# Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and Work Choices

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## Abstract

*The Workplace Relations Amendment (Work Choices) Act 2005 (Cth) effects significant changes to the provisions of the Workplace Relations Act 1996 (Cth) governing industrial action in the federal workplace relations system. This paper examines these changes, situating them in the context of the historical relationship between law and industrial action in Australia, and evaluating the impact of the changes on the balance of power in voluntary collective bargaining. The paper argues that the Work Choices changes have elevated the power of employers, and protection of third party welfare, above access to the right to strike for employee participants in collective bargaining.*

## Introduction

The 2005 *Workplace Relations Amendment (Work Choices) Act* (Cth) (the Work Choices Act) introduced important and far reaching changes to the industrial action provisions of the *Workplace Relations Act* 1996 (Cth) (WRA). The changes will have a significant impact on the balance of power in the collective bargaining relationship, increasing the power of employers to the detriment of employees and employee organisations. This change comes at a time of historically low industrial disputation in Australia, a fact which could suggest that many of the changes are

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politically rather than industrially motivated.

This paper will examine the changes introduced by the Work Choices Act with respect to industrial action in the federal workplace relations system. The paper will provide a brief historical overview of the relationship between law and industrial action in Australia, before examining the substance of the changes in detail. In particular, the paper will focus on the effect of the changes on the balance of power in collective bargaining.

## Industrial Action and the Law – the Australian Experience

Australian law has always had a difficult relationship with industrial conflict. The compulsory conciliation and arbitration model that prevailed in Australia for the better part of the twentieth century embraced the premise that if parties to industrial conflict were provided with an alternative compulsory forum for the resolution of disputes, there would be no need to resort to industrial action. All disputes could be resolved through the decision of an independent and impartial arbitrator, a role played by the Conciliation and Arbitration Court (now the Australian Industrial Relations Commission (AIRC)). However, the flawed nature of this premise was evident from the earliest days of the operation of conciliation and arbitration. Compulsory arbitration did not operate in practice to prevent strikes; rather it influenced strike behaviour, whereby Australia consistently maintained a high incidence of short sharp strikes rather than drawn out industrial conflict (Creighton and Stewart 2005: 23).

Strikes were uneasily accommodated within compulsory arbitration, leading to two well recognised oddities. First, the conciliation and arbitration system was not either free market collective bargaining or true compulsory conciliation and arbitration. The model was hybrid in nature, drawing upon elements of bargaining and of compulsory arbitration. Sykes and Glasbeek (1972: 368) observed:

> The notion was simple enough. Employers could try to set the terms of employment by individual bargaining or, if the employees had managed to create a cohesive group or trade union, by collective bargaining. But in either case, if a deadlock ensued, then the disputants had to submit to an external settlement of their quarrels. Thus, the scheme theoretically endorsed regulation of industrial conditions by a commercial free-for-

> all limited by the law of private contract and by the newly evolved legal and economic concepts associated with collective action, and finally, by the forceful imposition of a solution agreed to by neither party to the dispute.

The second oddity of the conciliation and arbitration system was the enforcement paradox identified and explored by Creighton (1991: 4). Under conciliation and arbitration strike action was for all practical purposes unlawful, with the potential to attract a wide range of civil penalties or statutory sanctions, yet industrial action continued unabated. Potential sanctions were rarely utilised in practice, leading to a dichotomy between the availability of sanctions and the willingness of participants in the industrial arena to use them. Consequently, the role of strikes within conciliation and arbitration was incongruous. Strikes were unlawful but rampant. Enforcement mechanisms abounded, yet until the mid 1980's few efforts were made to apply them.[1] In addition, there were difficulties with the relationship of Australian law and practice to international labour standards, particularly those concerning the principle of freedom of association recognised in International Labour Organization (ILO) Conventions ratified by Australia in 1973.[2]

In 1991, an ILO Committee on Freedom of Association determination[3] in the aftermath of a prolonged dispute in the aviation industry drew attention to the difficulties involved in reconciling the compulsory aspects of the Australian conciliation and arbitration model with international standards on free collective bargaining and the right to strike (McEvoy and Owens 1993). This led Creighton (1991: 210) to note that: "[i]t is not inconceivable that the entire concept of 'compulsory arbitration' could be found incompatible with the ILO standards regarding freedom of association". Further, increasingly globalisation and economic integration demanded that the insular approach of successive Australian governments to labour relations be abandoned in favour of increased engagement with the international community in economic matters (Creighton 1995).

