

# **Speech to the HR Nichols Society 2013 Annual Conference**

## **The Changing Industrial Relations Landscape in Australia**

I'd like to take you on a brief journey as we sit as passengers on the bus the Government have put us in. As we drive through the changing IR Landscape in Australia, peering out through the window with no control over which roads we take, which direction we head or how fast or slow we hit those bumps along the way. This is how things have looked for businesses and practitioners over the last few years!

There have been many changes to the Australian Industrial Relations system since Kevin Rudd was elected as Prime Minister in 2007.

Firstly the *Workplace Relations Act* was replaced with the *Fair Work Act* ('FWA').

It took some time for a number of the changes to be tested and for their true impact to be realised. Unfortunately for the Australian Economy, the impact on business, on jobs, and on productivity, have indeed been realised.

As time has moved on, there have been an increasing number of changes to our Employment Framework. These changes have become increasingly ill-considered, increasingly reactive, increasingly union friendly, increasingly anti-business, increasing lacking in consultation and increasingly damaging to how the world sees us as a place to do business.

The level of interference in the management of private and public businesses and in our "independent umpires" has reached unprecedented levels.

### **Let's take a look at our Employment Tribunal**

It's pretty typical for an incumbent Government to make appointments to tribunals and courts from their side of the political fence. However, over the last 5 or so years we have seen the vast majority of appointments come from the Union side of the fence and I think it would be fair to say that this has resulted in a shift in the perceived independence of the Fair Work Commission.

Here are some examples of union appointments since 2007:

- Chris Simpson - Former Australian Workers Union senior industrial advocate
- John Ryan – Former Shop Employees Union National Industrial Officer
- Julius Roe – Former Australian Manufacturing Workers Union President
- Danny Cloghan – Former WA Prison Officers Union Secretary
- Michelle Bissett – Former Senior Industrial Officer with the ACTU
- Bernie Riordan – Former Electrical Trades Union NSW State Secretary
- Peter Sams – Former Secretary of Unions NSW.
- Ian Cambridge – Former National Secretary of the Australian Workers Union.
- Alastair McDonald – Former official with the Federated Clerks Union and the Australian Services Union
- Deidre Swan – Former Australian Workers Union official and member of the ALP, QIRC DP now dual appointee to the FWC
- Anna Booth – Former Textile, Clothing and Footwear Union and ACTU Official.
- Nick Wilson – Ex Union Official, former Fair Work Ombudsman appointed as a Commissioner in 2013
- Leigh Johns, former Chief Executive of the Fair Work Building and Construction Commissioner and long term labour campaigner appointed as a Commissioner in 2013.
- Val Gostenick – Former Lawyer who acted for the CFMEU and recently Bill Shorten

### **Appointment of Justice Ian Ross and New Vice Presidents**

Moreover we have seen considerable change in the management of the Fair Work Commission.

In February 2012 Justice Iain Ross was appointed as the new President of Fair Work Australia (as it then was). Justice Ross was formerly a Deputy Secretary at the ACTU.

On 28 March 2013 Bill Shorten announced the appointment of the two new Vice Presidents - Mr Joe Catanzariti and Mr Adam Hatcher SC. The Vice Presidents position now sit over the top of the previous deputy president positions.

***Lets have a look at the vast majority of matters brought before the FWC.***

April 2012 to June 2012 – General Protection Applications	
Section 365 Applications	Section 372 Applications
548	162
July 2012 to September 2012 – General Protection Applications	
Section 365 Applications	Section 372 Applications
543	134
October 2012 to December 2012– General Protection Applications	
Section 365 Applications	Section 372 Applications
563	143
January 2013 to March 2013– General Protection Applications	
Section 365 Applications	Section 372 Applications
740	148

The number of unfair dismissal and general protection applications have greatly increased with the introduction of the *Fair Work Act* when compared to the number of unfair dismissal applications under the *previous Legislation*.

Lets firstly look at General Protections/Adverse Action Claims

- From the year to March 2013 there were a total of 2981 claims

## Lets have a look at Unfair Dismissals

### UNFAIR DISMISSAL APPLICATIONS



Unfair Dismissal Applications	
	Section 394 Applications
April 2012 to June 2012	3494
July 2012 to September 2012	3521
October 2012 to December 2012	3867
January 2013 to March 2013	3501
<b>Total</b>	<b>14 383</b>

Total Number of Unfair Dismissal and Unlawful Terminations lodged under the Work Choices Legislation	
2005-2006	5758
2006-2007	5173

Over the year to March this year, we have seen a total of 14 383 unfair dismissal claims. Add this to the almost 3000 Adverse/General Protection Claims over the same period and we have a total of 17364 claims.

