

THE RIGHT TO STRIKE IN AUSTRALIA

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1. For much of Australia's history there has been no right to strike.¹ Even now Australian law does not recognise or create a specific right to strike. The right to strike, such as it is, arises indirectly. Employees and their unions can gain immunity from legal liability for strike action at common law and under statute if the action is taken in compliance with conditions prescribed in the relevant legislation. Strikes to which the immunity applies are known as protected action. The conditions to be complied with for the action to be "protected" have been a matter of controversy since the introduction of protected action in 1993. The controversy has been evidenced by various legislative changes, proposals for change and a series of critical observations made by organs of the International Labour Organisation (ILO). The nature of the conditions attaching to protected action, and in particular their compliance with international labour standards, are the main focus for what follows.
2. In broad terms this paper is concerned with the development of the law concerning the right to strike in Australia, which commenced with the *Industrial Relations Reform Act 1993* (1993 Reform Act). The first part of the paper deals with the legislative history. The second part deals with the legal foundations for the right to strike and the ILO's criticisms, in particular those of the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts). The third part deals with the operation of the protected action provisions in practice and includes reference to relevant statistical material. The final section contains some observations and conclusions.

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3. The paper is limited to the national industrial relations system and does not deal with the systems which have operated from time to time in the Australian States. Nor does it deal in any substantial way with lockouts by employers. Throughout the paper the term "strike" is often used broadly to include sympathy strikes and more limited forms of industrial actions such as bans and secondary boycotts. The national industrial tribunal, previously known as the Australian Industrial Relations Commission, was reconstituted in 2009 and renamed Fair Work Australia. In 2013 Fair Work Australia was in turn renamed the Fair Work Commission. To avoid unnecessary repetition and possible confusion the tribunal is usually referred to simply as the Commission, regardless of its actual title at the time.

THE LEGISLATIVE HISTORY

4. The Commonwealth of Australia came into existence on 17 September 1900.² One of the first laws made by the Commonwealth Parliament was the *Conciliation and Arbitration Act 1904*. The Act established a system of compulsory conciliation and arbitration of industrial disputes. Strikes and lockouts were not permitted. Unions and employers were obliged to submit unresolved disputes to binding arbitration. Employees, and their unions, were liable to penalties under industrial law for strikes and other forms of industrial action and they could also be sued for damages in the civil courts.³ These were the dominant characteristics of the system for nearly 90 years.
5. In 1993 the Government introduced a package of reforms to the industrial relations system. The package included limited recognition of a right to strike by means of protected action. The 1993 Reform Act was a watershed in Australian industrial law. The recognition of a limited right to strike was an important development in itself,

but it was only one of a number of significant changes including statutory recognition of enterprise bargaining and the curtailment of compulsory arbitration. From this point on the arbitral role of the national industrial tribunal would be to set basic wages and conditions only, leaving scope for, and encouraging, bargaining at the enterprise level. Awards were to become a safety net of minimum conditions for employees who were unable to bargain as well as a floor for enterprise bargaining. Strikes and lockouts were protected during enterprise bargaining, subject to certain limits which will be discussed below. It is noteworthy that although the legislation has been amended in a number of respects, most of the protected action provisions established in 1993 have survived and constitute the framework of the current legislation.

6. Employees and their unions were protected from legal liability in relation to strike action⁴ subject to complying with the following conditions:
 - the action was taken in the course of negotiations for an enterprise agreement (an agreement to cover a single business, part of a single business or a single place of work);⁵
 - a union wishing to negotiate an agreement had first initiated a bargaining period by giving the employer 7 days' notice, together with particulars of the agreement sought;⁶
 - the employer was given 72 hours' notice of the strike;⁷
 - genuine attempts had been made to negotiate an agreement;⁸ and
 - the action was duly authorised by the union.⁹

7. Two other limitations should be mentioned. A party taking protected action would lose its immunity if the action involved personal injury, wilful or reckless property damage, unlawful use of property or defamation.¹⁰ There was also a limitation on the nature of the claims which could be made. Claims had to pertain to the relationship between employers and employees. Any industrial action taken in pursuit of other claims was not protected.¹¹
8. The Australian Industrial Relations Commission was given the power to suspend or terminate a bargaining period which rendered the action unprotected either for the period of the suspension or permanently as the case may be. The power could only be exercised if:
 - a party taking industrial action was not genuinely trying to reach an agreement, or had failed to comply with an order to negotiate in good faith; or
 - industrial action was threatening to endanger the health or welfare of a part of the population or to cause significant damage to the Australian economy or an important part of it.¹²
9. If the Commission terminated the bargaining period on the grounds that the industrial action was a threat to health and welfare or to the economy or an important part of it, the Commission was required to arbitrate any unresolved claims.¹³
10. In 1996 a Conservative government was elected and as is so often the case in Australia, the change in Government was followed shortly thereafter by an attempt to reform the industrial law. The result was the *Workplace Relations Act 1996* (WR

Act). Although making sweeping changes in other areas, the changes in relation to strike action were few and most were relatively minor. The main alterations were:

- strengthening the Commission's power to stop or prevent industrial action which was not protected action;
- prohibiting strike pay, subject to a health and safety exclusion; and
- restoring the prohibition on secondary boycotts in relation to industrial disputes to the *Trade Practices Act 1974*.