The perceived need for change within the Australian labour relations system led to the passage of the *Industrial Relations Reform Act* 1993 (Cth). Conciliation and arbitration was modified substantially to include free collective bargaining with an express right to take industrial action (see McCarry 1994). The transformation was consolidated in the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) (see McCarry 1997). Through these amending Acts, bargaining was altered from an incidental element of conciliation and arbitration, existing in the form of

over-award bargaining, to a central plank of the new voluntary collective bargaining model, with industrial action assuming a central role as a potential weapon available to both employers and employees in collective bargaining.

The 1993 and 1996 reforms used the pre-existing award system as a 'safety net' of wages and conditions for employees covered by the WRA, while enabling individual and collective bargaining to take place above the safety net. The role of industrial action within this collective bargaining model was very specific. Employers, employees or employee organisations could engage in industrial action in support of their claims in relation to a collective agreement applicable at a single enterprise or business, or in support of their claims in relation to an individual Australian Workplace Agreement (AWA). Provided that the legislative process for engaging in such industrial action was followed, the participants would be protected against liability under the common law industrial torts, termination for breach of contract or liability under State or Territory legislation ('protected action'). Protection did not extend to secondary boycott conduct under the *Trade Practices Act* 1974 (Cth) (TPA) or certain prohibited conduct under the WRA. Unprotected industrial action left participants open to potential injunctive, common law or other liability, depending on the willingness of the target employer to pursue a common law claim. Proceedings in the common law courts were affected by WRA s 166A which operated in practice as a 72 hour delay on common law claims in tort in cases of unprotected action. Additionally, the AIRC had the power under s 127 to order that industrial action cease or not occur. Such orders were discretionary, enabling the AIRC to consider all relevant industrial factors before making a direction under the section.[4] AIRC orders were subject to enforcement in the Federal Court.

The process outlined had two important features. First, the protected action model facilitated industrial action by parties to collective bargaining in a relatively straightforward, accessible manner. The process was not perfect. It had attracted ILO criticism over excessive restrictions on the form, content and voluntariness of bargaining (ILO 2004, 2005), and extensive litigation over aspects of the operation of the provisions in practice.[5] However, parties were able to take protected action without being impeded by excessively burdensome requirements. The second feature of note is the substantial inbuilt flexibility which enabled the AIRC to supervise all forms of industrial action falling within the federal system. The exercise of discretion by the AIRC allowed it to balance a range of competing interests including protection of the public, and recognition of

the role of industrial action in collective bargaining, while dealing with disputes in an industrially sensitive manner (see Di Felice 2000: 320-7).

The combination of accessible protected action and inbuilt flexibility for dealing with unprotected action were factors that helped to create a relatively stable workplace relations system. One indicator of this stability is Australian Bureau of Statistics (ABS) data showing the number of working days lost to industrial disputes in Australia. From an historical high reflected in the 1978 figures when there were 434 working days lost per 1000 employees, the number has steadily declined whereby there were 147 days lost in 1992 and only 32 days lost in 2002 (ABS 1989: 2003). Although the number of working days lost per 1000 employees increased slightly in 2003 and 2004 to 53 and 45.5 respectively, these figures demonstrate that industrial disputation has been at historically low levels over the past decade (ABS 2004, 2005). In terms of potential economic disruption from industrial disputation, Australian employers had rarely fared better.

Despite the reduction in working days lost to industrial disputation, the federal coalition government has consistently pursued a legislative agenda designed to restrict protected action. First introduced in the unsuccessful omnibus *Workplace Relations Amendment (More Jobs, Better Pay)* Bill 1999 (Cth), and reintroduced in a series of unsuccessful single issue Bills, the government sought to tighten access to protected action, reduce the availability of such action and restrict the discretion of the AIRC (see O'Neill 2005). However, it was not until the federal coalition government gained control of the Senate in July 2005, after re-election in October 2004, that it was able to pass its amendments through Commonwealth Parliament. The first attack on industrial action came with the passage of the *Building and Construction Industry Improvement Act* 2005 (Cth) which outlawed all unprotected industrial action in the building and construction industry within the limits of Commonwealth jurisdictional competence, imposing hefty fines on individuals or organisations acting in breach of the ban. This legislation was followed by the Work Choices Act.

The Work Choices Act, while stopping only just short of an outright ban on unprotected industrial action, has substantially restricted the availability of protected action, removed the discretion of the AIRC in decision making and mandated AIRC orders against unprotected action. The overall effect of these changes will be twofold. First, the bargaining power of employers as against employees or employee groups will be increased, and second, the protection of the public against any adverse

consequences from industrial action will be elevated above the interests of the bargaining parties. The paper will now discuss the changes introduced by the Work Choices Act, focusing on how the changes to the law have shifted the balance of power in collective bargaining in favour of employers and how the changes have distorted the concept of the public interest.

