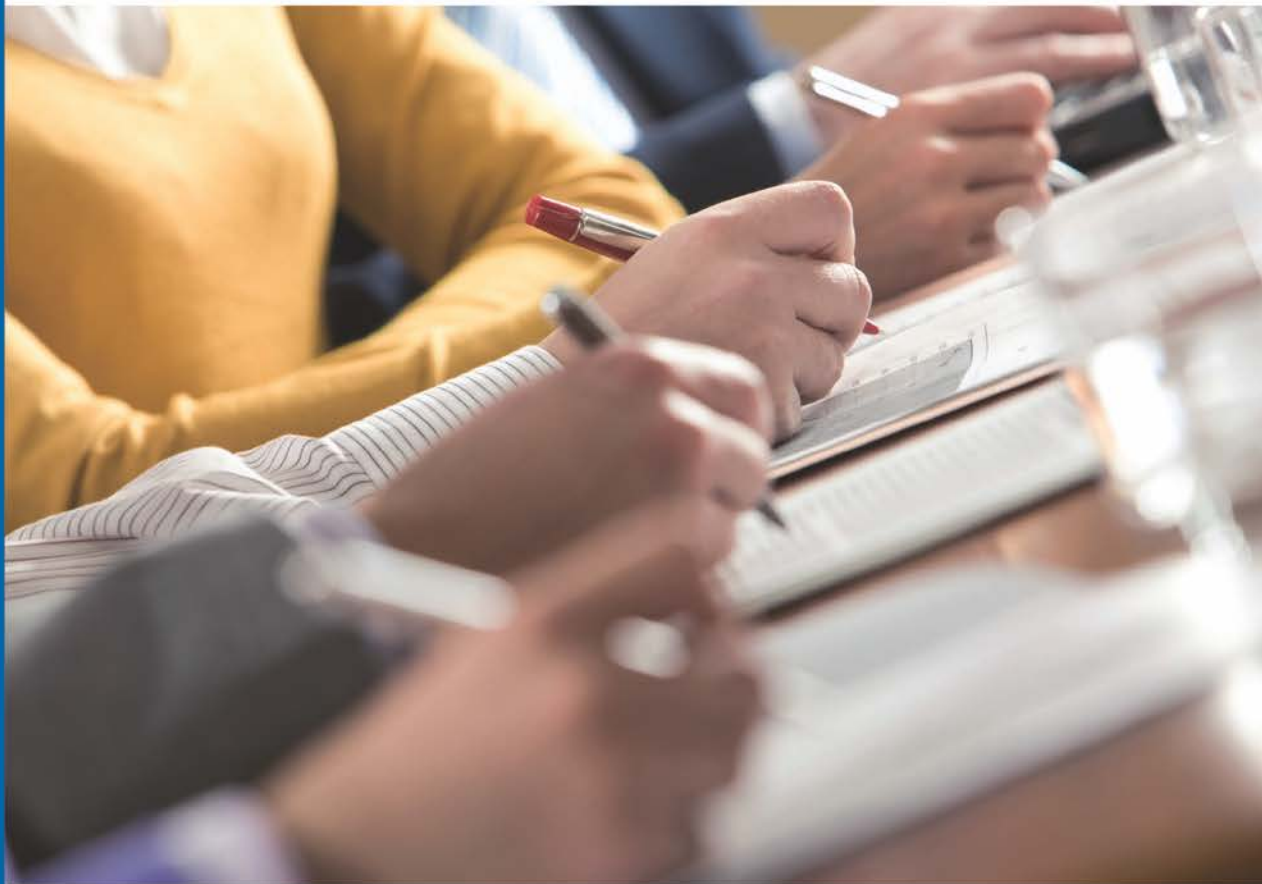


## ELECTION YEAR POLICY SCORECARD

Analysis of Labor, Coalition and Greens workplace relations policies for the 2013 federal election





AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to those industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

The resource industry currently employs more than 1.1 million people either directly or indirectly and accounts for 18% of economy activity in Australia<sup>1</sup> (double its share of a decade ago). The industry is forecast to contribute a record \$205 billion of export earnings to our national income in 2013-14<sup>2</sup>.

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<sup>1</sup> Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013

<sup>2</sup> Bureau of Resources and Energy Economics, *Resources and Energy Quarterly—March quarter 2013*

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# Executive summary

## Introduction




- Since 2007, AMMA has published a scorecard critically evaluating the competing workplace relations policies of our leading political parties against the operational and competitiveness needs of the Australian resource industry.
- This scorecard focuses on this critical area in the lead-up to the 2013 federal election, when the importance of effective job and productivity-generating workplace regulation is increasing, and Australia faces heightened competitive and investment pressures.
- The scorecard process, the ten criteria, and the evaluations of the competing workplace policies of our main political parties has been overseen and informed since its inception in 2007 by a panel of Australia's foremost and best-qualified workplace relations and human resource strategists and practitioners.
- AMMA Board Reference Group (BRG) members represent all parts of the Australian resources industry. The BRG brings together the experiences of those working at the coalface of trying to do business and create jobs under the Fair Work Act and its predecessor legislation.
- Most BRG members work either in companies operating in multiple countries, or competing with international operators, making them well aware of the competitive pressures facing resource development in Australia, and the pressures of trying to do business and employ people in global markets.

## The scorecard

- AMMA evaluates the workplace relations policies of Labor, the Coalition and the Australian Greens on a scale of 0 to 4 across a range of criteria, according to whether they meet the key workplace relations needs of the resource industry.
- In this scorecard, this scale is applied across 10 criteria / workplace policy priorities for the industry, giving an overall score out of 40. The final scores indicate the extent to which each party would deliver a workplace relations system that supported resource investment, employment and contribution to our economy.
- The 10 scorecard criteria / policy priorities for the resource industry focus on the areas of:
  1. A national regulatory framework / regulatory burden
  2. Minimum standards and awards

3. Agreement making
  4. Agreement processing
  5. Industrial action and compliance
  6. Unfair dismissal / general protections
  7. Union right of entry and access to records
  8. Impact on productivity
  9. Independence of the industrial tribunal (the Fair Work Commission)
  10. Accountability of registered organisations (unions and employer organisations)
- Three additional categories were added in 2013 expanding the pre-existing 7 criteria to 10. This has been used to arrive at a score out of 40 for each of the three parties whereas on previous scorecards they received a score out of 28. Below are the overall scores of the parties compared with their scores on the preceding 2010 scorecard.

### Summary of scores

	2010 Score (out of 28)		2013 Score (out of 40)
	17/28 (60%)	↓	18.5/40 (46%)
	18/28 (64%)	↑	29/40 (73%)
	8/28 (29%)	↓	7.5/40 (19%)

- As the scores above show, of the three political parties rated:
  - Only the Coalition has revised its workplace policies between the 2010 and 2013 election years to better deliver on the needs of the resource industry. Notwithstanding that, there remain key deficiencies in the Coalition's workplace relations policy, namely its failure to commit to delivering a workable individual agreement.
  - Labor and the Greens have gone substantially backwards, demonstrating a manifest failure to engage with the needs of enterprises endeavouring to

operate productively and competitively in this country, and seeking to deliver jobs, opportunities and increased living standards to Australians.

- Labour has pursued overwhelmingly negative changes to Australia's workplace regulation based almost solely on trade union interests and agendas, clearly exceeding and departing from its previous electoral announcements and commitments, and ignoring the bulk of recommendations of its own hand-picked Fair Work Review Panel.
- The Greens have gone backwards from a very low base, notwithstanding an expanded range of matters being taken into account in this scorecard (and therefore a higher overall score being possible). This is indicative of a party formulating its workplace policies with absolutely no engagement with industry, and with deliberate disregard for the needs of industry and industry's contribution to the economy and job creation.

## Labor


- Key reasons for Labor's decreased score include:
  - Massively expanding union rights of entry into workplaces, further skewing the rules in favour of unions (Fair Work Amendment Act 2013);
  - Inserting additional prescription into modern awards from 1 January 2014 (Fair Work Amendment Act 2013);
  - Prohibiting certain forms of individual agreement making, such as "opt-out" clauses in enterprise agreements (Fair Work Amendment Act 2012);
  - Significantly broadening the "general protections" in the Fair Work Act by introducing a new, fast-access jurisdiction for the Fair Work Commission to take on workplace bullying claims from 1 January 2014;
  - Ongoing failure to introduce stringent accountability requirements for unions and employers' organisations;
  - Failure to introduce tangible requirements to factor productivity into workplace relations arrangements, and to encourage bargaining for more productive workplaces; and
  - Recent appointments to and promotions within the Fair Work Commission that continue to favour those with union or Labor-leaning backgrounds.
- Across all 10 policy areas/scorecard criteria, Labor scored just 18.5 out of 40.
- Labor has gone backwards in terms of the extent to which its workplace policies support a competitive, job-creating resource industry in this country. This reflects a comprehensive failure to meet the workplace relations needs of an industry that:

- Overwhelmingly operates modern, highly-evolved workplaces that deliberately pursue high remuneration, high skills and high retention by nurturing positive and supportive workplace cultures.
- Applies international best practices in human resource management to make the resource sector an attractive place for employment and investment.
- Employs over 1.1 million people<sup>3</sup> and contributes 18% of Australia's economic activity.
- The Rudd/Gillard/Rudd government's ongoing policy failure comes despite AMMA and its members clearly communicating what is required through a consistent program of policy analysis and advocacy based on expert industry feedback from those seeking to work with Australia's workplace laws.
- No political party genuinely willing to engage with what the resource industry needs to be more competitive and attract more business to this country could claim to have been unaware of what is required in terms of workplace reform.
- Below is a full breakdown of Labor's scores across the 10 key policy areas compared with its scores on the 2010 scorecard.

