Putting the 'Fair' Into Fair Work –Address to the HR Nicholls Society

by Senator Eric Abetz, Shadow Minister for Workplace Relations

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My sharply honed forensic instincts make me suspect that amongst some gathered here this afternoon, there may be a cohort that was disappointed with the Coalition's approach to workplace relations at the last election …

Some things never change.

Indeed, I recall this august body was critical of 'that policy' – the name of which has momentarily – no permanently – slipped my mind …

How right you were!

As a Tasmanian, I am always delighted to appear at H R Nicholls fora and seek to honour the name of H R Nicholls, a former editor of the Hobart Mercury – my local paper.

H R Nicholls was a man who was willing to go to jail in his campaign to expose some inappropriate industrial relations rulings. Thank goodness for the High Court. I sometimes ponder whether current editors would be as committed and the High Court as sensible. But I digress!

After the ideological battle of recent times, neither the Coalition nor Labor took a substantial policy position to the 2010 election. It was as though the Industrial Commission had imposed a compulsory 'smoko'– forgive the politically incorrect language.

But the 'time out' was rightly seen by many as necessary to see how the new system would settle down. There was genuine industrial relations change fatigue within the community.

As the system is settling down, a few characteristics are emerging.

APPREHENDED BIAS

For those Aussie Rules tragics within our midst, thank you for your sacrifice in listening to me rather than being at the 'G' this afternoon. After Geelong's magnificent one point victory over St Kilda last week Friday night, I got to thinking.

How would we feel playing a game of Aussie Rules if the on-field umpires also happened to be members of the team we were competing against? Would we be confident that the umpire would treat our side with fairness? Perhaps we might entertain a suspicion that there was a tendency to lean in favour of the other side.

Most people I know would be a little wary, if not completely dubious. After all, someone with a vested interest in seeing the other side walk away victorious can't really take on the role of umpire with a true degree of fairness and independence.

Fair Work Australia, the 'independent' workplace umpire dealing with disputes and dismissals, recently told a Senate Estimates Committee that there is no requirement for members of the tribunal to resign from political parties or industrial organisations[1]. In other words, members of the bench, the independent umpires themselves, may also be members of an industrial organisation or political party.

This begs the question – will people appearing before the industrial tribunal believe they are getting justice if the umpire is possibly a paid up member of the other side?

Will small business, defending an unfair dismissal claim, believe that they will get a fair hearing knowing that the tribunal member might be a member of the same union who represents the worker?

Will a worker who wants to stop their wages being reduced as a result of the modern award system feel confident they will get a fair hearing if the umpire is a member of the Council of Small Business of Australia (COSBOA)?

Given the unconscionable stacking of the bench, the latter is highly unlikely to occur!

Let me be clear – I trust that the men and women appointed as independent umpires are able to make sound judgments about potential conflicts of interest and disqualify themselves early to avoid apprehensions of bias. But I am a Senator and ex-lawyer. Workers and small business owners, whose livelihoods, prosperity and future depend on the decisions of the tribunal, may think otherwise. And as the old saying goes, *perception* is everything when it comes to bias – apprehended bias.

It is important that there is absolute transparency in what happens in our industrial tribunal. Transparency is necessary to ensure that those seeking justice can do so with complete confidence.

And on this, I welcome Ms Gillard's commitment to 'let the sun shine in'[2]. It's just a shame that the curtains are still drawn.

The Coalition has previously raised concerns about the appointments to the industrial tribunal and transparency. Before he became Prime Minister, Mr Rudd promised that the appointments 'wouldn't just be an endless tribe of union officials'[3], but nonetheless seven out of eight appointments have in fact been just that, a line of union officials.

But it doesn't stop just with the industrial tribunal. The Labor appointed chief of the Australian Building and Construction Commission (ABCC), the independent watchdog charged with making sure construction sites follow the law, is a paid up member of the Australian Labor Party and intends to retain his membership[4].