11. Following the Government's re-election in 2004, the *Workplace Relations (Work Choices) Act 2005* (Work Choices) was passed. It placed additional restrictions on protected action. The new limitations included the following:

- prohibiting strikes which were not authorised by a pre-strike ballot supervised by the Commission;
- narrowing the range of matters which could be a legitimate subject for bargaining;
- prohibiting strikes in support of pattern bargaining; and
- broadening the Commission's power to suspend or terminate protected action.

12. Following the Work Choices amendments the restrictions on strikes were greater than at any time since the introduction of protected action in 1993. For that reason it might have been expected that when the Government eventually changed, Labor would overhaul the arrangements. But that is not what happened. After the 2007 election, which Labor won, the new Government did undertake a complete review of

the industrial relations system. The Fair Work Act 2009 (FW Act), which altered the system in many ways, replaced the WR Act. In relation to the right to strike, however, many, perhaps most, of the restrictions on protected industrial action contained in the WR Act were re-enacted in the FW Act.

13. Despite that protected action was made somewhat more accessible. Changes included:

- the prohibition on multiple employer bargaining was lifted where a "single interest" exemption could be obtained;¹⁴
- strikes in support of pattern bargaining may be protected if the parties are genuinely trying to reach agreement; and
- although the "prohibited content" provisions were liberalised, strikes in support of claims of various types - described as "unlawful terms" and non-permitted matters – are still not protected.

14. A review of the FW Act conducted in 2012 recommended some changes to the protected action provisions. These included proposals to streamline the protected action ballot procedures and to remove the provision which empowers the relevant Minister to terminate protected action.¹⁵ Neither of these recommendations has been implemented.¹⁶

THE ILO POSITION

15. Having looked at the legislative history attention turns to the ILO's position, in particular the views expressed by the Committee of Experts. A right to strike is

expressly recognised in the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 8 reads in part:

"1. The States Parties to the present Covenant undertake to ensure:

.....

(d) the right to strike, provided that it is exercised in conformity with the laws of the particular country

... "

16. The ICESCR was ratified by Australia in 1975 and came into force in 1976.¹⁷ Although it is not an ILO document it is nevertheless very influential. It is, however, rather vague about the nature of the right to strike which it contemplates. Apart from the ICESCR there are two relevant ILO conventions. They 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).¹⁸ While neither convention deals explicitly with the right to strike, ILO bodies such as the Committee on Freedom of Association, the Committee on the Application of Standards and the Committee of Experts have consistently found that the right to strike is a necessary implication of both Conventions. (The Committee on Freedom of Association and the Committee on the Application of Standards are both tripartite committees. The Committee of Experts is comprised of eminent jurists.) It may be significant that the only instrument which deals specifically with the right to strike, the ICESCR, requires the right to be exercised in conformity with the laws of the country concerned.
17. On several occasions prior to 1993, notably in 1989 and 1991, the Committee of Experts drew attention to the situation in Australia - that strikes were prima facie

unlawful and striking employees and their unions did not have any protection from common law liability for strikes. The ILO also expressed concern about provisions in the *Trade Practices Act* which "rendered unlawful a wide range of boycott activity and most, if not all, sympathy action."¹⁹

18. These observations were in part the result of a complaint made to the Committee on Freedom of Association by an Australian trade union, the International Federation of Airline Pilots, in October 1989. The complaint concerned a major industrial dispute in the Australian airline industry and, among other things, an award of common law damages obtained by the employer airlines against the Federation. On that matter the Committee on Freedom of Association delivered an unequivocal opinion:

"The Committee cannot view with equanimity a set of legal rules which:

(i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein;

(ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and

(iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests (see Digest, op. cit., para. 363). Accordingly, the Committee considers that it would be appropriate to draw this aspect of the case to the attention of the

Committee of Experts on the Application of Conventions and Recommendations."²⁰

19. It is difficult to say what influence the ILO position had on government policy, but it is likely to have been significant. The absence of a right to strike was at least inconsistent with, if not a breach of, the Covenant which Australia had ratified some 15 years before. Whatever the reasons, the Government decided to take action.
20. The 1993 Reform Act purported to give effect to Australia's international obligation to provide for a right to strike. That obligation was said to exist under the ICESCR, the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), the Right to Organise and Collective Bargaining Convention 1949 (No. 98), the Constitution of the ILO and customary international law relating to freedom of association and the right to strike.²¹
21. In 1995 the Committee of Experts summarised the effect of the 1993 Reform Act in this way:

"The object of Division 4 of this Act (immunity from civil liability) "is to give effect, in particular situations, to Australia's international obligation to provide for a right to strike". It provides that, except for certain types of wilful or reckless conduct involving personal injury or destruction of, or damage to, property, no action lies under any law of a State or territory in respect of industrial action that is "protected action" (i.e. that which takes place in relation to an industrial dispute during the bargaining period."²²

22. The Committee went on to note that the 1993 Reform Act also confined the operation of the secondary boycott provisions of the *Trade Practices Act 1974* to "non-industrial secondary boycotts".
23. As we have seen, the 1993 Reform Act was amended by the WR Act in 1996. In 1999 the Committee of Experts drew attention to aspects of the protected action provisions which it indicated might not conform with the requirements of Convention No. 87.²³ It should be pointed out that most of the provisions identified were in the same or similar form before the WR Act amendments. There were three areas of concern.
24. The first area related to restrictions on the types of claims which could be pursued. Protected action could only be taken during a bargaining period for a single enterprise agreement in support of claims involving matters pertaining to the relationship between the employer and the employees to be covered by the agreement.²⁴ As the Committee pointed out, this meant that protected action could not be taken in relation to "multi-employer, industry-wide or national level agreements". The Committee said that the restriction "excessively inhibits the rights of workers and their organisations to promote and protect their economic and social interests".²⁵ It also drew attention to the fact that protected action was not available in relation to claims for strike pay and that protected action could lose its protected status if it involved a demarcation dispute.²⁶
25. The second area was the prohibition on sympathy action. The Committee referred to its earlier expression of view that "a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is lawful."²⁷

