Resource Industry Workplace Relations Election Paper:

Trade union access to workplaces

The Australian Mines & Metals Association (AMMA)

June 2013

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[1].

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[1] Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013

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EXECUTIVE SUMMARY

- This is the first in a series of *Resource industry workplace relations election papers* that AMMA will release leading up to the 2013 federal election.
- The papers will highlight priority areas of policy and operational concern for resource industry employers under the *Fair Work Act* and identify options for reform.
- This paper presents a comprehensive review of the *Fair Work Act's* right of entry system, backed up by facts, evidence and independent research into resource industry employers' experiences under the current rules pertaining to union access to worksites (known as "right of entry" under the legislation).

Problems with the current rules governing union access to workplaces

- AMMA's members were willing to work within the rules governing union access to workplaces that existed prior to the *Fair Work Act* being introduced on 1 July 2009.
- Employers now have serious problems resulting from changes the Rudd/Gillard Government made to the system. These problems stem from the government's continued efforts to place unions between employers and employees irrespective of their wishes and regardless of whether they have been invited.
- These problems include but are not limited to:
  - Union officials causing unwarranted disruptions to businesses due to excessive visits for discussion and recruitment purposes;
  - Difficulties ascertaining which unions are entitled to enter which premises;
  - Difficulties ascertaining which groups of employees, if any, unions are entitled to meet with onsite as well as ensuring entry requirements are respected;
  - The endorsement of clauses in enterprise agreements that broaden the already expanded scope of the legislative rules and over which protected industrial action can now be taken; and
  - Increasing instances of aggression between competing unions at the expense of industrial harmony and workplace productivity.

Employers' position

- AMMA and its members have no objections to balanced union access to workplaces as long as it is for valid reasons and conducted in a safe and orderly manner.
- However, resource industry employers support any rules empowering unions to enter employer premises being subject to appropriate checks and balances in the same way as any other visits to a site (see Chapter 1).

- Australia had the checks and balances right prior to the Labor government's *Fair Work Act* 2009. Our system needs to return to those balanced rules for union entry.

- In 2007, then-Deputy Opposition Leader Julia Gillard promised the following on right of entry[2]:

> *"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like ... we will be delivering our policy as we have outlined it."*

- This promise was broken, and established right of entry laws were deliberately skewed in favour of trade unions.

- If Labor kept Julia Gillard's 2007 unambiguous promise on union entry into workplaces, it would go a long way to fixing problems of its own making in this area.

State of play

- Unfortunately, Labor policy appears to be to:

  - Retain the existing right of entry provisions of the *Fair Work Act* 2009;

  - Do nothing further to address the serious problems being experienced in workplaces on a daily basis, particularly in the resource industry; and

  - Provide a further leg up to unions (via the *Fair Work Amendment Bill 2013*), thereby adding even further pro-union powers, costs and complexities (see Chapter 5).

- The Coalition will, in contrast to Labor, return to right of entry laws based on the pre-2009 rules. This reflects the approach advocated by the resource industry (see Chapter 6).

Currently proposed 2013 amendments

- The latest tranche of proposed Labor amendments on union entry into workplaces would, if allowed to pass into law:

  - Further skew an already unfair system in favour of unions;

  - Further complicate compliance for employers in this area; and

  - Further increase costs for businesses asked to subsidise union activities.

- Labor's *Fair Work Amendment Bill 2013* should not be passed. If it is, the resource industry will look to an incoming government to urgently reverse it (see Chapter 5).

Reform priorities

- AMMA calls on Australia's next Federal Government to:

[2] Deputy Opposition Leader, Julia Gillard, National Press Club Address, 8 November 2007

- Return to the system that worked by reinstating the union entry rules that applied prior to the *Fair Work Act 2009*;

- Implement further essential controls and conditions to ensure a greater degree of rigour and balance in the operation of union access to workplaces; and

- Minimise the damage from the latest proposals in the *Fair Work Amendment Bill 2013* by either not enacting them or overturning them if they are enacted.

- On the detailed operation of union powers to enter workplaces, AMMA calls for:

  - Allowing entry to unions with current or historical award or agreement coverage, that is, with a connection to the workplace;

  - The Fair Work Commission to review and confirm entry entitlements before a union can exercise entry powers;

  - Effective sanctions to prevent unions misrepresenting their entry powers;

  - Genuine requirements to follow lawful owner/occupier instructions when onsite;

  - Effective sanctions (suspension or revocation of union permits) when rules are breached;

  - More effective requirements for the character and conduct of union permit holders;

  - Improved notices to employers when a union intends to enter a workplace;

  - Caps on total trade union visits in any month for discussion purposes, and an enhanced capacity to address excessive union visits to particular workplaces; and

  - Prohibitions on agreement making being used to subvert the right of entry rules set by parliament (see Chapter 7).

Longer term considerations

- Longer term, the whole right of entry concept should be fundamentally reviewed.

- Consideration should be given to the future shape and extent of union powers to enter workplaces, particularly in light of changing technologies and attitudes, and sustained declines in trade union membership (see Chapter 2).

1. GUIDING PRINCIPLES AND PRIORITIES FOR EMPLOYERS

1. Australia's next Federal Government must at all times ensure the workplace relations system genuinely balances the needs of employers, employees and trade unions, in particular in relation to union access to worksites (termed "right of entry" under the legislation).

2. The object of the *Fair Work Act*'s union access or right of entry provisions according to s480 is to establish a framework for officials of organisations to enter premises that ensures a balance between the right of unions to represent their members in the workplace, hold discussions and investigate suspected contraventions with the rights of occupiers and employers to go about their business without 'undue inconvenience'.

3. Any system imposing union entry on employers and occupiers must operate proportionately and reasonably, with a maximum of clarity and a minimum of disputation.

4. Broadly speaking, AMMA and its members support any regime providing access to workplaces for union officials operating subject to the following:

   <u>When entering a site for any purpose</u>

   - Every union official seeking to exercise right of entry must hold a valid entry permit; and

   - Disputes must be minimised by having very clear rules and quick and simple access to decision making in cases where rules have been breached or disputes have arisen.

   <u>When entering to hold discussions</u>

   - The union must have constitutional coverage of the work being performed;

   - A collective agreement or other industrial instrument by which the union is covered or has historically been covered must operate at that workplace;

   - Unions must be required to provide reasonable notice in writing to all employers and occupiers on a site of an impending visit;

   - Employers and occupiers must be able to place reasonable limits on union access for discussion purposes based on safety, security, operational and other relevant concerns; and

   - Other than in exceptional circumstances, employers and occupiers must be able to designate the location of union discussions as well as the routes to those discussions.

When entering to investigate suspected contraventions

- Unions must be able to demonstrate they have members onsite that are affected by the alleged contravention and that those members have requested the union's presence;

- Unions must be required to provide adequate details about any breaches of workplace laws they seek to investigate; and

- Reasonable notice in writing must be provided to all employers and occupiers on a site of an impending visit to investigate a contravention.

5. How these guiding principles may be implemented in practice is detailed in Chapter 7 of this paper – *Reform priorities*.

The previous system worked

6. Whenever Australian industry seeks to start a dialogue about better balancing the rights of businesses to conduct their activities with proportionate rights for workers to be represented, this is misrepresented as an infringement on union rights.

7. The fact is that the right of entry laws that were in place immediately before the *Fair Work Act* took effect predated Work Choices, and were the evolution of a long-standing system, refined under both political parties and through arbitration. For a comparison of what Australia's right of entry regime has looked like under the past four IR frameworks, see the table in Chapter 4.

8. The previous rules did not place particularly difficult obstacles on unions but balanced the general principles and interests that should underpin an effective legal right for trade unions to enter workplaces.

9. It is to those previous rules that AMMA would like to see the system return.

10. There has never been any strong public sentiment against the previous right of entry rules. At no time did former Prime Minister Kevin Rudd or current Prime Minister Julia Gillard suggest they had an election mandate to open up union access to worksites yet that is exactly what they did through the *Fair Work Act* on 1 July 2009.

11. In fact, by promising to leave the existing right of entry rules as they were (an unambiguous promise later brazenly reneged upon), Julia Gillard confirmed things were functioning well under the previous system, and that it had widespread support.

12. The then-Deputy Leader of the Opposition famously promised back in 2007 that the Labor Party in government would retain identical right of entry provisions under the *Fair Work Act 2009* as existed under the *Workplace Relations Act 1996*[3]:

[3] Deputy Opposition Leader, Julia Gillard, National Press Club Address, 8 November 2007

> *"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like … we will be delivering our policy as we have outlined it."*

13. This promise was not kept, to the detriment of working relations in enterprises throughout Australia, and it is about time that one party or the other restored the preceding status quo.

14. AMMA is simply calling on the Labor government to honour its promise to retain the right of entry laws that existed immediately prior to the commencement of the *Fair Work Act*. Those laws had evolved over many years to balance the rights of occupiers against the rights of unions to access and represent their members.

15. AMMA is pleased to note that holding Labor to its promise is in essence what the Coalition has advocated in its *Policy to improve the Fair Work laws* released on 9 May 2013. A full analysis of the Coalition's policy in this area is included in Chapter 6 of this paper.

The importance of employer direction and control

16. Unions have never had unfettered access under the law to wander worksites as they please. This has never been a union right. It has always been recognised that employers and occupiers can and should have some control over where union permit holders go and what they do while onsite, just as they would have over any other visitor to their premises. Right of entry laws have been formulated and applied on this basis over many years (albeit not sufficiently since 2009).

17. There is very well-developed law either restricting access or imposing controls on access whenever a law provides a power to enter premises against the owner's consent. Whether it is the police exercising warrants, sheriffs serving warrants or notices, or government inspectors inspecting premises, all have statutory obligations and limits on their powers when entering both commercial and private property.

18. This is also the case for union entry onto worksites, with substantial and well-developed obligations having evolved to ensure safe and healthy workplaces are maintained. Again, this was operating quite well prior to the Labor government choosing to unbalance the system in favour of unions in 2009.

19. Given the size, location and type of machinery on various resource projects as well as their enormous safety obligations, employers must retain the capacity to reasonably direct permit holders in relation to their visits.

20. Other than in exceptional circumstances, decisions around the timing, location and frequency of union visits should rest with the employer and/or occupier.

21. Site management should also have absolute control over union officials' whereabouts at all times in order to ensure everyone's safety (as they do with all other visitors to workplaces, and as is required under OHS laws).

Priorities for the next Federal Government

22. AMMA's full recommendations for reforms appear in Chapter 7 of this paper but in short, AMMA calls on Australia's next Federal Government to:

    a. Return to a system that worked by reinstating the pre-2009 right of entry rules to the fullest extent possible;

    b. Implement further essential controls and conditions to deliver greater rigour and balance to the operation of union entry under the *Fair Work Act*; and

    c. Minimise the damage inherent in the *Fair Work Amendment Bill 2013* by either not enacting it or overturning it (these are the most recent tranche of changes on right of entry introduced by Workplace Relations Minister Bill Shorten, which are strongly opposed by employers across the Australian community).

Labor's policy on right of entry

23. A full analysis of the Labor policy on right of entry, as signified in its enacted and proposed IR legislation to date is contained in Chapter 5 of this paper. In essence, Labor's policy in this area appears to be to:

    a. Retain the existing right of entry provisions under the *Fair Work Act* 2009;

    b. Do nothing to address the serious problems being experienced by employers, particularly in the resource industry; and

    c. Provide a further leg up to unions through the *Fair Work Amendment Bill 2013*. This will create even further pro-union powers that will impose additional costs and complexities for employers.

24. It appears Labor would retain the current damaging and unbalanced system if it won the next federal election and further skew the current laws in favour of union power, despite clear evidence of the need to take the opposite approach and return to a long-standing system within which everyone could work.

The Coalition's policy on right of entry

25. A detailed analysis of the Coalition's policy announcements in this area is contained in Chapter 6 but in short it appears the Coalition intends to restore the pre-*Fair Work Act* version of the right of entry laws.

26. This accords with the priorities of the Australian resource industry and is a rare area of direct and clear contrast between the policies of the two major political parties.

27. However, the Coalition should also explicitly close the loophole allowing unions to use agreements to subvert the statutory rules governing entry into workplaces along with enacting the other changes AMMA has outlined in Chapter 7 of this paper.