This has been admitted on several occasions before the Senate Estimates Committee, followed by denials that this membership may create a perception of bias[5].

But anyone who reads the 'industry updates' issued by the ABCC, may be forgiven for thinking that there is a degree of Labor bias starting to emanate from this independent statutory body funded by our taxpayer dollars. Take this extract from their 23 December, 2010 Industry Update (with emphasis added):

The Government's agenda currently features a specific focus on areas including:

- *ensuring a strong economy;*
- *the plan to return the budget to surplus in 2013;*
- *lifting capacity in the economy to better manage the challenges of the mining boom;*
- *investing in infrastructure; and*
- ***extending market reform in health, education, carbon and water.***

The building and construction industry is crucial to this agenda. ***Just as these issues are the focus of the national agenda, they have been identified as a major focus of ours.[6]***

How is it that the ABCC, whose responsibility is to ensure that workplace laws are upheld in the building and construction industry, considers water, health, education and carbon reform as a 'major focus'?

This little frolic of reverting to Party activism highlights why the Commissioner is so compromised whilst he retains his membership of the ALP.

I cannot help but note the serendipity, the coincidence, the fortuitous alignment of certain heavenly bodies which has seen the ABCC take on as new, vital, front of mind, two issues publically advocated by Labor's most extreme left wing - Senator, Doug Cameron of AMWU fame – namely sham contracting and under payment of wages.

This announcement of change of direction was made before the new Commissioner could even get his feet under the desk.

In itself that is not a problem, but for the fact that both these areas of law are pursued and enforced by other bodies, which and are doing so exceptionally well.

Like all Australians, I want our industrial tribunals and statutory agencies to ensure that the law is fairly enforced and applied, without fear or favour. I want people to have confidence in them. Given the newness of the Fair Work framework, it is particularly important to get it right from the beginning.

All of our courts and tribunals need to be transparent and free from the perception of bias as this is fundamental to any democracy and to ensure respect for the rule of law.

As it currently stands, Fair Work Australia and the ABCC are open to accusations of bias, which could be lessened by ensuring those with a decision making role resign from their political or industrial affiliations.

I call for this small change in the interests of upholding transparency and delivering on the Prime Minister's promise of letting the 'sunshine in'[7].

FAIR WORK OMBUDSMAN

Another area of key concern to the Coalition and to the Australian people is at the office of the Fair Work Ombudsman.

Here we have a situation where employees and employers have nowhere to turn for independent advice and assistance. People can call the hot line or talk to the FWO online and obtain advice – advice that is neither binding nor to be taken as legal advice.

But if the employer acts on that advice and is audited down the track and it turns out to be wrong, the employer can face very severe penalties.

Also, if employers approach the Ombudsman , seeking advice on a particular situation, the Ombudsman can turn around and penalise the employer for doing the wrong thing.

It goes without saying that this is another area where 'fair' could be brought into the Fair Work regime.

It is unfair on employees and employers alike to not have a place from which to get information without fear of prosecution.

But this also puts people in a quandary for another reason. How can you trust an agency which can't even give you binding advice?

It seems that Labor have assumed that every business, big and small around the country has an industrial lawyer on staff…

…and that every worker is in a union. A suspicious mind may even suspect that Labor is trying to force people to re-join unions.

PRODUCTIVITY & NO WORKER WORSE OFF

As with most things this government does, it sets out with wonderful spin but spectacularly fails in matching the spin with substance.

Labor, with its Fair Work Act has been no different. One of the objectives of the Act is- *"achieving productivity and fairness"[8]*, something that no-one could argue with and something that had, and still has, the full support of the Coalition.

The problem is that the spin does not match the reality. Instead of driving us towards a more productive nation, the legislation is permitting the exact opposite[9].

Instead of students being able to do the paper run in the morning or work at their local hardware store after school, we now have small business operators themselves doing these jobs.

On public holidays and weekends, we are seeing cafes and retail outlets close because they cannot afford the labour.