26. The third area related to restrictions on the right to strike other than in essential services. It was explained that the definition of essential services accepted by the Committee was: services "the interruption of which would endanger the life, personal safety or health of the whole or part of the population". The Committee was concerned at the possibility that industrial action would lose its protected status if the bargaining period was terminated by the Commission on the basis that the action was threatening to cause significant damage to the Australian economy or an important part of it.²⁸
27. The Committee of Experts also referred to the operation of the secondary boycott provisions of the *Trade Practices Act 1974*, which had been broadened again by the WR Act, and to provisions in the *Crimes Act 1914* banning strikes in certain circumstances.²⁹
28. The Government did not make any legislative response to these criticisms, which were reiterated by the Committee of Experts in 2002, 2003 and 2006.³⁰ In the latest of those observations there is a clear note of frustration:
- "The Committee, noting with regret that the Government reiterates previously provided information and remains of the view that there is no need to amend the above provisions, can only reiterate its hope that the Government will take measures to amend the above provisions so as to bring them into full conformity with the Convention, and requests the Government to indicate in its next report any measures taken or contemplated in this respect."
29. In its 2006 observation the Committee of Experts also referred to a case which the Committee on Freedom of Association had recently dealt with concerning "discrepancies" between the *Building and Construction Industry Improvement Act*

2005 and Convention No. 87. Some of these discrepancies, so-called, related to restrictions on the right to strike applying specifically to the building and construction industry. Similar questions have arisen from time to time and still do, but they are not dealt with in this paper, which is directed at the provisions applying to Australian workers generally.³¹

30. Far from moving to mollify the ILO, the Australian Government, having gained an absolute Parliamentary majority in the 2004 election, embarked on a further program of reform, including tightening access to protected action, in the Work Choices legislation.

31. The Committee of Experts raised the prospect that a number of the Work Choices provisions replicated existing impediments to the implementation of Convention No. 87 or gave rise to new ones. In an observation published in 2007, the committee itemised the issues as follows.³²

- an effective prohibition on protected action being taken in support of "pattern bargaining";³³
- a further limitation on the range of matters which could be the subject of negotiation in enterprise bargaining and in relation to which protected action could be taken, known as "prohibited content", and a power to amend the range of prohibited content by regulation;³⁴
- a provision removing the discretion formerly held by the tribunal in respect of suspending or terminating a bargaining period in case of danger to the economy and making it mandatory to do so;³⁵

- provision for a third party who is affected by protected action to apply for the suspension or termination of the bargaining period which must be granted if the tribunal is satisfied that the employer is adversely affected and economic loss is also caused to the applicant;³⁶
- a new provision empowering the Government (through the relevant Minister of State) to unilaterally issue a declaration terminating a bargaining period in certain circumstances, including threatened economic damage (to be followed by binding arbitration);³⁷ and
- potentially heavy pecuniary penalties for "coercion and duress" in relation to strikes which are "unprotected".³⁸

32. As noted earlier Labor won Government in 2007 and many of the protected action provisions were carried over from the previous legislation into the Fair Work Act in 2009. In an observation made in 2009 the Committee of Experts, relying on concerns expressed by the ACTU, requested the Government to take various steps "with a view to bringing the [Fair Work Act] into full conformity with the Convention".³⁹

33. More recently the Committee has identified 5 issues of ongoing concern which it believes should be reviewed by the Government in consultation with representatives of employers and employees. They are:

- the circumstances in which protected industrial action may be suspended or terminated;
- competition and consumer law legislation prohibiting secondary boycotts;

- criminal law provisions prohibiting industrial action which threatens trade or commerce with other countries or between states, boycotts which obstruct or hinder the provision of Government services and boycotts affecting the transport of goods or persons in international trade;
- the potential for the right to strike to be unduly fettered by the pre-strike ballot procedures; and
- restrictions on the scope of collective bargaining.⁴⁰

34. The Australian Government has not indicated any intention of taking action in relation to these matters. To the contrary, it has recently introduced legislation to impose new conditions on protected action.⁴¹

35. The legal effect of international strike law in Australia is unclear. The High Court considered the validity of the relevant provisions of the 1993 Reform Act in *Victoria v The Commonwealth*.⁴² The Court found that the ICESCR gives rise to an obligation to provide a right to strike and the protected action provisions represent a partial implementation of that right.⁴³ It also made a finding that provision of a right to strike is not an obligation under international customary law.⁴⁴

36. In *Victoria v The Commonwealth* the Court did not find it necessary to rule on a submission that a right to strike is a necessary implication of Conventions Nos. 87 and 98. Of course the Committee of Experts has relied extensively on such an implication when framing its observations concerning the adequacy of the protected action provisions. Within the ILO itself some employer groups and Governments have recently questioned whether a right to strike is a necessary implication of Convention No. 87. At the meeting of the ILO Governing Body in November 2014

