

# RIGHT TO STRIKE?

## Industrial action under the *Fair Work Act*

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The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.<sup>1</sup>

Strikes and other forms of industrial action have been an abiding concern for the framers of industrial relations legislation in Australia since Federation. From outright prohibition in the early years of the 20th century, to 'ban clauses' contained in awards, and against the background of the common law remedies for breach of contract and under the industrial torts, Australian law has consistently rendered unlawful virtually all forms of industrial action, and armed

employers with an intimidating arsenal of remedies should it occur.

Notwithstanding its unlawful nature, industrial action has been a common feature of the Australian industrial landscape. Resort by employers to the remedies the law provided in the event of industrial action remained rare until the last 20 or 30 years. From the 1980s onwards, however, employers became increasingly willing to exploit the legal remedies available to them to combat industrial action, and the ordinary courts

became involved to a greater extent in industrial disputes.

The increased tendency for employers to enforce their rights in the event of industrial action coincided with the introduction from 1993 of mechanisms enabling collective bargaining and the making of statutory workplace or enterprise agreements. One consequence of the establishment of a statutory process of collective bargaining was the introduction, for the first time, of limited protections for industrial action undertaken as part of the bargaining process. It was recognised that collective bargaining could operate effectively only if the weapon of industrial action was available.

**PROTECTED ACTION**

This resulted in the introduction of what has been consistently referred to as 'protected action'; that is, industrial action taken for the purpose of advancing claims in respect of a proposed agreement. Participants in protected industrial action were protected against liability under the common law industrial torts, for breach of contract or other liability otherwise attracted by industrial action.

From the outset, strict limitations were imposed upon the taking of protected action, policed by the Australian Industrial Relations Commission. These limitations included the creation of a bargaining period, notice requirements and the requirement that a party satisfy the Commission it was genuinely trying to reach agreement. The Commission was able to bring action to a halt by suspending or terminating the bargaining period. Industrial action taken outside of these strict limitations remained unprotected and subject to common law remedies, as well as powers conferred on the Commission to order that industrial action stop or not occur.

The restrictions imposed on protected action were significantly tightened with the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005*. Enhanced procedural requirements were introduced, particularly the requirement to undertake a 'protected action ballot' of workers prior to industrial action taking place. Various categories of industrial action were excluded from constituting protected action. Direct prohibitions were introduced for industrial action occurring prior to the nominal expiry date of an agreement, or involving what was called 'pattern bargaining'. The discretions previously conferred upon the Commission as to whether to order industrial action to stop or to terminate a bargaining period were removed.<sup>2</sup>

The limitations imposed by law upon unions and their members organising or engaging in protected industrial action as well as the unlawfulness of industrial action under the general law have been repeatedly criticised by the International Labour Organisation (ILO) as contravening the obligations under international conventions to which Australia is a party. The ILO has particularly criticised the restriction of protected action to single business bargaining, the procedural restrictions imposed upon protected action and the prohibition of secondary boycott action.<sup>3</sup> These findings by the ILO Committee of Experts should be acutely embarrassing for Australia, which has traditionally maintained

a high level of observance of ILO standards.<sup>4</sup> The criticisms, however, unsurprisingly failed to move the Coalition government.

The Rudd government has exhibited barely less disdain for industrial action than its predecessor. In the lead-up to the 2007 federal election, while publicly reviling some aspects of the WorkChoices legislation, the then Labor opposition made it clear that it intended to maintain a tough line with respect to industrial action. Labor promised 'clear, tough rules' for industrial action.<sup>5</sup> This promise has been reflected in provisions of the *Fair Work Act 2009* (FW Act) which commenced operation on 1 July 2009. The objects to the Act (s3) include reference to imposing 'clear rules governing industrial action'.

**THE FAIR WORK ACT 2009**

The FW Act retains the bulk of the restrictions on industrial action contained in the WorkChoices legislation. Protected industrial action can only occur strictly in the context of bargaining for the making of a new enterprise agreement within a single enterprise. Industry-wide or multi-enterprise industrial action will not be protected. The requirement to undertake a protected action ballot has been retained, as have the notice requirements. The industrial action provisions will be policed by the new independent umpire, Fair Work Australia (FWA), which has been armed with formidable powers to control industrial action that is not authorised by the Act. >>



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The FW Act deals with industrial action in three ways. Industrial action is protected, unprotected or prohibited. Within the restrictions and exclusions imposed by the Act, industrial action taken in the context of negotiations for the making of an enterprise agreement is protected. Any industrial action which is unprotected may be subject to prohibition by FWA or action in the general courts. In addition, certain forms of industrial action are subject to outright prohibition by the Act and expose persons participating in the industrial action to penalties.