28. The Coalition should also, if elected in September 2013, urgently reverse and remediate the impact of the changes contained in the *Fair Work Amendment Bill 2013,* given that those changes will further skew right of entry towards empowering militant trade unions at the expense of business.

2. WHAT IS 'RIGHT' OF ENTRY?

29. Trade unions throughout the world assert that they need to meet with employees at their place of work to properly represent them. In many situations, trade unions and employers are able to successfully agree on arrangements for unions to enter worksites to meet with their members.

30. However, where there is no agreement, unions have no natural legal capacity or right to enter worksites. A union official would be trespassing where there was no agreement with the occupier on entry to the premises.

31. Some workplace relations systems, including that currently operating in Australia, create a capacity for trade unions to enter workplaces lawfully, without being subject to charges of trespass or other sanctions. In these systems, the capacity to meet with employees at their place of work has been considered a necessary support for trade unions to undertake their representative functions.

32. However, the scope and conditions (checks and balances) placed on unions seeking legal access to workplaces is a significant policy consideration:

    a. Like any part of the industrial relations system, legal capacities for trade unions to access employer-owned and controlled premises are open to misuse and to being deliberately "gamed" as an industrial relations technique; and

    b. There are well-documented, independently verified examples of trade unions misusing powers to enter worksites and acting inconsistently with both the policy basis on which access is provided and against any reasonable expectations of conduct when exercising their legal rights.

33. AMMA has systematically surveyed its members on the impact of the *Fair Work Act* since April 2010, revealing that resource industry employers' concerns with union workplace visits have grown under the *Fair Work Act*, along with the number of union visits themselves. Union access to worksites has consistently ranked among the top three concerns of AMMA members since the *Fair Work Act* began on 1 July 2009 (for details see Chapter 3).

Should it really be a 'right'?

34. Much of the thinking behind the rules providing Australian trade unions with legal capacities to enter workplaces is a product of the 'horse and buggy era' thinking of the early 20th Century.

35. Right of entry rules arguably made sense in the era prior to mass communication and mass literacy, and in the context of the monopolistic, highly centralist thinking behind Australia's conciliation and arbitration system.

36. However, more than a century on, many of these assumptions warrant reconsideration:

a. Why should a union which has no members on a worksite have an automatic right to represent the interests of employees there, not to mention a legal right to enter that site against the wishes of the employer or occupier?

b. Why should unions be able to advertise their wares to a captive audience rather than having to meet with interested potential members offsite, or appeal to them using modern technologies such as the internet?

c. More fundamentally, if employees are interested in a trade union and what it has to offer, why can't they seek the union out and arrange to meet with its representatives outside the workplace?

37. An open discussion is required on these issues in the longer term, including on the issue of whether in the 21st Century such a union right needs to form part of Australia's workplace relations system.

38. It should be recalled in this regard that other interest groups in the Australian community are not given such extensive legal powers to access potential members or customers in contravention of otherwise quite fundamental legal protections.

39. 'Right of entry' is a restricted and regulated right to trespass on someone else's property. Part of that restricted right to trespass is that the owner or occupier gets to manage that entry.

40. As Federal Court Justice Geoffrey Flick said in June 2012[4], it is important to remember there may be a 'divergence' between what an occupier regards as reasonable access and the perception of those seeking entry.

41. According to the judge, there is much to be said for the view that statutory right of entry given to a permit holder should not confer any greater right than is necessary to achieve the statutory objective:

> *"The common law rights of an occupier, on this approach, are only to be diminished to the extent absolutely necessary to give effect to the right conferred."*

42. In that vein, the Federal Government's continued efforts at opening up union access to worksites, which are not only unnecessary but unbalanced and unworkable, are moving further away from the wider objectives of balancing competing rights and inconveniencing businesses to the least extent possible.

43. AMMA has consistently called not only for the reversal of the most recent tranche of proposed new union powers contained in the *Fair Work Amendment Bill 2013* (which at the time of writing this paper had yet to pass through the Senate), but also to have the government keep its promise and return Australia to the efficient and accepted model that preceded the Rudd government's changes in 2009.

[4] *AMIEU v Fair Work Australia* [2012] FCAFC 85, 8 June 2012

The future of face-to-face visits

44. Arguably, the traditional justifications for physical union access to worksites have been superseded by technological, social and attitudinal changes over recent decades.

45. Traditional factory-based models of employment, and varying personal usages of time and engagement with information, may have justified right of entry for discussion with members and potential members during the 20th Century.

46. However, with the introduction of modern technologies like the internet, Skype, Facebook and email, along with the increased accessibility of TV and radio, unions can easily run their recruitment drives electronically or digitally rather than by disrupting worksites, or requiring face-to-face meetings to sell their wares.

47. Most people now have computers, many have Ipads and wireless internet, and there's even planned national broadband network (NBN) internet access in the bush. Unions have amazing new technologies at their disposal and often have correspondingly huge campaign budgets, so a question for the future must be whether physical right of entry remains necessary or appropriate for union recruitment drives, or even to respond to member concerns.

48. Consideration will in time need to be given to fundamentally modernising Australia's IR legislation and directing unions' recruitment drives into both traditional and new advertising avenues rather than forcing access to the sites of Australian businesses:

    a. If unions have a good product to sell and can win the hearts and minds of their potential members and customers, why should they not have to do so in the open market like any other service provider?

    b. Why should our workplace relations legislation provide unions with unique powers to force access to their potential customer base? Government provides few other private organisations with that privilege.

    c. Business people don't try to run their businesses on union resources so why should unions be able to run their businesses on management time?

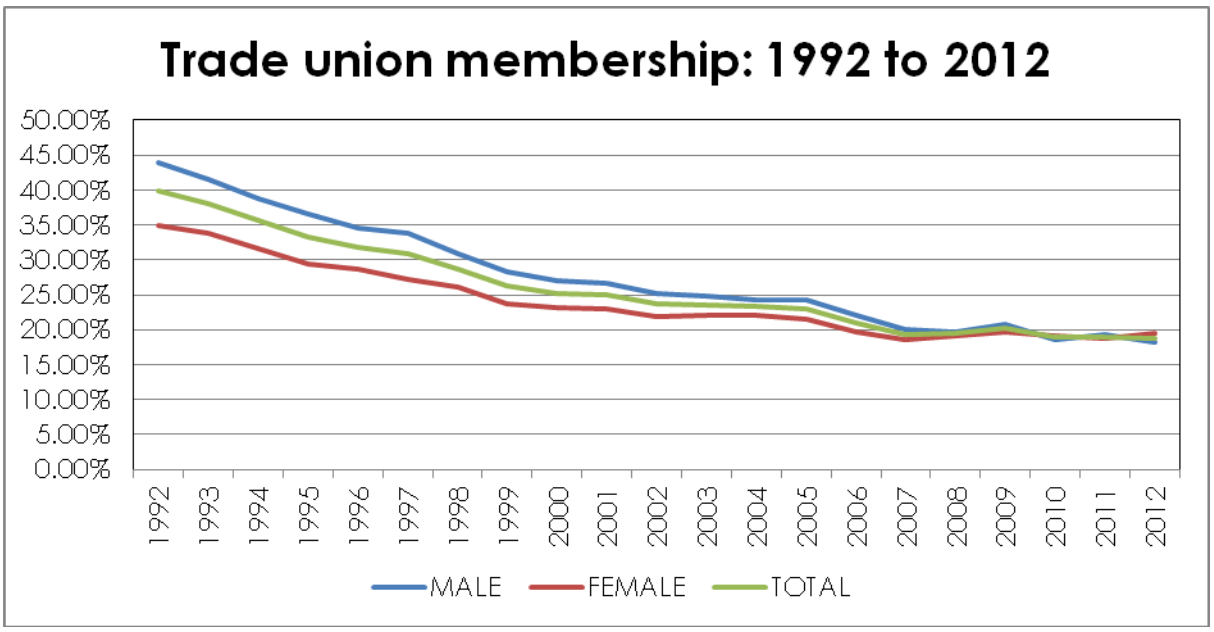
Declining union membership

49. A high priority for the next Federal Government should be better respecting freedom of association. This means respecting the rights and wishes of employees who choose to either join or not join a trade union, particularly when non-union members now comprise around 87% of private sector workers according to the latest figures[5] and closer to 100% on many worksites.

50. As the following graph shows, from August 1992 to August 2012 the proportion of workers in all industries who were trade union members in their main job fell from

[5] ABS catalogue number 6310.0 – *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2012*, released on 17 May 2013

43% to 18% for men and from 35% to 18% for women[6], with private sector union membership now at around 13% overall.



51. This marked decline in union density provides a major argument against extending further legislative rights to unions and in favour of fundamentally re-examining existing union powers to enter worksites.

52. As AMMA pointed out in a 2005 submission on right of entry issues[7], a strong case can be made against uninvited access for union officials to workplaces where employees choose both not to be a member of a union and to enter into an employment agreement directly with their employer.

53. A fact that unions, some tribunal members and the Labor government tend to forget is that most workers just want to relax during meal breaks, chat, read the paper or whatever they choose. They don't want to talk politics, be intimidated or drawn into industrial campaigns when having lunch at work.

54. Why then should they be subjected to union membership drives? Why should union powers to impose themselves on such individuals for purposes that have nothing to do with their wellbeing be enshrined in the legislation and have to be facilitated and encouraged by employers?

55. To carry this commercial analogy further, no-one in business has a legally protected capacity to harass and repeatedly hard-sell their potential customers and to completely ignore a lack of interest in what they are selling.

[6] *Employee earnings, benefits and trade union membership, Australia, August 2012,* Catalogue number 6310.0, published by the ABS on 17 May 2013

[7] *AMMA submission to Senate inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004,* published in February 2005

56. Would an office-based CEO deliberately expose his or her workers to hawkers or insurance salespeople during their lunch breaks? For many workers, unions are about as relevant as that.

57. It is not 'anti-union' to ensure workers who have no interest in union activities are not exposed to them at their place of work, particularly at those places where they relax and eat their meals.

58. It is very hard to believe working Australians are unaware of the trade union movement and what it has to offer its potential customers. The overwhelming and sustained lack of interest from the contemporary workforce in union membership certainly does not favour extending unions' powers to sell their wares.

59. If employees are happy with their employment terms and conditions, which the highly-paid employees in Australia's resource industry overwhelmingly are, and are satisfied with the standards of onsite health and safety, why shouldn't unions have to run their recruitment drives offsite and outside of productive hours?

60. The main reason for unions' existence is to help workers with their industrial and physical wellbeing while at work. But if unions do not have any members on a site and there are no problems with safety or terms and conditions, what rights (or rather privileges) should unions be given to enter such sites, often repeatedly, to drum up business?

61. As Julia Gillard said in April 2007 when she was Deputy Leader of the Opposition[8]:

> *"I believe in freedom of association; I believe it's your right to choose to join a trade union if you wish to. I believe it's your right to choose not to join that union if you wish to."*

62. Julia Gillard's comments remain entirely correct. Working people must retain the right to either join or not join a union as they choose, and those choices must be reflected in the level of access unions are given under the law, and in the obligations and powers of trade unions when they are onsite.

[8] Julia Gillard, 3AW interview, Mitchell, 18 April 2007

3. AMMA MEMBERS' EXPERIENCES UNDER THE CURRENT SYSTEM

> *"Unions had no entitlement to enter the site under previous legislation."*[9]

63. On 1 July 2009, when the *Fair Work Act* came into effect it drastically changed the operation of the rules around union access to Australian workplaces. This drastic change was to the detriment of employers, gave a leg-up to trade unions and was a direct breach of an unequivocal promise made by then Deputy Opposition Leader Julia Gillard in 2007.

64. The *Fair Work Act* changed the rules on right of entry in three main ways:

    a. Linking right of entry to unions' eligibility rules rather than requiring a union to be bound by an agreement or award applying on a site before being given access for discussion purposes.

        i. In many cases this created a virtual free-for-all in which employers had to face overlapping unions, often with absolutely no history in the workplace and no support from employees, entering the workplace to compete for members.

    b. Abolishing the ability to make new Australian Workplace Agreements (AWAs) following the introduction of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* in March 2008. From then on, total coverage of a site by individually negotiated agreements was not possible and could no longer limit union access for discussion purposes.

        i. This meant that employee choices to reject trade unionism and bargain directly with their employer no longer translated into ongoing protections against unwanted union harassment in the workplace.

    c. Introducing capacity to include clauses in enterprise agreements further extending the reach of the legislative provisions relating to union access to worksites. The only condition on such clauses under the current rules is that they do not directly overlap with the existing legislative provisions.

        i. This change allowed unions to "game" or work around the already neutered protections for employers and employees that parliament placed on entry into workplaces. Skewed agreement-making rules and 'strike first, ask questions later' laws allowed unions to secure such arrangements with impunity.