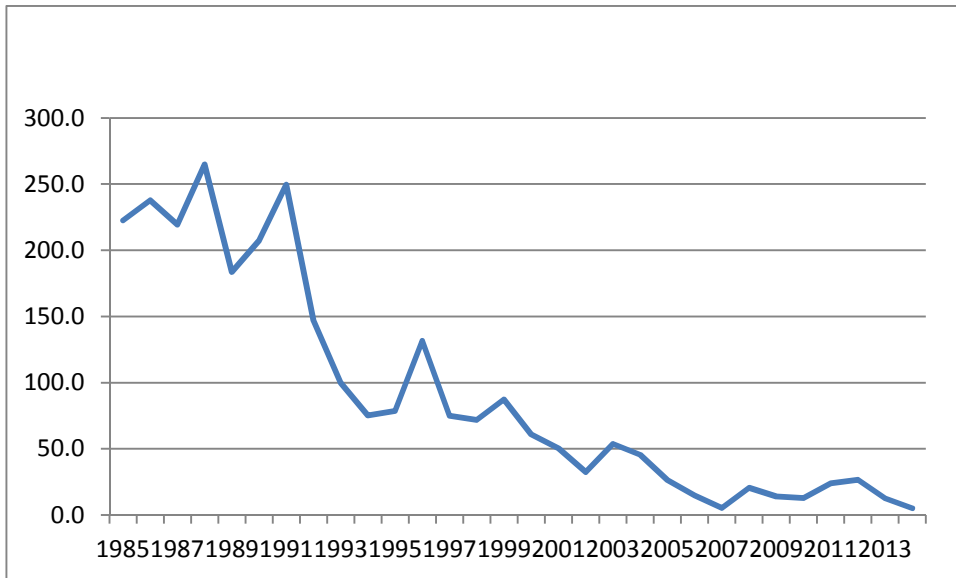
there was some consideration of a proposal to request an advisory opinion from the International Court of Justice concerning the interpretation of the Convention in relation to the right to strike.⁴⁵ At its meeting in March 2015 the Governing Body, noting that an agreement had been reached at a tripartite meeting in February, decided not to pursue an interpretation of Convention No. 87 for the time being.⁴⁶

THE RIGHT TO STRIKE PROVISIONS IN PRACTICE

37. So much for the legislative framework. What has been the experience with the operation of the protected action provisions? Chart 1 shows working time lost due to industrial disputes between 1985 and 2014. In 1993, the last full year before the 1993 Reform Act commenced, 100 working days were lost per thousand employees due to industrial disputes. By 2013 that figure had reduced to 13. This may be thought surprising as the protected action provisions provide at least tacit encouragement to strike more rather than less. To put the decline into perspective, however, time lost due to industrial disputes was reducing well before 1993. In 1985, for example, 222 days were lost per thousand employees, more than double the number in 1993 when the protected action provisions commenced. This suggests that other factors contributed to the reduction in strikes. These could include the sustained increase in real wages during the last 20 or more years and the decline in popularity of collective approaches to labour issues, not just in Australia but in many developed economies, over the closing decades of the 20th century. It has also been cogently argued that greater employment insecurity allied with increased global competition have been very influential factors.⁴⁷

Chart 1⁴⁸

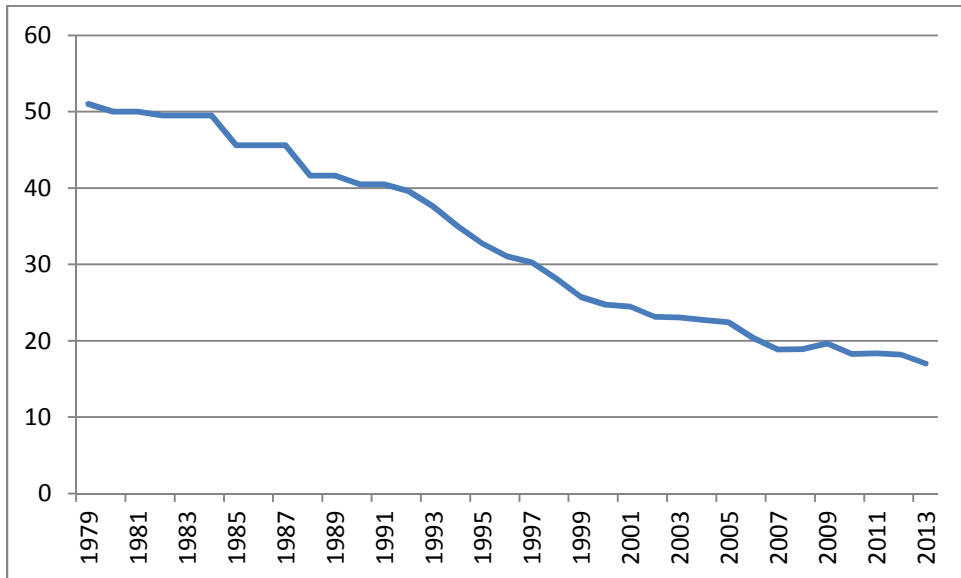
Time lost due to strikes



38. Union density has reduced significantly over the last 30 years (Chart 2). Density declined from 50% in 1980 to 17% in 2013. This represents fewer than 2 million union members in a workforce of around 11.7 million.⁴⁹The downward trend seems to have been unaffected by the introduction of protected action in 1993, the WR Act, Work Choices or the FW Act. There is sure to be a relationship between union density and strike activity, but there does not appear to be any link between union density and the various changes in the protected action provisions. The reduction in union density, like the reduction in strikes, has been observed in a number of other developed economies.

