



Fair for Who?

The rhetoric versus
the reality of the

Fair Work Act

September 2013

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Six years on and two leadership coups later – how many more promises will Labor break?

With further anti-business changes to Australia's workplace relations system recently passed into law, the replacement of former Prime Minister Julia Gillard with Kevin Rudd has done little to restore business confidence that Labor's promises in this crucial policy area will be kept.

Key provisions in the Fair Work Amendment Act 2013 that recently passed into law have not only moved the Labor Government further away from its original 2007 promises on workplace relations, but denied the broad economic impacts of its workplace system and ignored growing business concerns about productivity, competitiveness and investment in Australia.

While it is now clear that Labor's promises in the lead-up to introducing the Fair Work Act are well and truly broken and unlikely to be rectified under the current government, business confidence is also suffering from the very real prospect of further anti-business workplace regulation under Labor.

Just hours after being sworn back in as Prime Minister, Kevin Rudd broke his June 2013 promise to 'work closely with Australia's business community' by ramming through three anti-business, pro-union amendment bills in the areas of skilled migration and workplace relations.

Hopes that Kevin Rudd would govern for all Australians were dashed within his first few days back on the job.

So what are these broken promises? How have these critical policy decisions played out in Australian industry since Labor introduced its Fair Work system? And what are the key concerns of business in these areas for the future?

This paper answers these questions and more, detailing the practical realities that resource industry employers are dealing with four years after the introduction of the Fair Work Act on 1 July 2009 and six years since Labor was returned to government.

In crucial areas such as union access to workplaces, industrial regulation of the building and construction industry, enterprise bargaining, freedom of association and appointments to the federal industrial tribunal, Labor continues to break promise after promise...and this is harming employers and employees in our critical national resource industry.

"I will not be Prime Minister of this country and appoint some endless tribe of trade union officials or ex-trade union officials to staff the key positions in this body."
Kevin Rudd (April 2007)

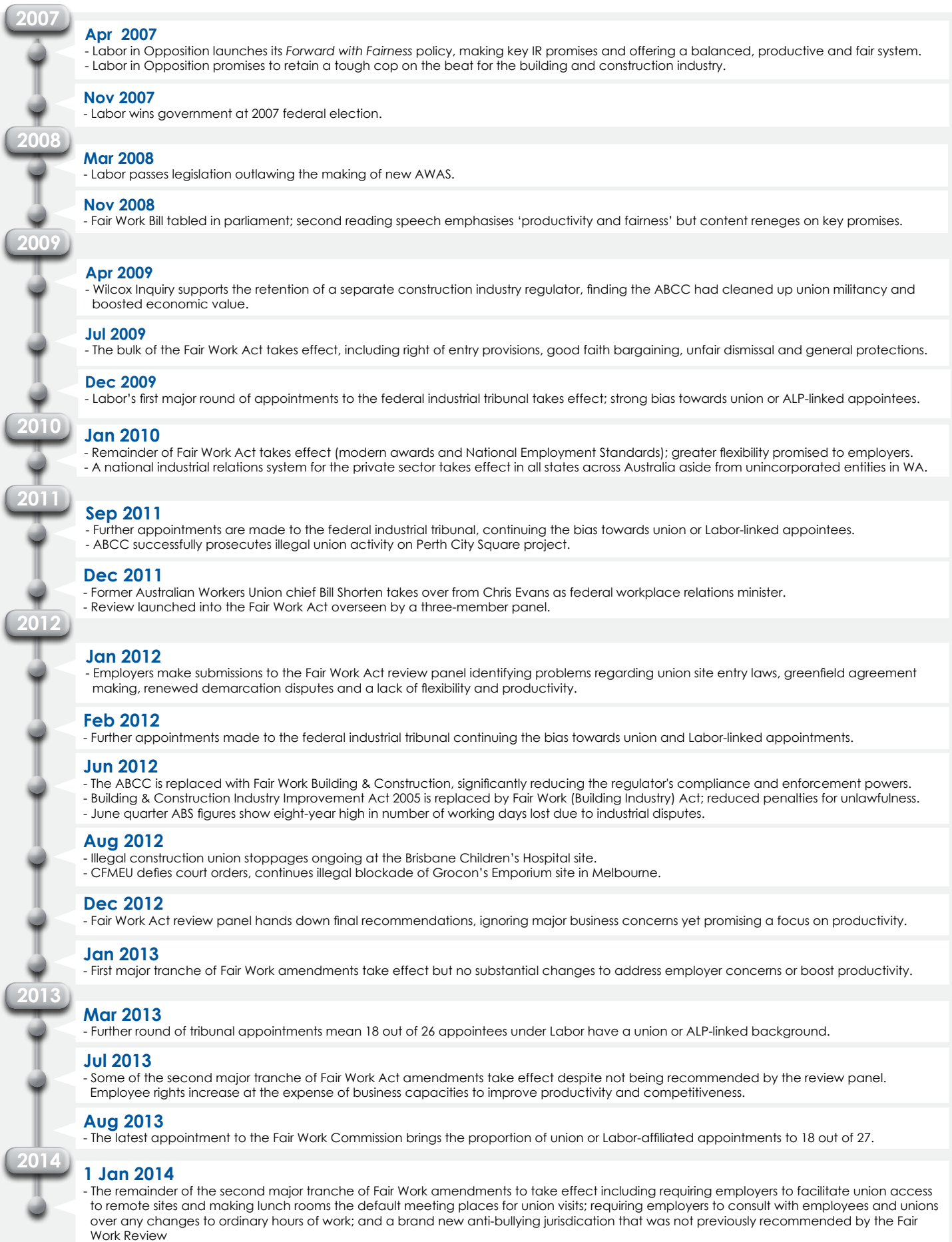
"Changes to the entry rights will give more certainty for employers and help them remain competitive... I'm seriously engaging with employers and unions...we will try and come up with a joint package."
Bill Shorten (March 2013)