Key WR needs of the resource industry Criteria 1 to 10	Score (0 to 4) August 2010		Score (0 to 4) July 2013
National regulatory framework / regulatory burden	3.5	↓	3.0
Minimum standards and awards	3.5	↓	2.0
Agreement making	1.5	↓	1.0
Agreement processing	3.0	—	3.0
Industrial action and compliance	2.0	↓	1.5
Unfair dismissal / general protections	2.5	↓	2.0
Union right of entry and access to records	1.0	↓	0.5
Score for existing 7 categories	17 / 28	↓	13 / 28

<sup>3</sup> Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013




Impact on productivity		New	1.5
Independence of the industrial tribunal		New	2.0
Accountability of registered organisations		New	2.0
Score for 3 additional categories		New	5.5 / 12
 Total score			18.5 / 40

### The Coalition

- The Coalition's slightly improved score since 2010 is based on changes to its workplace relations policies following the 2010 federal election, which will better meet the needs of the resource industry.
- Key reasons for the Coalition's score, which is significantly higher than Labor's, include:
  - Promising to base future right of entry laws on the system that existed prior to the Fair Work Act taking effect on 1 July 2009;
  - Promising to re-establish the Australian Building & Construction Commission and the associated legislation as one of its first acts of government, promising to formally extend its area of regulation to offshore construction;
  - Promising to ensure enterprise agreements cannot restrict the use of Individual Flexibility Arrangements (although the Coalition policy fails to address other problems with IFAs);
  - Promising to introduce new rules around greenfield agreement negotiations that would encourage more reasonable union conduct and demands;
  - Tasking the Productivity Commission with conducting a thorough review of the Fair Work laws and the impact they are having on the economy, productivity and jobs;
  - Actively considering creating an independent industrial relations appeal jurisdiction; and
  - Planning to create a Registered Organisations Commission to enforce new rules requiring unions and employer organisations to be subject to the same requirements as companies and directors.
- While still containing significant shortfalls, the Coalition's workplace relations policy goes substantially further than Labor's in meeting resource industry needs.

- Below is a full breakdown of the Coalition's scores across the 10 key policy areas.


Key WR needs of the resource industry Criteria 1 to 10	Score (0 to 4) August 2010		Score (0 to 4) July 2013
National regulatory framework / regulatory burden	3.5	—	3.5
Minimum standards and awards	3.5	↓	3.0
Agreement making	1.5	↑	2.5
Agreement processing	3.0	↑	3.5
Industrial action and compliance	3.0	—	3.0
Unfair dismissal / general protections	2.5	↓	2.0
Union right of entry and access to records	1.0	↑	3.5
Score for existing 7 categories	18 / 28	↑	21 / 28
Impact on productivity		New	2.0
Independence of the industrial tribunal		New	2.5
Accountability of registered organisations		New	3.5
Score for 3 additional categories		New	8.0 / 12
	<b>Total score</b>		29.0 / 40

### The Australian Greens

- The Australian Greens' overall score fell in the latest scorecard, despite being evaluated on an expanded set of criteria.

- This is indicative of a workplace policy stance that is increasingly removed from the practical realities and challenges of operating in the resource industry.
- Key reasons for the Greens' continuing poor score include:
  - Proposing to require employers to enter into collective agreements unless a majority of employees are demonstrably opposed to collective bargaining, with the federal industrial tribunal having the power to arbitrate if no agreement can be reached;
  - Proposing to require employers to inform new and existing employees that they are entitled to join a union and to enable the provision of information about the unions "responsible" for the sector and industry;
  - Increasing the potential for strike action by expanding the right for employees to strike not only to advance industrial interests but also social and environmental interests; and
  - Completely failing to engage with key policy considerations for the resource industry, leaving the industry perplexed as to how the Greens would approach key industry parties if engaged on future workplace relations amendments.
- Below is a full breakdown of the Greens' scores across the 10 key policy areas.

Key WR needs of the resource industry Criteria 1 to 10	Score (0 to 4) August 2010		Score (0 to 4) July 2013
National regulatory framework / regulatory burden	2.0	—	2.0
Minimum standards and awards	1.5	↓	1.0
Agreement making	1.0	—	1.0
Agreement processing	0	—	0
Industrial action and compliance	1.0	—	1.0
Unfair dismissal / general protections	1.5	↓	1.0
Union right of entry and access to records	1.0	↓	0.5
Score for existing 7 categories	8 / 28	↓	6.5 / 28

Key WR needs of the resource industry Criteria 1 to 10		Score (0 to 4) August 2010		Score (0 to 4) July 2013
Impact on productivity			New	1.0
Independence of the industrial tribunal			New	0
Accountability of registered organisations			New	0
Score for 3 additional categories			New	1.0 / 12
	Total score			7.5 / 40

# Introduction

The 2013 federal election represents a significant workplace relations policy risk for the Australian resource industry.

Leading into the 2013 federal election, it is essential that the workplace relations policies of the key political parties vying for government and to have influence in parliament are evaluated against the key workplace relations needs of the resource industry.

Australian resource industry employers increasingly compete in globalised markets for both products and investment capital. Their competitiveness and viability is determined by the capacity to economically, productively and efficiently do business in this country. The operation of the workplace relations system, and the policy approaches guiding it, are key determinants of doing business in any country.

The resource industry has a significant interest in ensuring Australia's national workplace relations system provides maximum flexibility and optimal productivity, along with placing a minimal regulatory burden on businesses seeking to respond quickly to changing markets and global demand.

First and foremost, a modern workplace relations system must provide employers and employees with the capacity to determine the working arrangements that best suit their needs, while at the same time ensuring appropriate protections against exploitative or discriminatory conduct.

This capacity for parties to agree on workplace arrangements must be accompanied by a responsibility to honour and respect the terms and conditions agreed during the life of any agreement.

## **Why the need for a workplace relations scorecard?**

The AMMA Scorecard was developed to illustrate and highlight the differences between competing political parties on key workplace relations policy settings, and compare them on the extent to which they do or do not deliver on the needs of Australia's critical resource industry in supporting our capacity to compete, grow and generate jobs.

In the lead-up to the November 2007 federal election, AMMA in conjunction with its Board Reference Group of senior human resources and industrial relations professionals from the resource industry, compiled a set of criteria that defined a modern workplace relations system that would appropriately support employment and growth.

In April 2007, AMMA released its initial *Workplace Relations Policy Scorecard Criteria* against which the workplace relations policies of the various political parties would be rated. Since publishing its original criteria, AMMA has updated its scorecard at key points in the political cycle to evaluate the competing workplace relations policies of influential political parties.

In July 2007, AMMA released its first *Workplace Relations Policy Scorecard* based on the established criteria. Seven initial policy areas were used to rank the workplace relations policies of Labor, the Coalition and the Australian Greens.

### The original scorecard criteria

In developing the original seven criteria, AMMA considered the resource industry's record exports, historically low levels of industrial disputation and above-average earnings to highlight 'what works' in workplace relations regulation.

Through this process, AMMA identified the requirements for a modern workplace relations system that were most likely to ensure the industry could continue its significant contribution to the Australian economy.

The seven initial scorecard criteria were:

1. **A national regulatory framework** (recognising the need for a single national workplace relations system without unnecessary duplication or complexity);
2. **Minimum standards and awards** (recognising the need for a set of core minimum standards on top of which enterprise-specific industrial arrangements could be built);
3. **Agreement making** (highlighting the need for a broad range of agreement-making options including collective and individual agreements);
4. **Agreement processing** (recognising the need for a streamlined agreement processing system with minimal bureaucracy and minimal project delays);
5. **Industrial action and compliance** (recognising the economically damaging impacts of industrial action and that it should only be taken as a last resort, with ongoing access to appropriate remedies and circuit breakers along the way);
6. **Unfair dismissal** (recognising that probationary employees who have yet to prove themselves and high-income earners who are not in need of the same protections as other workers should be excluded from the jurisdiction); and
7. **Union right of entry and access to records** (recognising that union access to worksites for recruitment and discussion purposes must be limited and that union access to employment records must be strictly controlled and disruptions to business minimised).

In AMMA's 2007 and 2010 scorecards, the policy positions of the Coalition, the Greens and Labor were rated against the above seven criteria according to how closely their stated policies met the workplace relations needs of the resource industry at that time.

### New criteria for 2013

Since the release of AMMA's previous scorecard in August 2010, Australia's workplace relations landscape has continued to change.

New priorities have emerged, leading AMMA to build on but not replace the existing seven priorities which remain relevant to this day.

Among other things, key policy directions of the Labor Government since the 2010 federal election have led to AMMA inserting three new criteria to supplement the existing seven. The new criteria are:

8. **Impact on productivity** (recognising the heightened importance of ensuring Australia's workplace relations systems is able to boost productivity);
9. **Independence of the industrial tribunal** (highlighting the need for the structure and administrative arrangements of the federal industrial tribunal to function independently of the government of the day); and
10. **Accountability of registered organisations** (highlighting the importance of ensuring adequate transparency, disclosure, and financial governance arrangements for registered industrial organisations in order to protect their members from inappropriate conduct).

The introduction of the expansive suite of general protections / adverse action provisions in the Fair Work Act 2009, along with changes contained in the Fair Work Amendment Act 2013 in relation to workplace bullying, have led AMMA to broaden the existing category of "unfair dismissal" (Criteria 6) to "unfair dismissal and general protections", which includes processes to address workplace bullying as well as what is commonly referred to as the "adverse action" provisions.

An almost uniform national industrial relations framework was achieved by the Howard Government in 2006 and built on by the Rudd Government in 2010. As a result, AMMA's latest scorecard criteria has seen a shift in focus away from achieving a national system and towards ensuring such a system minimises the regulatory burden on business given this is the key aim of any truly national system. As a result, AMMA's existing scorecard category of "national regulatory framework" (Criteria 1) has been expanded to become "national regulatory framework / regulatory burden".