## Industrial Action after Work Choices

The Work Choices Act repealed all of the substantive provisions of the WRA pertaining to industrial action and re-enacted them in the new Part 9. Part 9 consolidates and amends pre-existing WRA provisions covering protected action, AIRC orders and strike pay, providing comprehensive coverage of all industrial action occurring within the federal system. Further, the Work Choices Act has shifted the jurisdictional basis of the WRA away from 'interstate industrial disputes', and now covers industrial action undertaken by relevant employees (defined as those employed by 'employers') and employers. Relevant employers for the purposes of the WRA include constitutional corporations, the Commonwealth, employers in a Territory or Victoria and employers in constitutional trade and commerce (ss 6, 872).

The focus of the amendments relating to industrial action is succinctly captured by the addition of a new legislative object, s 3(i), providing the objective of: "balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action". This object had no pre-existing WRA equivalent and provides insight into the focus of the Work Choices Act amendments. Initially, the object recognises a right to take industrial action for the purposes of collective bargaining, enshrining recognition of the right to take industrial action as a component of collective bargaining under the WRA. The object then refers to the need to balance the right to take industrial action with the need to protect the 'public interest'. Here, the 'public interest' is contrasted with the right to take industrial action, a contrast which downplays the public interest in ensuring voluntary collective bargaining, and elevates the public interest in minimising the adverse consequences of industrial action on the general public. The object also signals a more inflexible approach to unprotected action, ensuring that any illegitimate or unprotected action is 'appropriately' dealt with. 'Appropriate' in this context refers to ending such conduct rather than

more industrially sensitive options like conciliation.

It is useful to discuss the Work Choices Act amendments in line with the new legislative object, by examining the extent to which the WRA retains a 'right to take industrial action for the purposes of collective bargaining at the workplace level', the extent to which the legislation has been amended to elevate protection of the public interest and how the WRA will 'appropriately deal with illegitimate and unprotected industrial action'.

## A Right to Take Industrial Action?

The recognition of a 'right to take industrial action' expressed within new WRA object s 3(i) denotes acceptance of the principle that the right to take industrial action is a necessary component of a system of free collective bargaining, providing a mechanism whereby employees and their organisations can exercise power in collective bargaining relationships, roughly commensurate to the power of the employer (although employers can also take industrial action). For the majority of employees, a job is their main asset, leaving them vulnerable in collective bargaining, with little leverage to use as a bargaining tool as against an employer. Weiler (1980: 67) notes that "[i]f the law were just to ban strikes by employees, that would effectively end collective *bargaining*. It would deprive the union of the ultimate lever it has to extract concessions from a recalcitrant employer" (emphasis in original).

However, while the legislative objects now formally recognise the role of the right to take industrial action within collective bargaining, the industrial action provisions within the WRA have been considerably restricted. Legislation recognising the right to take industrial action, while suppressing the right in practice, is not new. The phenomenon has been noted in Canada by Weiler (1980: 69): "[w]e have gone about as far as we can go in legally regulating strike action in Canada. All that remains of the right to strike is the irreducible minimum", and in South Africa by Yusuf Cassim (1989: 281). Before the passage of the Work Choices Act Australian law had already been the subject of international criticism for imposing excessive obstacles to the free exercise of the right to take industrial action (ILO 2004: 2005). The changes have exacerbated this situation, potentially reducing the federal right to take industrial action to Weilers' irreducible minimum.

As all unprotected industrial action in Australia may attract common law and statutory liabilities, the scope of the protected action regime denotes the scope of the right to take industrial action in the federal system.

The Work Choices Act has impacted the protected action regime by reducing the scope of conduct falling under the protection, burdened the process for engaging in protected action with a compulsory secret ballot and increased the circumstances in which protected action may be brought to an end.

### *Access to protected action*

Under the WRA, access to the protected action regime is only available in the context of negotiations for a workplace agreement. However, the Work Choices Act has repealed provisions that had enabled individual employers and employees to engage in protected action with respect to negotiations for AWA's. Protected action may now only be taken to support negotiations for a collective agreement, removing the ability of employers to isolate individual employees through an individual lockout without pay, and rejecting the anomalous concept of 'individual' industrial action (see McCallum 1997: 56).