It is interesting to compare these numbers to those made under the WR Act. There were 5,100 claims in 2007 so this represents more than a tripling in claim numbers.

Since the introduction of the *Fair Work Act* there has been a substantial increase in the number of applications for protected actions resulting in increased costs and lower levels of productivity for business.

Here is just one random week's worth

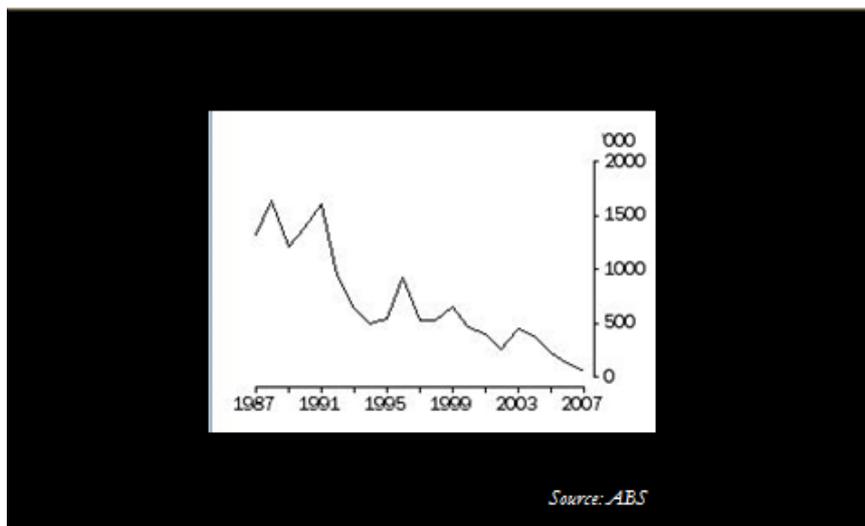
The repeated instances of industrial action at the Energy Australia Yallourn power station have had a financial impact which cost the Company around \$4 million dollars<sup>1</sup>. Executive Manager Michael Hutchinson said the cost would have to “come straight off our works program, costing more jobs.”

The industrial action stemmed from a CFMEU demand in Enterprise Agreement negotiations that the Company must advise the Union before making any major decisions.<sup>1</sup>

The proposed Coalition IR policy, if it can be put into place, will at least force meaningful discussions, but it won't stop these types of ridiculous claims being pursued.

#### WORKING DAYS LOST – WORKPLACE RELATIONS ACT 1996

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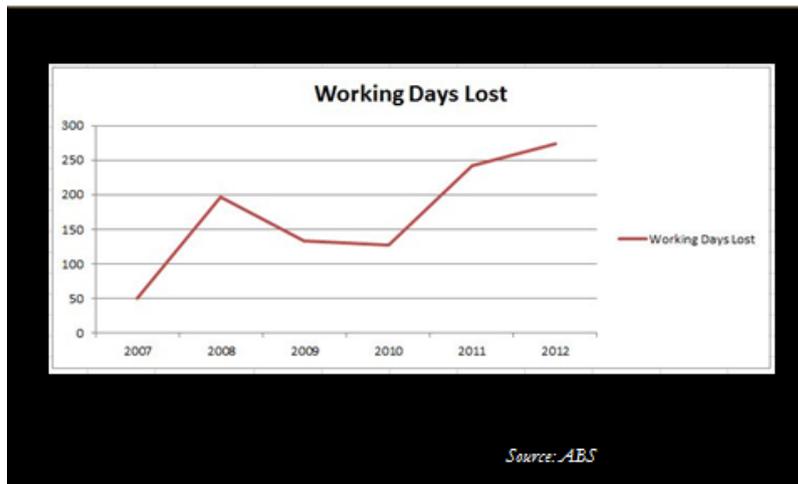


### The Impact of Industrial Action

The introduction of the *Fair Work Act* in 2009 has certainly had a big impact on the number of days lost to industrial action in our workplaces.

This Graph represents the number of working days lost in dispute due to industrial action under the Workplace Relations Act. As you can see in 2007 industrial action was down to 49.7 days lost per thousand employees in 2007.

<sup>1</sup> <http://www.theaustralian.com.au/national-affairs/industrial-relations/energy-australia-to-bypass-cfmeu-on-yallourn-power-station-worker-deal/story-fn59noo3-1226631368022>



Over the period since the change of Govt and the introduction of the Fair Work Act we saw those numbers rise to 273.2 days lost per thousand employees in 2012. This is over 5 times the numbers of days when compared to the 2007 figures.

**As our journey continues there have been a number of events worth noting, because while a train wreck is unpleasant to watch, this one will undoubtedly have an influence on future policy,** particularly if we are to have a Coalition Government in September.