### How the scoring system works

In each previous scorecard, competing policies were rated on a five-point scale that saw them awarded a score from zero to four in each of the seven scorecard criteria – zero being 'no policy position put forward' and four being 'policy meets resource industry requirements'. The complete scale is reproduced below:

- |  |
|--|
| <ol style="list-style-type: none"><li>0. = No policy position put forward</li><li>1. = Policy does not meet resource industry requirements</li><li>2. = Policy addresses resource industry requirements but contains undesirable content</li><li>3. = Policy substantially addresses resource industry requirements</li><li>4. = Policy meets resource industry requirements</li></ol> |
|--|

According to the above rating scale, the greater the score, the more closely a specific policy meets the needs of the resource industry.

In this 2013 scorecard, the expansion of the existing seven criteria to 10 has meant that instead of getting a score out of 28 (based on a maximum score of four points for each of seven criteria), the parties have received a score out of 40.

### **How the workplace relations policies of the parties are identified and assessed**

Competing political parties will generally release a workplace relations policy or policies in the lead-up to each federal election. While these publicly released policies form the basis of the AMMA scorecard rankings, they are not the only documents/sources used to identify and compare the policies of the various political parties.

Other useful sources of policy positions include media statements and announcements as well as proposed and enacted changes to workplace relations legislation (and how parties vote upon key propositions affecting the resource industry).

### **History of the AMMA scorecard**

#### *The 2007 scorecards*

AMMA's first scorecard analysis in July 2007 drew attention to a number of deficiencies in Labor's policy, which at that time received a very poor score of 9 out of 28 based on the details available.

In September 2007, following the release of Labor's *Forward with Fairness: policy implementation plan* and significant media announcements, AMMA felt it was important to revisit the scorecard. As a result, Labor's score improved from 9 out of 28 to 13 out of 28 although was still well below satisfactory and signalled the need for an urgent overhaul of Labor's workplace relations policy.

#### *The 2008 scorecard*

The AMMA scorecard was again revisited in October 2008 after Labor had been in government for nearly 12 months. That scorecard focused solely on reassessing the Labor government's policy in the absence of a revised Coalition policy at that time.

In AMMA's 2008 scorecard, Labor's score again improved compared to previously, rising to 18 out of 28 (from 13 out of 28).

#### *The 2010 scorecard*

AMMA next revisited its scorecard in August 2010, shortly before the 2010 federal election. At that stage, the bulk of the Fair Work Act had been in force for around 12 months and was the key basis used to derive Labor's score.

In 2010, the key point of difference emerging between the Labor and Coalition workplace relations policies was that the Coalition was committed to retaining the Australian Building & Construction Commission with its full powers, while Labor had



announced plans (later enacted into law) to dilute the compliance powers and deterrent effect of the building and construction industry watchdog.

At that stage, other than retaining the ABCC, the Coalition had said it would do little more than 'tweak' the Fair Work Act if it won government in 2010. This fell well short of meeting resource industry needs, which is why the Coalition received a score of 18 out of 28 in the 2010 scorecard, just marginally better than Labor's score of 17.

### **The 2013 scorecard**

At the time of releasing this scorecard in July 2013, the Coalition had recently released a detailed workplace relations policy (May 2013) and Labor had passed its second major tranche of amendments to the Fair Work Act 2009.

For the purpose of this scorecard, the workplace relations policies of Labor, the Coalition and the Greens have been derived from the following public documents:

#### *Labor*

- The Fair Work Act 2009;
- The Fair Work Amendment Act 2012;
- The Fair Work Amendment Act 2013;
- The Fair Work (Registered Organisations) Amendment Act 2012; and
- The Equal Opportunity for Women in the Workplace Amendment Act 2012.

#### *The Coalition*

- The Coalition's *Policy to improve the Fair Work laws*, released in May 2013; and
- The Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2013.

#### *The Australian Greens*

- The Australian Greens *Policy on employment and workplace relations* (November 2012);
- The Fair Work Amendment (Tackling Job Insecurity) Bill 2012;
- The Fair Work (Job Security and Fairer Bargaining) Amendment Bill 2012; and
- The Fair Work Amendment (Better Work/Life Balance) Bill 2012.

AMMA will consider revising the scorecard in the event that Labor, the Coalition or the Greens release any further significant policy detail in the lead-up to the 2013 election.



## Criteria 1: National regulatory framework/regulatory burden

A single national workplace relations system, without the duplication and complexity resulting from the interaction of six states, two territories and a federal system is a prime requirement of a modern industrial relations system. The national system should cover all employing entities including both constitutional corporations and unincorporated bodies. At the same time, the regulatory burden on employers resulting from Australia's IR laws should be kept at the minimum possible while ensuring appropriate safeguards and safety nets are in place.

On 1 January 2010, a national workplace relations system for the private sector took effect in all states except Western Australia (WA).

In 2008 and again in 2009, the WA government said it would not refer its industrial relations powers for unincorporated entities to the Commonwealth, nor enact legislation mirroring the *Fair Work Act 2009* for those entities. Instead, the WA government commissioned a review into the Industrial Relations Act 1979 (WA) to assess if it needed updating. That review has since been completed, a number of recommendations made, and amending legislation in the form of a "green" bill tabled in state parliament in November 2012.

The Labour Relations Legislation Amendment and Repeal Bill 2012, because it was a green bill, did not represent the state government's settled position and was open to feedback from stakeholders. While the bill has not yet been finalised, its positive proposals include:

- Broadly harmonising the WA Industrial Relations Act's unfair dismissal and right of entry provisions with those under the Fair Work Act;
- Improving the regulation of registered organisations and associations; and
- making minor amendments to the Act's freedom of association provisions.

While the bill proposes a number of positive moves by way of harmonisation, there remains a carve-out in WA of a state industrial relations system for the private sector. This means a truly national workplace relations system for the private sector has not been achieved under the Rudd/Gillard/Rudd government albeit due to a state Coalition government refusing to hand over its remaining IR powers to a federal Labor government.




The Howard Government made the first moves towards a national industrial relations system for the private sector with the introduction of amendments to the Workplace Relations Act in March 2006.

While the achievement of a largely national industrial relations system was a logistically complex exercise started by the Howard Government and built on by the Rudd Government, AMMA recognises that significant progress has been made towards achieving the goal of a national regulatory framework.

The focus of this scorecard then turns to not so much the creation of a national framework, which has all but been achieved, but to meeting the objectives of a national framework, key to which is to reduce the compliance burden for business.

AMMA has therefore broadened the existing criteria from “national regulatory framework” to “national regulatory framework / regulatory burden”.

The scores of each of the three political parties in this area are detailed below:

National regulatory framework / regulatory burden	2010 Score (0 to 4)	2013 Score (0 to 4)
	3.5	3.0
	3.5	3.5
	2.0	2.0

## Labor

Against the national regulatory framework criteria, Labor’s score fell from 3.5 out of 4 in 2010 to 3.0 out of 4 in 2013 based on its most recent policies and performance.

A number of Labor’s policies will increase the regulatory burden on business (and on doing business in Australia) despite a national regulatory framework having essentially been achieved.

Labor policies that will increase the regulatory burden include the increased gender equity reporting requirements under the Equal Opportunity for Women in the Workplace Amendment Act 2012, significantly adding to the reporting burden on private sector entities employing more than 100 people.

AMMA is a strong supporter of encouraging more women into the resource industry. However, AMMA maintains that voluntary, business-driven initiatives are better vehicles for women’s participation than mandated reporting that only serves to direct efforts away from other measures that might be more effective.

Recent Fair Work Act changes passed into law that took effect on 1 July 2013 will also add to the regulatory burden for business. In particular, the vast expansion of the right to request flexible working arrangements will require employers to field a much higher volume of requests in this area while retaining the right to refuse such requests on 'reasonable business grounds'.

The new anti-bullying provisions that will commence on 1 January 2014 will also massively increase the regulatory burden on business by introducing yet another compliance mechanism on top of those already in place, in addition to employers having to observe their own internal policies and procedures and conducting their own investigations in this area.

### **The Coalition**

On this criteria, the Coalition's score has remained steady at 3.5 out of 4 in both the 2010 and 2013 scorecards. The key reason for this is that the Coalition's latest policies will do no harm in this area and could have a positive effect. Positive aspects of the Coalition's workplace relations policy include that it supports the Fair Work Act review panel recommendations:

- to create a national long service leave standard, which Labor has so far failed to implement. AMMA members support a national long service leave standard in principle given it would reduce the regulatory burden. Of course, the specific content and impact of a national long service leave standard would need to be assessed before AMMA could fully endorse it; and
- that where employees are transferring from one business to another of their own initiative, their employment terms and conditions will be those of the new employer rather than the old, thus potentially reducing the regulatory burden associated with acquiring a new business.

Negative aspects of the Coalition's workplace relations policy include that it:

- supports the Fair Work Act review panel recommendation to require an employer and employee to hold a meeting to discuss requests for extended unpaid parental leave unless the employer agrees to the request, thereby increasing the regulatory burden on employers, although not significantly.

Another positive development was the 7 July 2013 release of the *Coalition's Policy to Boost Productivity and Reduce Regulation*. An Opposition media statement about the policy acknowledged that all modern economies need regulation but excessive regulation results in more costs than benefits and discourages innovation, investment and job creation. The policy includes transferring the administration of paid parental leave from business to the Family Assistance Office, which is something AMMA would welcome.

## The Australian Greens

In the national regulatory framework area, the Greens' policy remains at a score of 2.0 out of 4 in both the 2010 and 2013 scorecards.