Chart 2⁵⁰

Union density



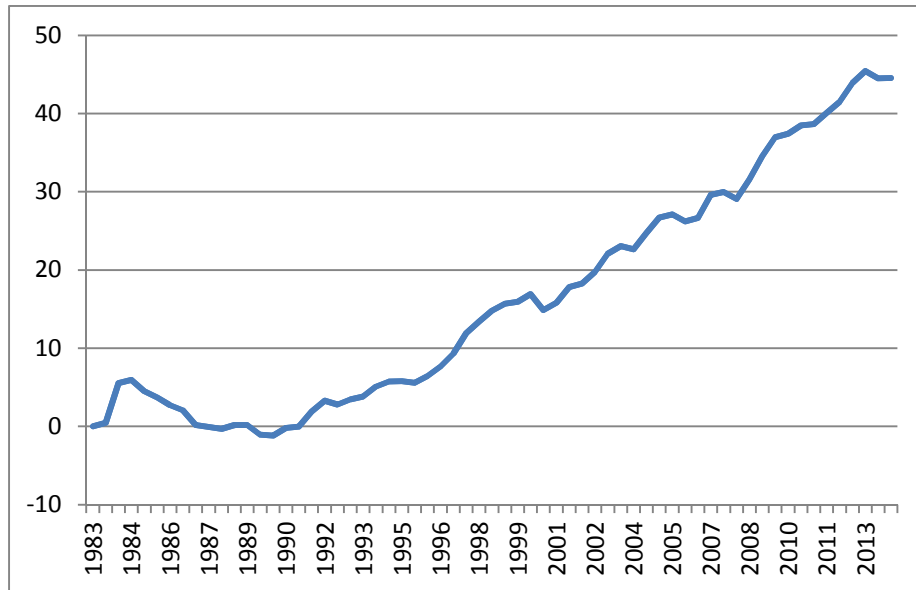
39. Growth in enterprise agreement coverage is a potentially important indicator of the effectiveness of the right to strike. Unfortunately the data on agreement coverage are inconclusive. There was an initial period of burgeoning growth in agreement-making following the introduction of the legal framework for approval of enterprise agreements in 1993. After that the picture is less clear. The 2012 review of the FW Act discussed different official estimates of agreement coverage. The Review Panel estimated that in 2011 21% of total persons employed in Australia were covered by enterprise agreements.⁵¹ It also found that collective agreements had "become a somewhat more important form of wage setting" over the previous decade, although there was little growth in agreement coverage in the private sector.⁵² Recent figures from the Australian Workplace Relations Study suggest that 36.5% of employees now have their pay set by an enterprise agreement.⁵³ It is difficult to say whether this indicates growth in coverage since 2011 or is simply a reflection of differences in

survey method. It is impossible to tell from the data on agreement coverage whether changes in the protected action provisions have had an effect on agreement-making.

40. Looking at economic performance more broadly, Australia has recorded strong non-inflationary growth for a sustained period although more recently growth has been affected by reductions in demand for minerals and falling commodity prices. Unemployment has generally been low, certainly relative to other developed economies. Wages growth has been steady, although slowing in the last few years in line with the more subdued economic performance overall (Chart 3). Since 1993 real wages have grown by more than 40%. This is a significant feature of Australia's economic performance over the last 2 decades, but there is no basis for suggesting that the protected action provisions contributed to it. The data suggest that the protected action provisions are compatible with growth in real wages, but there are too many variables at work to draw any other conclusions.

Chart 3⁵⁴

Real earnings

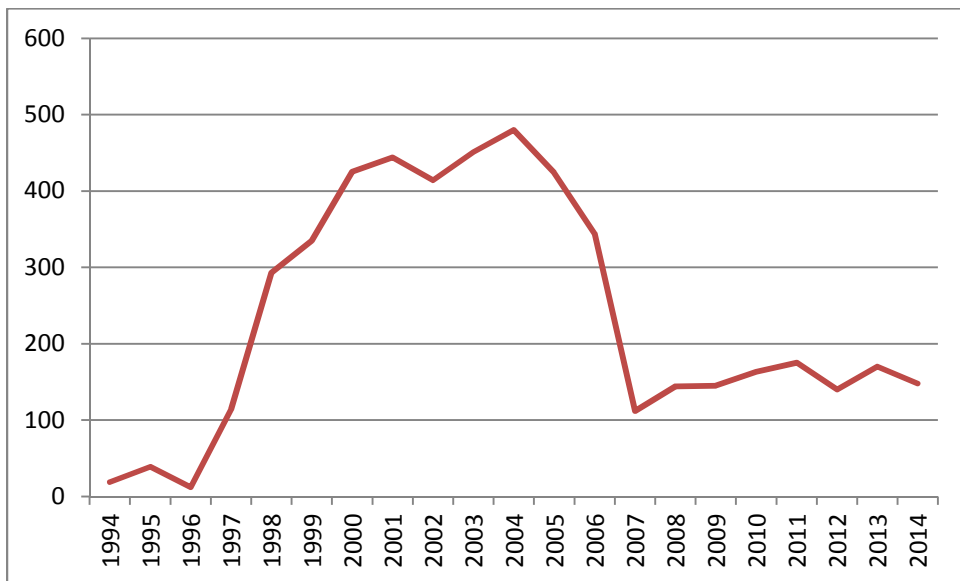


41. There are some data in relation to Commission proceedings which throw light on how the protected action provisions have operated in practice. Since 1993 the Commission has had the power to make orders prohibiting industrial action which is not protected. Parties to disputes, and others, can make application for orders that industrial action cease or not occur. (See Chart 4) After a slow start the annual number of applications spiked in the period from 1998 to 2006 but reduced and has stayed low since then. There does not seem to be a simple explanation for this pattern. Prior to 2006 the Commission had a discretion not to issue a no-strike order even if the action was unprotected and an application was often a prelude to successful conciliation in the Commission. Since 2006 the Commission has had no discretion if the action is unprotected. Perhaps this has reduced the opportunity for conciliation and in turn the utility of making an application. Another possible explanation for the data is that between 1996 and 2007 there was a relatively high