"When it comes to the construction industry, we support a strong cop on the beat. Certainly it is critical for the future of the construction industry and we will not tolerate the return of any unlawful practices."
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The Fair Work Bill 'aims to achieve productivity and fairness through enterprise level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action.'
Julia Gillard (November 2008)

Promises, promises, promises...

FIGURE 1: Timeline of Labor's IR legacy



THE LABOR PROMISE: Appointments to the federal industrial tribunal will not favour one side over another

“ I will not be Prime Minister of this country and appoint some endless tribe of trade union officials or ex-trade union officials to staff the key positions in this body.”

~ Kevin Rudd, 2007 (30 Apr - 7:30 Report)

“ I will not stand by and have this body become the agency of ex-trade union officials. People will be appointed on their merit.”

~ Kevin Rudd, 2007 (30 Apr - 7.30 Report)

“ Our new industrial umpire will be independent of unions, business and government. It will definitely not be a return to the old industrial relations club. Appointments will not favour one side over the other.”

~ Julia Gillard, 2007 (30 May - National Press Club)

WHAT ACTUALLY HAPPENED: A tribunal stacked with ex-union bosses and Labor linked figures...

2009	Dec 2009: Five of six new commission appointees have union backgrounds or Labor links. Two former union officials appointed from the NSW Industrial Relations Commission to the federal industrial tribunal.
2010	May 2010: Australian Workers Union official Chris Simpson appointed commissioner with the federal tribunal.
2011	Sep 2011: Two of three new commission appointees have union or Labor linked backgrounds.
2012	Feb 2012: Two of four new commission appointees have union or Labor linked backgrounds.
	Jul 2013: Five of eight new commission appointees have union or Labor leaning backgrounds. Legislative amendments take effect to restructure the tribunal, effectively demoting two existing Vice Presidents and promoting two new Labor appointees.
2013	Aug 2013: The latest appointment to the Fair Work Commission brings the proportion of union or Labor-affiliated appointments to 18 out of 27.