In the 2010 scorecard, a key reason for the Greens' low score was that its industrial relations policy listed among its goals<sup>4</sup> 'the restoration and maintenance of strong state and national industrial relations systems'.

That goal has since disappeared from the Greens' workplace relations policy but there remain concerns for AMMA members in its current policy in terms of its failure to meet industry requirements for a reduced regulatory burden and greater support for doing business in Australia. These concerns include:

- requiring employers to inform new and existing employees of their entitlement to join a union and enabling the provision of information about unions responsible for the sector and industry; and
- establishing mechanisms 'both budgetary and statutory' to eliminate the gender pay gap such as industrial tribunals with full powers to make orders to give effect to gender pay equity on a workforce, industry or workplace basis.

Both of these policy principles, if enacted, would unnecessarily increase the regulatory burden on business.

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<sup>4</sup> The Australian Greens IR policy, accessed in August 2010

## Criteria 2: Minimum standards and awards

There must be a set of legislated statutory core minimum standards of general application. There must also be an ability to agree to hours of work that meet operational needs having regard to OHS and fitness for work principles, and employee priorities. Awards should be restricted to providing a genuine safety net of core conditions of employment in industry (and where relevant sub-industry) sectors.

The Labor Government's two-part safety net, which took effect on 1 January 2010, provides for nationally legislated minimum standards and has created minimum conditions in the form of the National Employment Standards (NES) and modern awards.

AMMA supports appropriate minimum employment entitlements for all employees. The NES expanded on the minimum standards under the Howard Government, known as the Australian Fair Pay and Conditions Standard.

The NES have provided essential minimum entitlements to all employees, whilst arguably exceeding such minima in some areas, and in the detail of prescription provided. Any minimum standards must be sufficiently adaptable to recognise that there is not always a single form that will meet the requirements of all industries, particularly when industry practices vary considerably in terms of hours of work, rosters, shift patterns, leave, etc.

For example, around 95% of the resource industry works in excess of a standard 38-hour week. Forty-two and 56-hour rosters and fly-in, fly-out arrangements, which by necessity mean working longer hours over a concentrated period, are common on remote and isolated worksites and are driven by employee preferences as much as by operational requirements.




The key issues for the resource industry in this area include the need to allow flexibility in how the NES are applied but also to ensure clarity around the precise requirements of the NES. This is lacking in some of the current arrangements put in place by the Labor government.

In terms of the award modernisation process that resulted in new modern awards taking effect on 1 January 2010, AMMA is comfortable with the outcomes for modern awards relevant to the resource industry, in particular the mining and hydrocarbons awards. These modern awards are sufficiently flexible so that employers and employees can operate without the absolute need to enter into enterprise negotiations.

However, since the operation of the safety net and modern awards was last assessed in 2010, there have been developments that risk returning to a situation where awards do not just comprise a minimum safety net but entail more and more prescription.

This would not be acceptable and would call into question the NES plus awards model which Labor's Fair Work Act provides for both minimum standards and the bargaining safety net.

Based on AMMA's latest assessment in this category, the scores for each of the three main political parties appear below, next to the scores they received in 2010:

Minimum standards and awards	2010 Score (0 to 4)	2013 Score (0 to 4)
	3.5	2.0
	3.5	3.0
	1.5	1.0

## Labor

Against the "minimum standards and awards" criteria, Labor's score fell from 3.5 out of 4 in 2010 to a score of 2.0 in 2013.

Key reasons for the drop include that in the recently enacted Fair Work Amendment Act 2013, Labor has:

- Significantly expanded employee rights to request changes to working arrangements under the NES, at the same time restricting the capacity for employers to refuse such requests on reasonable business grounds.
- Required greater consultation over rostering changes from 1 January 2014; and
- Required the Fair Work Commission to give greater consideration to including penalty rates in modern awards, effective from 1 January 2014.

Further changes under Labor in the area of minimum standards and awards include in the Fair Work Amendment Act 2012 introducing new requirements for modern award terms about superannuation funds which do not currently exist in modern awards, effective from 1 January 2014.



## The Coalition

In the “minimum standards and awards” area, the Coalition’s score fell from 3.5 out of 4 in 2010 to 3.0 out of 4 in 2013. While this was not as big a drop as Labor saw in this area, it happened for several important reasons:

- While not responsible for Labor’s extension of the changes to the right to request flexible working arrangements and the extended rights of pregnant workers to transfer to safe jobs, the Coalition did not oppose those changes which is tantamount to endorsing them; and
- The Coalition has said it will deliver a bolstered paid parental leave scheme giving mothers six months’ pay based on their actual wage plus superannuation. AMMA does not believe businesses should be asked to foot the bill for this vastly boosted parental leave scheme through the proposed new tax.

Despite the above negative features, positive aspects of the Coalition’s policy in this area include:

- Supporting the Fair Work Act review panel recommendation that employees should not accrue annual leave while absent from work and receiving workers’ compensation payments; and
- Supporting the review panel recommendation that annual leave loading not be payable on termination of employment unless a modern award or enterprise agreement expressly provides for that.

On this last point, this is an area on which the resource industry has been awaiting government clarification since the National Employment Standards took effect on 1 January 2010. Long-standing industry practice is that annual leave loading is not payable on termination (even if it would have been if the leave was taken during the employment relationship) unless an award or agreement specifically says so. However, the Fair Work Ombudsman’s approach to enforcement is contrary to that and says that according to the NES, leave loading is payable on termination if it would otherwise have been payable on annual leave taken, regardless of what the award or enterprise agreement says.

## The Australian Greens

Against the “minimum standards and awards” criteria, the Greens’ score fell from an already low 1.5 out of 4 in 2010 to 1.0 out of 4 in 2013.

Key reasons for this include that the Greens’ workplace relations policy cites among its aims and principles to:

- Provide comprehensive industry-wide awards that give rights and entitlements in excess of the legislative minimum and which would be determined by conciliation and arbitration. This moves further away from the resource industry’s need for awards to provide a minimum safety net of core conditions of employment in industry sectors, which supports and encourages workplace bargaining;

- Mandate shorter standard working hours, which again does not meet the needs of the resource industry to work flexible or non-standard shifts, which also match the preferences of many employees; and
- Legislate a minimum of five weeks' annual leave for all employees. This fails to take into account even-time rosters operating in the offshore resource industry, for example, where some people work two weeks on, two weeks off and do not need five weeks' annual leave. The additional costs of this proposal are considerable and fail to be addressed by the Greens.

## Criteria 3: Agreement making

There must be access to a broad range of agreement-making options including collective agreements, greenfield agreements and statutory individual agreements, with a duration of up to five years.

Agreements should be able to customise the conditions of employment to the needs of the parties and be capable of overriding awards or (in the case of individual agreements) collective agreements. Agreements should not be imposed except in limited circumstances.

In the two decades leading up to the introduction of the Fair Work Act 2009, the resource industry accessed a wide range of agreement-making options to maximise flexibility and productivity, reward performance and attract and retain the best employees. During those two decades, statutory agreement-making options included:

- Union collective agreements;
- Employee collective agreements;
- Australian Workplace Agreements (AWAs);
- Individual Transitional Employment Agreements (ITEAs);
- Union greenfield agreements; and
- Employer greenfield agreements.

The Fair Work Act in 2009 (building on Labor's transitional legislation introduced in March 2008) reduced the statutory agreement making options available to just two – collective agreements with unions as default bargaining representatives where they have members to be covered by the agreement, and greenfield agreements where negotiating with unions is mandatory.

The limited number of agreement options now available has frustrated the continued use of innovative, flexible workplace relations practices in enterprise agreements and in some cases has eliminated flexible work practices.

### *Greenfield (new project) agreements*

AMMA members' experience is that unions continue to use their power to veto greenfield agreements (agreements for new workplaces commencing operations and employing people for the first time) in order to extract extravagant windfalls from investors and employers who are seeking to build new operations or expand existing ones.

AMMA members are reporting more and more difficulty in negotiating reasonable and timely outcomes for new projects, with some member companies reporting that unions are withholding agreement from them altogether meaning they cannot even tender for projects.

Prior to the Fair Work Act taking effect, employers could make a greenfield agreement with one or more unions lasting for up to five years or an employer greenfield agreement lasting for up to 12 months which had to meet the no-disadvantage test of the day.

Under the Fair Work Act, employers can only make a greenfield agreement with one or more unions entitled to represent the majority of employees, with a maximum agreement duration of four years.

AMMA notes that on 11 July 2013, restored Prime Minister Kevin Rudd put changes to greenfield agreements back on the table<sup>5</sup>. While the PM's speech to the National Press Club was scant on detail, AMMA would be very concerned with any proposals to implement compulsory arbitration in relation to greenfield agreements.

In his second reading speech for the Fair Work Amendment Bill in March 2013<sup>6</sup>, Workplace Relations Minister Bill Shorten reiterated Fair Work Act review panel concerns that there were significant risks that bargaining practices associated with greenfield agreements could threaten investment in major projects, flagging this as an issue Labor would come back to following further consultation with stakeholders.

#### *Individual Flexibility Arrangements (IFAs)*

The mandatory inclusion of a flexibility clause in all enterprise agreements negotiated from 1 July 2009 was expected to allow an employer and individual employee to agree to vary the application of certain award terms to meet their individual needs. This was expected to be done through individual flexibility arrangements (IFAs) that would be facilitated by flexibility clauses in enterprise agreements.

Although not expected to provide the full range of flexibility and protections possible under AWAs, employers hoped that IFAs would provide some flexibility for both the employee and the enterprise. This has turned out not to be the case.