65. Despite the Rudd/Gillard Government's assurances that right of entry rules would not change under the *Fair Work Act*, there was immediate and dramatic negative effect on resource industry worksites across the country in the first weeks of the new laws.

[9] AMMA member company responding to Survey 1 in the AMMA Workplace Relations Research Project in April 2010, 10 months after the *Fair Work Act*'s right of entry provisions took effect

66. Workplaces that had never experienced right of entry disputes or misuse, or that had not encountered such challenges for years, were almost instantaneously targeted by a union movement that knew exactly the free kick it was being offered, despite the crocodile tears of a government misrepresenting both the intentions and impact of its amendments.

67. On the Pluto liquefied natural gas (LNG) project near Karratha in Western Australia, a project with a capital expenditure of $5 billion, there were no union visits for the first two years of construction between 2007 and 2009. During that time, unions had no access privileges as they had no members onsite and no award or agreement coverage.

68. That all changed once the *Fair Work Act* was introduced when all that was required was that there be employees onsite that were eligible to become a union's members, that is, who could theoretically become members of a union.

69. In the four months between 1 July 2009 and 27 October 2009, despite no change in the project's industrial arrangements, the four unions eligible to represent workers on the Pluto project made 217 entry requests. By May 2010, that number had grown to 450[10]. That is an average of 10 entries per week during which unions sought to meet with the employees of multiple contractors.

70. Similarly, the Worsley aluminium plant experienced more than 180 visits in a single year[11].

71. These are just two of many examples that show the exponential growth in union visits to some sites under the *Fair Work Act*.

72. By any reasonable assessment these are examples of unions besetting and harassing the employees on this project and paying no heed at all to their wishes, not to mention the inconvenience this caused to the businesses. Employees are quite capable of making up their minds as to whether they want to join and/or be represented by a trade union without being approached 450 times.

73. Seeking to make 450 separate approaches in less than 12 months with a view to getting workers to change their decision not to become members may in some cases represent bullying or at the very least harassment. Apparently, this is the bullying the Rudd/Gillard Government not only countenances but seeks to extend through its 2013 proposed amendments to the *Fair Work Act*.

74. AMMA has surveyed its members every six months on right of entry issues since April 2010.

75. Those surveys, particularly the first one, revealed immediate changes to the number and nature of union site visits as soon as the first tranche of Rudd/Gillard amendments to union entry rules commenced (from 1 July 2009).

[10] *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341, 29 March 2010
[11] *Union tilt for BHP workers slammed*, published in *The Australian*, 26 January 2013, written by Ewin Hannan

76. In the first survey under the AMMA Workplace Relations Research Project, AMMA asked its members what their biggest concerns were with the then-*Fair Work Act*, which had at that stage been in force for 10 months.

77. Consistently rating among the top three concerns was union access to workplaces/right of entry, including having to establish site access protocols to enable union visits to be contained and properly supervised to ensure they were compliant with the new legislation. Many AMMA members had not had to deal with union access to their sites for many years, if at all, which changed as a direct function of the amendments made by the Rudd/Gillard government in 2009.

A greater number of different unions sought and gained entry

78. In the first *AMMA Workplace Relations Research Project* survey (April 2010), respondents were asked if a greater number of different unions technically had access to their worksites under the *Fair Work Act*, to which 58.7% answered 'yes'.

79. Asked if a greater number of different unions actually entered their sites under the *Fair Work Act*, 37.2% said 'yes'.

80. Asked if unions had become entitled to enter their worksites for the first time under the *Fair Work Act*, 55.6% of respondents answered 'yes'.

81. As one AMMA member observed in that first survey:

> *"We have recently had our first right of entry matter at a remote site."*

82. Asked how the number of visits under the *Fair Work Act* rated against a comparable period under the previous legislation, 30.2% of respondents said union visits had 'significantly increased'.

83. Feedback from employer respondents in the resource industry included:

> *"[There is] greater access regardless of the industrial instrument in place. [There are] attempts by competing unions to attract membership."*
>
> *"They couldn't enter before because they weren't party to our instruments and, simply, now they can."*
>
> *"Unions [now have] access to sites traditionally regulated by statutory agreements which limited their access (eg. Australian Workplace Agreements)."*

Entry for recruitment and discussion still the most common reason

84. By far the most common reason for union visits to resource industry premises under the *Fair Work Act* is for "discussion" purposes, ie. to recruit new members.

85. By the time of the second AMMA Workplace Relations Research Project survey (October 2010), 50.7% of respondents said their concerns with union access had grown in the preceding six months.

86. After the changed provisions had been in force for more than 12 months, respondents to the second survey said:

> *"There has been increased agitation by unions wanting to get onsite; unions trying to gain right of entry without following the legislative steps required. Due to increased union activity we have been asked to ensure there are workplace delegates in place."*
>
> *"[There has been an] increase in right of entry notifications, mainly for trivial issues."*

87. Asked what their major concerns were with Australia's right of entry rules at that point, one respondent to the second survey said:

> *"It causes great concern for us as a service provider to other companies who we provide our services to. I believe unions look to target companies like ourselves to gain access to larger 'bigger fish' companies like our clients."*

88. In other words, clever union strategists had been offered a significant legal and operational opportunity, or leg up, and rapidly moved to seize on it. Departing from a well-accepted, efficient and balanced approach of some years' standing, this created incentives to actively "game" and, in many cases, misuse, the system.

89. By the third AMMA survey (April 2011), respondents were making the following observations:

> *"Generally, the unions now have a heightened level of access via the right of entry provisions and the negotiation process seems weighted more in unions' favour..."*
>
> *"[There has been] increased union involvement through right of entry in both operations and construction."*

90. Asked what the greatest concern was in relation to right of entry at that point, one respondent had this to say:

> *"Managing the roles of unions on our worksites – while there is very little involvement, the right of entries are required to be managed tightly."*

91. This points to a critical disconnect in the rules governing union entry under the *Fair Work Act 2009*. Notwithstanding that employees may maintain little or no interest in what a trade union is offering, and that they may choose not join a union despite repeated entreaties to do so, unions can keep coming and continue to enter the workplace, in effect without limits.

92. This is a pretty extraordinary situation. The current Australian system contains virtually no respect for the freedom of association choices of ordinary working Australians who consistently maintain a lack of interest in what a trade union is offering, and choose not to join one.

93. There is an irony in comparing this situation, which the Rudd/Gillard government seeks to perpetuate and exacerbate, with the same government's approach to workplace bullying:

    a. One of the examples of bullying that the current government claims needs to be clamped down upon via the *Fair Work Amendment Bill 2013* is

otherwise legitimate management actions that are unreasonably repeated or protracted.

b. In direct contrast, the Rudd/Gillard government seems perfectly happy to encourage repeated trade union entries into workplaces to recruit employees, with no regard to employees' lack of interest in joining such a union.

c. In fact, the public policy intent seems to be to allow trade unions to beset and badger employees who choose not to join a union until they are simply worn down and give in.

94. This reinforces the impression that there are two rules under the Rudd/Gillard government - swift action on employer and co-worker bullying, but a complete green light to bullying by union officials and delegates.

95. By the fourth AMMA survey in October 2011 (more than two years after the *Fair Work Act* first took effect), unions' increased role and heightened access to workplaces had become entrenched:

> *"Unions are using the current rules to undertake membership drives and are greatly disrupting to productivity."*

96. Despite then-Deputy Leader of the Opposition, Julia Gillard's, "cast iron" assurances to the contrary, union access to worksites was not governed by the same rules under the *Fair Work Act* as it was previously, and this policy reversal has caused more problems for employers in managing union visits than ever before.

4. PROBLEMS CAUSED BY THE CURRENT RULES

97. When the *Fair Work Act's* rules for union access to worksites are compared with those that applied previously, it becomes clear how things have changed under the *Fair Work Act,* despite the Labor government's repeated assurances to the contrary. The following table shows what has happened to union access to workplaces under Australia's past four national workplace relations frameworks.

Entry rights able to be exercised	*Fair Work Act* (2009)	Workplace Relations Act WorkChoices reforms 2006	Workplace Relations Act (1996)	Industrial Relations Act (1988 to 1996)
Entry to workplaces where no members employed for discussion purposes?	Yes, if entitled to represent the industrial interests of employees at the workplace (s484)	Yes, if employees at the workplace are covered by an award or agreement that binds the union (s760). Note that a non-union collective agreement excludes the operation of an award	Yes, if employees at the workplace are covered by an award that binds the union (s285C). Note that collective agreements did not exclude the operation of the award, meaning that a right of entry remained even when the collective agreement was in operation	N/A, entry for discussion provided for in individual awards
Entry to workplaces where no members employed for investigation purposes?	No (s481)	No (s747)	No (s285B)	Yes, including a requirement that the union must be bound to the award or agreement being investigated (s286)
Union access to non-member records?	Yes, but with limitations. Commission may order access if necessary to investigate a breach (s483AA)	Yes, but with limitations. Commission may order access if necessary to investigate a breach (s748(9))	Yes, provided relevant to suspected breach (s285B(3))	Yes, for purpose of ensuring compliance with award or order (Reg 131L of IR Regulations)
Express privacy protections?	Yes (s504)	No, although Privacy Act may apply	No, although Privacy Act may have applied	No
Requirement to be a fit and proper person to receive permit?	Yes (s512)	Yes (s742(2))	No, registrar could issue a permit to any officer or employee of a union (s285A(1))	No, secretary of a union could authorise any officer to enter premises (s286(1))
Union must give notice of entry?	Yes, at least 24 hours (s487)	Yes, at least 24 hours (ss749 & 763)	Yes, at least 24 hours (s285D(2))	No
Employer can request location of discussions/interviews?	Yes, but with conditions (s492)	Yes (s765(3) & 751(3))	No	No
Mandatory revocation/suspension of permits?	Yes, two additional grounds for mandatory revocation relating to breaches of NPP2 of the Privacy Act (s510(b) & (c))	Yes (s744(5))	No	N/A – no permit system.
Industrial instruments able to include clauses conferring entry rights?	Yes, although clauses unlawful if inconsistent with the legislation under s194(f) and (g)	No, expressly prohibited under the Workplace Relations Regulations 2006 (s8.5(1)(g))	Yes, as long as clauses pertained to the employment relationship[12]	Yes, as long as clauses pertained to the employment relationship

[12] AIRC 'Schefenacker' (three agreements) decision [2005] PR956575, 18 March 2005

98. The previous rules under the *Workplace Relations Act* were sensible and respected the fact that if there was no union involvement on a site, ie. no union members and no union agreement, a union did not have the right to enter that site even if other unions did. Under the former system, unions were not able to use the workplace as an arena to compete for the allegiance of the ever-declining numbers of employees who chose to associate with them.

99. As of 1 July 2009, unions have been able to enter worksites where there is no award or agreement in place to which they are a party and where they have no actual members onsite. This is directly contrary to the former rules that worked well to achieve fairness and balance between the parties and to ensure employees could be represented by unions if they chose.

100. Unions have also successfully applied pressure to the Labor Government to give them default access to lunch rooms through proposed legislation rather than having to rely on the discretion of the tribunal. Chapter 5 of this paper addresses employers' issues with this and other proposals contained in the *Fair Work Amendment Bill 2013*, which at the time of releasing this paper had not yet passed into law.

101. However, even without the latest proposed changes being enacted, there are numerous serious problems with the existing laws that must be changed.

Entry no longer tied to agreement coverage

> *"Even if a non-union agreement still has three years left to run, [unions] are able to enter and hold discussions."* [13]

102. Under the current system, unions have entry to workplaces for 'discussion' purposes under s484 of the *Fair Work Act 2009* where no union members are employed as long as the union is eligible to represent the industrial interests of employees. This right is meant to hinge on those employees wishing to participate in discussions although in practice employees' wishes are rarely tested.