On the other hand, we have university students struggling to get through uni who can no longer get jobs in the hospitality and retail sectors because employers cannot afford them.

While the Coalition guaranteed at the last election that we wouldn't change the Fair Work Act – bearing in mind that there are still proceedings before Fair Work Australia on the minimum hours issue, which we hope adopts a common sense approach in the interests of

students, employers and the economy – if Labor were in the future to amend the Act to address such issues we would support them.

Labor promised us that 'no worker would be worse off'[10] under Fair Work. Now even the Unions[11] are telling us that many are worse off.

Literally thousands of Australian workers are being ripped off under Labor's so-called "modern awards". Under Labor's new laws childcare workers, aged care nurses, bar staff and funeral workers have lost entitlements and had their pay cut.

This is despite Labor's ironclad promise that *'no worker would be worse off'* under Labor's Fair Work Laws. Surprisingly, even the unions now admit that workers have had wages and conditions ripped away from them and that Labor's modern awards scheme is deeply flawed.

One wonders if this breach of solemn promise that 'no worker would be worse off'[12] gave Labor the courage to break its carbon tax promise. But that's a topic for another day.

These workers, who are some of the lowest paid in the country, will now be forced to commence expensive and complex legal action in the courts simply to recover what Labor has taken away from them – just to get back to where they were 18 months ago.

When the Fair Work laws passed through Parliament, the Coalition knew this would be a problem and tried to fix it by putting Labor's guarantee into law.

Yes, Labor voted against the Coalition and by doing so threw thousands of low paid workers to the mercy of a complex, confusing system that has now been proven to actually take conditions and pay away from them.

Ironically, this was Labor's criticism of Workchoices! (Damn it, I said it.)

PRODUCTIVITY

If one is actually concerned about the future of the nation as a whole, and the long term interest of individual workers, then productivity has to genuinely be front and centre of any workplace relations system.

It is one thing to chant the mantra, it is another to deliver it. As we saw with the MUA case in Western Australia, this Government is prepared to embrace 30 per cent wage increases without any productivity gains or concern for the flow-on effects.

And the flow-on effects are plain to see. Indeed even the former Labor Treasurer, Frank Crean was able to recognise that 'one man's wage increase is another man's job.' That is not fair.

Most people want to see fairness in people obtaining employment. The fact that after-school hours work is being denied to newpaper boys and the like because of minimum hour clauses in awards is not fair to either the businesses or the students concerned.

On the other hand, if you are working for a cleaning contractor who has a contract to clean a 300 square metre office space, you are by law entitled to be employed for a single hour.

It is hard to understand the fairness in saying that a cleaner can be employed for a minimum of one hour, but a student or paper boy needs to be employed for a minimum of three hours.

ADVERSE ACTION – RIGHT OF ENTRY

It is also difficult to see how 'fair' fits into the new regime of adverse action and right of entry where the employer is required to prove a negative. Let me turn to adverse action[13].

Adverse action was never part of Labor's 'Forward with Fairness' document. It was a surprise insert into the legislation which potentially has all the ramifications of the reverse onus of proof in the New South Wales Occupation and Health and Safety legislation which Labor were going to continue in New South Wales had they been re-elected.

One week on, let's celebrate the great victory in New South Wales and the new Premier's commitment to overturn this grossly unfair and job destroying trade union madness which threatened to derail the national Occupation and Health and Safety regime. But that is an aside.

Fair Work Australia has reported that the number of adverse action claims under the Fair Work Act is on the rise. The number of claims in the September and December quarters were 434 and 464 respectively. That compares to a total number of claims in the year ending June 2010 of nearly 1200.

The 9 February 2011 decision of the Federal Court in the Barclay v The Board of Bendigo Regional Institute of Technical and Further Education[14] highlights the problems the Coalition predicted.

The Federal Court has interpreted Labor's Fair Work Act as, in effect, absolving an employee engaging in industrial activity or as a union officer from any responsibility and accountability as an employee.