level of "unprotected" industrial action – industrial action which was not taken in accordance with the protected action provisions – but that compliance has increased significantly since 2007. The reduction in strikes overall is also clearly a relevant factor.

Chart 4⁵⁵

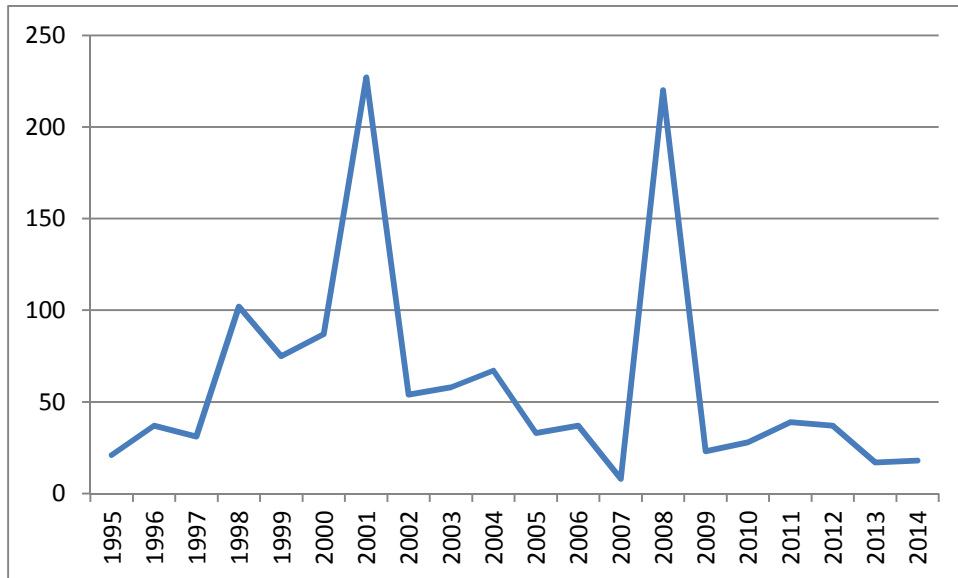
Applications for no-strike orders



42. The purpose of no-strike orders is to stop or prevent industrial action which is unprotected. As already indicated, in cases where the action is protected, there are nevertheless a number of grounds on which the Commission may suspend or terminate the action.⁵⁶ Looking first at the aggregate position, Chart 5 shows the annual number of applications since 1994. It is likely that the large number of applications in 2001 and 2008 relate to the bargaining cycle in the health care industry. Even allowing for that, the data are volatile, although stabilizing somewhat since the FW Act commenced in 2010.

Chart 5⁵⁷

Applications to suspend or terminate strike action



43. It is possible to break these figures down by reference to the different provisions under which applications which can be made. This has been done for the period during which the FW Act has been in operation (Table 1). Under the FW Act there are three main provisions. The first provision permits the Commission to suspend or terminate protected action if it is causing significant economic harm to the employer and the employees concerned.⁵⁸ Since 2010 there have been 30 applications under this provision and the Commission has made 3 suspension orders and one termination order. Secondly, if the Commission finds that protected action is threatening to endanger the life, the personal safety or health, or the welfare, of the population or part of it or to cause significant damage to the economy or an important part of it must suspend or terminate the action.⁵⁹ Since 2010 there have been 73 applications under this provision. The Commission has made 10 suspension orders and 6 termination orders. All but one of those 16 orders have been made on the grounds that the protected action was threatening to endanger the life, the personal safety or

health, or the welfare, of the population or part of it, grounds which the Committee of Experts accepts as legitimate.⁶⁰ Thirdly, if the Commission is satisfied that the protected action is adversely affecting the employer *or* any of the relevant employees *and* threatening to cause significant harm to a third party the Commission *may* suspend the action, but cannot terminate it.⁶¹ Since 2010 there have been 11 applications, only one of which resulted in a suspension order.

Table 1⁶²

Applications to suspend or terminate

2010 -2014

	Applications	Orders	
		Suspend	Terminate
Significant economic harm to the employer and any of the employees	30	3	1
Threatening to endanger life, etc or to cause damage to the economy, etc	73	10	6
Adversely affecting the employer <i>or</i> any of the relevant employees <i>and</i> threatening to cause significant harm to a third party	11	1	
Total	114	14	7

44. In summary, in the 5 years in which the FW Act has been in operation there have been only six orders made on grounds which the Committee of Experts does not regard as legitimate, of which 4 have been suspensions and 2 terminations. It can be concluded that very few orders have been made suspending or terminating protected action on grounds which the Committee of Experts regards as inconsistent with the right to strike in international law.