103. Under the *Workplace Relations Act* as it existed immediately prior to the *Fair Work Act* being created, entry for discussion purposes where a union had no members was only allowed if the union was bound by an agreement or award covering that site, ie, if the union had some connection to the workplace.

104. This represents one of the most significant changes under the legislation and has seen unions attempt to gain traction and significance on more worksites than ever before.

105. The fact that unions often meet with very limited success and that attendance at union meetings is poor does not negate the time and expense employers have to devote to such visits. Nor it seems does disinterest dampen the ardour of union officials seeking the ever-diminishing resource of new members from captive audiences in the workplace.

[13] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

106. The change here should not be underestimated. As one AMMA member observed:

> *"Previously, when right of entry was determined by status under a workplace agreement, there were no visits."*[14]

107. In a January 2012 decision involving the *SDA v NUW*[15], a Full Bench confirmed the industrial landscape had changed dramatically:

> *"Changes arising from the Fair Work Act included the expansion of right of entry provisions by removing a pre-existing requirement that the permit holder's organisation be covered by an existing award or collective agreement."*

108. The Bench's view of the changes was as follows:

> *"In our view, the terms of the Fair Work Act alter the traditional approach to matters of this nature which has involved the assumption that competition between unions for membership at the workplace level is undesirable and should be discouraged. The freedom of employees to choose their bargaining representatives and provisions of the Fair Work Act that support the right to freedom of association significantly reduce the significance of the historical assumptions that have applied in matters of this type. In our view a strong case needs to be presented for an order to be made which would have an effect to modify current statutory rights."*

109. So much for Julia Gillard's promise that the previous right of entry rules would not change under the *Fair Work Act*.

Entry now based on complex union eligibility rules

> *"The concern is that a union can now gain lawful access to a site based upon the scope of their rules as distinct from any real connection to the workforce or workplace."*[16]

110. In a submission to the Department of Education, Employment & Workplace Relations (DEEWR) in January 2009[17], AMMA warned that a reliance on union eligibility rules for entry rights without regard to historical award or agreement coverage would see a significant overlap of union representation and increase the likelihood of 'turf wars'.

111. AMMA warned the legislation would allow a union which had theoretical coverage of workers but had not exercised it for many years to become active and commence a recruitment campaign resulting in a major dispute:

> *"The existence of overlapping union coverage and the capacity for more than one union to represent employees will increase the likelihood of union turf wars and increase uncertainty in relation to union access and representation rights. This will put at risk the currently low levels of industrial disputation in both [the resource and construction] sectors."*

[14] Respondent to AMMA Workplace Relations Research Project Survey 6, October 2012 – as yet unpublished
[15] *SDA v NUW* [2012] FWAFB 461, 31 January 2012
[16] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010
[17] AMMA submission to DEEWR on union representation rights under the Fair Work Bill

112. AMMA's submission went on to say:

> *"Employers must be certain about which organisations are 'eligible to represent the interests of relevant employees'. They must be able to properly determine their position on the legitimacy of union officials seeking right of entry and be able to assess the capacity of the union to request [the federal industrial tribunal] to make a range of orders (including scope, majority representation, good faith bargaining, workplace determinations, union coverage of agreement, etc)."*

113. When the *Fair Work Act*'s new rules took effect, there was a distinct lack of knowledge on the part of some site-based employees as to how to handle a visit from a union official given that many had not had to do so before. A lot of resources have since been devoted to getting industry site managers and other staff up to speed although difficulties in interpreting complex union rules remain.

114. As one AMMA member put it[18]:

> *"It is difficult to fully ascertain the eligibility rules of each and every union; they are difficult to obtain, read and make sense of ... This has resulted in additional resources being required to manage right of entry requests to deal with union delegates when they arrive – they are often quite aggressive."*

115. Many unions have not modernised their rules in some years. As a result, deciphering relevant and applicable classifications is often difficult.

116. In a recent case where the Transport Workers Union (TWU) sought to represent a group of Woolworths workers[19], the matter had to go to a Full Bench before it could be determined whether the union had constitutional coverage of the group of workers.

117. In its December 2011 decision, the Full Bench observed:

> *"While the evidence indicates that many employees at the [site] are not directly involved in loading or unloading vehicles, it is equally clear that some are. The issue is whether that by itself is enough to establish that they fall within the TWU's eligibility rule (let alone whether the employees not directly involved could be covered)."*

118. The Bench itself acknowledged that identifying all employees who came within the union's relevant occupational rule was 'a little difficult' as the job titles used on the site did not neatly line up with the occupations in the union's rules. The Bench ordered the parties to go away, discuss and identify those employees the TWU was entitled to hold discussions with.

119. Aside from the time and resources this required from the employer in working out which employees the TWU was entitled to represent (ie. doing the union's work for it), the case demonstrates that if tribunal members cannot get to the bottom of complex coverage issues with ease, there is little hope for the average site manager.

[18] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010
[19] *TWU v Queensland Properties Investment Pty Ltd* [2011] FWAFB 8207, 6 December 2011

120. Site managers would not only have to be across complicated union eligibility rules but also across the latest case law in this area which is continually evolving.

121. So we currently have a situation in which the government apparently thinks it is acceptable and sound workplace relations regulation to:

a. Ask employer representatives and trade union officials to try to interpret on the fly areas of law and practice that are so complex that the "judges" who made it cannot do so "in court" when hearing from expert legal practitioners[20]; and

b. Massively increase the costs of complying with the Fair Work framework at the workplace level in the interests of giving a leg up to a declining trade union movement that is consistently failing to win the hearts and minds of changing generations of Australian employees.

The current rules encourage inter-union aggression

> *"As multiple unions have potential coverage, it means an increase in entries and therefore time taken out of my day. The unions spend a lot of time bagging out the other unions, [which] places confusion in the workforce. This then [in] turn increases the entries on each site so that each union can maintain face, strength and counter attack. The entries are about who can be the unions with the most membership and not about the employees. They spend so much time focusing on large projects because it sparks more media attention rather than on mid-tier or small businesses who generally need to improve safety and look after employees better."*[21]

122. The *Fair Work Act* actively encourages inter-union coverage disputes that, whilst traditionally a part of our industrial relations system, had for most workplaces been consigned to the realms of history.

123. In the construction area in particular, unions are using the current entry rules to further their long-standing demarcation campaigns. Unions fighting with each other for employees who often don't want to join any of the competing organisations creates a major impediment to industrial harmony and workplace productivity. It directly works against what our national workplace relations legislation is supposed to deliver for our community.

124. As one AMMA member observed:

> *"[There is] opportunity for aggressive unions ... to disturb existing arrangements with employees and other unions."*[22]

125. As an example, it's no secret that there is a long history of demarcation issues between the AWU and the CFMEU. The issues between the two unions are ongoing and have historically been over coverage of non-trades classifications

[20] Noting that the Fair Work Commission is not a court of law and most members are not judges, however the analogy is completely apt in this case.
[21] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010
[22] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

working on civil, mechanical and electrical engineering construction projects in the resource industry.

126. Some employers prefer to make agreements (including greenfield agreements for new projects) with the AWU because it has broad coverage and is often seen as more "moderate" industrially:

a. The AWU has also enjoyed the support of employees in those areas where there is union membership and participation;

b. The CFMEU nonetheless continues to disrupt resource projects via entry to worksites despite not being party to agreements on those sites;

c. This has only become possible under the *Fair Work Act* and as a direct function of the Rudd/Gillard government failing to honour its promise not to change the rules on right of entry.

127. While under the current system's greenfield agreement making rules, employers have the right to make an agreement with just one union as long as it is entitled to represent the majority of employees, doing so almost always raises the ire of any competing unions. Under the *Fair Work Act*, those disgruntled rival unions now have the right to come onsite and undermine industrial arrangements that have been settled between the business and other unions or, in the case of non-greenfield agreements, directly between the employer and its employees.

128. As AMMA's April 2012 submission to the *Fair Work Act* review panel pointed out, under the previous IR framework once a greenfield or collective agreement was made with one union, no other union had right of entry unless they had members onsite affected by a breach.

129. This took the heat out of most demarcation disputes.

130. With the *Fair Work Act*'s reliance on union eligibility rules for entry rather than agreement coverage, rival unions continue to be able to access the same sites, disrupt work and disturb the industrial peace.

131. The West Gate Bridge dispute is a telling example of the havoc that union demarcation disputes can wreak on a construction project.

132. This is exactly the type of union behaviour that undermines collective bargaining but which the *Fair Work Act* does nothing to discourage, and quite a bit to encourage. This is the type of problem the Rudd/Gillard government created when it chose to break its promise and disturb the accepted status quo to give trade unions an artificial leg up into workplaces.

No requirement for a union to reveal members onsite

"I think if a site has no union members, the union should not have right of entry." [23]

133. Under the current laws, non-unionised workplaces are treated the same as unionised ones, with no regard to a lack of union membership or the choices of employees not to associate with a trade union.

134. Unions now have unfettered access to enter and stir up trouble in situations where they may receive little or no encouragement from workers and may continue to have no members.

135. In order to enter to investigate a suspected contravention under s481 of the *Fair Work Act*, a union must have at least one member onsite to whom a breach relates.

136. When purporting to enter to investigate a suspected breach under s481, it is far too easy for a union to fabricate some sort of complaint from a so-called member and come onto a site to 'have a look around'. From there, it is fairly easy to manufacture an industrial or safety issue in order to put pressure on an employer to accede to a union's industrial demands.

137. This is the leverage the Rudd/Gillard government handed Australian trade unions, paying no care to the impact on workplace relations or the freedom not to associate with trade unions.

138. As one AMMA member pointed out[24]:

> *"Without the knowledge as to whether or not employees are members of a union, we could face a request for entry purely based on a 'fishing expedition' by a union."*

139. AMMA maintains that unions should have to prove they have members onsite that have requested their presence in relation to an alleged breach before entering that site using right of entry laws.

140. At present, unions can apply for an "affected member certificate" from the Fair Work Commission under s520 to prove they have a member onsite for a variety of industrial purposes, although few if any applications are made under the current system.

141. The problem is that little or no due diligence is required in relation to any such applications to ensure the alleged member actually exists and that they are actually eligible to be a member of that particular union. While such applications are rare in any case, there is no requirement for them to be made public and the employer has no ability to test a union's claims that they have a member onsite and that the member is affected by a suspected breach.

[23] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010
[24] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

142. Section 520 is typically only used in situations where employers dispute the existence of a union member on a site, and not only in relation to right of entry.

143. In a recent scenario involving an AMMA member, the company disputed a particular union's ability to represent the interests of a group of employees during enterprise bargaining. The employer maintained that to the best of its knowledge there were no workers to be covered by the proposed agreement that the union could legitimately represent in bargaining.

144. However, under the *Fair Work Act* as it stands, if a union obtains an "affected member certificate" from the Fair Work Commission, this is considered proof the union has a member onsite it is taken as providing they have a member affected by any alleged breach. The problem for employers is that they are not made aware of who that affected member is and are not notified of applications so have no ability to test the evidence.

145. As it stands, as long as a union can demonstrate they have a member onsite via their records, they will receive a certificate, with employers given no opportunity to respond. This is one-sided and partisan and reflects badly on the Fair Work system erected by the Rudd/Gillard government.

146. AMMA considers that in all such cases where entry is sought under s481 the Fair Work Commission should be required to hear evidence to back up union claims of having an affected member onsite:

    a. Under the current right of entry rules, employers are not entitled to know the identity of the alleged affected member, ostensibly on the grounds of protecting the individual's privacy or because they might be discriminated against by the employer if they are known to have raised a complaint.

    b. However, it must be remembered that:

        i. There are general protections / adverse action provisions in place that protect employees from being discriminated against on the basis of their union membership; and

        ii. Other approaches could be implemented that would both protect union members/complainants and allow the proper verification of union claims regarding employee support.

147. It is important for employers to be able to test the evidence of union membership including whether a person is actually entitled to belong to a particular union in order to ensure they are not a 'bogus', expired or ex-employee member.

148. It is important that the employer knows the identity of the person as it will depend entirely on that individual's job function as to whether they are eligible to belong to a union.

149. It is entirely possible that based on some employees' functions, they may not be eligible to belong to a particular union even though their colleagues working

directly with them might. Employers need to be able to examine the actual individual's circumstances.