In several papers and submissions to date<sup>7</sup>, AMMA has highlighted the extremely limited usefulness of IFAs in their current form and their extremely low take-up in the industry. AMMA estimates that less than 5% of employment arrangements in the industry are covered by IFAs compared with 60% to 80% of industry arrangements that enjoyed the flexibility of AWAs prior to new statutory individual agreements being outlawed in March 2008.

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<sup>5</sup> The Australian Economy in Transition: Building a new National Competitiveness Agenda, Prime Minister Kevin Rudd, National Press Club Address, 11 July 2013




<sup>6</sup> Second Reading [Speech](#) for Fair Work Amendment Bill 2013, 21 March 2013

<sup>7</sup> *IFAs: The great illusion paper* published by AMMA in May 2010; AMMA [submission](#) to the General Manager of Fair Work Australia on the operation of the first three years of IFAs under the Fair Work Act, April 2012

### Agreement content

The Fair Work Act 2009 expanded the breadth of matters that could be subject to bargaining, and therefore protected industrial action in the context of enterprise agreement making. The legislative definition of “matters pertaining to the employment relationship” was significantly expanded to include matters pertaining to the relationship of employers with their employees’ unions, thereby paving the way for negotiations over clauses that have nothing to do with the enterprise but everything to do with entrenching union power.

Based on AMMA’s latest assessment of this scorecard category of “agreement making”, and drawing together the considerations outlined above, the scores for each of the three main political parties appear below, next to the scores they received in 2010:

Agreement making	2010 Score (0 to 4)	2013 Score (0 to 4)
	1.5	1.0
	1.5	2.5
	1.0	1.0

### Labor

Labor’s score in the ‘agreement making’ area has fallen from an already low 1.5 out of 4 in 2010 to a lower 1.0 out of 4 in 2013.

Key reasons for this include that in the Fair Work Amendment Act 2012, which passed into law in late 2012, Labor specifically prohibited:

- “Opt-out” clauses in enterprise agreements which would have allowed individual employees to voluntarily opt out of collective arrangements; and
- The making of enterprise agreements with one employee.

Labor is yet to act on any of the recommendations of the Fair Work Act review panel that would bolster agreement-making in ways the resource industry would support, such as:

- Extending the notice required to be given by either party of terminating an IFA from the current 28 days to 90 days, thereby making IFAs more attractive and reliable;
- Requiring flexibility terms in enterprise agreements to allow flexibility around all the terms contained in the “model” flexibility clause rather than continuing to permit unions to use bargaining to reduce flexibility clauses down to no more than meaningless tokens; and
- Applying good faith bargaining obligations to greenfield agreements, which AMMA could support (with modifications and conditions) as it would prevent unions from simply refusing to bargain with particular companies.

### **The Coalition**

The Coalition’s score in the area of “agreement making” has risen from 1.5 out of 4 in the 2010 scorecard to 2.5 in 2013.

While this is still well below what would be considered a strong score in this area, the Coalition’s latest workplace relations policy would go some way towards meeting the needs of the resource industry in this area. Positive parts of the Coalition’s policy include:

- Ensuring enterprise agreements can no longer restrict the use of IFAs by mandating the model flexibility clause as the minimum;
- Introducing a 90-day notice period for terminating an IFA by either party, up from the current 28 days;
- Introducing good faith bargaining for greenfield agreement negotiations; and
- Requiring greenfield negotiations to be completed within three months and, if not, enabling the employer’s latest offer (as long as it meets the Better Off Overall Test and other criteria) to be approved on application by the business to the Fair Work Commission.

While the Coalition’s policy contains some positive steps in the area of agreement making, it does not do nearly enough to ensure there is a workable form of individual agreement. IFAs could easily be made more workable by allowing them to run for fixed terms of up to four years and enabling them to be made a condition of employment, provided they left employees better off overall than they would have been under the prevailing arrangements, which is already a legal requirement.

The Coalition policy specifically states it will not re-introduce Australian Workplace Agreements but AMMA’s policy has always been that as long as individual agreements are underpinned by a no-disadvantage test there should be no problem with statutory individual agreements being freely entered into.

## The Australian Greens

The Australian Greens' score in the "agreement making" area has stayed at a dismal 1.0 out of 4 in both the 2010 and 2013 scorecards. Key reasons for this include that the Greens' policy would:

- Promote industry-wide collective agreements that are union negotiated;
- Require employers to enter into collective agreements with their workforce unless a majority are demonstrably opposed to collective bargaining;
- In terms of agreement content, recognise the rights of workers to take industrial action, including strike action, to advance their economic, social and environmental interests; and
- Restrict independent contractor arrangements.





## Criteria 4: Agreement processing

There should be a simple administrative agreement registration process, without a requirement to attend a formal hearing. Agreements should commence on signing and be required to meet a simple set of legislated minimum conditions.




The Fair Work Act 2009 allowed agreements to be approved against a two-part safety net comprising the legislated minimum conditions and the relevant modern award. This is the basis for the Better Off Overall Test (BOOT) under which an agreement must leave an employee better off compared to the two-part safety net. AMMA supports the BOOT as a manifestation of the earlier no-disadvantage test which applied to agreements before the Fair Work Act was introduced.

However, under the Fair Work Act, an agreement cannot become operational until the federal industrial tribunal formally approves it. This process is vulnerable to delays depending on the number of agreements lodged, the review mechanism and the number of resources allocated to the tribunal for that function.

Processing delays create uncertainty for both the business and employees. There are also administrative requirements to be met under the current system when lodging enterprise agreements for approval.

AMMA members also remain concerned about divergent decisions in relation to the same enterprise agreements depending on which Fair Work Commission member they are allocated to for approval. Concerns also remain about the inflexible application of the BOOT which does not adequately take into account the subjectivities involved in trading off a monetary benefit for a non-monetary benefit driven by an employee's choice.

Based on AMMA's latest assessment of the respective policies in this area, the scores for each of the three main political parties are:

Agreement processing	2010 Score (0 to 4)	2013 Score (0 to 4)
	3.0	3.0
	3.0	3.5
	0.0	0.0

## Labor

Labor's score in this area has stayed at a good level of 3.0 out of 4 in both the 2010 and 2013 scorecards, reflecting that its policy continues to substantially meet the needs of resource industry employers, although there is room for improvement.

A key reason for Labor's continuing good score is that processing times have improved under the Fair Work Act and are currently at acceptable levels.

Having said that, the Labor government has failed to act on specific Fair Work Act review panel recommendations that would further improve the system, including:

- That the BOOT expressly permit an IFA to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided the value of the monetary benefit foregone is specified in writing and is relatively insignificant and the value of the non-monetary benefit is proportionate; and
- That the government continue to monitor the application of the BOOT to enterprise agreement approvals to ensure it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.

## The Coalition

The Coalition's score in this area has risen from 3.0 out of 4 in the 2010 scorecard to 3.5 in 2013, reflecting that its policy continues to substantially meet the needs of resource industry employers and is marginally ahead of Labor's.

Unlike Labor, the Coalition supports the two Fair Work Act review panel proposals that would ensure:

- The application of the BOOT expressly permits an IFA to confer a non-monetary benefit on an employee in exchange for a monetary benefit; and
- That the government continues to monitor the application of the BOOT to ensure it is not implemented in too rigid a manner.

In AMMA's assessment, this puts the Coalition ahead of Labor in this area.

## The Australian Greens

The Australian Greens' score has remained at zero in 2010 and 2013 by virtue of the fact that its workplace relations policy has been silent on the issue of agreement processing. This is illustrative of a wider failure by the Greens to engage with the practical concerns of users of the workplace relations system (employer, union and employees) and a propensity to formulate policy based solely on ideology and increasing engagement with hard-left trade unions.




## Criteria 5: Industrial action and compliance

The law should prohibit the taking of industrial action during the life of an agreement and provide readily accessible remedies to prevent or stop the taking of unlawful industrial action and the capacity to seek compensation.

In the paper *Constructing Lawful Workplaces: The need to retain Australia's economic success by maintaining a strong industrial action compliance regime*<sup>8</sup>, AMMA outlined key areas of compliance that were necessary to prevent unlawful industrial action, including:

- The continued operation of s45D and s45E of the Competition and Consumer Act 2010 (formerly the Trade Practices Act 1974) to deal with secondary boycott behaviour by unions;
- The ability to stop or prevent unlawful industrial action without delay;
- Access to readily available civil remedies for unlawful industrial action; and
- An authoritative building industry inspectorate to police the industrial relations regulation of the building and construction industry.

Based on AMMA's latest assessment of this category, the scores for each of the three main political parties appear below:

Industrial action and compliance	2010 Score (0 to 4)	2013 Score (0 to 4)
	2.0	1.5
	3.0	3.0
	1.0	1.0

<sup>8</sup> *Constructing Lawful Workplaces: The need to maintain Australia's economic success by retaining a strong industrial action compliance regime*, published by AMMA on 2 July 2007. (<http://www.amma.org.au/assets/images/stories/papers/20070702%20paper%20constructing%20lawful%20workplaces.pdf>)

## Labor

Labor's score in this critical area of compliance and enforcement has reduced from an already low 2.0 out of 4 in the 2010 scorecard to 1.5 out of 4 in 2013, based on further damage it has done in this area, including through legislative changes now in effect.

AMMA supports the Labor government's decision to retain the existing secondary boycott provisions along with previous arrangements for obtaining orders to stop or prevent industrial action.

However, under the Fair Work Act, by removing the concept of "prohibited content" and expanding the traditional definition of "matters pertaining to the employment relationship", the Labor government has sanctioned industrial action in support of a wider range of claims that do not pertain to the employment relationship, such as payment for trade-union provided training and the requirement to provide amenities for union delegates while they are onsite. These clauses have also been used to undo a number of checks and balances that should be provided through the Fair Work Act 2009, including on right of entry and freedom of association.