The 2013 reality is:

- 18 out of 27 (or two-thirds) appointees to the federal industrial tribunal under the current Labor government have had trade union backgrounds or Labor affiliations.
- Seven of the nine most recent appointments were at the presidential level. The tribunal currently has 23 presidential roles (including president, vice presidents and deputy presidents) and just 23 commissioner roles.
- Recent appointments have effectively demoted the two existing Howard-appointed vice presidents, Graeme Watson and Michael Lawler, and promoted two new Labor-appointed vice presidents. This is a massive attack on the independence and integrity of the tribunal.
- Serious structural issues now plague the Fair Work Commission.

PRACTICAL IMPACTS:

While appointed members of the federal industrial tribunal strive to maintain a high degree of independence and objectivity in the course of their duties, the following business impacts have been inescapable:

- The endless stream of union and Labor appointees has undermined employers' confidence in the system.
- The greatly enhanced role of the Fair Work Commission under the current system has seen those partisan appointments have greater impact on business outcomes than ever before.
- Business unease with the system is greater than ever following many anti-business decisions being handed down.

WHAT SHOULD HAPPEN NEXT:

For the Fair Work Commission to be seen as a modern and independent industrial tribunal, it desperately needs a properly balanced composition and members with real business experience.

An incoming federal government must appoint more tribunal members with business backgrounds and properly structure the tribunal's seniority and administrative arrangements so they are beyond reproach.

THE LABOR PROMISE: Union site entry laws will remain balanced and responsible

“ We understand that entering on the premises of an employer needs to happen in an orderly way. We will make sure that current right of entry provisions stay (and) unions get about their work without disruption to businesses.”

~ Kevin Rudd and Julia Gillard press conference, 2007 (28 Aug – Launch of Forward with Fairness MkII).

“ We believe (in) a clear cut set of rules that doesn't provide unnecessary burdens for employers. We've got to make sure that when it comes to union right of entry, that is prescribed to defined areas and properly authorised.”

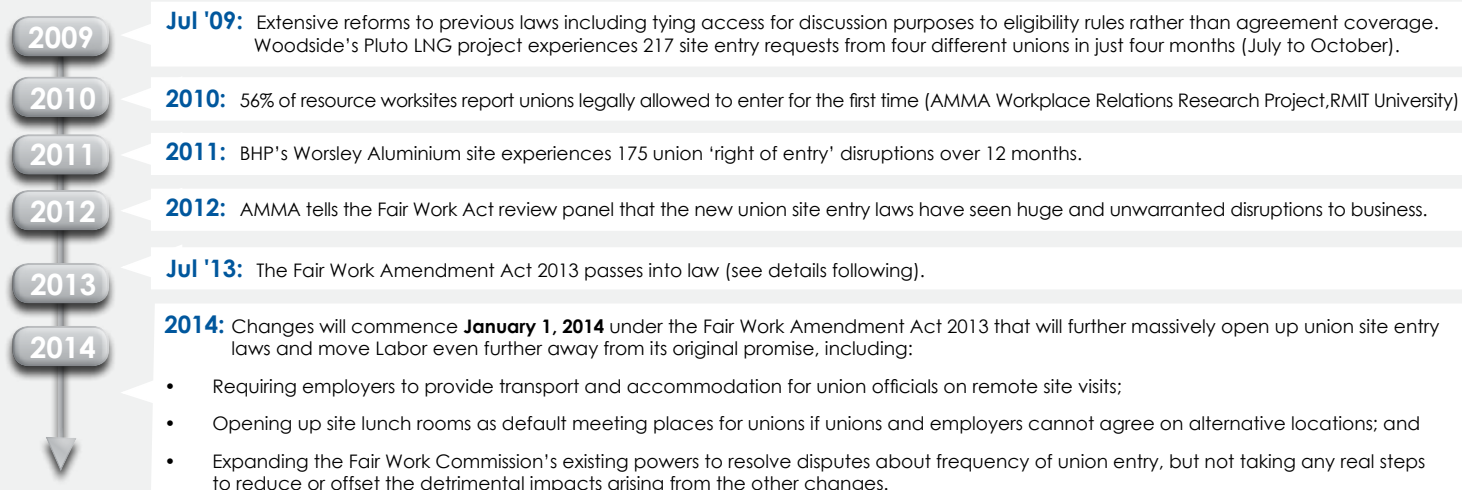
~ Kevin Rudd, 2007 (27 Jun – ABC Ballarat)

“ Changes to the entry rights will give more certainty for employers and help them remain competitive... I'm seriously engaging with employers and unions...we will try and come up with a joint package.”