Parties engaged in negotiations for an employee collective agreement under s 327 or a union collective agreement under s 328 may initiate a bargaining period and engage in protected action in support of their claims with respect to the proposed agreement. Pre-existing exclusions from protected action have been retained by the Work Choices Act, whereby protected action may not occur during the suspension of a bargaining period (s 437), if it involves persons who are not also protected persons in that particular industrial action (s 438), if parties have not complied with AIRC orders or directions (s 443), if union action has not been duly authorised by the relevant committee of management (s 446) or where the employer parties have not genuinely tried to reach agreement (ss 444, 461(1)(a)). Further, three new exclusions from protected action have been included: industrial action supporting a claim for the inclusion of 'prohibited content', industrial action supporting 'pattern bargaining' or industrial action undertaken before the expiry date of an existing agreement.

The first new category of excluded industrial action is action undertaken in support of the inclusion of 'prohibited content' in an agreement (s 436). The issue of 'certifiable' content and protected action had been a highly contentious area until the High Court decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[6]. The High Court held that protected industrial action could not be taken in support of uncertifiable claims, which were those claims which did not pertain to the relationship between an employer and an employee (see Johns 2004). While the decision in *Electrolux* excluded all such claims from protected action, the changes

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introduced by the Work Choices Act evince an intention on the part of the federal coalition government to closely control the content of certified agreements, and consequently, claims that may be supported by protected action. The WRA does not detail what is 'prohibited content'. Instead the WRA reserves the right to the Minister to declare content 'prohibited' by regulation (s 356). Regulations of this kind have not yet been made, but policy information released before the passage of the Work Choices Act indicates that as well as claims that do not pertain to the relationship between an employer and employee, the list of prohibited content is likely to include any clauses requiring 'fair' dismissal of employees, clauses restricting the use of contractor labour or clauses relating to employee use of work time for trade union purposes.[7] Such clauses have previously been certifiable because they pertain to the employment relationship, but will now be prohibited. This change will enable the Minister, without direct parliamentary scrutiny, to interfere in the content of agreements made by parties in a freely negotiated bargain. This is demonstrated in the likely inclusion of unfair dismissal as prohibited content. Agreement over termination of employment is a matter directly at the heart of the employment relationship, yet parties will not be able to seek agreement that termination of employment be carried out in a fair manner because of the federal coalition government opposition to unfair dismissal protections.

The second new exclusion from protected action is pattern bargaining. Pattern bargaining involves the initiation of simultaneous bargaining periods at different businesses, enabling co-ordinated protected action to occur in pursuit of similar terms and conditions in workplace agreements covering workers doing similar types of work. Pattern bargaining enables trade unions to seek comparative wage justice for their members across different businesses, but has been attacked by the federal coalition government on the basis that each individual workplace should negotiate agreements on a site by site basis, reflecting the needs of that workplace.[8]

A clumsy legislative mechanism now excludes any industrial action involving pattern bargaining from legislative protection (s 438). As pattern bargaining is essentially a course of otherwise acceptable conduct rendered illegitimate if engaged in across more than one set of negotiations, the practice is hard to define. The definition, contained in s 421, distinguishes legitimate and illegitimate bargaining on the basis of the extent to which a party appears to be 'genuinely trying to reach agreement' at a single business. A person seeking two or more agreements with common wages and conditions where conduct extends beyond a single business will be engaged in pattern bargaining, and therefore excluded from protected

action, unless it can be shown that they are seeking to include national standards set by the AIRC or are genuinely trying to reach agreement at a single business.

The task of ascertaining whether a negotiating party is 'genuinely trying to reach agreement' at a single business is aided by a list of factors set out in s 421(4), designed to ascertain the actual intentions of a party engaged in negotiations. The factors that suggest that a negotiating party is genuinely trying to reach agreement at a single business are:

- Preparedness to take into account the individual circumstances of the business in the content and expiry date of the agreement.
- Negotiating in a manner consistent with the determination of wages and conditions between the employer and its employees at the single business.
- Agreeing to meet face to face at reasonable times proposed by another negotiating party, and responding to proposals from the other party in a reasonable time.
- Not capriciously adding or withdrawing items for bargaining.

No area of bargaining behaviour is free from scrutiny in the new 'deregulated' workplace relations environment. The provisions are interventionist and discount the benefits of comparative wage justice for employees and benchmarking for employers. Further, they will be very difficult to apply in practice, particularly in sectors where similar sets of employment conditions are usual across the sector (for example higher education).