150. As an example, a site could employ 50 process technicians but not all of them would be eligible to belong to a particular union. Just because the union signs up one process technician does not mean that particular worker is eligible to belong to that union or that they in particular are affected by a suspected contravention of the legislation:

a. There is no way of knowing that unless the member can be identified.

b. It is entirely possible that someone might once have been a member of a union but their job classification has since changed and they are no longer eligible.

c. Alternatively, they may have stopped making contributions and no longer be a financial member of the union but remain on the books.

151. Employers must be made aware of all applications under that section and should always have the opportunity to be heard in response and to cross-examine witnesses if necessary. This could be done without the individual worker's name appearing on any public documents so that they are not widely identified. Again, with some thought and engagement, the interests of all parties can be properly protected rather than the current approach of privileging one side over another.

152. Justice should be done for all parties involved, which the current system falls short of delivering.

No explicit caps on visits for discussion purposes

> *"Unions are visiting too frequently for non-valid reasons, which is disruptive. [We are seeing] weekly visits."*[25]

153. A major problem for employers under the *Fair Work Act* is the lack of an explicit cap on union visits for discussion purposes under s484 together with a lack of any reasonable capacity to address over-servicing by trade unions.

154. The excessive number of union visits seen on some sites over the past four years has led to the loss of many hours of productive time.

155. On some sites, entire positions are now devoted to dealing with union visits and the issues arising from them. This is a function of trade union campaigns involving seeking to visit sites on a daily or more than daily basis.

156. One AMMA member reported having a full-time compliance person spending 60 hours a week on union right of entry under the current framework.

157. Another member has said they received 150 right of entry applications from one particular union in a single month.

[25] Respondent to AMMA Workplace Relations Research Project Survey 6, October 2012 – as yet unpublished

158. Yet another member said that across all their worksites they had devoted 1,000 hours of productive time to union access in a single month, including union visits to discuss and negotiate industrial agreements.

159. This unnecessary expenditure by businesses is doing nothing to make the Australian resource industry more competitive or productive. In fact, potential international investors are more than well aware that the balance of power on Australian resource projects has been skewed in unions' favour and are making their investment decisions accordingly.

No real protections against inappropriate use and disclosure of records

> *"[Due to the entry] right being based on the ability to be a member, the union doesn't have to show cause and [there is] extensive ability to have access to company records."*[26]

160. Unions can currently access non-member records when they enter a site under s482 as long as those records are relevant to a suspected breach that relates to one of their members. Similar to the *Workplace Relations Act* under s748(9), unions must obtain an order from the federal industrial tribunal that such access is necessary to investigate a suspected breach.

161. Express use and disclosure requirements under the current s504 cover the records that unions are able to access as part of their entry rights. Under the previous system, there were no express privacy protections in the legislation but the Commonwealth *Privacy Act* applied where it otherwise would have. However, it should be noted that employee records, which often contain highly personal information, are exempt from privacy protections relating to use and disclosure of such information.

162. Under s482 of the *Fair Work Act*, unions can access any documents that are kept onsite other than non-member records or documents that are directly relevant to a suspected contravention.

163. Under s483AA, a permit holder can also apply for an order from the Fair Work Commission to inspect and make copies of specific non-member records or documents. The tribunal can make orders for such access if it deems it necessary to investigate a suspected breach.

164. The problem with those provisions is that the case law continues to reveal union abuses of document access provisions, which is likely to be just the tip of the iceberg. Many more instances of misuse of member and non-member records are likely going unreported.

165. Access to employment records is a major concern for employers as it allows unions to conduct fishing expeditions and also creates the risk of bullying and intimidation of non-members.

166. This is contrary to the requirement that such information be used only to provide relevant information about a suspected breach.

[26] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

167. As one AMMA member observed:

> *"[A key concern is the] disclosure of employee information of non-union members; unions' ability to investigate and access records without substantiation."* [27]

168. Unauthorised use or disclosure of information and documents obtained while exercising right of entry is prohibited under s504 of the *Fair Work Act*.

169. However, in a matter that went before the federal industrial tribunal in 2011[28], a union official was found to have misused information collected after securing a right of entry order to access non-member records.

170. The union later used the employment records along with footage it obtained covertly in a number of unauthorised ways which according to the tribunal were improper and unlawful. This included using the information obtained to send invitations to non-members to join the union.

171. This is one of the few cases that the tribunal brought on of its own motion but even then the wrongdoers went unpunished.

172. The use and disclosure of the above types of documents must be more strictly controlled. While the use and disclosure of personal information is regulated under the Commonwealth *Privacy Act 1988*, the 'employee records exemption' should be removed.

173. The current exemption means that significant personal information about employees, whether or not they are union members, is not protected under the *Privacy Act* from use and disclosure by union officials or other parties. Such unprotected information can include health and genetic information, financial information, information about criminal convictions, the results of pre-employment psychological testing and other sensitive information.

174. The exemption of those records from privacy protections allows them to be disclosed to union officials and others which brings the potential to damage individuals' privacy as well as an enterprise's commercial viability.

The bar is set too high to find 'misuse' of entry permits

175. The tribunal has the power under s508 of the *Fair Work Act* to restrict entry rights for a union or its officials if it is satisfied they have misused those rights. However, only a Vice President, Deputy President or Full Bench can take action under that section.

176. The tribunal under that section can impose conditions on permits, suspend or revoke permits or require future entry permits to be issued subject to conditions. In practice this only occurred twice in the 2.5 years between July 2010 and December 2012.

[27] Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010
[28] *Fair Work Australia* [2011] FWA 4096, 29 June 2011

177. Under the current rules, the issuing of entry permits can also be banned for a period of time in relation to a union generally or to officials specifically. The tribunal can also make any other orders it considers appropriate.

178. However, under that section the tribunal can only take action on its own initiative or on application by an inspector, which again limits the recourse those provisions offer employers.

179. The current legislation sets the bar very high for placing any conditions on entry permits following 'misuse', even in the most incriminating of circumstances.

180. In the case referred to earlier involving Baiada Poultry (Adelaide) Pty Ltd and the National Union of Workers (NUW)[29], Senior Deputy President Matthew O'Callaghan found NUW officials had committed numerous transgressions and misused their entry permits. Yet he was disinclined to place any conditions on individual permit holders given the actions were condoned by 'multiple' union staff.

181. The union had smuggled a covert camera into a meeting in October 2010 at the company's Wingfield, South Australia, site after securing a right of entry order to access non-member records.

182. After covertly filming the meetings, the union published the footage on its website, gave it to a TV station and used the information gained under the guise of an investigation into alleged wage underpayments to approach employees to join the union. According to Senior Deputy President O'Callaghan:

> *"... I have concluded that the film was primarily intended to show the distasteful nature of certain of the work and to commercially harm Baiada in support of the organising campaign, rather than demonstrating or facilitating clarification of wage and employment issues. Bluntly, it operated as one of a number of commercially oriented attacks on Baiada."*

183. He went on to say:

> *"It is inconsistent with the basis upon which the application for access to non-member records was made and it is inconsistent with access for the purposes of investigating suspected contraventions in terms of award compliance and allegations of anti-union behaviour inconsistent with the Fair Work Act ... The use of information, including employee names, obtained through that right of entry process for invitations to a union meeting reflected an abuse of the basis upon which that information was provided and was contrary to the privacy employees were entitled to expect."*

184. While he regarded the filming behaviours as 'particularly significant instances of misuse', he said he doubted that taking action against individual permit holders was appropriate given the actions of most concern were carried out by multiple NUW staff.

[29] *Fair Work Australia* [2011] FWA 4096, 29 June 2011

185. In a more recent case involving Bechtel (Western Australia) Pty Ltd and the CFMEU[30], a union official was found to have:

a. Refused to comply with a request that discussions take place in a particular meeting room;

b. Entered the residential 'wet mess' contrary to explicit instructions not to;

c. Conducted a meeting with workers in the wet mess (the bar) rather than the designated meeting room; and

d. Refused to comply with lawful instructions by the occupier of the site.

186. As a result of the employer's dispute application under s505, the Fair Work Commission imposed the following conditions on the official's entry permit:

a. He was not to enter the Wheatstone project site for discussion purposes on more than two days a fortnight (to be taken consecutively);

b. He was to comply with reasonable directions by the occupier;

c. He was not to act in an improper manner towards any person onsite;

d. He was not to enter any part of the site used mainly for residential purposes; and

e. He was not to attempt to or hold discussions with employees whose industrial interests the CFMEU was not entitled to represent.

187. Aside from the first condition limiting the number of site visits to two days per fortnight, a generous outcome by anyone's standards, all other 'conditions' said to be imposed were what was required of union officials under the current legislation anyway.

188. This and other similar cases show that under the current rules there are few or no negative consequences for union officials who misuse their entry privileges and still fewer consequences for the unions that encourage them to do so.

189. Misuse of entry rights is said to include an official repeatedly exercising their rights with the intention or effect of hindering, obstructing or otherwise harassing an occupier or employer.

190. Under s508, it can also be considered misuse if an official encourages a person to become a member of the union in a way that is 'unduly disruptive' in that the actions are 'excessive' in the circumstances. Again, the bar is set very high and the onus is on the employee to challenge the union's presence, which can be a daunting prospect for any individual.

[30] *Bechtel (Western Australia) Pty Ltd v CFMEU* [2013] FWC 2498, 26 April 2013

191. In one recent case where the AMIEU applied to the tribunal to deal with a right of entry dispute at an abattoir[31], the employer said that a union official had attempted to sell knives to workers he entered to hold discussions with in the lunch room. The company said three employees complained that the union discussions interrupted their meal breaks and they objected to the union's attempt to sell them knives.

192. The employer said this clearly went beyond the 'discussion' role without the authority of the occupier. However, the tribunal did not place any conditions on the union official's entry permit.

193. Another issue is that while the current s488 says a permit holder is not allowed to breach any conditions placed on their permit, they face no civil penalties if they do. But as mentioned, conditions are rarely if ever applied in the first place.

194. Under s515 of the *Fair Work Act*, the tribunal can impose conditions on an entry permit at the time it is issued if there has been misuse. Again, the bar has been set extremely high for imposing conditions on the basis of misuse of entry rights.

195. While the *Fair Work Amendment Bill 2013* proposes to enhance the existing powers of the Fair Work Commission to deal with disputes over frequency of entry in the event it causes undue inconvenience for employers, it appears the bar will be set very high under these new provisions and be difficult to prove any sort of misuse has occurred.

Entry permits are seldom suspended or revoked

> *"There is no doubt that union organisers who do not have entry permits will be less capable of performing their functions. There is also a possibility that this may lead to the CFMEU requiring the organisers to take unpaid leave, with consequent personal difficulties or hardship for them."*[32] (Fair Work Australia, 2011)

196. Entry permits under the current legislation are seldom if ever suspended or revoked. One reason for this is that taking away someone's entry permit is expected to affect their livelihood and so, in many cases, is considered too harsh a punishment.

197. There is technically a system of 'mandatory' revocation or suspension of entry permits as long as certain conditions are met under the current s510, which is similarly worded to the old s744(5).

198. Under the *Fair Work Act* as it stands, the tribunal is technically required to suspend or revoke an entry permit if any of the following have occurred:

    a. Union permit holders were found to have contravened s503(1), ie, they misrepresented what they were entitled to do;

    b. They have contravened s504 which deals with unauthorised use or disclosure of information or documents;

[31] *AMIEU v Goodchild Pty Ltd* [2011] FWA 8228, 6 December 2011
[32] *Parker, Hanlon, Kera, Mitchell* [2011] FWA 2577, 13 May 2011

c. There has been a substantiated complaint under the *Federal Privacy Act* in relation to documents obtained by the permit holder;

d. The permit holder or another person was ordered to pay a penalty under the *Fair Work Act* in relation to a breach of the right of entry provisions;

e. A court or other person or body under a state or territory industrial law cancelled or suspended a right of entry for industrial purposes or disqualified them from exercising, applying for a right of entry for industrial purposes under that law;

f. The permit holder has in exercising a right of entry under a state or territory OHS law taken action not authorised by that law.

199. However, the federal industrial tribunal retains a discretion to decline to revoke or suspend a permit if to do so would be 'harsh or unreasonable in the circumstances'. It is because of this discretion that most breaches go unpunished.