CONCLUSIONS

45. Is the right to strike in Australia adequate? How should the ILO pronouncements be assessed? At a general level the ILO's position is encapsulated in the following quotation:

" ... strikes can be prohibited under the Convention only in essential services in the strict sense of the term, that is, those the interruption of which would endanger the life, personal safety or health of the whole or part of the population, and for public servants exercising authority in the name of the State, in addition to the armed forces and police (1994 General Survey on freedom of association and collective bargaining, paragraphs 158 and 159)."

46. In applying this statement of principle to the protected action provisions in the FW Act the ILO has indicated a number of specific inconsistencies. They are:

- the prohibition in relation to multi-employer agreements;
- the prohibition of sympathy strikes and secondary boycotts;
- provisions of the Crimes Act which prohibit industrial action threatening trade or commerce with other countries or between States and boycotts affecting Government services or international trade;
- limitations on the matters which are permitted subjects for bargaining; and
- the provision for suspension or termination of protected action on the grounds of economic harm.

47. To this list might be added some concerns articulated by the Committee in relation to the potential effect of pre-strike ballot procedures.
48. Since the introduction of a right to take protected action in 1993, the exercise of the right has been confined to bargaining for an agreement at the level of the enterprise. Agreements applying to more than one enterprise have only been permitted in very limited circumstances. Although bargaining is not so confined in many other developed economies, to permit bargaining on a sectoral, industry or some other broad basis in Australia would be a significant change. Australia's labour institutions were the mechanism for transmitting unsustainable wage increases across the economy at several times during the latter part of the last century, but the nature of those institutions has changed and our economy is now exposed to a much greater extent to global competition. It remains to be seen whether economic policy makers will revisit the limitation on bargaining which is not strictly enterprise based.
49. The prohibitions on sympathy strikes and secondary boycotts are also the product of particular events. Legal limitations on industrial action of that kind were partly a response at the political level to widespread use of secondary bans. It was commonplace during the 1970s and 1980s for bans to be imposed on the supply of goods or services to a particular employer by employees of a second employer. While there might be no economic effect on the employees imposing the ban or on the second employer, often the first employer's operations would be seriously affected. It is for reasons such as these that sympathy strikes and secondary boycotts came to be prohibited. The position taken by the Committee of Experts would permit employees to exert economic pressure on an employer, not their own, in support of the industrial interests of the employees of that employer. It is not self-evident that such a position

is either fair or appropriate in the contemporary context. For example, it can be argued that permitting secondary strikes and boycotts might go too far in redressing the natural imbalance in bargaining power between employers and employees.⁶³

50. The Crimes Act provisions are potentially very serious as they impose criminal liability. On the other hand, the criminal law provides protections for defendants which might make it difficult to prove breach of the Act. For that reason, absent extraordinary circumstances, it is unlikely that these provisions are an effective restriction on protected action in practice. Nevertheless they are a potential threat to the right to strike.

51. The Australian industrial relations system has always placed some limits on the matters which could be the legitimate subject of award or agreement regulation. The conciliation and arbitration system was confined to matters pertaining to the relations between employers and employees. When enterprise agreements were introduced in 1993 the same restrictions were applied to enterprise bargaining. Since then the restrictions have been built on and changed at various times. The list of matters which are not permitted tends to expand and contract depending upon which major party can command a majority in the Parliament.⁶⁴ There is general agreement that some claims should not be permitted, such as claims for agreement terms which would be discriminatory. Among the matters which merit further comment are the prohibition on the payment of a bargaining services fee and the prohibition on strike pay provisions.⁶⁵

52. The payment of a bargaining services fee is seen by unions as a way of extracting a financial contribution from employees who do not wish to join the union but will benefit from the union's efforts in bargaining. Antipathy to the idea of a free ride was

once widespread. Whether it has survived the recent decline in union membership is difficult to say. Nevertheless some, perhaps many, employers regard a bargaining services fee as the near equivalent of compulsory unionism. There is a clear clash of ideologies which raises an argument of principle. One question is whether a union should be deprived of the ability to take protected action simply because it makes a demand that the employer require non-union employees to pay a bargaining services fee. Under the current legislative provisions such an arrangement would have no legal effect even if the employer agreed to it.

53. The prohibition on making demands of the employer which involve strike pay is part of a broader legislative objective which is to prohibit strike pay under any circumstances.⁶⁶ There are other provisions which prohibit employers from making payment for strikes and employees from seeking or to accepting strike pay. In the context of enterprise bargaining at least, on one view this limitation is not of great consequence. Financial compensation for earnings lost through strikes can be made in the terms of the agreement reached without using the label "strike pay". The wider question of principle, however, still remains.
54. The potential for suspension or termination of protected action has also been part of the Australian system since 1993 although the power to suspend or terminate has become broader in recent years. The grounds for suspension or termination which continue to attract the ILO's attention are those relating to significant economic harm to the parties, damage to the economy or an important part of it, and significant harm to a third party. Restrictions such as these may seem incongruous when it is considered that the right to strike necessarily involves the use of economic power by employees. Seen in their historical context, however, the provisions are more readily

understandable. Prior to 1993, for around 90 years the industrial relations system placed a high value on protecting the parties to industrial disputes and the public from the effects of those disputes. This objective was at the heart of the idea of compulsory conciliation and arbitration. The substitution of compulsory arbitration for economically damaging strikes is a familiar concept in Australia. Furthermore successful applications under these provisions have been very few⁶⁷, possibly because the Commission has imposed a strict test on applicants. For example, the Commission has found that an applicant must show the harm that is occurring is over and above harm of the sort that is commonly the consequence of protected industrial action.⁶⁸ A recent decision suggests, however, that decisions under the earlier legislative provisions do not apply to the Fair Work Act and that the test under that Act is not as strict.⁶⁹