The final new exclusion from protected action is industrial action undertaken during the currency of a workplace agreement, which has been rendered both unprotected (s 440) and unlawful (ss 494, 495) by the Work Choices Act amendments. Prior to the changes, the decision in *Emwest Products v AFMEP&KIU*[9] had held that the pre-existing exclusion of industrial action undertaken during the currency of an agreement did not apply to industrial action in support of claims that were not covered by the agreement. The new provisions clearly state that all industrial action that occurs before the expiration of the relevant instrument will be both unprotected and unlawful. While the decision in *Emwest* was easily circumvented through the inclusion of 'no extra claims' clauses in certified agreements, the outright prohibition of such action means that parties may no longer strategically defer contentious issues in order to ensure the timely conclusion of agreements.[11] Although further negotiations can take place after the creation of an agreement, the inability to utilise protected action may be a disincentive to the deferral of issues where there could be a

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serious deadlock between the parties. This may result in more protracted periods of collective bargaining and industrial disputation.[11]

Undertaking protected action: The technical process that must be undertaken before parties can engage in protected action operates to delay the exercise of the right to take industrial action, imposing an administrative burden on access to the right. Further, under the WRA, a failure to strictly adhere to the technical process will render subsequent action unprotected. Therefore, it is important that any obstacles to protected action be industrially necessary and that the process be as user friendly and accessible as possible.

Prior to the passage of the Work Choices Act, parties who wanted to engage in protected action had to initiate a bargaining period, make a genuine effort to reach agreement with the other party and then provide three days strike notice, setting out the nature of the intended action. This applied unless the action was in response to protected action taken by the other party. This process remains, however employee negotiators or employee organisations now have the additional requirement, if they initiate protected action, of a compulsory secret ballot of potential strike participants.

The secret ballot provisions are set out in Division 4 of Part 9. The negotiating party that initiated the bargaining period may apply to the AIRC for a ballot order. Before making such an order, the AIRC must ensure that the applicant continues to genuinely try to reach agreement with the other party, is not engaged in pattern bargaining and has included all prescribed information on the application, including the questions to be asked in the ballot (ss 452, 461). Once a ballot order is made, the ballot must be conducted by either the Australian Electoral Commission or an independent ballot officer approved by the AIRC (s 480). Protected action may only proceed if it occurs within 30 days of the declaration of the result of the ballot and the action was approved by an absolute majority, whereby at least 50% of the persons eligible to vote have voted, and at least 50% of the votes cast have approved the action (s 478). The cost of administering the ballot is divided between the Commonwealth (80%) and the applicant (20%) (ss 482, 483).

The persons that are eligible to vote will depend on whether the applicant for the ballot was an employee organisation or an employee negotiating party. For union collective agreements, only members of the employee organisation, employed by the relevant employer on the day the ballot order is made, and who may be subject to the proposed agreement, are eligible to vote and engage in protected action (s 467(1)(a)). For

employee collective agreements, the employee negotiating party must first demonstrate to the AIRC that they have the support of a prescribed number of relevant employees before the AIRC will make a ballot order (s 451(4)).[12] The persons eligible to vote will be those employees of the relevant employer, who are employed on the day that the ballot order is made, who may be subject to the proposed employee collective agreement (s 467(1)(b)). Further, employee negotiating parties who wish to remain anonymous in the collective bargaining process may appoint a person as a bargaining agent to act on their behalf (ss 424, 451(5)).

The rationale for the introduction of compulsory secret ballots is encapsulated within the object of Division 4: "to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employees, or by employees". The object suggests that employees directly concerned with collective negotiations have not, in the past, been able to 'directly' choose whether strike action proceeds and that any relevant processes were not fair or democratic. These assumptions ignore the difficulties of undertaking successful industrial action without the support of those directly affected. Further, they reject the legitimacy of the internal democracy of trade unions and the right of unions to set their own rules and processes, despite the fact that the internal workings of employee organisations are "subjected to a much higher degree of state regulation of their affairs than their counterparts in comparable overseas countries" (Forsyth 2001: 29).

Accordingly, the motivation behind the changes as they pertain to union protected action appears to be political, rather than industrial. Despite this, the application of the ballot process in practice may not prove to be an overwhelming obstacle for unions to undertake protected action. Employee organisations generally have sufficient organisational and financial strength to bear administrative and cost burdens. Further, the fact that only union members are eligible to vote, means that an absolute majority should be achievable in practice. In Britain, compulsory strike ballots were introduced in 1984. Collins, Ewing and McColgan (2001: 915) note that while the British provisions have proven to be a "fertile ground for litigation", successful ballots have had the effect of increasing trade union bargaining power, by demonstrating the commitment of the union membership to the proposed industrial action (at 924).

