

**Speech to the
HR Nicholls Society 2014
Annual Conference**

A Year of Lost Opportunity

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Stopping the decline – A year of Lost Opportunity

Introduction

Since our last conference we have continued to see further labour market reform, however it hasn't been going in the direction that was so desperately needed, indeed it has continued to go backwards. Much of this has been due to the implementation of Bill Kelty's espoused Plan B¹ by the former Rudd-Gillard-Rudd Government. Let's review the year that was....

In what appeared to be a desperate bid to shore up as many layers of Plan B as possible, we saw change after change pushed through Parliament with no slowing down as the last opportunities to do so arose before the election. The polls painted a clear picture that Labor were heading for opposition and in a defiant refusal to accept the will of the people, the Government reacted by pushing through changes that had no mandate whatsoever, changes that were not designed to have a positive effect on employment, productivity or the broader economy, changes that were instead designed to bolster Plan B. Unfortunately as Margaret Thatcher once said (and Australians are now finding), "the problem with socialism is that you eventually run out of other people's money".

The last minute amendments to the *Fair Work Act* included:

- Embedding into every award, requirements for businesses to consult with unions and staff in order to change rosters of work and/or working hours;
- Increased regulation by prescribing upon which grounds requests from employees in regards to the right to request flexible working arrangements might be refused;
- Increased right of entry powers for union officials, including the requirement that employers facilitate union travel and accommodation to access remote sites; and
- Allowing union officials to have unilateral access to lunchrooms where they have a right to enter a site.

New Government

Moving forward to September 2013, it turns out the polls were right.

We saw a change of government with the Labor Party suffering a 3.5 % swing against it nationally. The incoming Coalition government had gone to the election with a conservative list of labour market policies, a plan to hold a review of the *Fair Work Act* and a promise not to change anything significant until those changes had a mandate from the next election in 2016.

ALP Leadership

One of the last things Kevin Rudd did was to change the way the leaders of the ALP came and went. The contenders this time were Anthony Albanese and ex AWU National Secretary Bill Shorten.

¹ Hannan, E. 'Unions plan for life after Labor', *The Australian*, 8 June 2013.

Guns drawn, it was an ALP battle, the proponents of which were respectful and polite, the likes of which we had not seen in 6 years. Mr Shorten won more support from the powerbrokers in the executive of the party (those famous faceless men) with a caucus vote of 55 to 31 and Mr Albanese won more support from the rank and file with almost 60% of the vote to Mr Shorten's 40%. All things not being equal of course, Mr Shorten was declared the winner and new leader of the ALP.

The Senate

So that leads us to examine the ability of the new Government to govern.

The new Government have a clear majority in the lower house however at present the Greens and the ALP continue to control the Senate. Both parties have indicated they will not support the Carbon tax, changes to the ABCC, amendments to the Fair Work Act or indeed many of the budget measures announced just this week, despite the fact the Government clearly received a mandate in their decisive election win.

That means they will have to wait until July when the half senate changes in order to have any kind of chance to of getting any policy changes through. From July, the Coalition requires 5 additional seats from the 8 minor party seats to vote with them. This will be challenging with 3 Palmerites and 1 Motoring enthusiast planning to form a block, which leaves 4 independents. The Government will not be able to get anything through without the support of that block.

Australian Building and Construction Commission

One of the Coalitions pre-election policies was the reestablishment of the Australian Building and Construction Commission ('ABCC'). The *Building and Construction Industry (Improving Productivity) Bill 2013* put forward by the Coalition late last year sought to re-establish the ABCC by replacing the Office of the Fair Work Building Industry Inspectorate. The Bill includes industry specific provisions prohibiting unlawful action and coercion and restores higher penalties for contraventions of those provisions.²

The abolition of the ABCC by the former Government and the watering down of efforts, resources and powers by replacing it with a much weaker FWBC (Fair Work Building Commission), has seen the Construction Industry regress into more lawlessness, higher costs and lower productivity.³

Lawlessness

After a prolonged, and at times violent battle, with Grocon on the Myer Emporium project in Melbourne, the CFMEU Construction and General Division's Victorian branch was fined more than \$2 million after the Victoria Supreme Court found it guilty of five charges of criminal contempt for breaching orders not to hinder access to two Grocon sites.⁴ There are many other examples.

² *Building and Construction Industry (Improving Productivity) Bill 2013*, Explanatory Memorandum, pg 2.

³ Mather, J. 'ABCC Boosted Productivity by \$7.5 billion a year: Abetz', *Australian Financial Review*, 16 January 2014.