~ Workplace Relations Minister Bill Shorten, 2013 (21 Mar – Press Release)

WHAT ACTUALLY HAPPENED: Employers suffer massive disruptions to productivity and efficiency across the country with Australian worksites completely opened up to increased union access from 1 July 2009.

Despite unequivocally promising that laws governing union right of entry would not change from the balanced and responsible pre-2009 model, the Labor Government has enacted several more rounds of wholesale changes that have opened up Australian worksites even further to union intrusion. Changes and implications to date include:



PRACTICAL IMPACTS:

The reality is that since the Fair Work Act commenced in 2009, unions have been able to enter worksites where they had no current or historical connection to the work being performed there, leading to:

- Unwarranted disruptions due to excessive visits for discussion and recruitment purposes;
- Difficulties for site managers in ascertaining which unions are entitled to enter which premises;
- Difficulties monitoring which groups of employees unions are meeting with onsite and ensuring unions are complying with the current legislative requirements and controls; and
- Increased demarcation disputes between rival unions who can now freely enter worksites where they couldn't before.

Labor's continued focus on putting unions between employers and employees has seen Australian worksites experience unnecessary disruptions through union site entry, often for recruitment purposes. This stems from the broken promises of the Rudd/Gillard/ Rudd Government to retain the pre-2009 union site entry laws, despite industry warnings that the changes would lead to major problems for business.

WHAT SHOULD HAPPEN NEXT:

With the next round of legislative changes set to take effect in early 2014, the current minimal restrictions on union access to worksites will be further neutered. The next Australian Government must work to restore the rules that existed immediately prior to the Fair Work Act 2009 taking effect which ensured balance and fairness between the parties.

AMMA's Resource Industry *Workplace Relations Election Paper: Trade union access to workplaces* contains full details of AMMA's proposed reforms in this area and can be viewed at the AMMA website at www.amma.org.au.

THE LABOR PROMISE: A tough cop will remain on the beat in the building and construction industry

“When it comes to the construction industry, we support a strong cop on the beat. Certainly, it is critical for the future of the construction industry and we will not tolerate the return of any unlawful practices.”

~ Kevin Rudd, 2007 (2 Jun - WA ALP State Conference)

“What the building and construction sector is looking for is that they want a tough cop on the beat. We want to make sure that no-one is engaged in improper conduct in the building industry.”

~ Julia Gillard, 2007 (2 Aug - ABC News Radio)

“We've put legislation in the Parliament to put the ABCC to within the jurisdiction of Fair Work Australia. We certainly see value to having strong industrial relations regulation in the construction sector.”

~ Bill Shorten, 2011 (13 Dec - ABC 774 Mornings)

WHAT ACTUALLY HAPPENED:

In June 2012, the Rudd/Gillard Government made substantial changes to industrial relations regulation for the building and construction industry, significantly watering down the regulator's powers. The amendments massively downgraded the inspectorate's enforcement and compliance powers and raised a green flag to unlawful conduct in the industry.