The situation is likely to be different for employee collective agreements because of the cost and the absolute majority. Without the administrative and financial resources of a trade union, employee negotiators will find it

extremely difficult, especially in larger businesses, to mobilise at least 50% of employees to participate in the ballot. Further, the imposition of 20% of the cost of such a ballot is likely to act as a strong disincentive to applying for a ballot order. The British experience has demonstrated that such ballots are "very expensive to administer" (Collins, Ewing and McColgan 2001: 915). It is not unreasonable to suggest that the cost and difficulties associated with absolute majorities will combine to effectively prevent any protected action undertaken by non union actors in larger businesses, unless some assistance is provided by a trade union acting as a bargaining agent.

### *Ending Industrial Action*

The AIRC has power, on certain grounds, to suspend or terminate a bargaining period involving protected action. Any industrial action taken during a suspended bargaining period or after the termination of a bargaining period will not be protected. Prior to the passage of the Work Choices Act, there were four main grounds on which the AIRC could terminate or suspend a bargaining period: where parties had not complied with AIRC orders or directions, where parties had not genuinely tried to reach agreement, on public welfare grounds or where industrial action related to a demarcation dispute (s 430). These grounds have been retained, but the discretion has been removed, and the AIRC must now order the suspension or termination of the bargaining period in question if the circumstances are established, regardless of any mitigating or other circumstances, or even where AIRC intervention would be counter productive.

The Work Choices Act has also added three new grounds requiring the suspension or termination of a bargaining period. The AIRC must suspend or terminate a bargaining period on application by a negotiating party or person prescribed by the regulations, if the AIRC is satisfied that pattern bargaining is occurring, regardless of whether protected action has been taken or not (s 431). The right of a person 'specified in the regulations' to apply for an order will enable suspension or termination to occur even if neither negotiating party has objected to the conduct. This permits an extraordinary degree of interference to occur in voluntary bargaining in pursuit of an anti-pattern bargaining agenda that may not be shared by the parties themselves.

The next additional ground requires the AIRC to suspend a bargaining period involving protected action if one of the negotiating parties requests a 'cooling off' period and the AIRC is satisfied that the suspension is

appropriate, having regard to whether the suspension would assist resolving the dispute, the length of the action and the public interest (s 432). This provision could be used by either negotiating party to dull the impact of particularly successful industrial action, but may also prove to be a useful safety valve in the case of protracted disputes.

The last new ground for suspension of a bargaining period is the right of third parties to seek suspension on the grounds of significant harm (s 433). As a new public interest provision it will be discussed in the next section.

### *Protecting the 'Public Interest'*

Any model of voluntary collective bargaining involves two competing public interest considerations. The right of workers to engage in industrial action in a system of voluntary collective bargaining must be balanced against the welfare of the general community. There is a public interest in protecting public welfare and there is also a public interest in protecting free collective bargaining over wages and conditions.

In the WRA, the balance between these two competing public interests had been maintained by the AIRC under a discretionary power in former s 170MW(3), which allowed the suspension or termination of a bargaining period on public welfare grounds. As noted by Justice Munro, the discretionary power required careful application in practice:

> Section 170MW(3) is a most important part of the section [170MW]. The way in which it is interpreted and applied has serious consequences for disputing parties and for the public at large. Its operation involves the resolution of the competing rights of registered organizations and employers to take industrial action against each other with impunity and of the community and the economy to be protected from serious harm arising from such action.[13]

The Work Choices Act has changed the public interest balance within the WRA, weighting the equation in favour of community welfare and economic stability over the right to take industrial action.

The discretion vested in the AIRC to suspend or terminate a bargaining period on public welfare grounds has been removed. Under s 430, the AIRC must suspend or terminate a bargaining period involving industrial action threatening to endanger the life, the personal safety or health, or the welfare of the population or part thereof, or threatening to cause

significant damage to an important part of the Australian economy. In addition, Division 7 of Part 9 gives the Minister the power to terminate a bargaining period on the same public welfare grounds (s 498). The power will enable the Minister to second guess the AIRC, where, for example, it has found that there is no 'significant' damage to an important part of the economy or no genuine threat to public welfare. Further, the Minister may now intervene in politically sensitive disputes, removing the right to take industrial action on unchallengeable public interest grounds. This power is an extraordinary attack on independent impartial decision making and has introduced political considerations into industrial decision making.[14]