The Australian Chamber of Commerce and Industry have quite rightly warned that the decision "throws into doubt legitimate company action against staff who happen to be associated with union activities"[15].

My very real concern is that the adverse action provisions of the Fair Work Act could make union representatives untouchable.

Just look at Jones v Queensland Tertiary Admissions Centre Ltd[16]. Quite rightly, QTAC investigated complaints of workplace harassment and bullying and they came to the view that the appellant – a union official – was in the wrong.

The primary concern is that QTAC even investigating whether the union official had been harassing and bullying other employees constituted adverse action.

Law firm Blake Dawson have been on the record about the Federal Court decision, saying "On the approach of the majority, it may be that any conduct in a union capacity regardless of whether it is inappropriate, incompetent or in breach of an employer's policies or procedures is immune from any adverse consequence being brought by an employer [most typically disciplinary action]."[17]

You would be unsurprised to hear me say that I do not think that union representatives should be awarded such a superior status in our workplaces.

To coin a phrase, ‘it’s not fair’.

These provisions and the decisions by the Federal Court will undoubtedly affect all aspects of engaging with employees, from the recruitment process to general management and from how complaints are handled to the potential termination of an employee’s position.

RIGHT OF ENTRY

Most people would question the fairness of the right of entry laws - laws that we were promised would not be changed, a promise made on the life of the Prime Minister’s own mother[18]. I suppose after having done that to your mother, it is pretty easy to go back on a ‘no carbon tax’ promise.

The issue of union right of entry and access to records has been on the Coalition's radar for some time. There is an accepted right for a union to enter a workplace where it has members. However there are also important historical limitations and rules defining such a right.

Labor's *Forward with Fairness* document prior to the 2007 election contained an express commitment to retain existing right of entry provisions. Indeed, the then Shadow Minister Julia Gillard told us:

We will make sure that **current right of entry provisions stay**. We understand that entering on the premises of an employer needs to happen in an orderly way. **We will keep the right of entry provisions**.[19]

Based on these promises, it was rightly expected by all involved that the existing right of entry provisions would be maintained. However, as we know, this was simply just not the case.

Not only did the Act change the right of entry provisions, it allows a union official who is a permit holder to inspect the records of workers who are not members of a union in certain circumstances.

When Labor put up the Fair Work Bill, we said that there was no “public good” policy reason for the shift in right of entry and that it was undeniably designed to increase union power.

Respected economics lecturer Professor Kates wrote in ‘*The Australian’* earlier in the year that early warning signs suggest the Fair Work Act is seriously hurting business confidence and that right of entry provisions are, surprise surprise, unraveling in the way that we suspected it would.[20]

Professor Kates had been analyzing the results of a survey of industrial relations personnel within the mining and resources sector. He tells us that "the effects of this union presence is showing up in all the data". He goes on, saying that:

> ..bargaining has become more difficult. Workplace flexibility is being diminished. Industrial action is harder to deal with.[21]

All in all, he sums it up quite simply:

> the survey portrays an industry facing more difficult times in making workplace adjustments just as the demand for the products of our resources sector is picking up.

Steve Knott of the Australian Metals and Minerals Association also told *'The Australian*' that the industry has "seen 51.1% of businesses recording increases in unions visiting workplaces".[22]

And, as we suspected at the time, he goes on to say "many visits were union membership fishing expeditions resulting in valuable resources being diverted to chaperone union officials around worksites".

For obvious reasons, these new right of entry provisions, which Julia Gillard promised that we wouldn't have are damaging productivity in Australia's most productive sector and are damaging productivity across the board.

GOOD FAITH BARGAINING

Let's turn to good faith bargaining. Most people would agree that it is not fair that good faith bargaining provisions allow unions to go on strike simply on the basis that they have advised the employer that they intend to negotiate about new conditions but have not provided the employer with any detail whatsoever to which the employer could actually respond.