Protected action takes three forms:

1. employee claim action;
2. employee response action; and
3. employer response action.

'Employee claim action' is industrial action organised or engaged in for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement (s409). 'Employee response action' (s410) and 'employer response action' (s411) are (self-evidently) action taken in response to industrial action engaged in by the other party to the bargaining process. Unlike the WorkChoices legislation, the only form of employer-protected action is lockout action, undertaken in response to industrial action taken by employees. Employers are no longer able to take offensive industrial action.

Industrial action remains restricted to enterprise-level bargaining, and the Act prevents industrial action in support of common claims across an industry. Protected action can only relate to the bargaining of a single-enterprise agreement<sup>6</sup> and must not relate to a proposed agreement that is a greenfields or multi-enterprise agreement (s413(2)). While the rules relating to the making of multi-business agreements have been relaxed, there remains a prohibition upon industrial action across more than one business. Industrial action involving 'pattern bargaining' will also be excluded from protection. If a union is seeking common terms<sup>7</sup> in two or more enterprise agreements relating to more than one employer, any industrial action taken in support of such claims will not be protected unless the union can show that it has been genuinely trying to reach agreement with each employer (s412).

In this respect, the FW Act continues to defy recommendations of the ILO in relation to the Coalition era legislation. The ILO Committee on Freedom of Association

has observed that 'the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and ... legislation should not constitute an obstacle to collective bargaining at the industry level'.<sup>8</sup> The prohibition of pattern bargaining and the deprivation of the right to engage in protected industrial action in support of multi-business agreements are difficult to reconcile with the principles of freedom of association and an uninhibited process of collective bargaining.

The FW Act has done away with the notion of a bargaining period. Protected industrial action can take place at any time after the nominal expiry date of an existing agreement so long as it is for the purpose of supporting or advancing claims in relation to a new agreement. However, the requirement to apply for a ballot order and obtain authorisation by a protected action ballot before industrial action still stands (s437). The Act has, to some extent, streamlined the procedure for obtaining a ballot order and conducting the ballot. For example, although FWA may invite submissions from relevant parties, employers no longer have a right to make submissions in relation to the making of a ballot order. This has the potential to avoid ballot order hearings becoming a mechanism for frustrating industrial action.

The protected action ballot process remains a mechanism for policing the conduct of industrial parties. The applicant for a ballot order is required to satisfy FWA that it has been genuinely trying to reach agreement (s443(1)). The concept of 'genuinely trying to reach agreement' has been interpreted as involving consideration of the reasonableness of bargaining conduct, such as whether the party has adopted an all or nothing approach.<sup>9</sup> It remains to be seen whether the new provisions requiring 'good faith bargaining'<sup>10</sup> will be considered relevant to the granting of a ballot order. [For more information on good faith bargaining, see Joellen Riley's article in this edition.] Compliance with orders relating to the bargaining process is also separately made a prerequisite for protected industrial action (s413(5)).

Protected industrial action will be permitted to continue only if its effects do not exceed acceptable levels. FWA is compelled, in certain circumstances, to make an order suspending or terminating protected industrial action. FWA is required to terminate protected industrial action if satisfied that the industrial action is causing significant economic harm to the employer or employees (s423) or endangering the life, personal safety or health or welfare of the population or part of it or causing significant harm to the Australian economy (s424). Protected industrial action is to be suspended if FWA is satisfied it is appropriate for a cooling-off period (s425), or if significant harm is being caused to third parties (s426).

It has already been observed that, grammatically at least, it seems odd to speak of terminating industrial action.<sup>11</sup> The intention of the legislation appears to be to replicate the provisions that previously permitted the Commission to suspend or terminate a bargaining period, thereby denying access to protected action. It is the right to take protected industrial action that is suspended or terminated.<sup>12</sup> Such an order is not directed at particular industrial action, but is

intended to bring to an end all protected industrial action in support of a proposed enterprise agreement. Any industrial action that follows will not be afforded the protections conferred by the Act.