AMMA also has well-documented concerns about the ongoing trend for unions to apply for and obtain secret ballot orders for protected industrial action before bargaining has been exhausted and, as seen in the *JJ Richards* case, before bargaining has even commenced<sup>9</sup>.

AMMA members have ongoing concerns about the watering down of the building and construction industry inspectorate's powers and supporting laws in mid-2012 with the abolition of the Australian Building & Construction Commission and its replacement with Fair Work Building & Construction, as well as the replacement of the Building & Construction Industry Improvement Act 2005 with the Fair Work (Building Industry) Act 2012.

Labor's series of legislative and regulatory changes in the building and construction industry had the effect of:

- Narrowing the statutory definition of industrial action;
- Reducing the scope for injunctions to be granted in response to unlawful industrial action that is 'threatened' rather than taken;
- Weakening the anti-coercion provisions in regard to making, terminating, varying or extending industrial agreements;
- Reducing by two-thirds the penalties for unlawful conduct by building industry participants;
- Weakening the regulator's prosecutorial powers by barring it from initiating or continuing with legal proceedings if other parties reach a settlement;

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<sup>9</sup> *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] [FCAFC 53](#), 20 April 2012

- Reducing the effectiveness of the compulsory information gathering powers by requiring more red tape around the use of those powers;
- Reducing the independence of the inspectorate by enabling the minister of the day to give it directions;
- Narrowing the definition of 'building work' to exclude offsite construction work and manufacturing; and
- Introducing the ability for compulsory examination notices to be applied against employers in relation to alleged safety net and entitlement breaches.

While having ample opportunity to do so, the Labor Government has made no remedial changes in its first (2012) or second (2013) major tranches of amendments to the Fair Work Act that would improve its performance in relation to "industrial action and compliance" in the eyes of the resource industry.

In its Fair Work Amendment Act 2012, Labor did make one positive change in this area by preventing a union official from acting as an 'individual' bargaining representative for employees over whom the official's union had no constitutional coverage. This meant such officials could also not apply for secret ballot orders to take protected industrial action on behalf of those employees.

But in other changes contained in that same piece of legislation, Labor amended the rules around the conduct of protected action ballots, thereby expanding the number of workers that could be included on a roll of voters.

Labor has also chosen to ignore the review panel recommendations that would have allowed the Fair Work Commission to grant an application for a protected action ballot order only after bargaining for a proposed agreement had commenced. This amendment would have closed the *JJ Richards* loophole which AMMA has strongly lobbied to have addressed, but which remains open.

### **The Coalition**

The Coalition's score in the area of "industrial action and compliance" has stayed at a reasonably high 3.0 out of 4 in the 2010 and 2013 scorecards.

The Coalition's workplace relations policy in this area substantially meets the needs of the resource industry, while leaving room for improvement. This is a key area of policy differentiation between Labor and the Coalition which led to Labor receiving a much lower score of 1.5 out of 4.

In the building and construction industry specifically, the Coalition's policy on industrial action and compliance would:

- Re-establish the Australian Building & Construction Commission and the Building & Construction Industry Improvement Act;
- Ensure the industry regulator not only maintains the rule of law and improves productivity on onshore building and construction sites but also in offshore construction;

- Have the new industry regulator administer a strengthened national code and guidelines that were weakened under Labor with the introduction of the Building Code 2013; and
- Work with state governments that have enacted their own codes and guidelines to ensure national consistency.

In relation to the industrial action provisions in the workplace relations system generally, the Coalition's policy would:

- Only empower the Fair Work Commission to approve secret ballot applications for protected industrial action following 'genuine and meaningful' talks between workers and business;
- Ensure the Fair Work Commission, before approving a secret ballot application, was satisfied that the claims being made by both parties were 'sensible and realistic' and the parties had discussed ways to improve workplace productivity;
- Ensure unions could only be found to be 'genuinely trying to reach an agreement' if their claims were not exorbitant or excessive but were 'fair' and 'reasonable'; and
- Support the Fair Work Act review panel recommendation to only allow a protected action ballot order to be made after bargaining for a proposed agreement had commenced.

### **The Australian Greens**

The Greens' score in this area has stayed at a fairly dismal 1.0 out of 4 in both the 2010 and 2013 scorecards.

This is because the Greens' policy falls far short of meeting the needs of the resource industry to ensure industrial action is minimised and that there is a tough compliance and enforcement regime to enforce the law.

Contrary to industry needs, the Greens' policy in this area would:




- Ensure there are no industry-specific laws with which workers have to abide, thereby removing the construction industry-specific regulator and legislation;
- Recognise the rights of workers to take industrial action, including the right to strike, and to further their economic, social and environmental interests (in other words, expanding the basis for legally protected strike action);
- Ensure workers and their unions are protected against sanctions under non-industrial laws such as the Competition and Consumer Act 2010 or common law actions when undertaking "legitimate" industrial activity (thereby allowing secondary boycott action); and
- Completely remove any existing coercive powers from the regulators such as those currently existing in the building and construction industry.

## Criteria 6: Unfair dismissal/ general protections

There should be a single unfair/unlawful dismissal system with exemptions for probationary employees and high-income earners. The primary determinant of whether a termination is unfair should be confined to the merits of the case. Employers should be protected from vexatious and frivolous claims by providing an ability to recover costs in the case of unmeritorious applications.

There is no justification for a comprehensive suite of laws to address workplace rights and bullying allegations that expose employers to unlimited liabilities and which also impose a reverse onus of proof on employers. The burden of proof should be on the applicant to prove their case. This alone would reduce the level of unmeritorious claims.

Based on AMMA's latest assessment of this revised scorecard category, the scores for the three political parties appear below:

Unfair dismissal / general protections	2010 Score (0 to 4)	2013 Score (0 to 4)
	2.5	2.0
	2.5	2.0
	1.5	1.0

### Labor

Labor's score in this area has reduced from an already fairly low 2.5 out of 4 in the 2010 scorecard to an even lower score of 2.0 in 2013.

This is due not only to the Fair Work Act's original expansion of the unfair dismissal jurisdiction and the creation of a substantial new 'general protections' jurisdiction, but to the recent introduction of a further anti-bullying jurisdiction that will add substantially to employees' general protections under the Fair Work Act.

This new jurisdiction will expose employers to unacceptable and unwarranted litigation and displace the existing work of safety regulators in relation to bullying.

### *Unfair dismissal*

Under the Fair Work Act which took effect on 1 July 2009, unfair dismissal rights were restored to almost every employee in the country following a six-month qualifying period (12 months for those working in small business). There is currently little disincentive against employees making frivolous claims as the jurisdiction remains a 'no costs' one. In fact, AMMA members are reporting significant pressure to settle even the most unmeritorious of claims during the 'conciliation' process before the Fair Work Commission.

While employees have to serve a six-month qualifying period before being eligible to lodge an unfair dismissal claim (12 months for small business employees), other eligibility rules have been relaxed. Significantly, casuals now have the same qualifying periods as other employees and fixed-term employees are only excluded from making a claim if their employment is terminated at the end of a contract rather than during its term.

While the time limit for lodging unfair dismissal claims was originally reduced from 21 days to 14 when the Fair Work Act first took effect, the Fair Work Amendment Act 2012 extended this back to 21 days. The time limit for lodging dismissal-related general protections claims was at the same time reduced from 60 days down to 21 to be consistent with the unfair dismissal timeframe, but the six-year time limit remains for general protections claims not related to termination of employment.

Bearing all this in mind, Labor's current unfair dismissal system falls well short of what the resource industry needs in order to dissuade employees from making frivolous claims and employers from feeling coerced into paying 'go away' money. Other aspects of Labor's general protections provisions are of even more significant concern than its unfair dismissal rules.

### *General protections*

The Fair Work Act 2009 introduced a comprehensive suite of new "protections" for employees, building on existing protections based on discrimination and protection against unlawful termination of employment.

Of most significance and detriment to employers in this area is the imposition of a reverse onus of proof in relation to "adverse action" claims, placing a positive onus on employers to disprove claims rather than applicants to prove them.

This, together with a low evidentiary burden to commence such applications, has seen employers having to prepare entire legal defences even for clearly unmeritorious and speculative claims. The potentially unlimited compensation and orders that can be made by the Federal Court or the Federal Circuit Court of Australia (formerly the Federal Magistrates Court) puts further pressure on employers to settle, even where applications are unfounded.



The Fair Work Amendment Act 2013 contained an eleventh-hour amendment to enable dismissal-related general protections claims, along with unlawful termination claims, to be arbitrated by the Fair Work Commission rather than the courts, provided there is the consent of both parties.

It remains to be seen whether this will be a positive or negative development for employers, with doubts already raised about the enforceability of such outcomes given that the Fair Work Commission is a tribunal rather than a court.

### *Bullying*

The Fair Work Amendment Act 2013 introduced a brand new anti-bullying jurisdiction for the Fair Work Commission (to commence on 1 January 2014).

While the commission will not be able to make orders for financial compensation, it will be able to make other types of orders that will impact financially on employers.

AMMA's concerns about this new jurisdiction are well-documented<sup>10</sup> and include:

- The potential for the line between 'discipline' and 'bullying' to become blurred, and for legitimate management actions to be drawn into or counteracted by bullying litigation. While the legislation states that 'reasonable management action carried out in a reasonable manner' will be exempt from the definition of bullying, employers remain unconvinced;
- The potential for groundless, self-serving, or mischievous claims;
- The anticipated increase in the volume of claims coming before the Fair Work Commission, with these claims to be fast-tracked;
- The intersection and interference with employers' own bullying investigations and management of workplace relations;
- The potential for claims in this jurisdiction to 'leak' into the workplace health and safety jurisdiction and leave employers open to additional civil and even criminal prosecutions;
- The lack of a bar on concurrent claims in multiple jurisdictions; and
- The continued protection of bullying behaviour by unionists and union officials as a workplace right under the Fair Work Act's adverse action provisions.