The outcome of the JJ Richards decision is an alarming development. It has essentially exposed another lie of Julia Gillard and Labor, who promised us that industrial action would only be used as a last resort measure to facilitate genuine bargaining. Now it has become another lever in the union tool box and will be used to force an employer to the table, or to boost membership ranks, or to achieve some other social activist aim that has little to do with the actual needs of workers or business.

The failure of Labor to respond to the outcome of JJ Richards is evidence not only of the Government's true long term intentions behind the good faith provisions, but also evidence that the Labor-Green alliance is alive and well.

After all, it is Greens policy that strike action be available at any time, in any place, and for any reason.

Even Labor's IR Business advisor, Heather Ridout, is concerned about developments in this area and has recently called for the Government to amend the Act to rectify these problems.

These calls will be a test for Labor and Julia Gillard. Will she default to protecting the unions, or, stay true to her word about how these provisions were intended to operate? I predict the former, particularly with the make up of the Senate changing after 1 July this year.

Labor will continue to rely on ABS figures that show levels of industrial action are not increasing. But we here today would all agree that these figures do not accurately represent the true situation; they are, after all, merely a summary of media reports. They do not reflect the substantial increase in applications for protected action ballots; they do not represent the emboldened nature of the trade union movement; and they do not represent the experiences of business on the ground and in the real world.

CONCLUSION

While I understand that the Fair Work legislation is Ms Gillard's personal legislative baby, and Labor will be reluctant to make any changes, I strongly call on the government to let the ‘sunshine in’.

If they did: Labor would stop political or industrial affiliations for senior officials at Fair Work Australia and the Australian Building and Construction Commission.

Labor would ensure that employees and employers have a point of contact to ask about the laws – in effect to separate the advice giving agency and the enforcement body.

Labor would ensure that no worker is worse off.

And finally, Labor would enable the delivery of the productivity of which the legislation speaks for the benefit and welfare of all Australians.

Labor must right their wrong and put the ‘fair’ back into Fair Work.

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[1] Senate Education, Employment and Workplace Relations Committee Hansard, *Senate Estimates*, 22 February 2011, Pp.EWR54

[2] Julia Gillard Press Conference, 7 September 2010

[3] Kevin Rudd interview with Kerry O’Brien, 7:30 Report, 30 April 2007

[4] *Watchdog chief's links 'a concern'*, The Age Newspaper, 29 September 2010

[5] Senate Education, Employment and Workplace Relations Committee Hansard, *Senate Estimates*, 22 February 2011, Pp.EWR109

[6] *Industry Update,* Australian Building and Construction Commission, 23 December 2010

[7] See 2

[8] Fair Work Act 2009

[9] Quarterly change in market sector labour productivity (5 year rolling average), prepared by the AI Group

[10] Julia Gillard interview with Kieran Gilbert, Sky News Agenda, 4:15pm 19 March 2008

[11] *Battlers jilted by Labor IR reforms*, The Daily Telegraph, 3 March 2011

[12] See 11

[13] **Adverse action** is a new concept introduced by the Fair Work Act 2009. The adverse action provision has the potential to give rise to claims by prospective, current and former employees in a wide range of circumstances, including in respect of discrimination, an area traditionally confined to Federal and State anti-discrimination laws.

[14] Barclay v The Board of Bendigo Regional Institute of Technical and Further Education [2011] FCAFC 14

[15] *Employers fear union ruling*, Mark Sculley, Australian Financial Review, 21 February 2011

[16] Jones v Queensland Tertiary Admissions Centre Ltd [2009] FCA 1382

[17] Blake Dawson Employment Alert, 10 February 2011

[18] *"If you'd like me to pledge to resign, to sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you like."* Julia Gillard, National Press Club debate, 8 November 2007

[19] Julia Gillard, 28 August 2007, Press Conference

[20] *Union Revels in an Unbalanced Act*, Steven Kates, The Australian, 2 February 2011

[21] See 3

[22] *Concerns rise over union entry,* Patricia Karvelas, The Australian, 2 February 2011