The formerly very effective Australian Building & Construction Commission (ABCC) was replaced with the neutered Fair Work Building & Construction (FWBC). The Building & Construction Industry Improvement Act 2005 was replaced with the Fair Work (Building Industry) Act 2012. Detrimental changes that reduced deterrents to unlawful union behaviour included:

- Reducing maximum penalties for unlawful conduct from \$22,000 to \$6,600 per breach for individuals and from \$110,000 to \$33,000 for corporations (including unions);
- Weakening the prosecutorial powers of the regulator, barring it from intervening in or initiating legal proceedings where other parties to the conduct have settled (encouraging union pressure on employers to settle);
- Weakening the “anti-coercion” provisions in relation to making, terminating, varying or extending industrial agreements, allowing coercive behaviour to fly under the radar; and
- Undermining the independence of the inspectorate, with the minister of the day able to give the regulator directions about its program and priorities and how it conducts its activities.

PRACTICAL IMPACTS:

Despite Labor's assurances it would retain a tough cop on the beat, the 2012 changes have resulted in far less of a deterrent and far fewer consequences for those who engage in unlawful industrial behaviour in the construction industry.

2005

2005 - 2012: ABCC initiates 105 court cases against union breaches of the law, of which just eight are unsuccessful.

Apr 2009: Wilcox Inquiry finds the ABCC has improved productivity, workplace harmony and supported Australian jobs and industry.

Dec 2009: Encouraged by the CFMEU, 1300 unionised workers take illegal strike action on Woodside's Pluto LNG Project, costing around \$3.5m a day (CFMEU v Woodside Burrup Pty Ltd, FCA 2010). The ABCC would later successfully prosecute the union.

Sep 2011: Federal Court fines CFMEU \$40,000 for unlawful strike action at Perth's City Square project.

Apr 2012: BHP Billiton closes Norwich Park coal construction project after widespread strikes over a new workplace agreement.

Jun 2012: ABCC replaced with FWBC with reduced compliance and enforcement powers. Largely due to construction disputes, ABS figures show eight-year high in number of working days lost due to striking.

Sep 2012: Defying court orders, CFMEU and CEPU members continue stoppages at Brisbane's \$1.5 billion Children's Hospital project. CFMEU illegally blockades Grocon's Emporium site in Melbourne for 16 days, costing Grocon \$5m to \$7m (FWBC v CFMEU 2012)

2013

May 2013: The Coalition promises to restore the ABCC with its full former powers as one of its first acts if it wins government at the 2013 federal election.

WHAT SHOULD HAPPEN NEXT:

Unlawful industrial action continues to plague the building and construction and resource industries despite Labor's assurances to the contrary. The weakened compliance regime will continue to act as a powerful incentive for further unlawful behaviour. The next Australian Government must reinstate the ABCC with the full investigatory and prosecution powers of the pre-2012 model and ensure that its enforcement powers cover onshore and offshore construction.

THE LABOR PROMISE: Compulsory arbitration will not be part of Australia's IR system

“The industrial relations system of the 20th century was based on arbitration... Labor's new system will be different.”
~ Labor's Forward with Fairness policy, 2007 (released 28 April)

“Compulsory arbitration will not be a feature of good faith bargaining. And Fair Work Australia will only be able to make a binding determination if the parties agree.”
~ Julia Gillard, 2008 (17 Nov - National Press Club)

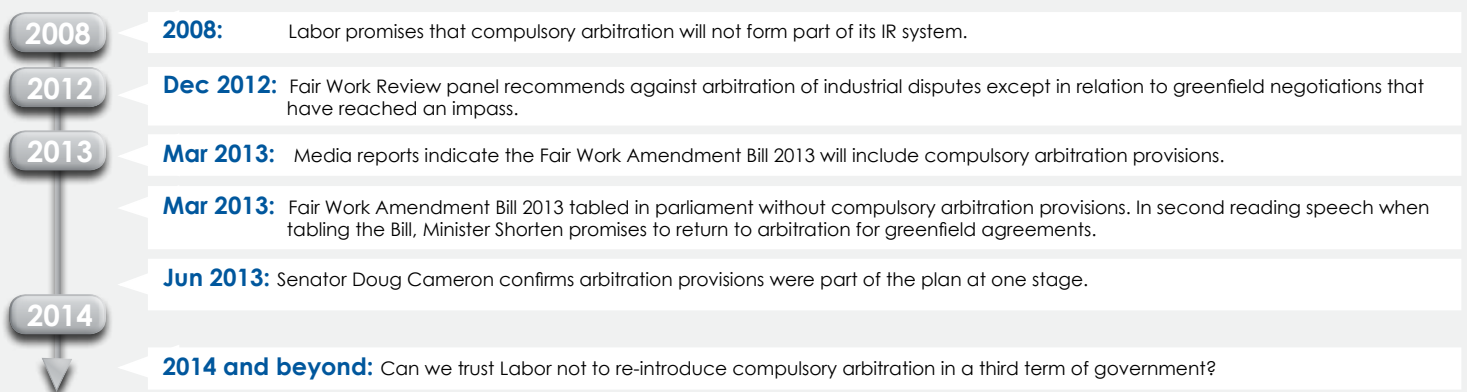
“As a general principle, I think arbitration is a last resort. I don't see it as the default position. I actually believe in the bargaining system. I think the Australian people will expect us to focus on the future, not just dwell on the past.”
~ Bill Shorten, 2011 (12 Dec - ABC 7:30)