⁴ *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134, 31 March 2014.

Despite this, shockingly both the Labor Party and the Greens have made it clear they will not be supporting legislation to re-establish the ABCC.⁵

Construction Code

On the 17th of April 2014 the Coalition released a draft Building and Construction Code.⁶ The Code will take effect when the *Building and Construction Industry (Improving Productivity) Bill* is passed by the Senate, which is expected to be in July 2014.

However in a move that was sound, the Government announced that the Code will apply retrospectively to Agreements made from 23 April 2014.⁷

ABCC Boosted Productivity by \$7.5B a Year

Employment Minister Eric Abetz made a personal submission to the Senate Committee regarding the re-establishment of the ABCC. His submission included an analysis of the number of days lost to industrial action on building sites since the Commission was abolished in 2012. It claims that “productivity was higher and consumers were better off by around \$7.5 billion a year under the ABCC.”⁸

Australian Bureau of Statistics data shows that in the five years before the ABCC began operations in 2005, the industrial dispute rate in the construction sector was five times the all industries average.⁹ While the ABCC was in operation the quarterly average was 9.6 working days lost per 1000 Employees, which was under two times the all industries average.¹⁰

The abolition of the ABCC, the increased lawlessness that followed and the refusal of the Senate to back the legislation in restoring it - are additional examples of the further decline in labour market reform.

Labour Market Low

In an analysis on the current state of the labour market conducted by former Labor Senator John Black, showed that the number of under-used workers has grown since the labour market was re-regulated by the Rudd/Gillard Labor Government.¹¹

The majority of jobs created during the six years Labor was in power came in areas either funded by the taxpayer or significantly influenced by the Federal Government.¹²

⁵ 'Abetz says Labor must back new ABCC', Sydney Morning Herald, 28 January 2014.

⁶ *Building and Construction Industry (Fair and Lawful Building Sites) Code*, 17 April 2014.

⁷ *Building and Construction Industry (Improving Productivity) Bill 2013*, section 11(2).

⁸ Mather, J. 'ABCC Boosted Productivity by \$7.5 billion a year: Abetz', *Australian Financial Review*, 16 January 2014.

⁹ Australian Building and Construction Commission, 'Industrial disputes, working days lost per 1000 Employees', *Australian Financial Review*, 16 January 2014.

¹⁰ Ibid.

¹¹ Maher, S. 'Labour Market Returns to GFC Low', *The Australian*, 5 October 2013.

¹² Ibid.

Mr Black said *“the legacy of Labor’s re-regulated labour market was the under-utilisation in the workforce stagnated well above the Howard –Costello levels for two years after the post – GFC stimulus, before beginning to climb again from November last year, reaching 13.5% in the middle of this year.”*¹³

Productivity

Looking again at productivity, a discussion paper by remuneration consultants Egan Associates, released in October, stated that *“... It is our view that payments to a proportion of the Australian Workforce are currently out of step with the rest of the world. Australia’s preservation of penalty rates, overtime and other cost additive provisions has in some cases lost relevance in a world where access to information and assistance via the internet is 24/7...”*¹⁴

The report recommended that the Government should:

- Commit to further award simplification;
- Move away from the view that workers should receive premiums for varying shifts and certain days of the week; and
- Open employer access to sources of capital and skilled labour at internationally competitive pay rates.¹⁵

Of course we have seen none of this yet.

The Egan’s discussion paper presented further compelling evidence of the need for Governments and Industry to act. In this graph the Orange line represents the Australian Unit Labour costs compared to other Nations. The darkest blue line, the next one down, being the OECD Europe position, the lightest blue at the bottom representing the G7 and the middle blue line representing the OECD Total. Since 2003 we have been higher. Australia has the highest cost of labour in the OECD world! Frighteningly the gap since 2009 has and is continuing to escalate at increasingly alarming levels.¹⁶ Additionally, Australia’s annual minimum wage is the highest in the world with Australian’s considered to be living in the most expensive G20 economy in the world.¹⁷

Review by Productivity Commission

The Productivity Commission review promised by the Coalition will be required to assess the performance of the workplace relations framework and is due to produce a report by April 2015. Specifically, it will look at the impact of the current workplace relations framework on things like unemployment, under employment, job creation, productivity, competitiveness and business investment.¹⁸

¹³ Ibid.

¹⁴ Egan Associates, ‘Egan Associates Discussion Paper – Productivity’, October 2013, pg 4.