200. Under the *Fair Work Act* in the 2.5 years between July 2010 and December 2012, the number of entry permits suspended under s510 was two and the number revoked was also two.

201. A high bar for revoking or even suspending permits is due to the livelihood of union officials being at stake, as clarified in a recent case involving four officials of the NSW branch of the CFMEU[33].

202. In that case, the tribunal found it would be harsh to suspend the permits of two of the four officials who had acted inappropriately onsite, despite the fact that their breaches included refusing to undergo a site safety induction, thereby jeopardising the safety of not only themselves but of the rest of the workforce.

203. This is despite the current requirement under s491 for permit holders to comply with any reasonable request by the occupier to comply with an occupational health and safety requirement that applies to the premises.

204. Further, under the current s500, permit holders exercising or seeking to exercise rights of entry must not intentionally hinder or obstruct any person or act in an improper manner. If they do, they face civil penalties but not automatic suspension or revocation of their entry permits.

205. Under s503, a person must not take action with the intention of giving the impression they are authorised to do something under the right of entry provisions that they are not authorised to do.

206. However, this section does not apply if the permit holder 'reasonably believes' their actions were authorised. This qualifier works as a 'get out of jail free' card for union officials and has no place in Australia's IR legislation. Ignorance about the law, whether real or pretended, should be no defence against taking unauthorised actions whilst on someone else's property.

[33] *Parker, Hanlon, Kera, Mitchell* [2011] FWA 2577, 13 May 2011

Wide discretion to deem someone a fit and proper person

207. A union official is required to be a 'fit and proper' person in order to receive an entry permit under s512 of the current Act. Under s513, the factors the commission must take into account in deciding whether someone is a fit and proper person are roughly consistent with the predecessor provisions under s742(2). However, the test is generally not stringently applied and the commission has a great deal of discretion in deciding whether someone is a fit and proper person.

208. In deciding whether someone is a fit and proper person, the tribunal must take into account things such as:

a. Whether that person has received appropriate right of entry training;

b. Whether they have ever been convicted of an offence against industrial law;

c. Whether they have ever been convicted of an offence against a Commonwealth, state, territory or foreign country law involving entry onto premises or fraud or dishonesty or intentional use of violence against another person or intentional damage or destruction of property;

d. Whether they have been ordered to pay a penalty under the *Fair Work Act* or other industrial law;

e. Whether a permit issued to the official has been revoked or suspended or made subject to conditions; and

f. Any other matters the tribunal considers relevant.

209. However, the tribunal can still deem someone a fit and proper person if any or all of the above are a factor.

210. In AMMA's view, if any of the above are factors, the official should not be given an entry permit. If a permit has already been issued, it should immediately be revoked upon any of the above being enlivened. There should be no suggestion that permits are revoked or suspended only if it would not be harsh or unreasonable given that the revocation of a permit will always have a detrimental impact on an individual's ability to perform their role.

211. AMMA also maintains that all applications for entry permits should be posted on the Fair Work Commission website to provide an opportunity for interested parties to be heard in relation to why an individual may not be a fit and proper person.

212. Currently on the Fair Work Commission website you can find out who has an entry permit, plus the date on which it was issued and the date on which it is due to expire, but no information about whether it has been suspended or revoked or had conditions imposed.

213. There is also a gap between when a permit is revoked and when an official is required to return their permit to the Fair Work Commission, during which time they could still be using it to access sites unlawfully.

214. Another issue that warrants attention is that under s512 of the *Fair Work Act*, the Fair Work Commission should be required to go to some lengths to ensure an applicant for an entry permit is not only a fit and proper person to hold an entry permit but also an authorised representative of the union named on the application. This is particularly important given the 1 January 2013 change to the *Fair Work Act* that prohibited union officials from being bargaining representatives for a group of workers if they were not from a union that had the right to represent those workers. Under the current system, it would be relatively easy for a union official to claim to be a representative of a union for which they were not a duly authorised representative and consequently represent a group of workers in negotiations that they were not entitled to represent.

215. The commission should ensure it goes to appropriate lengths to satisfy itself that an applicant is a duly authorised representative of a particular union, requiring evidence such as statutory declarations, minutes of union meetings, etc.

Industrial agreements can expand on legislative rights

> *"I welcome particularly the policy that lets us put anything back in agreements that we can coerce our friendly employers to put back in. That's going to be fun."*[34] (ETU Victorian branch secretary Dean Mighell, 2007)

216. Under the current s490:

a. Permit holders may exercise entry rights only during working hours;

b. They may hold discussions under s484 only during meal times or other breaks; and

c. They may only enter premises on a day specified in the entry notice unless they provide an exemption certificate.

217. Given the already extremely broad ambit for unions to enter business premises under the *Fair Work Act*, there is absolutely no justification for industrial agreements to be able to give unions extended entry rights on top of those already conferred by the legislation or to circumvent the above requirements.

218. Since the *Fair Work Act* began, the federal industrial tribunal and subsequently the courts have upheld clauses in enterprise agreements allowing even broader union access to worksites than is permitted under the legislation.

219. This was not a feature of the previous system and it is unacceptable that industrial agreements can be used to undo the legislative checks and balances in the *Fair Work Act*.

[34] ETU Victorian branch secretary Dean Mighell in 2007 after the proposed *Fair Work Act* agreement making changes are announced

220. In a 2010 case involving Dunlop Foams, the company and the union had sought to include a right of entry clause in the enterprise agreement[35]. The parties to the agreement said the clause was meant to operate as a 'conditional invitation' to the union to enter the premises. The tribunal rejected the clause, finding that because it was unrestricted in application, it trespassed onto the *Fair Work Act*'s provisions allowing right of entry to investigate breaches and for discussion purposes.

221. Unions rarely made that kind of drafting error again and became very savvy about how to word right of entry clauses to navigate around the legislative provisions.

222. In a 2011 decision involving Moyle Bendale Timber Pty Ltd and the CFMEU, the union appealed an earlier decision where the commissioner found that no agreement clauses relating to right of entry were lawful under the *Fair Work Act*. The union successfully argued the legislation did not create an 'exclusive code' governing the rights of union officials to enter premises.

223. In the appeal decision[36], the Full Bench found the clause was lawfully expressed to confine entry to those situations not covered by the *Fair Work Act*.

224. Another clause was approved all the way to the Federal Court[37] in an agreement between ADJ Contracting and the Electrical Trades Union (ETU). That clause allowed union officials to enter worksites outside the restrictions of the *Fair Work Act* including:

    a. Outside of meal breaks.

    b. Without notice.

    c. Without valid entry permits.

225. In other words, the approved clause allowed entry by mutual agreement without officials having to abide by any of the restrictions under the *Fair Work Act* attached to entry for discussion purposes[38].

226. It is worth contrasting this with the lack of capacity to negotiate any clauses that would be contrary to the minimum terms and conditions under the National Employment Standards and modern awards. The current legislation seems to allow itself to be disregarded in some areas but not in others.

227. If unions are entering to investigate suspected breaches of the legislation under s481 or to hold discussions with members or eligible members under s484, they have to comply with the right of entry requirements under the Act.

[35] *Australian Industry Group* [2010] FWAFB 4337, 11 June 2010
[36] *CFMEU v Moyle Bendale Timber Pty Ltd* [2011] FWAFB 6761, 13 October 2011
[37] *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108, 14 August 2012
[38] ADJ Contracting Pty Ltd [2011] FWA 2380, 28 April 2011

228. However, officials only have to say they are entering to 'assist with representing an employee under the dispute resolution clause' to avoid any of the usual restrictions or conditions on entry.

229. This creates a strong incentive for unions to mask their true motivations for entering a site and "game" or play the system.

230. Importantly, court and tribunal endorsement of particular right of entry clauses in enterprise agreements means unions can now apply on behalf of their members to take protected industrial action in support of such clauses.

231. Under the laws immediately preceding the *Fair Work Act*, there was clarity for all parties involved given that the Workplace Relations Regulations at that time specifically prohibited clauses conferring additional entry rights for union officials. Australia's workplace relations system must return to that level of clarity and policy certainty.

Not all employers onsite are required to be notified

> *"Right of entry notifications are given to the occupier of premises for union visits. Given our employees work on other companies' sites to undertake construction activity, those notices are given to parties other than the employer. Some principals manage this well and ensure we are notified and involved in visit management, however, others aren't, leading to detrimental impacts on our business. In my view, such notices should be required to be lodged with the employer, or both the occupier and employer."*[39]

232. Shortfalls in notification requirements under the *Fair Work Act* mean not all employers on a site are informed of a union's impending presence. This not only has the potential to undermine the safety and security of the employer's operations but deprives them of the ability to raise a dispute about a union's right to enter, query a union's eligibility rules or direct them to a particular meeting place.

233. Unions must give between 24 hours and 14 days' notice of entry for discussion purposes and investigation purposes under the current s487, the same as that required under s749 and s763 of the former system.

234. Under s487, a permit holder entering to investigate a breach must give the occupier of premises, and any affected employer, a notice of entry. If entering for discussion purposes, they only have to notify the occupier.

235. In AMMA's view, those provisions should be amended so that all employers on a site, including all contractors and sub-contractors, are given notice of a union's planned entry for either investigation or discussion purposes. The current system may be predicated on an owner-occupier model but it needs to better take into account the complex site arrangements that characterise resource projects.

236. The *Fair Work Act* should also be clarified to make it clear that only one union official can be covered by each entry notice for a single 24-hour period. A single

[39] Respondent to AMMA Workplace Relations Research Project Survey 6, October 2012, yet to be published

entry notice should under no circumstances be able to cover more than one union official for weeks at a time or for intermittent periods within a certain timeframe. For every day that an individual union official intends to come onto a site they should be expressly required to put in a separate notice of entry.

237. Again, it should be recalled that this is a statutory power for union officials to legally force entry onto property owned or legally controlled by another:

a. Right of entry is a derogation from some of the most fundamental property rights in our legal system – it should not operate on a *laissez faire* basis or be based on open-ended and unaccountable trade union rights.

b. By way of comparison, the police require separate warrants to enter premises to investigate separate crimes and do not gain standing warrants to waltz in and out of premises at will.

Dispute orders are rarely if ever made

238. While employers are technically able to bring disputes under s505 of the *Fair Work Act* about the frequency of union entry visits in relation to their operational requirements, in practice orders are rarely handed down under those provisions.

239. In the 2.5 years between July 2010 and December 2012, there were just 22 orders made relating to disputes about the operation of the right of entry rules and that was across all right of entry dispute issues, not just in relation to frequency of entry.

240. Importantly, there are no serious repercussions for unions that fail to comply with orders under s505.

241. Again, while the *Fair Work Amendment Bill 2013* proposes to go some way to broaden the Fair Work Commission's dispute settling powers in relation to frequency of entry, the high bar attached and the shortfalls in the provisions mean they are expected to provide scant comfort to Australian businesses.

5. LABOR'S RIGHT OF ENTRY POLICY

242. At the time of publishing this paper, the Labor government had not released a formal workplace relations policy for the 2013 federal election. However, based on its policy announcements, and legislative amendments to date, it is clear that the government's policy in this area is essentially to:

a. Retain the right of entry provisions of the *Fair Work Act* that have applied since 1 July 2009, declining to act on the overwhelming majority of serious problems outlined in this paper; and

b. Make only those further changes to the rules specified in the *Fair Work Amendment Bill 2013*, the provisions of which overwhelmingly represent further pro-union measures and fail to address employer concerns.

243. In essence, the Labor policy on union entry into workplaces is to retain the status quo and further skew already unbalanced rules in favour of trade unions.

AMMA's concerns with the *Fair Work Amendment Bill 2013*

244. At the time of publishing this paper, the federal parliament had not yet passed the *Fair Work Amendment Bill 2013* and none of the changes in the proposed legislation had yet commenced.

245. The changes in that bill, along with the existing flawed suite of right of entry laws, represent the current position of the Rudd/Gillard government on the powers trade unions should have to enter Australian workplaces:

a. The bill contains further changes on right of entry that if passed will massively further expand union access to workplaces;

b. The bill represents a deliberate failure to act on the significant flaws of the union access system which the Labor government has constructed during its time in office; and

c. It represents further backtracking from the "no change" promise Julia Gillard made in 2007.