Finally, s 433 directs the AIRC to suspend a bargaining period, on application by an affected person or the Minister, where industrial action is threatening to cause significant harm to any person other than a negotiating party, and such an order would be appropriate in the context of the public interest and the objects of the WRA. Any person, other than a negotiating party, who is adversely affected by protected action, may now intervene before the AIRC seeking a suspension of the right of parties to pursue industrial action. Industrial action will, inevitably, have an impact on third parties. This provision is likely to lead to vexatious applications to the AIRC, involving persons both directly and indirectly affected by industrial action, and difficult litigation over the application of the provision in practice, particularly over the meaning of 'significant harm'. This will tie up negotiating parties in the AIRC, potentially impacting significantly on collective negotiations. Protection of public interest considerations has already been elevated in importance, and more than adequately protected, by the public welfare provisions. While the ability of the Minister to intervene and seek orders under this provision is also of concern, it is likely that the Minister will simply use the power to terminate a bargaining period under a Ministerial Declaration, rather than pursuing action in the AIRC.

### *Dealing 'Appropriately' with Illegitimate and Unprotected Action*

The 1997 decision of the Full Bench of the AIRC in *Coal and Allied Operations v AFMEPKIU*[15] identified three forms of industrial action relevant to AIRC decision making: prohibited, unprotected and protected action. Prohibited (or 'illegitimate') action was action prohibited outright by the WRA. The pre-existing prohibitions on industrial action have been re-enacted in the WRA by the Work Choices Act, prohibiting any industrial

action taken before the expiry date of a relevant workplace agreement (ss 494, 495) and any action undertaken in support of claims for strike pay (s 508). The prohibition on secondary boycott conduct contained within the WRA has been re-enacted through the prohibition on industrial action taken in support of pattern bargaining and secondary boycott conduct remains specifically unlawful under the TPA. Prohibited industrial action may be subject to injunctive relief and damages in the Federal Court without the need to first bring proceedings in the AIRC.

Unprotected industrial action is action that is neither specifically prohibited nor protected. Action falling into this category may be action undertaken where the parties have not strictly followed the requirements to obtain protection under the WRA, or have engaged in industrial action without first seeking protection, for example protest action or a lightning strike. The changes instituted by the Work Choices Act have had the most impact with respect to unprotected industrial action. The delay on the commencement of tortious proceedings in the common law courts contained in former s 166A has been repealed. Further, the discretion vested in the AIRC to make an order stopping or preventing industrial action under former s 127 has been removed. The AIRC had exercised caution in making orders against unprotected action, taking into account specific industrial factors, the public interest, and the fact that unprotected industrial action was not specifically outlawed under the WRA:

> The scheme of the Act does not in our view clearly imprint the discretion granted by s 127 with any guiding requirement to the effect that any industrial action that is not protected action should be directed to cease. The norms of the system reflected in the Act are not so specific that all unprotected industrial action must be taken to be of itself unjustifiable.[16]

However, the Work Choices Act has changed the norms of the system reflected in the WRA and all unprotected industrial action must now 'be taken to be of itself unjustifiable'. Section 127 has been re-enacted as s 496, requiring the AIRC, on application by a person affected by industrial action or acting on its own motion, to make an order that industrial action cease or not occur against any threatened or actual unprotected action. Further, the AIRC must make an order against any industrial action undertaken by a party who does not meet the definition of employer or employee under the WRA, if the industrial action will, or would have the effect, of causing substantial loss or damage to the business of a constitutional corporation. It is likely that the majority of such industrial action will impact upon third party corporations. This change means that

orders against unprotected action, or industrial action by a non federal system party affecting a constitutional corporation, are now virtually automatic. Breaches of such orders are enforceable through damages and injunctive relief in the Federal Court. The only difference between the s 496 process and an outright ban on unprotected industrial action is that s 496 gives parties one opportunity to prepare action, or engage in industrial action, before any continuance of the action is subject to potential fines and enforcement provisions in the Federal Court.

The final change with respect to 'illegitimate' action is industrial action involving pattern bargaining. Where industrial action is threatened or undertaken by a party involved in pattern bargaining, any person may apply to the Federal Court for an injunction against that industrial action, without first having to seek an order from the AIRC (s 497).

These changes clearly demonstrate that any unprotected action is to be treated as illegitimate industrial action. Section 496 will operate in practice as a de facto prohibition on any industrial action undertaken in Australia that has not complied with the onerous WRA protected action requirements, regardless of whether the participants fall within the federal system or not.

## The Balance of Power – Employers and 'Public Interest' Ascendant

The changes introduced to the WRA by the Work Choices Act have, almost uniformly, decreased the bargaining power of employees to the benefit of employers. Further, the public interest in minimising the adverse consequences of industrial action has been elevated, to the detriment of the public interest in maintaining robust voluntary collective bargaining.

