6

Deadlocked Bargaining Disputes: Industrial Action, Agreement Termination and Access to Arbitration

Shae McCrystal

Introduction

Conventional models of voluntary collective bargaining proceed from the premise that the bargaining parties are best placed to resolve their own disputes on the terms, and at the level, that they see fit. The capacity to take industrial action should be available where the parties are unable to reach agreement on terms acceptable to them. According to Weiler, it is 'the strike that determines which side will find it more painful to disagree, which party will be forced to make the major moves toward compromise'.[1]

This model of voluntary collective bargaining is endorsed by key international labour standards,[2] and has been implemented in many industrialised economies. Both ILO standards and national systems treat arbitration as an appropriate vehicle for resolution of public sector bargaining disputes and disputes in essential services. Occasionally, it is also used as a means of resolving first contract disputes.[3] It is not generally available as a means of resolving disputes where the parties have bargained to impasse.

The system of enterprise bargaining that is set out in the *Fair Work Act 2009* (Cth) (FW Act) broadly conforms to this model, albeit with some significant departures from the applicable international

1 Weiler 1980 at 49.

2 Specifically the International Labour Organization Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98); see further International Labour Conference 1994; Creighton 2012a; Gernigon, Odero & Guido 2000.

3 See generally ILO 1980; see also Forsyth 2015; Novitz 2003 at ch 13; Novitz 2017.