246. As AMMA pointed out in its written and verbal submissions to the Senate Education, Employment & Workplace Relations Committee inquiry into the *Fair Work Amendment Bill 2013*, the proposed changes risk further opening up union access to worksites and creating untold future liabilities for employers.

247. The bill's proposals will:

a. Require employers to facilitate union transport and accommodation in remote areas while at the same time limiting employers' ability to recoup the full costs of doing so.

b. Make lunch rooms and crib rooms the default locations for unions to meet with potential members to hold discussions or conduct interviews if the parties cannot agree on alternative locations. This removes one of the few remaining rights of employers in this area.

c. Explicitly empower the Fair Work Commission to rule on the frequency of union entry for discussion purposes, which AMMA maintains should only be used to curb excessive union visits with no possibility of further opening up workplaces to third-party disruptions. AMMA notes this dispute resolution power already exists to an extent under the current framework and has proven manifestly ineffective.

248. Under the current s492:

a. Permit holders must comply with any reasonable request by the occupier to:

i. Conduct interviews or hold discussions in a particular room or area of the premises; and/or

ii. Take a particular route to a particular room or area.

b. The Fair Work Commission can also deal with disputes about whether employers' requests for particular locations or routes are reasonable. However, some case law in this area seeks to cast doubt over the existence of an onus of proof resting on unions to show that an employer's request is unreasonable. Some decisions have suggested there is a reverse onus on employers to prove their request was reasonable in the event that the reasonableness of their request is challenged[40].

c. According to the current s492, an employer's designated location for union meetings will be deemed unreasonable if:

i. The room or area is not 'fit for the purpose' of conducting interviews or holding discussions; or

ii. The employer makes the request with the intention of intimidating or discouraging those who might participate in interviews or discussions or makes it difficult for them to participate because the room is not easily accessible during meal times or other breaks or for some other reason.

d. Those explicit qualifiers did not exist under the previous legislation, nor was there any suggestion that an employer should have a positive obligation to prove its requests were reasonable, something which has been suggested in some recent interpretations of the current framework.

[40] *AMIEU v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847, 17 June 2011

249. However, if the *Fair Work Amendment Bill 2013* is passed into law, it will remove employers' ability to designate meeting places while retaining the ability to designate the routes to those meeting places, which will be of little solace to Australian businesses.

What the *Fair Work Act* review panel recommended

250. In August 2012, the Federal Government's own hand-picked *Fair Work Act* review panel proposed three key changes in the area of union access to worksites:

a. Amend s505 of the Act to provide the Fair Work Commission with greater power to resolve disputes about the **frequency** of union visits to a workplace in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without 'undue inconvenience'.

b. Amend s492 and s505 to provide the Fair Work Commission with greater powers to resolve disputes about the **location** of union interviews and discussions.

i. This recommendation was not adopted in the way the Fair Work Review Panel recommended.

ii. Instead, the Labor government chose to cut out the 'middle man' and go straight to giving permit holders default access to lunch rooms instead of giving the Fair Work Commission discretion to resolve disputes over the suitability of locations as they arise.

c. The panel also recommended that the capacity for a permit holder to enter premises under s481 to investigate a suspected contravention relating to a member of the union should continue to apply, with appropriate limits, following the end of the member's employment.

i. This panel recommendation was not adopted at all in the bill and AMMA supports that approach.

251. The review panel made no recommendations whatsoever that would require employers to facilitate union access to remote worksites yet that is exactly what the bill proposes in Division 7 of Schedule 4.

252. This is a brand new and massive right being proposed for unions that will have disproportionate impacts on employers in the resource industry. It will have such far-reaching ramifications that it is difficult to assess the true extent of the damage it will do. An already unfair and poorly operating system will be further and deliberately skewed in favour of trade unions if these provisions are allowed to pass into law.

253. While AMMA opposes the passing of the *Fair Work Amendment Bill 2013* in its entirety, if changes are made in relation to the location of union visits, the legislation should revert to the review panel's recommendations.

254. This would give the Fair Work Commission greater powers to resolve disputes about the location and frequency of union visits, not make lunch and crib rooms the default locations as the *Fair Work Amendment Bill 2013* proposes.

255. While AMMA does not support the review panel's recommendation above, in this instance it would represent the lesser of two evils, illustrating just how unbalanced the recent legislative proposals are.

Accommodation and transport in remote areas

256. Division 7 of Schedule 4 of the *Fair Work Amendment Bill 2013* proposes never before legislated provisions in relation to accommodation and transport arrangements for unions in remote areas.

257. The types of sites that will be affected by the proposals include not only those in the middle of a body of water (e.g. offshore oil and gas "rigs") but also those that are onshore in remote, desert-like locations which are just as complex to manage from an operational perspective.

258. Under the proposed s521C(2), in situations where unions and occupiers are unable to agree on accommodation and transport arrangements to enable union access to remote sites, employers will have to facilitate access by providing transport and accommodation for which they will only be able to charge back a portion of the costs.

259. This huge financial and operational impost on employers is proposed to be limited to situations where the only "reasonably available" transport and accommodation to the premises is that provided by the occupier.

260. However, employers fear that in many cases the proposed s521D(1) will impose an obligation on the occupier to provide to a union the commercially available transport that it has arranged for its own workers. There is absolutely no reason why a union cannot make its own commercially available transport arrangements in such cases in order to access remote sites. It goes without saying that unions would also have to obtain the appropriate permissions and approvals from the occupiers before entering worksites via transport they have arranged themselves.

261. By way of attempting to appease employers about the massive new obligations they face under the bill, ss521C(2)(a) and 521D(2)(a) state that an employer does not have to comply with the obligations to facilitate access if:

a. Providing accommodation or transport would cause the occupier 'undue inconvenience'; or

b. The request is not made in a reasonable period before the accommodation or transport is required.

262. What amounts to 'undue inconvenience' remains to be seen and, according to the bill's Explanatory Memorandum, will depend on the circumstances of each case and be up to the Fair Work Commission to decide.

263. It is fair to say that employers expect an extremely high bar to be set and foresee no solace in the bill's interpretation by the Fair Work Commission.

Specific issues for employers

264. AMMA clearly and comprehensively enunciated the policy rationale weighing against the right of entry amendments contained in the *Fair Work Amendment Bill 2013* in its submissions to the Senate Education, Employment and Workplace Relations Committee in April 2013[41].

265. Those submissions included extensive examination of the unique concerns of the resource industry which stands to be most affected by the proposed right of entry changes. Properly examined, there is every basis to conclude that the agitation for these amendments came primarily from unions seeking to artificially secure a foothold into resource industry workplaces, at which they have enjoyed little or no employee support on a consistent basis.

266. AMMA's concerns with the bill's proposals relating to facilitating access to remote locations include that:

a. Such visits will compromise safety, environmental and quarantine obligations;

b. They ignore the widespread accommodation shortages employers are already facing on remote sites;

c. They risk overriding existing protections for employees not to be disturbed in their private accommodation;

d. They ignore the lack of seats on most transport to remote operations, particularly to offshore operations, along with the high costs associated with providing such transport to union officials;

e. They overlook the fact that unions can more easily and safely talk with workers at transit points or via remote technologies; and

f. They would restrict employers' ability to recoup their full expenses of providing such transport and accommodation.

267. In relation to the other right of entry proposals contained in the *Fair Work Amendment Bill 2013*, AMMA's concerns include:

a. They would remove important existing rights for employers to designate union meeting places, thereby removing one of the only remaining controls employers and occupiers have over union site visits; and

b. The existing dispute resolution provisions for excessive union visits involve an extremely high bar and there is no assurance any bolstered provisions would significantly alleviate the concerns of business in this area.

[41] http://www.amma.org.au/library/submissions-2/2956-submission-on-the-fair-work-amendment-bill-2013

Future-proofing the latest amendments

268. At the time of writing this paper, there was considerable discussion of the latest Labor government legislative proposals in the industrial relations space being designed to counteract reforms by any incoming Liberal government, and of the current government creating mechanisms and requirements that could not be undone by the Coalition if it was elected in September 2013.

269. Putting to one side considerations of the democratic legitimacy of such tactics and respect for the will of the electorate, this is not a sound way to think about the right of entry framework.

270. The idea that an already skewed and deliberately manipulated system needs to be dragged even further towards trade union empowerment and to resist or counteract future policies with no regard paid to the significant concerns with the existing rules represents the height of poor governance and reflects badly on all concerned. This is not an acceptable basis for policy in this critical area and is strongly opposed by the Australian resource industry.

6. THE COALITION'S RIGHT OF ENTRY POLICY

271. On 9 May 2013, the Coalition released its pre-election workplace relations policy titled *The Coalition's policy to improve the Fair Work laws*.

272. On union entry into workplaces, the Coalition promises to finally deliver on Julia Gillard's 2007 promise to retain the rules of the *Workplace Relations Act 1996* as they applied immediately prior to the introduction of the *Fair Work Act*:

> *"A Coalition Government will ensure union right of entry provisions are sensible and fair, by making sure they are modelled on the 2007 promise of Julia Gillard."*

273. The Coalition policy is in essence a welcome remediation of not only a broken promise but more importantly a return to a proven approach that better balances rights and interests at the workplace level and that will minimise the disputation and uncertainty that has emerged since 2009.

274. However:

a. The Coalition policy does not appear to remediate all concerns for employers, including some concerns unique to the resource industry; and

b. The Coalition's reform task is not without its complexities given some of the changes to the system under the Rudd/Gillard government will complicate a complete return to the pre-existing right of entry framework.

Entry to investigate breaches and represent members in disputes

275. As part of the Coalition's policy, all union officials will need to have photo entry permits which they will need to produce upon request before entering a worksite.

276. Further, the Coalition does not plan to change the current rules around union right of entry to investigate suspected breaches of the *Fair Work Act*, to represent members in disputes under awards or agreements, or to investigate health and safety breaches. Nor will it change special entry rules relating to clothing outworkers.

277. The Coalition's plans to maintain the current provisions relating to entry for purposes including 'representing a member in a dispute under an award or agreement' is potentially a concern for AMMA and its members.

278. This would appear to leave open the possibility for unions to cite dispute resolution as the reason for entering in order to conduct fishing expeditions. These clauses in union-negotiated enterprise agreements are also commonly used to give extra entry rights to unions. Thus, a significant existing flaw in right of entry under the Rudd/Gillard government may be perpetuated under the Coalition's IR policy.

279. The Coalition policy makes no explicit mention of outlawing clauses in enterprise agreements that expand on right of entry under the *Fair Work Act* itself.

280. AMMA members throughout the Australian resource industry would support a ban on enterprise agreement provisions expanding right of entry or otherwise counteracting or altering the requirements of the *Fair Work Act*.

281. The next Federal Government should consider an outright prohibition on enterprise agreements that bolster trade union right of entry to workplaces, leaving reformed legislation as the exclusive regulatory code on these matters.

Entry for discussion purposes

282. The Coalition has said it will change the rules around right of entry for 'discussion' purposes which is currently regulated under s484 of the *Fair Work Act*.

283. Under the Coalition's policy, unions would only have access to worksites for discussion purposes if:

a. The union was covered by an enterprise agreement that applied to that workplace; or

b. The union was a bargaining representative seeking in good faith to make an agreement that would apply in that workplace; and

c. There was evidence the union had members in that workplace who had requested its presence.

284. If a workplace was covered by a modern award or an enterprise agreement that did not cover a particular union, access would only be allowed for discussion purposes if that union:

a. Could demonstrate it had, or previously had, a lawful representative role at that workplace; and

b. There was evidence that the workers or members had requested the presence of the union.

285. In relation to such proposals, including the distinction between enterprise agreement-covered workplaces and award-covered workplaces, AMMA would need to consider the full details of any proposals.

The Coalition's view on the *Fair Work Amendment Bill 2013*

286. The Coalition is on the record as opposing the *Fair Work Amendment Bill 2013*'s provisions seeking to give default union access to lunchrooms in the absence of agreement between the employer and unions entering the workplace for discussions.

287. It also opposes those provisions that would require employers to pay for travel and accommodation in order for unions to access remote sites.

288. The Coalition does, however, support *Fair Work Act* review panel recommendation 35 which would provide the Fair Work Commission with greater power to resolve disputes about the frequency of union visits to a workplace.

289. A provision nominally implementing this recommendation is contained in the *Fair Work Amendment Bill 2013* which was still before parliament at the time of writing this paper.