### **The Coalition**

The Coalition's score in this area has dropped from 2.5 out of 4 in 2010 to 2.0 out of 4 in 2013.

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<sup>10</sup> AMMA submission to Senate Education, Employment & Workplace Relations inquiry into the Fair Work Amendment Bill 2013, April 2013

While the same as Labor's score of 2.0 and higher than the Greens' score of 1.0 in this area, the deterioration in the Coalition's score is based on the fact that its workplace relations policy will do little to reverse the damage that Labor has done.

The Coalition's score is impacted by:

- Its support, in essence, of Labor's anti-bullying jurisdiction. The Coalition seeks only to apply a contingency on workers accessing the jurisdiction to require them to take reasonable steps such as seeking help and impartial advice from a regulatory agency such as the Fair Work Ombudsman or a state health and safety regulator before elevating their complaint to the Fair Work Commission; and
- Its calls to expand the anti-bullying provisions to explicitly include the conduct of union officials towards workers and employers while doing nothing to overhaul the Fair Work Act's adverse action provisions. Under the adverse action provisions, furthering the views of one's union is a workplace right that is protected and at least one Federal Court decision has found some bullying behaviour goes part and parcel with those union activities<sup>11</sup>.

Positive aspects of the Coalition's policy in this area include its support of the Fair Work Act review panel recommendations that:

- the Fair Work Commission not be required to hold a hearing before dismissing frivolous applications under [s587](#) of the Fair Work Act; and
- annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement specifically says so.

### **The Australian Greens**

The Australian Greens' score in this area has deteriorated from 1.5 out of 4 in the 2010 scorecard to 1.0 out of 4 in 2013.

The Greens' policy would provide even greater protections for casual, fixed-term and probationary workers and employees of small business, including giving them full rights to challenge termination of employment where it is unfair, with reinstatement the primary remedy other than in exceptional circumstances.

This goes against AMMA's views that probationary and fixed-term employees are not permanent employees and therefore should not be able to bring an unfair dismissal claim against their employer. Reinstatement is also often not practical or desirable in such cases.

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<sup>11</sup> *CFMEU v BHP Coal Pty Ltd (No 3)* [2012] [FCA 1218](#) (7 November 2012)

## Criteria 7: Union entry into workplaces (right of entry) and access to records

There should be a single national law on union powers to enter workplaces, with access for discussion purposes restricted to where unions have a current or historical connection to a worksite via a workplace agreement or award.

Union access to employee records should be strictly controlled and there should be appropriate penalties for abuse.

Based on AMMA's latest assessment, the scores for each of the three political parties in the area of "union entry into workplaces and access to records" appear below, next to the scores they received in 2010:

Union right of entry and access to records	2010 Score (0 to 4)	2013 Score (0 to 4)
	1.0	0.5
	1.0	3.5
	1.0	0.5

### Labor

Labor's score in this area, although coming off a very low 1.0 out of 4 in the 2010 scorecard, has deteriorated even further to 0.5 in the latest scorecard.

When Labor was in Opposition in 2007 it promised to retain existing right of entry laws and that union officials would only be able to enter workplaces if they had a permit and in the limited circumstances the legislation had long provided.

Of particular concern to AMMA members arising out of Labor's broken promise was the Fair Work Act's linking of right of entry for discussion purposes to union eligibility rules rather than award or agreement coverage.

Previous limitations on unions accessing the time and wages records of non-union members were, however, retained under the Fair Work Act which requires federal industrial tribunal approval before third-party access is given to non-member records.

Labor's low score in this area reflects not only the broken promises of 2007 but its further opening up of union access to worksites in ways that will be disproportionately detrimental to resource industry employers.

The Fair Work Amendment Act 2013, which has now passed into law, has amended the Fair Work Act so that from 1 January 2014:

- Lunch rooms or crib rooms will become the default meeting places for onsite discussions between unions and employees unless the union and employer agree on an alternative location;
- Where unions and occupiers are unable to agree on accommodation and transport arrangements for union access to remote worksites, employers will be required to facilitate access by providing transport and accommodation for which they can then charge back only the direct costs; and
- The Fair Work Commission's existing powers to hear disputes over frequency of entry by union officials will be expanded but only in relation to the frequency of visits by officials from one union and only where it would require an "unreasonable diversion of the occupier's critical resources". A very high bar is expected to be applied in this area and this enhanced dispute resolution power is expected to provide minimal recourse to employers who are inundated with union visits.

AMMA's concerns with the previous and new right of entry rules under the Fair Work Act are well-documented in AMMA's June 2013 *Resource industry workplace relations election paper: Trade union access to workplaces*<sup>12</sup>, where AMMA makes comprehensive recommendations for reform of the current right of entry system based on resource industry needs.

### **The Coalition**

The Coalition's score in this area has seen a marked improvement from 1.0 out of 4 in the 2010 scorecard to 3.5 in the latest scorecard. This means the Coalition's policy on union access to workplaces comes very close to meeting resource industry needs.

The Coalition's previous low score of 1.0 was based on its policy announcements at the time of the 2010 federal election. At that time, the Coalition said it would not make any substantial changes to the Fair Work Act for at least three years of a federal Coalition government. Based on that, AMMA gave the Coalition the same score as Labor in that area in 2010.

However, following the Coalition's release of significant policy detail in May 2013, AMMA has substantially re-evaluated its score based on it having a much better potential for meeting resource industry needs.

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<sup>12</sup> *Resource industry workplace relations election paper: Trade union access to workplaces*, published by AMMA in June 2013 ([www.amma.org.au/assets/Policy/Papers/201306\\_AMMA\\_right\\_of\\_entry\\_preelection\\_paper.pdf](http://www.amma.org.au/assets/Policy/Papers/201306_AMMA_right_of_entry_preelection_paper.pdf))

The Coalition policy in this area would:

- Change the right of entry laws to reflect then-Deputy Opposition Leader Julia Gillard and Opposition Leader Kevin Rudd's 2007 promises to retain the right of entry laws that existed prior to the Fair Work Act 2009 taking effect;
- Leave untouched the rules around union entry for investigation, OHS and dispute resolution purposes (raising some red flags with AMMA);
- Require union officials to carry photo entry permits; and
- Ensure unions only have access to worksites for discussion purposes if, among other things, they have a current or historical connection to an industrial agreement operating at that site or are seeking in good faith to make such an agreement.

### **The Australian Greens**

The Australian Greens' score in this area has decreased from a dismal 1.0 out of 4 in the 2010 scorecard to a woeful 0.5 in this scorecard. This again demonstrates how far removed from the practicalities of running a business the Greens' workplace relations policies are.

The Greens' policy is to introduce even stronger entry rights for unions to recruit new members, inspect for and remedy breaches of health and safety provisions, breaches of the Fair Work Act and relevant awards or agreements, as well as bolstering 'other activities relating to strengthening workers' organisations'.



## Criteria 8: Impact on productivity




Australia's workplace relations system must foster, not inhibit, productivity by being as flexible as possible and putting productivity on the agenda in enterprise bargaining and agreement making. There must be positive requirements on members of the federal industrial tribunal to assess industrial instruments against their impact on productivity.

In its July 2013 *Resource industry productivity, analysis and policy options discussion paper*<sup>13</sup>, AMMA pointed out that productivity in the resource industry is at its lowest level since 2001. Capital, labour and multi-factor productivity have all been in decline since 2000-01, and Australia ranks increasingly poorly against its competitors.

There are of course multiple factors influencing productivity in the resource industry including commodity prices, resource depletion, mining investment, production lags, work practices, innovation, technology and labour efficiency.

A boom in capital investment has created an inevitable, steady decline in capital productivity, placing further importance on improving levels of labour productivity to help drive overall resource industry productivity growth.

Based on AMMA's assessment of this scorecard category, which is one of three new areas of assessment, the scores for each of the political parties appear below:

Impact on productivity	2013 Score (0 to 4)
	1.5
	2.0
	1.0

<sup>13</sup> *Resource industry productivity, analysis and policy options discussion paper*, published by AMMA in July 2013 ([www.amma.org.au/assets/Policy/Papers/AMMA\\_Productivity\\_Paper\\_July\\_2013.pdf](http://www.amma.org.au/assets/Policy/Papers/AMMA_Productivity_Paper_July_2013.pdf))

## Labor

Labor's score in this area is a disappointing 1.5 out of 4, mainly due to the Fair Work Act doing very little to boost productivity and the recent amendments likely to do even less.

Independent research conducted by RMIT University of AMMA members since the Fair Work Act began has revealed that just 11% of those that had finalised enterprise agreements under the Fair Work Act had negotiated any productivity increases in exchange for increases in wages and conditions.

This means that the huge number of industrial agreements due to expire in the industry in the next 12 months sets the scene for a period during which all power is in the hands of the unions to extract exorbitant pay and conditions outcomes, with no productivity improvements. There is no support in the legislation to assist employers in pursuing productivity benefits as part of the bargaining process against the wishes of unions opposed to yielding improvements.

In oral submissions to the Senate inquiry into the Fair Work Amendment Bill 2012 (the first significant tranche of amendments to the Fair Work Act), AMMA told Senators it could not see any aspects of that bill that would improve productivity<sup>14</sup>.

In particular, there were no provisions in the legislation to make it more difficult to take costly protected industrial action which had the potential to significantly undermine continuity of supply and hence productivity. Similarly, there were no changes in the Fair Work Amendment Act 2013 that would do anything to address the economic and competitiveness challenges facing the Australian resource industry.