¹⁵ Ibid at pg 5.

¹⁶ Ibid at pg 24, Figure 14.

¹⁷ Kehoe, J. ‘Australia the most expensive economy in the G20’, *Brisbane Times*, 12 May 2014.

¹⁸ Hockey, J. Productivity Commission Review of the Workplace Relations Framework – Draft Terms of Reference.

Unfortunately businesses are not going to see the benefit of any recommendations made by the Productivity Commission as the Coalition is firmly committed to taking any recommendations to the 2016 election before they can be implemented.

Legislative Changes in Queensland

On the 3rd of April, only just over a month ago, the Queensland Parliament passed the Work Health and Safety and Other Legislation Amendment Act 2014 which among other things seeks to put an end to fabricating non-existent safety issues in order to extort employers. The key changes which were proclaimed to take effect yesterday (16 May 2014) are to:

- Require Unions give at least 24 hours' notice to enter a worksite on Safety grounds, aligning now to the *Fair Work Act 2009*;
- Increase penalties for breaching Safety permit conditions;
- Introduction of penalties for failure to comply with the entry notifications requirements; and
- Remove the power of unions and health and safety representatives to direct workers to cease unsafe work,¹⁹ while maintaining the rights of individual's workers to cease work if they believe there is a serious risk to their health and safety.

New Bullying Jurisdiction

The new bullying jurisdiction that commenced operation on 1 January 2014 is proving to be an interesting and in some ways, frightening new form of regulation.

The Fair Work Commission ('FWC') as at the end of March this year had only received a total of 151 bullying Applications, a majority of which were against managers, 109 of the 155 in fact.²⁰

Key binding decisions so far:

- After calling for submissions from the ACTU, AiG and ACCI the Full Bench of the FWC decided that matters occurring before 1 January 2014 could be considered when dealing with applications for orders to stop bullying.²¹
- We saw the first substantial bullying order on 1 March, which required the alleged perpetrator to, amongst other things, have no contact with the complainant, make no comment about their clothes or appearance and complete any exercise at the Employers premises before 8am. The complainant was also ordered not to arrive at work before 8:15am.²²

The substance of this order raises some serious questions about whether or not it is appropriate to make orders that impinge on the liberty of people in the workplace, to make orders that impact on an Employer's

¹⁹ *Work Health and Safety and Other Legislation Amendment Bill 2014*, Explanatory Notes, pg 2.

²⁰ Fair Work Commission Anti-Bullying Report Jan – Mar 2014.

²¹ *Application by Kathleen McInnes* [2014] FWCFB 1440 (6 March 2014).

²² *Applicant v Respondent*, PR548852 (21 March 2014).

ability to conduct its core business and manage its workforce. For example dictating what time people can arrive at work and how they interact with others while there.

These new laws have stretched regulation in the workplace beyond which we have seen in Australia. Instead of regulating the traditional Employer/Employee relationship now we see the regulation of the relationship between individual Employees, of how businesses conduct their workflows/processes and indeed in this case, the starting and finishing times of their staff.

Increasing Costs and their impact on our global competitiveness

There have been a number of examples over the year, where high costs and low flexibility in an Australian industry has directly contributed to job losses. It should be crystal clear by now that we cannot isolate Australia from the rest of the world. Australia simply must be competitive globally and the repeated call of those who claim that this is just about reducing pay and conditions, is an irresponsible and demonstrates quite frankly the lack of understanding about what is required to address these challenges. Let's have a look at some examples:

Holden

Before the formal announcement by Holden that it was shutting up shop in Australia, an article in the *Australian* claimed that the Holden Enterprise Agreement has "utterly sunk Holden's prospects."²³

When you look at some of the conditions in the Holden Enterprise Agreement you might draw the conclusion that this statement is justified. Whilst these were reported in some detail in *The Australian* you will find them at **Appendix 1** of this paper.

Toyota

Early this year Employment Minister Eric Abetz has announced that he would intervene to support Toyota's appeal against a Federal Court decision that it breached the 'no extra claims' clause in its enterprise agreement by asking the Employees to vote on varying the enterprise agreement to remove certain uncompetitive clauses.²⁴

SPC Ardmona

In rejecting SPC Ardmona's request for \$25 million dollars in funding assistance, Prime Minister Tony Abbott pointed to SPC's 'pretty extraordinary' enterprise agreement.²⁵

Under the enterprise agreement workers are potentially entitled up to 104 weeks (2 years wages) if they are made redundant.²⁶ They get two weeks for each six months service. They get generous loadings on top

²³ Collier, G. 'High Wages Stall Holden Engine', *The Australian*, 10 December 2013.