290. If elected in September 2013, and if seeking to make long overdue reforms to restore balance to the rules on union entry into workplaces, the Coalition must:

a. Overturn or reverse all the provisions of the *Fair Work Amendment Bill 2013* it opposed the passage of;

b. Re-examine any provisions relating to the frequency of union entry in wider changes to the right of entry provisions of the *Fair Work Act*; and

c. More generally, review the operation and mechanics of the right of entry provisions of the legislation as a whole, noting this is not a call to abolish union right of entry altogether.

7. REFORM PRIORITIES

291. AMMA calls on the next Federal Government to do three things:

a. Return to the system that worked by reinstating to the greatest extent possible the former right of entry rules as they existed immediately prior to the *Fair Work Act* being introduced on 1 July 2009;

b. Implement further essential controls and conditions to ensure a greater degree of rigour and balance in the operation of union entry rules; and

c. Minimise the damage from the latest proposals in the *Fair Work Amendment Bill 2013* by either not enacting them or overturning them if they are enacted.

Return to a system that worked

Basis of entry for discussion purposes

292. **The Problem:** Union access to worksites for discussion purposes no longer requires unions to have a connection to an industrial instrument operating at a worksite, which was the long-standing requirement under the *Workplace Relations Act* as it stood immediately before the *Fair Work Act* took effect.

293. Where an employer and employees have chosen to make an enterprise agreement without the involvement of a union, that union should not have access to that site for discussion purposes unless it can prove it has a historical connection with an industrial instrument operating at that site, such as a pre-modernised award.

294. **The Solution:** Amend s484 of the *Fair Work Act* to make it as close as possible to the former s760 of the *Workplace Relations Act*. Under s760(a), an explicit requirement for union entry for discussion purposes was that work was carried out on the premises that was 'covered by an award or collective agreement that is binding on the permit holder's organisation'.

295. Given the changed role of awards under the current system and the fact that parties are no longer 'bound' by collective agreements or awards, the previous requirement would need to be modified. One way of doing this would be to have separate provisions for enterprise agreement-covered employees and non-enterprise agreement-covered employees. In short, entry for discussion purposes would hinge on unions having a current or historical connection to an industrial instrument applying or formerly applying at that enterprise.

296. **Note**: As a result of the above changes, the Fair Work Commission would have a declaratory and/or dispute resolution power for settling coverage issues such as those under modern awards.

Implement further essential controls and conditions

Proof of unions' entitlement to represent workers

297. **The Problem:** Site managers should not be asked to interpret complex union eligibility rules on the spot to determine if a union is eligible to enter a site for discussion purposes.

298. **The Solution:** If union site access for discussion purposes continues to be based on union eligibility rules in whole or in part, unions should be required to obtain a certificate from the Fair Work Commission confirming they have the right to represent workers before they are able to enter that site for recruitment and discussion purposes.

299. The federal industrial tribunal should be required to review a permit holder's entry notice to confirm the union has coverage of workers on that site. This is consistent with what AMMA proposed in a joint submission with Master Builders Australia in 2009[42]. This would require an amendment to s484 to require the Fair Work Commission to confirm the union's ability to represent the industrial interests of relevant employees on a site before entering for discussion purposes.

Proof a union has members onsite

300. **The Problem:** Confirming whether unions have members on a worksite when they seek to enter to investigate a suspected contravention is problematic despite such confirmation being a consistent requirement in our legislation.

301. **The Solution:** Amend s481(1) to require the Fair Work Commission to confirm the existence of a member onsite that has requested the union's presence to investigate a suspected contravention:

a. In all such cases, unions should be required to apply for an "affected member certificate" under s520.

b. Unlike under the current system, all applications under that section should be notified to employers, with employers able to explicitly challenge union claims of membership onsite.

c. This would consequently involve employers being made aware of the individual member to whom the breach allegedly relates, although their identity would not be made public.

Misrepresentation of entry rights

302. **The Problem:** Officials of unions with no legal right to represent employees at a workplace who are still seeking entry currently bear no consequences for that misrepresentation. The 'get out of jail free' card under the current s503, which allows a union official to misrepresent what they are authorised to do under their entry permit as long as they 'reasonably believe' their actions are authorised, must be removed.

[42] AMMA and MBA joint submission to DEEWR on union representation rights under the Fair Work Bill, January 2009

303. **The Solution:** Completely remove s503 subsection (2) which states that the requirement for union permit holders not to misrepresent their entry rights does not apply if the permit holder 'reasonably believes' their activities are authorised.

304. If educational or professional support of union officials is required to properly understand what they are and are not empowered to do under amended legislation, this should be considered to support such reforms.

Obeying lawful instructions

305. **The Problem:** There are currently few (or no) negative consequences attached for those who fail to comply with any reasonable request by the occupier of the premises to comply with a health and safety requirement.

306. **The Solution:** Amend s491 to explicitly state the consequences attached for non-compliance with a reasonable request.

a. A further amendment would require the permit holder to not only comply with the reasonable requests of the occupier but also of any other employer onsite with regard to health and safety.

b. Consequences of a failure to comply should include automatic suspension or revocation of an entry permit.

Automatic suspension or revocation under prescribed circumstances

307. **The Problem:** There are currently few (or no) consequences for union officials who misuse their entry privileges. Negative consequences must be applied consistently and in most cases automatically to deter such unacceptable behaviour. The fact that entry permits are seldom if ever suspended or revoked, even for truly inappropriate behaviour, means there is no deterrent value in the current provisions. Consequences must be established and enforced.

308. **The Solution:** Amend s510 to remove the discretion of the tribunal to decline to revoke or suspend entry permits for misuse if to do so would be "harsh or unreasonable". If any of the acts specified under s510 have occurred, there should be automatic suspension or revocation of an entry permit. Subsection (2) of s510 should therefore be removed.

Automatic suspension or revocation for hindrance or obstruction

309. **The Problem:** Under the current s500, permit holders exercising or seeking to exercise rights of entry must not intentionally hinder or obstruct any person or act in an improper manner. If they do, they face civil penalties but not automatic suspension or revocation of their entry permits.

310. **The Solution:** Amend s500 so that in the event any permit holder is found to have breached that section, their entry permits are automatically suspended or revoked, depending on the severity of the breach (but with a strong presumption towards suspension or revocation).

More detailed information about entry permits

311. **The Problem:** Currently on the Fair Work Commission website, interested parties can find out who has been issued with an entry permit, when it was issued and when it is due to expire. However, no further information is available as to whether a permit has been suspended, revoked or had conditions imposed on it.

312. **The Solution:** Amend the *Fair Work Act* to require any suspension or revocation or conditions imposed on an entry permit to be publicly posted to the Fair Work Commission website, along with all revocations of permits by holder name, for a period of 10 years.

The fit and proper person test

313. **The Problem:** The fact that the 'fit and proper' person test is not stringently applied means the vast majority of entry permits applied for are granted.

314. **The Solution:** If any of the circumstances described in s513 are enlivened, the permit holder should not be deemed a 'fit and proper person' to hold an entry permit and should not be issued with one. If that person already holds an entry permit, that permit should be automatically suspended or revoked.

Appropriate checks on permit holders' eligibility

315. **The Problem:** There is currently no stringent test required to ensure an applicant for a right of entry permit is actually a duly authorised official of the named union.

316. **The Solution:** Applicants must be required to provide sufficient evidence to the Fair Work Commission when applying for an entry permit under s512 that not only are they a fit and proper person as currently required but also that they are authorised to represent the union named in the application.

Publication of entry permit applications

317. **The Problem:** Union officials' applications for entry permits (including renewals thereof) are not publicised ahead of time, thus denying interested parties any opportunity to be heard on whether someone should be deemed a fit and proper person.

318. **The Solution:** Amend the *Fair Work Act* to explicitly require the publication of all applications under s512 for right of entry permits in advance of those applications being granted, giving all interested parties the chance to be heard in relation to an application.

    a. A restored Australian Building and Construction Commission (ABCC) should explicitly be one body that may be heard on the granting of permits, and duly empowered to intervene in such matters in the public interest.

Notification requirements

319. **The Problem**: At present, not all employers on a site are automatically informed of an impending union visit whether for discussion or investigation purposes. This removes employers' ability to raise disputes or query a union's eligibility rules.

320. Union officials exercising entry are sometimes not scrupulous in restricting their contact to the employees of the employer they came to see or those they are entitled to meet with.

321. **The Solution:** Introduce a requirement that all employers, occupiers, contractors and sub-contractors on a site are notified of an impending union visit. This would mean amending s487 which currently only requires a union official when entering for discussion purposes to notify the 'occupier' and when entering for investigation purposes to notify only the occupier and any affected employers.

Entry notices

322. **The Problem:** There is currently a lack of clarity around how many visits and union officials a right of entry notice can cover. There have been times when several union officials have sought to be included on a single entry notice.

323. **The Solution:** Explicitly require that each individual union official must lodge a separate entry notice for each day they plan to enter a site.

Frequency of entry

324. **The Problem:** The lack of an explicit cap on union visits for discussion purposes combined with the bar being set too high to prove "undue inconvenience" arising out of excessive visits means explicit caps are warranted. There are recent government moves to make "over contacting" on an issue a potential form of bullying when done by a manager but it appears the intention is not to apply this same standard to trade unions.

325. **The Solution:** Amend s484 covering entry to hold discussions to insert an explicit cap on the number of union visits. That cap should be set at one visit per union (not per union official) per month per site for discussion purposes.

Use and disclosure of information

326. **The Problem:** Unions continue to access non-member records and use them for their own ends, which is an abuse of power. Greater scrutiny is warranted and there should be no access to non-member records without the express consent of the tribunal, along with any employees concerned.

327. **The Solution:** Amend s483AA to make not only tribunal consent a requirement but to explicitly require the consent of the employee to whom the record applies. This would overcome the shortfalls arising from the current employee records exemption under the federal *Privacy Act*.

Allowable matters in enterprise agreements

328. **The Problem:** Enterprise agreements can deal with union right of entry to supplement and even bypass the broad legislative privileges that unions already enjoy. Such clauses should be expressly prohibited, whether or not they meet the definition of pertaining to the employment relationship as defined under the case law to date or the existing terms of the *Fair Work Act* 2009.

329. **The Solution:** This could most simply be achieved by expressly including clauses relating to union right of entry in the list of unlawful terms under s194(f) of the *Fair Work Act*, as was the case under the preceding Workplace Relations Regulations.

Minimise the damage from the latest proposals

330. AMMA has expressed its opposition to the *Fair Work Amendment Bill 2013* in its entirety in both written and oral submissions to the Senate inquiry into the bill. In relation to the bill's provisions on union access to worksites, AMMA maintains that the provisions should under no circumstances be allowed to become law. If they are passed, they should be overturned at the earliest possible instance following the September 2013 federal election.

Union access to remote sites

331. There should be no requirement for employers or occupiers to provide accommodation and/or transport to facilitate union access to remote sites. Transport costs are huge, accommodation is in short supply and there are acceptable alternative approaches for linking trade unions with interested employees working at remote locations.

332. In the event that employers are forced to provide transport and accommodation to unions, the legislation and/or the regulations should expressly enable employers and occupiers to recoup all direct and indirect costs associated with providing the accommodation and transport. Recoverable costs must include the full range of additional costs, including insurance, training, electricity, meals, etc, and unions must pay upfront for any fishing expeditions in all circumstances.

Appropriate meeting places

333. Employers should continue to be able to designate appropriate locations for union discussions and under no circumstances should lunch rooms be made the default location for union meetings (as proposed in the bill). At a minimum, the current powers of employers under s492 to designate reasonable meeting places and routes to those locations should be retained.

Frequency of entry

334. If the Fair Work Commission is given greater powers to hear disputes over the frequency of union entry to worksites (as proposed in the bill), it should only be to make orders reducing the frequency of visits, not expanding them. The legislation should also clarify that only an affected employer can bring an application under these provisions, not a union or permit holder.

335. Again, the consistent modus operandi of the trade union movement and its legal representatives is to "game" the statutory right of entry provisions, and seek to manipulate statutory right of entry in ways never intended by parliament. An incoming parliament, mindful to make changes in this area, should legislate in clear and tight terms that cannot be gamed or undone either in interpretation or when being deliberately stretched and tested by trade union officials seeking to enter workplaces.