### **The Grocon Dispute**

Another ugly construction dispute that erupted at the Myer Emporium building site in central Melbourne in August last year is an example of why the Construction industry, an important part of a strong economy, requires special attention.

As well as stopping work unlawfully, we hear reports of police horses being punched, of Union officials running down a Manager in his car.

All this because Grocon wouldn't bow to the CFMEU's demands to appoint workplace safety delegates at the site from outside Grocon and to fly the CFMEU flags onsite.

Orders from the Victorian Supreme Court to lift the blockade were ignored in another brazen display of disregard for the law.

### **The Craig Thomson Affair**

Over the last 12-18 months the Public has come to learn about allegations of fraud and misappropriation of Union members funds by Federal Member for Dobell, Craig Thomson during his time as the Federal Secretary of the Health Services Union.

150 charges of fraud have been alleged under the Victorian Crimes Act.

This story might be news to the general public, but it is most certainly not news to those who work in the field of Industrial Relations and I am absolutely certain it is not the only time that abuse of power, money or other benefits has occurred in Unions.

### **Julia Gillard AWU Affair**

Of course the Craig Thomson affair was followed by yet another.

The AWU Slush fund affair is an affair which one might say goes to the very heart of the relationship between the Government and the Unions.

An affair that is alleged to be the subject of an ongoing police investigation.

### **Why are these matters so significant?**

Because together they have built a compelling case for greater accountability of the Unions. One that must not be ignored.

It has made it abundantly clear that we need to look more closely at them, we need to regulate them and we need to increase penalties for wrong doing .

The Government has failed to do more than tinker with the legislation in an effort to make it look like they are doing something without really actually doing anything

## PLAN B

PLAN B



An article written by Ewin Hanna, the Australian Industrial Editor on Saturday 8 June 2013 stated:

**ONE autumn night in Sydney last year, Bill Kelty stood before hundreds of union officials and supporters and offered some pragmatic advice about how to prepare for political defeat.**

**In that speech Bill Kelty told those Union officials:**

**“You must always prepare. Every election had 2 plans. Plan A for a Labor win and we had plan B if the other side won” He went on to say:**

**“we would legislate our gains in advance to make it harder to take it off us” and “we did prepare for our defeat. We sat there day after day working out what we could do if (the Coalition) did certain things”**

Well as we reflect on the journey so far and as we continue the remainder of the journey, this certainly provides a poor excuse for the continuous barrage of regulation and imposition on business at a time when they needed quite the opposite. Quite simply, the desires of the Union put before the needs of the Economy and therefore the standard of living for all Australians.

### **Fair Work Act Review**

In 2012 the Government commissioned a review of the FWA. The review was conducted by a three member panel comprising Reserve Bank Board Member John Edwards, University of Sydney academic Ron McCallum and former Federal Court Judge Michael Moore. The panel was severely restricted in its terms of reference and the key issue of productivity was left out. The Terms of reference was effectively limited to an assessment of whether the objects of the act were being met. The result was not unexpected given those terms.

The report put forward 53 recommendations and the Government carefully chose which ones it would implement.

### **Fair Work Act Amendment Bill 2012 – Round 1**

The most significant legislative changes in 2012 were contained in the *Fair Work Amendment Bill 2012*, which adopted some of those recommendations.

The *Fair Work Act Amendment Bill 2012* made a number of changes to the FWA. For example:

- The name of Fair Work Australia was changed to the ‘Fair Work Commission’. (*adopted recommendation*)
- As I mentioned earlier, The Bill established 2 new Vice President Positions in the Commission that sit above the Deputy Presidents a move

seen as a deliberate act to increase Union control of our Independent umpire! (*adopted recommendation*)

- Causing further alarm, The President of the Commission now has wider powers, including the power to take matters out of the hands of Commission members and make decisions in their place. (*adopted recommendation*)
- The FWC will now review default fund terms in modern awards every 4 years and review the default superannuation list. Of course this has nothing at all to do with a push to include Union backed super funds with boards who, are made up with yet more Union representatives.

### **Legislating of the Building Code**

Legislating our gains Bill Kelty said?

A surprise announcement on 30 January this year that the Governments Construction Code and Guidelines had been converted into a legislative instrument ('The Building Industry Code 2013') to come into operation on 1 February 2013.

### **The Deals**

We saw the Prime Minister announce a plan to lift wages in the aged care and child care sector by making Age care providers eligible for \$1.2 billion in federal taxpayer funding and Child Care providers a further \$300 million if they put enterprise bargaining agreements in place that pay above-award rates.

A cynicist might say that the Government has found a thinly disguised way to launder taxpayer money through employers direct to Unions!