While productivity is claimed to be central to the Fair Work Act and was highlighted in the Fair Work Act review panel's recommendations, there are few if any specific requirements under the legislation that would require productivity to be taken into account. Labor policy and legislation pay lip service to improving productivity, but yield little support for employers seeking to make improvements in this area.

Given that labour productivity has continued to decline under the Fair Work Act and Labor's policies have done nothing to change that trend, AMMA has rated Labor poorly in this area with a score of 1.5 out of 4.

## The Coalition

The Coalition's score in this area is 2 out of 4, putting it slightly ahead of Labor given that parts of its workplace relations policy at least directly address productivity issues. The Coalition's policy would:

- Ensure that when asked to approve an enterprise agreement, the Fair Work Commission would need to be satisfied that the parties have considered and discussed ways to improve productivity;

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<sup>14</sup> Official Committee [Hansard](#), Senate Education, Employment & Workplace Relations Committee inquiry into Fair Work Amendment Bill 2012, 21 November 2012



- Task the Productivity Commission with conducting a thorough analysis of the Fair Work laws and their impact on the economy, productivity and jobs;
- Ensure this was a comprehensive and broad review of the laws and that all interested parties had a chance to have their say; and
- Ask the Productivity Commission to make recommendations for changes to the Fair Work laws that would help boost productivity while at the same time ensuring workers remained sufficiently protected and businesses were able to grow and prosper.

### **The Australian Greens**


The Greens' score in this area is predictably low at 1.0 out of 4 given that a key principle of its workplace relations policy is that 'the objectives of profitability and efficiency should not override social and ecological objectives'.



## Criteria 9: Independence of the industrial tribunal

Appointments to the federal industrial tribunal (the Fair Work Commission) should be based on merit and not favour the side of politics that is in government at the time. There should be recognition of seniority that is not able to be undermined by any minister of the day. The minister must not be able to interfere with the tribunal's activities or administrative and seniority arrangements. It is imperative that future appointments to the tribunal have private sector experience in running a business.

Based on AMMA's assessment of this scorecard category, one of three new areas of policy included in the latest scorecard, the scores for each of the political parties appear below:

Independence of the industrial tribunal	2013 Score (0 to 4)
	2.0
	2.5
	0.0

### Labor

Labor's score in the area of "independence of the industrial tribunal" is 2.0 out of 4. This is in part due to the skewed and partisan nature of appointments made to the tribunal by the current Labor government since 2009 as well as structural changes to the tribunal that have undermined its independence and the equal and fair treatment of its members.

Opposition Leader Kevin Rudd and Deputy Opposition Leader Julia Gillard both promised in 2007 that if Labor won government, appointments to the federal industrial tribunal would not favour one side of politics over another and nor would they see an 'endless tribe' of trade union officials appointed to the commission.

The fact is that 18 out of 27 appointments to the tribunal under the current Labor government have had trade union backgrounds or affiliations.

The most recent appointments in March 2013 exacerbate the serious structural concerns now facing the tribunal. There are far too many roles at the presidential level on top of a disproportionate number of union-affiliated appointments.

Six of the eight most recent appointments were at the presidential level, with the tribunal now having 23 presidential roles (including president, vice president and deputy president) and just 23 commissioner roles. Simply put, this is too high a ratio of 'chiefs' in the tribunal.

The latest appointments reflect Labor's fundamentally flawed version of the 'merit principle' with two long-standing vice presidents Graeme Watson and Michael Lawler effectively demoted in the process.

In 100 years of operation, Australia's federal industrial relations tribunal has never seen the demotion of two sitting vice presidents on the whim of the workplace relations minister of the day. The recent demotions and subsequent appointment of new vice presidents were not recommended by Labor's own review of its Fair Work legislation. Nor were they asked for by either business or unions, the key users of the Fair Work Commission.

This politicisation of the tribunal has been all too evident under Labor, in both its pattern of appointments and demotion of existing senior members. The Law Council of Australia shares AMMA's concerns at the potential for the new vice president positions to undermine the independence of the tribunal<sup>15</sup>.

For the Fair Work Commission to be perceived and function as a modern and independent tribunal, it desperately needs members with real business experience. Nevertheless, the union and Labor-affiliated dominance over tribunal appointments continues.

An incoming Federal Government must ensure it appoints tribunal members with private sector backgrounds and experience in running a business. It must also restructure the tribunal's seniority and administrative arrangements so they are beyond reproach.

With the greatly enhanced role of the Fair Work Commission under the current system, including providing it with a brand new anti-bullying jurisdiction from 1 January 2014, appointments to the tribunal have a greater impact on Australian businesses and the economy than ever before.

### **The Coalition**

The Coalition's score in this area is a respectable 2.5 out of 4. In this area, the Coalition's workplace relations policy would:

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<sup>15</sup> Law Council of Australia's November 2012 submission to Senate inquiry into Fair Work Amendment Bill 2012

- Continue the current change program that has been embarked on within the Fair Work Commission;
- Actively consider creating an independent appeal jurisdiction in order to allow appeals of Fair Work Commission decisions; and
- Remove the commission's power over registered organisations and establish another body to oversee and enforce bolstered rules in this area (see the following section on *Accountability of registered organisations* for details).

### **The Australian Greens**

The Greens' score for this new area of assessment is zero given that its policy is silent on how it would ensure the independence of the industrial tribunal going forward.



## Criteria 10: Accountability of registered organisations

Registered organisations should not receive special treatment and should be subject to the same high standards and responsibilities as organisations operating under the present-day legislation for corporate entities, the Corporations Act 2001.

AMMA is incorporated with the Australian Securities and Investments Commission (ASIC) and is of the view that all registered organisations should be subject to the same processes and rules applying to corporations. AMMA and its members benefit from the discipline associated with the higher standards required under the Corporations Act compared with the Fair Work (Registered Organisations) Act 2009, even taking into account its 2012 amendments aimed at bolstering its requirements.

The Fair Work Australia investigation into the Health Services Union is evidence the current system is simply not working. Key among its failings is that the federal industrial tribunal took an unreasonably long time to conduct the investigation into the improper use of union funds. Requiring unions to operate under the Corporations legislation would ensure that any future allegations of wrongdoing are investigated quickly and effectively.

As pointed out in a 2012 AMMA submission<sup>16</sup>, important differences between the Fair Work (Registered Organisations) Act and the Corporations Act include significant differences in penalties for officers that use information to advantage themselves.

This is not acceptable, and the public and union members should expect the same sanctions to apply to misuse and fraud in both the private sector and the union movement.

In a July 2013 media statement<sup>17</sup>, AMMA backed public comments made by Australian Workers Union secretary Paul Howes that the officials and managers of all trade unions and other registered organisations should be subject to the same rules and penalties as company directors under the Corporations Act 2001. However, unlike what the Coalition has proposed, AMMA sees no need to have separate legislation or a separate regulator in that area, maintaining that all such organisations should be brought under the Corporations Act.

Based on AMMA's assessment of this scorecard category, one of three new areas of policy included, the scores for each of the political parties appear below:

<sup>16</sup> AMMA [Submission](#) to the Senate, Education & Workplace Relations Committee inquiry into the Fair Work (Registered Organisations) Amendment Bill 2012, June 2012

<sup>17</sup> AMMA media [release](#), *Resource industry backs Paul Howes on tough union corruption laws*, 8 July 2013

Accountability of registered organisations	2013 Score (0 to 4)
	2.0
	3.5
	0.0

## Labor

Labor's score in the area of "accountability of registered organisations" was 2.0 out of 4 for this first scorecard on which the three political parties have been rated on this criterion.

While the Labor government made some improvements to the Fair Work (Registered Organisations) Act in 2012, they do not go far enough to stop something like the Health Services Union scandal happening again.

The changes enacted in the Fair Work (Registered Organisations) Amendment Act in 2012 will:

- require that the rules of all registered organisations deal with disclosure of remuneration, pecuniary and financial interests;
- increase the civil penalties available under the Act;
- enhance the investigative powers available to the Fair Work Commission under the legislation; and
- Require education and training to be provided to officials of registered organisations about their governance and accounting obligations.

In March 2013, the Labor government released draft model rules for registered organisations to assist them in complying with the new stronger financial transparency and accountability standards.

While these changes are a step in the right direction, they do not go far enough to secure the confidence of resource industry employers.



In particular, the lack of resources and forensic financial expertise at the Fair Work Commission will continue to exacerbate problems surrounding the transparent operation of registered organisations.

How can union members in Australia have confidence in their unions' administrators if those administrators are not subject to the same stringent regulations and policing processes as companies?

While Labor has focused on requiring more transparent reporting, the more immediate problem is the lack of a dedicated body and adequate resources to properly police the existing requirements.

### **The Coalition**

The Coalition's score in this area is an impressive 3.5 out of 4 in acknowledgement of the fact that its workplace relations policy proposes significant reforms in this area.

The Coalition's policy will:

- Remove the Fair Work Commission's power over unions and employer organisations;
- Introduce the same rules for unions and employer organisations as apply to companies and directors, with the same penalties as the Corporations Act 2001;
- Create a Registered Organisations Commission to ensure the new rules and obligations are strictly enforced;
- Require the Registered Organisations Commission to operate to a strict charter and co-operate with other law enforcement bodies;
- Allow its first head to be appointed by the minister but not be subject to ministerial direction;
- Require it to report annually to parliament and appear before Senate Estimates;
- Reform the financial disclosure and reporting guidelines under the registered organisations laws so they more closely align with those applying to companies and required by the Australian Stock Exchange corporate governance rules; and
- Require unions to provide each member with a written one-page pie chart breaking down their yearly expenditure on things like labour, advertising, capital, operating and political donations.

### **The Australian Greens**

The Australian Greens' score in this area is zero given that nothing in its workplace relations policy addresses the specific issue of the need for accountability of registered organisations.