WHAT ACTUALLY HAPPENED:

The Labor Government promised compulsory arbitration of industrial disputes would not occur under its workplace relations system. Despite those assurances, provisions for exactly that were touted for inclusion in the Fair Work Amendment Act 2013.

Under immense pressure from the business community, expert IR practitioners and independent MPs, Workplace Relations Minister Bill Shorten removed those provisions from the bill before it was tabled in federal parliament.

Despite those provisions not making their way into the bill as tabled, clearly the intention was there to do so. Labor Senator Doug Cameron confirmed that compulsory arbitration was on the table when speaking on the Fair Work Amendment Bill 2013 (27/6/2013). The Senator mistakenly said the bill included arbitration of greenfield and other disputes, referencing an earlier version of the bill and demonstrating that compulsory arbitration could well be on Labor's future agenda.



PRACTICAL IMPACTS:

The revelation of plans to re-introduce compulsory arbitration into Australia's IR system has completely eroded confidence that a re-elected Labor government would honour earlier promises not to impose outcomes on bargaining parties.

All four workplace relations frameworks since 1993 have shared an emphasis on market outcomes, agreement between employers and employees, and shifted away from arbitrated outcomes, until now. Any compulsory arbitration laws enacted in future would further undermine employers' ability to make unimpeded decisions about their operations and further reduce the ability for parties to resolve disputes between themselves.

The fact that two-thirds of appointments to the federal industrial tribunal under the current government have had union or ALP allegiances further undermines business confidence in the fairness of any arbitrated outcomes. In short, any moves towards compulsory arbitration are:

- Of major concern to Australia's resource industry and the wider business community;
- Contrary to Labor's explicit assurances that arbitration would not be a feature of its IR system; and
- Contrary to the recommendations of the government's own hand-picked Fair Work Review Panel.

WHAT SHOULD HAPPEN NEXT:

AMMA supports an extremely limited 'determination' power in the area of greenfield agreements, acknowledging that this is a unique area of bargaining where there is not yet any workforce to bargain with.

However, this is worlds apart from the compulsory arbitration of industrial disputes proposed by Labor. AMMA's model would allow for new resource projects to come to market in Australia without facing significant delays and cost blow-outs associated with the current system, which artificially inflates union influence in these nationally-significant investment decisions.

THE LABOR PROMISE: Freedom of association will be upheld

“ I believe in freedom of association. If you don't want to be a union member, it is completely wrong for government or anyone, to try and make you be a union member. So our laws will make it very clear the choice is yours.”