²⁴ *Marmara v Toyota Motor Corporation Australia Limited* [2013] FCA 1351 (12 December 2013).

²⁵ Tony Abbott cited in Workplace Express, 'Abbott points to work practices in denying SPC funding', 31 January 2014.

²⁶ *SPC Ardmona Operations Shepparton/Mooroopna (Food Preservers) Enterprise Agreement 2012*, s 2.7.3.

of that if they are over 50 years old.²⁷ Employees can also have their unused sick leave paid out when they are made redundant.²⁸

In comparing those features to the underpinning award:

- Under the modern award redundancy payments would be limited to 16 weeks²⁹;
- There would be no entitlement to sick leave payouts; and
- Mid-level production workers under the Award would receive \$19.07 per hour³⁰ or \$38k per annum vs \$26.15 an hour and around \$52,000 per year³¹ (not including all the other allowances they are entitled to under the Agreement). The Agreement has allowances for cold work, wet work, hot work, Team Leader, Lumping (that's for lifting heavy things), container allowance and my personal favourite, they get a bright can stacking allowance.³²

Subsequent to the Federal Government's refusal to give them a financial leg up, SPC Ardmona announced it would receive \$22 million in funding from the Victorian Government and \$78 million from its owner Coca Cola Amatil. The condition is that they will have to pay the money back if they leave inside of five years.³³

Royal Commission

On the 10th of February 2014, the Prime Minister announced that he would establish a Royal Commission into 'union governance and corruption' to be headed by former High Court Judge Dyson Heydon.

In setting the parameters of the Commission the Government has said that the Commission will look at alleged financial irregularities associated with the affairs of trade unions and 'activities relating to slush funds and other similar funds and entities established by, or related to, the affairs of these organisations'.³⁴

The AWU, HSU, CFMEU and ETU were named specifically in the Inquiry.

²⁷ SPC Ardmona Operations Shepparton/Mooroopna (Food Preservers) Enterprise Agreement 2012, s 2.7.3.4.

²⁸ SPC Ardmona Operations Shepparton/Mooroopna (Food Preservers) Enterprise Agreement 2012, s2.7.3.2.

²⁹ Manufacturing and Associated Industries and Occupations Award 2010, clause 23.

³⁰ Manufacturing and Associated Industries and Occupations Award 2010, clause 24.

³¹ SPC Ardmona Operations Shepparton/Mooroopna (Food Preservers) Enterprise Agreement 2012, schedule 4.

³² SPC Ardmona Operations Shepparton/Mooroopna (Food Preservers) Enterprise Agreement 2012, S5.2, S5.3, s3.41, s3.40, s3.37

³³ ABC News, 'Victorian Government announces \$22m assistance package for SPC Ardmona', 13 February 2014.

³⁴ 'Letters Patent' (Cth), <http://www.tradeunionroyalcommission.gov.au> defines the terms of reference which are

quite broad and include inquiring into and reporting on:

- The governance arrangements of separate entities established by Unions or their offices;
- The circumstances in which funds are sought from third parties and paid to those entities;
- The extent to which union members are protected from any adverse effects or negative consequences from any union wrongdoing;
- Any conduct that may amount to a breach of law;
- Any bribes, secret commissions or other unlawful payments or benefits arising from contracts, arrangements or understandings between unions or their officers; and
- The adequacy and effectiveness of existing regulations and legislation to deal with union corruption/wrong doing.

Current Status

The Fair Work Amendment Bill 2014 was introduced into parliament on the 17th of February 2014 with the message that it would “deliver key aspects” of the Coalitions pre-election IR policy.

The Bill provides for the following key amendments:

- Flexibility terms in Enterprise Agreements must provide a broader range of items that might be dealt with. This would be in response to the watering down of the effect of these clauses, a regular demand in Union Agreements;
- Introducing the ability to trade off non-monetary items for monetary items in IFAs subject to a number of checks and balances;
- Changes to Greenfields Agreements that require parties to bargain in good faith when agreement can't be reached after three months, the ability to ask the FWC to approve an Agreement as long as it passed both a BOOT test AND a further test ensuring it is consistent with prevailing industry standards. (Unfortunately, prevailing industry standards are completely unsustainable and this is why we have a problem in the first place. The prevailing industry standard test needs to be removed in order for these changes to reverse the slowing down of major project investment that we have seen over the last few years.)
- There are proposed changes to the Transfer of Business provisions under the Fair Work Act which will allow Employees to seek employment in other related entities of their employer without carrying their existing terms with them;
- The Bill seeks to repeal the amendments made by the *Fair Work Act Amendment Act 2013* that required an employer to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations and will also remove the absolute right of permit holders to access lunch rooms;
- Further changes are proposed to rights of entry, moving back to the 2007 ALP Election policy Forward with Fairness in which they promised to leave in place the requirement for unions to be party to an industrial instrument in order to enter a site;
- The Coalition policy goes one step further, it provides for an invitation to enter a site by the FWC where the permit holder can prove they are entitled to represent the interest of a member who performs work on the premises and that a member has invited them in; and finally
- Unions wanting to ballot members to take industrial action will be required to have begun bargaining before they do so, i.e. the Employees must have at least been given their notice of representational rights in accordance with section 173 of the Act.

Unlikely Source of Support

In a somewhat unlikely source of support, former Labor Front Bencher and ex union leader Martin Ferguson has come out in support of elements of Tony Abbott's proposed changes to the *Fair Work Act*. Mr Ferguson has described Mr Abbott's proposed changes as 'quite modest'.

He said “high labour costs and low productivity are an ‘unsustainable mix’ and called for ‘clear-eyed’ assessment of the Fair Work Act amid, the continued ratcheting up of wages and conditions under Green

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fields Agreements – with the last agreement outcome becoming the starting point for negotiations over the next one.”³⁵

He also warned that “Australia risked pricing itself out of \$180 billion worth of new LNG investments that would create 150,000 jobs.”³⁶

Unfortunately, instead we continue in our decline.

Junior Rates Scrapped

In a significant decision made earlier this year, a Full Bench of the FWC has agreed to scrap the 90% wage rate for 20 year old retail workers³⁷

Given the decline in workforce participation by younger workers, this has created a disincentive for employers to take on less experienced workers and train them. There is a cost to train workers, so if employers have to pay them as much as an older more experienced worker, why should they bother.

Conclusion

We have had some significant challenges this year with the early part of the year seeing a raft of rushed changes put in by the outgoing government who were doing their very best to implement Bill Kelty’s Plan B.³⁸ The latter part of the year has continued the slow burn that has resulted from the labour market changes implemented between 2009 and now.

So whilst we have had a change of government we continue to see the decline of key economic indicators that have and are a result of past decisions and past policy that is still in place strangling business growth, productivity, youth employment and employment more generally.

The smallest of movements by the Government in regards to labour market reform, the changes to the Fair Work Act and to the Building industry are before parliament, however their implementation has been unreasonably blocked in the Senate by the Greens and the ALP despite a mandate from the electorate at the last election to which those changes were made clear.

The productivity commission’s review and recommendations will be of critical importance to the labour market and consequently our economic and social prosperity, our ability to repay our debt, our ability to provide opportunity for growth and to provide a mechanism for increasing productivity, all of which are fundamental to protecting and improving the living standards of Australians.

³⁵ Maher, S. ‘Martin Ferguson backs Tony Abbott on IR law changes’, *The Australian*, 28 February 2014.

³⁶ Ibid.

³⁷ Modern Awards Review 2012 – General Retail Industry Award 2010 – Junior Rates [2014] FWCFB 1846 (21 March 2013).

³⁸ Hannan, E. ‘Unions plan for life after Labor’, *The Australian*, 8 June 2013.

Toyota Agreement

- Base wage rates for process workers in the Agreement are in the \$60,000 to \$80,000 per year range. Compare this to the modern award which only provides for base rates of \$37,000 to \$42,000;
- Occupational health and safety people are given ten days paid time off per year to be trained by the Union;
- Union delegates are allowed up to ten paid days a year for union training in 'how to be an effective union delegate, with two of these delegates being entitled to an extra one month's paid leave to 'further their industrial and/or leadership development'; and
- Casuals are only allowed to be hired in limited circumstances and after three months continuous full-time work a casual must be paid a permanent.³⁹

With unaffordable conditions such as these, it is not hard to see why Holden are struggling. Perhaps if they paid employees a more comparable wage to the Award, Holden would be in a much better position.

At least if Holden do leave "the average production-line worker will walk away with a redundancy package of between \$300k and \$500k." ⁴⁰

³⁹ Collier, G. 'High Wages Stall Holden Engine', *The Australian*, 10 December 2013.

⁴⁰ Ibid.