## **Superannuation contribution increases**

Superannuation contribution rates are set to increase to 12% from 1 July 2013 at 0.25% over a period of 7 years.

The final increase will be on 1 July 2019 for the 2019/2020 financial year.

## **Fair Work Amendment Bill 2013- Round 2**

As an election draws nigh we see another raft of changes contained in the *Fair Work Amendment Bill 2013*.

Initially there was some hope with the independents Rob Oakshott and Tony Windsor announcing they wouldn't support changes so close to an election without bipartisan support however this was shortlived with most of the changes getting through.

The Fair Work Amendment Bill 2013 does the following:

- Requires employers to consult with employees (who can have representation in the workplace) about a change to their regular roster or ordinary hours of work.
- Extensions the right to request flexible working hours.
- Defines what constitutes 'reasonable' business grounds for refusing a request for a flexible working arrangement.

## **Right of Entry**

**The Bill significantly increases union rights of entry.** Amongst other things it:

- Giving them access to lunch rooms.
- Forcing employers to arrange and pay for Unions to travel to remote sites and to accommodate them!

## **Arbitration in General Protections Matters**

The Bill also inserted a new provision that will allow parties to general protections matters involving a dismissal and unlawful termination matters to be arbitrated by the FWC in certain circumstances.

## **Proposed New Bullying Laws**

We now have a whole new area of regulation in the Fair Work Commission from 1 January 2014.

The new Workplace Bullying laws will allow workers to bring complaints to the FWC who will have 14 days to start dealing with it.

FWC can make orders to deal with the complaint or refer the matter to the relevant state safety regulator and impose civil penalties for breaches of FWC orders in relation to bullying.

Justice Ross has already indicated a concern about FWC's resources to deal with these matters both in numbers and in skills.

FWC has reported it is expecting some 3500 bullying related applications annually.<sup>2</sup>

# THE WORKPLACE SCORECARD

UNION WINS	EMPLOYER WINS
<ul style="list-style-type: none"> <li>• The establishment of 2 vice –president positions</li> <li>• Wider powers for the President of the Commission</li> <li>• Restrictions on Notice of Representational Rights</li> <li>• Review of Superannuation Fund Terms in Modern Awards every 4</li> <li>• An individual union official can only be a bargaining representative</li> <li>• Proposed change to Anti-Discrimination Legislation. <i>(Proposed)</i></li> <li>• Increasing the entitlement for parents taking unpaid leave</li> <li>• Allowing parents to choose when they take their unpaid parental</li> <li>• Ensuring pregnant women can transfer to a safe job where one is</li> <li>• Legislating the Building Code</li> <li>• Providing that women who take unpaid special maternity leave</li> <li>• Extension of right to request flexible working arrangements to</li> <li>• Giving Employees returning from parental leave the right to</li> <li>• Employee protections from roster changes</li> <li>• Implementation of a 'bullying jurisdiction'</li> <li>• Implementation of Arbitration in the FWC for General Protections</li> <li>• Government 'crack down' on employers with visa 457 employees</li> <li>• The 'Aged Care Deal</li> <li>• The Child Care Deal</li> <li>• The Fair Work Act</li> <li>• Right of Entry Provisions</li> <li>• Increased Superannuation</li> <li>• Transfer of Business Rules</li> <li>• Broadening of bargaining claims</li> <li>• Default representation in Bargaining</li> <li>• Abolishment of ABCC</li> <li>• Watering down policing</li> <li>• Removal of significant number of exemptions to unfair dismissal</li> <li>• Removal of Individual Agreements</li> <li>• Significant number of appointments to the FWC and other</li> <li>• Broadening of discriminatory identifiers in the Fair Work Act</li> </ul>	<ul style="list-style-type: none"> <li>• Extending notice period for termination of individual flexibility</li> <li>• Time limit for General Protections Claims reduced to 21 days</li> </ul>

## The Scorecard Thus Far

I think its fair to say Plan B has worked! But at what expense?

We can't deny the great imbalance at the expense of business, productivity and jobs.

Just about every bit of legislation or change in the Workplace arena over the last 5 years has made it more difficult for an Employer to run their business and more difficult for them to compete globally where they need to.

We now have a level of regulation in our workplace relations system, the likes of which we have never seen before.

We have seen a quadrupling in the volume of workplace legislation.

The level of regulation has become so great that we are now seeing a shift from a system that regulates relationships between employers and employees/unions to a system that now also regulates relationships between individual employees through the implementation of the bullying jurisdiction that will allow individual employees to obtain orders in the FWC against other individual employees.

### **Are Unions in Control?**

I'll answer that with another question....

Do you think Plan B has been put into place?