~ Julia Gillard, 2007 (29 Oct - 612ABC)

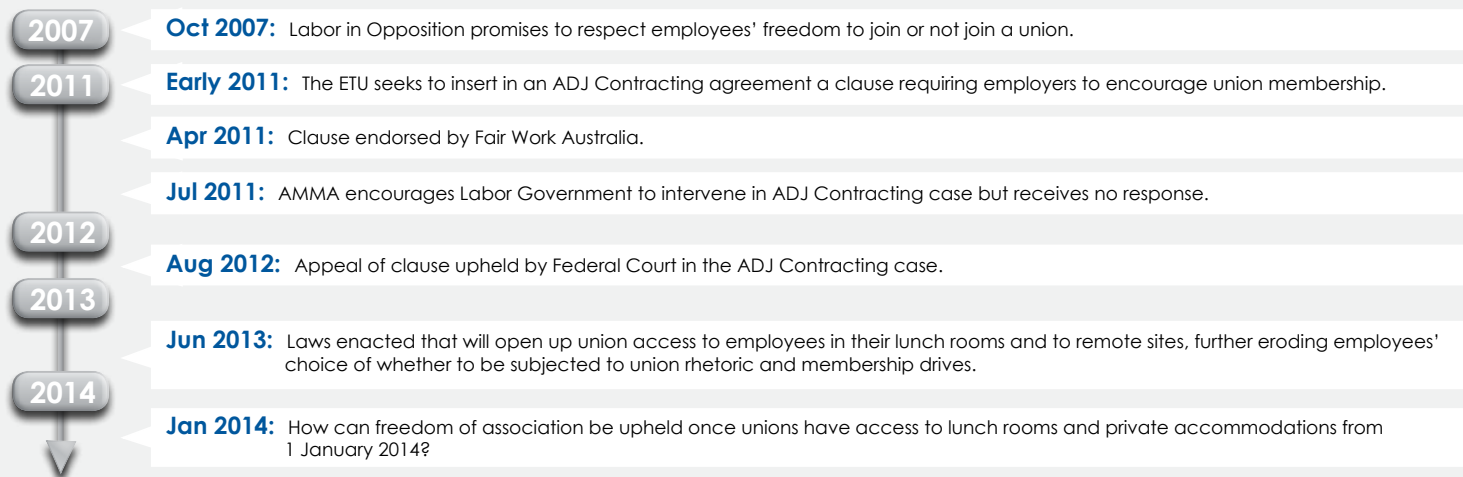
WHAT ACTUALLY HAPPENED:

Labor promised a balanced and fair workplace relations system that would respect the right for people to join or not join a trade union according to their wishes. Despite this pledge, the practical impacts of Labor's IR policies suggest otherwise.

In a series of decisions in the ADJ Contracting case, the courts and tribunals endorsed the inclusion of clauses in enterprise agreements that require employers to actively promote union membership to employees and to encourage employees to attend union meetings during work hours. This was allowable because, unlike the previous laws, such clauses were no longer deemed "prohibited content" under the new system.

The Labor Government did not object to the inclusion of such clauses and remained completely silent on the issue. Labor's latest Fair Work amendments take effect on 1 January 2014 and will further open union access to employees not only in their lunch rooms against their wishes but also potentially in their private accommodations where unions will need to be accommodated overnight for some remote site visits.

This is contrary to the existing protections for employees and delineations between employees' private and work time.



PRACTICAL IMPACTS:

The practical impacts of the ADJ Contracting decisions highlight the fine line between coercion and encouragement when it comes to an employer being required to promote union membership to employees. Someone applying for a job whom the employer 'encourages' to join a union might take that as meaning they will not get the job unless they join.

The requirement to actively encourage union activity also diverts important management resources away from the real job of doing business towards doing unions' job of recruiting new members for them. It is important to note the latest ABS statistics (*Employee Earnings, Benefits and Trade Union Membership, Australia, August 2012*) show 81.3% of the mining industry has chosen not to belong to a union, equating to:

- 87% in oil and gas extraction;
- 86.8% in metal ore mining;
- 79.7% in non-metallic mineral mining and quarrying; and 89% in exploration and other support services.
- 55.8% in coal mining;

Unions will have open slather access to employees under a range of recent Fair Work changes, leaving business with no confidence that current protections around freedom of association and union harassment will be maintained.