The effect of the Work Choices Act changes on the balance of power between employers and employees is starkly illustrated by the compulsory secret ballot and pattern bargaining provisions. In order to undertake protected industrial action, employers need only give the requisite notice (three days during a bargaining period) and genuinely try to reach agreement, before undertaking action. For employees and unions, the additional burden of the compulsory secret ballot process will have the effect of making initiation of protected action expensive, time consuming and virtually impossible for non union employees of larger businesses. The effect of this change will be a serious exacerbation of the power imbalance between employers and employees, because in addition to the normal imbalance of power, employers now have much easier access to

protected action than employees. Further, employers have less to lose from taking protected action because they can continue to operate their businesses and hire replacement staff, while employees must forgo remuneration for any period of industrial action (including employer initiated action), and cannot seek to include strike pay as a term of any industrial settlement (s 507).

The pattern bargaining provisions also illustrate the deepening of the power imbalance. If employee negotiators or employee organisations seek common terms and conditions across different workplaces, there are extensive anti pattern bargaining provisions that may be brought to bear to remove protection, suspend or terminate a bargaining period, or result in a grant of injunctive relief in the Federal Court, if the pattern bargaining involves industrial action. However, despite the extensive pattern bargaining provisions, the WRA continues to allow for the approval of multi-business agreements (s 331) upon application to the Office of the Employment Advocate by an employer (s 332). The provisions of the WRA recognise that the common setting of wages and conditions across businesses may suit some employers, but impose serious negative consequences on any employees who actively seek to achieve a similar arrangement.

In addition, the provisions balancing the interests of the public welfare are now firmly weighted in favour of minimising the effects of any successful industrial action, and do not allow for adequate accommodation of the fact that negative effects from industrial action are a necessary consequence of voluntary collective bargaining. This further reduces the bargaining power of employees, because successful protected action may be stopped by the AIRC, the Minister or on application by an affected third party. Finally, the role of law with respect to unprotected industrial action has been reasserted through the removal of the discretion of the AIRC and the de facto ban on all unprotected action. Coming at a time when protected action has been made significantly more difficult to access, these provisions may see a considerable increase in injunctive relief and the application of fines in the Federal Court, without proper attention to the industrial merits of the situation.

Overall, the package of changes contained within the Work Choices Act represents a regressive step which has reduced the availability of protected action, increased the likelihood of sanctions for unprotected action, and provided employers with significant advantages in collective bargaining. Employers now have better access to protected action than employees and are less restricted in the pursuit of industrial outcomes.

This does not represent a 'right to strike' designed to even the balance of power between employers and employees, but constitutes a legal entrenchment of the dominant position of employers.

## Notes

[1] In the 1980s employers in Australia became more prepared to utilise the industrial torts and the *Trade Practices Act* 1974 (Cth) to seek both injunctive and damages relief. See for example: Pittard (1986).

[2] The Conventions are: *The 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 the ILOLEX database at www.ilo.og.

[3] *Complaint against the Government of Australia presented by the International* Federation of Air Line Pilots Associations (IFALPA), Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1511.

[4] As to the exercise of the discretion under former s 127 see *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors* (1997) 73 IR 311.

[5] For example, difficulties arose over whether protected industrial action could be undertaken in support of 'uncertifiable' claims: see Johns (2004).

[6] (2004) 209 ALR 166.

[7] Australian Government, *WorkChoices: A New Workplace Relations System*, 2005, 23.

[8] See for example T Abbott MP, Second Reading Speech, *Workplace Relations Amendment (Genuine Bargaining) Bill* 2002, Parliamentary Debates, HOR, 20 February 2002, p 505.

[9] (2002) 112 IR 388.

[10] In *Emwest* (ibid) the parties had deferred agreement over the issue of redundancy in order to ensure the timely conclusion of a certified agreement.

[11] The length of bargaining will also be impacted by the ability of employers to terminate existing agreements once they have expired by giving 90 days notice: WRA s 393.

[12] WRA s 450 defines the prescribed number of relevant employees as 4 employees where there are fewer than 80 relevant employees, 5% of employees where there are between 50 and 5,000 relevant employees and 250 if there are over 5,000 employees.

[13] *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14 per Munro J at 51-52.

[14] Outstanding claims unresolved after the termination of a bargaining period on public welfare grounds may be finalised by the AIRC through the creation of a workplace determination – Part VC, Division 8.

[15] (1997) 73 IR 311.

[16] Ibid per Munro J, Harrison SDP and Leary C at 324.

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