FWA also retains powers to deal with unprotected action. If it appears to FWA that unprotected industrial action is happening, threatened, impending or probable, or being organised, it must order that the action stop, not occur or not be organised for a specified period (s418). The discretion held by the Commission prior to 2006 has not been reinstated.<sup>13</sup> However, the wording of the provision has been altered so as to require that the order relate to the particular industrial action which is happening, threatened, impending or probable, or being organised. This appears to be intended to endorse the approach of the Full Federal Court in *Transport Workers' Union v Australian Industrial Relations Commission*<sup>14</sup> which had been doubted by the Full Bench of the Commission.<sup>15</sup>

The FW Act continues to contain an outright prohibition upon the taking of industrial action prior to the nominal expiry date of an existing enterprise agreement or workplace determination (s417). Persons who organise or engage in industrial action before an existing agreement has expired may be subject to a penalty of up to \$6,600 for an individual and \$33,000 for a corporation. Statutory injunctions are also available to restrain industrial action undertaken before the expiry of an agreement and industrial action involving pattern bargaining claims (s422).

Strike pay remains prohibited. An employer who makes, an employee who receives or a union that requests such a payment is exposed to the imposition of a penalty (ss470, 473, 474 and 475). The minimum period of non-payment of four hours has been removed in the case of protected action, but remains for unprotected industrial action. Where the period of unprotected industrial action is less than four hours, an employee must nonetheless be deprived of four hours' pay (s474), presumably by way of punishment. New provisions have been introduced with respect to partial work bans, allowing an employer to give notice that it requires all work to be performed and the employee will not be paid, or that it proposes to reduce the employee's usual pay during the action (s471). FWA is able to adjust the amount of the reduction if it was not reasonable (s472).

### CONCLUSION

As will have been observed, the FW Act maintains tight controls on industrial action. While in some respects the Act has loosened the Work Choices era constraints on collective bargaining, such as by expanding the permissible content of agreements and reducing the restrictions upon multi-enterprise agreements, it has done little to redress the balance of power in the collective bargaining process in its treatment of industrial action. The industrial action provisions remain a regressive and overly complex feature of the legislation, which continues to impede the right to strike. ■

**Notes:** **1** Report of the ILO Committee of Experts on Freedom of Association and Collective Bargaining, International Labour Office, Geneva, 1994, para 147. **2** For a detailed description of the Work

Choices provisions, see: S McCrystal, 'Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and Work Choices', (2006) 16(2) *The Economics and Labour Relations Review* 193. **3** Report of the Committee of Experts on the Application of Conventions and Recommendations, 87<sup>th</sup> Session, ILC, 1999, Report III (Part 1A), at pp204-7. **4** B Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia', (1998) 22 *Melbourne University Law Review* 239, at p278. **5** Rudd and Gillard, Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces, ALP, Canberra, 2007, p16. **6** A single-enterprise agreement can extend to related corporations or employers engaged in a joint venture or common enterprise (s172(5)). **7** As to what constitutes 'common wages or conditions', see *Trinity Garden Aged Care v Australian Nursing Federation* (2006) 155 IR 124. **8** Report of the ILO Committee on Freedom of Association, International Labour Office, Geneva, 295<sup>th</sup> Report, Case No. 1698, para 259. **9** *Australian Industry Group v AFMEPKIU* (AIRC, Munro J, Print T1982, 16 October 2000). **10** *Fair Work Act 2009*, Division 8 of Part 2-4. **11** *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 at [44]. **12** The Explanatory Memorandum states that 'suspension or termination of protected industrial action brings to an end the right to take protected industrial action': Explanatory Memorandum, Fair Work Bill 2009, para 1707. **13** See, for example, the approach in *Coal & Allied Operations Pty Ltd v AFMEPKI* (1997) 73 IR 311, which required consideration of whether the industrial action was illegitimate in a sense that warranted the making of an order that it stop or not occur. **14** (2008) 166 FCR 108. **15** *Victorian Hospitals Association v Health Services Union* (2008) 173 IR 120 at [18].

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