WHAT SHOULD HAPPEN:

While unions should be free to represent members who have joined a union of their own accord and who wish to meet with a union representative, employers should not be required to further entrench unions' role in the workplace by actively promoting union membership, nor should employers be liable for improper union conduct while accessing worksites.

The next Australian government must ensure genuine freedom of association is upheld by not allowing its workplace relations system to artificially promote union membership to workers whom otherwise have shown no interest in joining a union. Under no circumstance should employers be forced to promote joining an industrial organisation to their employees, just as employers should never discourage workers from doing the same.

THE LABOR PROMISE: Enterprise bargaining will lead to increased productivity

“The Fair Work Bill ‘aims to achieve productivity and fairness through enterprise level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action’.”

~ Fair Work Bill 2008, Second Reading Speech (4 Dec)

“Enterprise collective bargaining is an important driver of productivity and a key feature of our policy... Labor’s industrial relations policies will be focused on the big drivers of productivity.”

~ Julia Gillard, 2007 (14 Mar - Australian Workplace Relations Summit)

WHAT ACTUALLY HAPPENED:

The reality is that despite Labor’s promised focus on boosting productivity through enterprise bargaining, there are no requirements under the Fair Work Act to link any enterprise agreement outcomes to productivity improvements. Nor is there any requirement for the Fair Work Commission to ask the parties whether productivity improvements have been considered during bargaining before approving an agreement.

Over the past four years, the overwhelming majority of resource industry employers have not been able to achieve any productivity increases in exchange for wage rises during enterprise bargaining, even where those wage increases are exorbitant (see the AMMA Workplace Relations Project Report by RMIT University). Often, it is even impossible for resource industry employers to raise productivity issues during enterprise bargaining rounds.

Productivity improvements are particularly elusive when it comes to negotiating greenfield (new project) agreements with unions, with many employers agreeing on matters they otherwise would not agree to in order to secure an agreement with a union, which is the only option under the present system.

This is contrary to Labor Government promises that the system of bargaining under the Fair Work Act would result in increased productivity.

PRACTICAL IMPACTS:

The overwhelming majority (89% according to AMMA’s Workplace Relations Research Project) of resource industry employers have not been able to achieve any productivity increases in exchange for wage rises during enterprise bargaining, even where those wage rises are exorbitant.

2010

Feb 2010 Maritime Union of Australia (MUA) national secretary Paddy Crumlin bragged that massive pay rises won by offshore oil and gas workers were secured without productivity trade-offs. Crumlin was quoted in The Australian newspaper as saying that employer groups like AMMA who suggested productivity should have been part of the deal were ‘dinosaurs’ (The Australian, 3/10/2010).

In the dispute, the MUA and other maritime unions used ongoing strike action as a tactic to secure more than 30% pay rises plus a construction allowance of \$200 for each day worked in return for absolutely no productivity offsets and no changes to their duties.

2013

Jul 2013 Those negotiations have recently recommenced for a replacement agreement with no changes to the legislation that would lead to any different outcome this time around. Employers are again experiencing difficulties gaining any productivity improvements in exchange for generous wage rises.

WHAT SHOULD HAPPEN NEXT:

For Australia’s workplace relations system to support an internationally competitive, productive and sustainable resource industry, the IR framework must ensure:

- Protected industrial action during bargaining can only be taken as a last resort and that there is greater access to ‘cooling off’ periods in order to minimise productivity damage from lost time;
- There is a capacity to make greenfield (new project) agreements without exorbitant wage and condition outcomes or unnecessary project delays;
- Allowable matters in enterprise agreements pertain to the direct relationship between employers and employees and not to third party issues that have no bearing on productivity and efficiency;
- The location and frequency of union right of entry visits is reasonable and does not undermine operational requirements thereby minimising productivity impacts from the diversion of resources;
- Agreement-making options are broadened through a genuinely workable form of individual agreement; and
- Greater rigour is introduced into the threshold for accessing the adverse action / general protections jurisdiction to minimise the incidence of unmeritorious claims and the costs for employers of defending groundless claims given the reverse onus of proof.

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