55. A final comment about the potential for pre-strike ballot procedures to unduly fetter the right to strike. Protected action cannot be taken unless an order has been obtained from the Commission for a ballot of the employees, the ballot has been successful and the employer has been given adequate notice of the action.⁷⁰ The Committee of Experts is apprehensive that if the pre-strike ballot provisions are complex and time-consuming the process may constitute an unreasonable impediment to strike action. This is a question of judgment and degree which employers and employees will approach with different assumptions. It is important to note, however, that, subject to its concerns about procedural complexity, the Committee accepts the legitimacy of compulsory pre-strike ballots.
56. Looking at the situation more generally, the ILO pronouncements should be seen in context. Comments on the way in which countries are implementing Convention No.

87 are not unusual. For example, in 2013 the Committee of Experts identified some 64 countries in which the implementation of the Convention was at issue, and within that number 32 countries in which the right to strike was mentioned.⁷¹ The countries in the latter group included, apart from Australia, Belgium, Canada, Denmark and Portugal. Without further research it is not practical to attempt to evaluate the Committee's comments about Australia by reference to its comments about other countries. But it is clear that Australia is neither the sole nor the worst offender. Some research suggests that standards relating to freedom of association and collective bargaining are compromised by economic policy and legislation in many developed countries labouring under the pressure of global competition.⁷²

57. It could be argued that the restrictions on the right to strike should be placed in a broader context. Australia's record on other labour issues is good. The National Employment Standards guarantee many basic entitlements such as working hours, leave, redundancy payments and so on. The modern award system provides for minimum wages, overtime, penalty rates and other benefits. In addition there is legislation protecting employees against unfair dismissal, entrenching workplace rights and providing for occupational superannuation and State-provided health care. Employees are legally entitled to these benefits regardless of where they work and regardless of union affiliation.
58. The fundamentals of the system have been in operation for 20 years. Restrictions on strikes were most severe under the Work Choices legislation. After the 2007 election the Labor Government decided to incorporate most of those restrictions into the FW Act with relatively few changes. While the trade union movement continues to press for greater liberalisation, there does not seem to be any significant political support

for making protected action more widely available. For its part the current Government has introduced a bill which would make discussion of productivity improvement a mandated subject of bargaining and require greater efforts to reach agreement before protected action can be taken. No doubt the bill is the result of lobbying by employer groups who wish to make the enterprise bargaining process more efficient and to reduce strikes. It is always difficult to predict events in the political sphere, but on recent indications it is unlikely the bill will be passed. The Government has also indicated that it will not introduce any further changes to the industrial system generally before the next election due in 2016.

59. It might be cautiously concluded that the right to strike as such is not a matter of great political controversy in Australia. It is of course highly undesirable that Australia should be or be seen to be in breach of its international obligations. But without some political impetus for change the protected action provisions, many of which have been in operation for a considerable period of time, are unlikely to be substantially altered. And it is also significant that in other respects Australia has high labour standards and solid protections. Perhaps further dialogue with the ILO and the major interests in the industrial relations system might lead to a reconciliation between what are currently quite different perspectives on the right to strike in the Australia.

¹ Although employees had a right at common law to refuse to comply with an unreasonable or unlawful direction given by the employer, this was of very little relevance in relation to strikes generally.

² Commonwealth of Australia Constitution Act.

³ Although the sanctions available under industrial law changed from time to time, generally speaking employers had access to civil remedies based on common law actions such as interference with contractual relations, trespass and conspiracy to injure.

⁴ IRA s.170PG

⁵ IRA s.170PA(2). Although multiple employer agreements were permitted in some circumstances, protected action could not be taken in pursuit of them: IRA s.170LC

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- ⁶ IRA s.170PD – 170PF
- ⁷ IRA s.170PH
- ⁸ IRA s.170PI
- ⁹ IRA s.170PK
- ¹⁰ IRA s.170PM.
- ¹¹ IRA s.170PG(2), s.170MA and s.170NA(1)(b).
- ¹² IRA s.170PO(1).
- ¹³ IRA s.170PP.
- ¹⁴ The FW Act provides a procedure by which a group of employers may be treated as a single employer because of a community of interest. The provisions have not been widely used.
- ¹⁵ Under FW Act s.431 the Minister for Workplace Relations may terminate protected action on the grounds that it is threatening to endanger the health or welfare of a part of the population or to cause significant damage to the Australian economy or an important part of it. The power has never been exercised since its introduction in Work Choices in 2005.
- ¹⁶ *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* 2 August 2012.
- ¹⁷ The Covenant was ratified by Australia in 1975.
- ¹⁸ Australia ratified both Conventions in 1973.
- ¹⁹ Direct Request 78th ILC Session (1991).
- ²⁰ Report No. 227 of the Committee on Freedom of Association, March 1991, case No. 1511 at para 236.
- ²¹ Industrial Relations Act 1998 (IRA) s.170PA(1).
- ²² Direct Request 82nd ILC session (1995).
- ²³ Observation 87th ILC Session (1999).
- ²⁴ Workplace Relations Act 1996, s.170LI.
- ²⁵ Cited above.
- ²⁶ Workplace Relations Act 1996 ss. 166A, 187AB and 170MW.
- ²⁷ Cited above and Committee of Experts General Survey on freedom of association and collective bargaining, 1994, paragraph 168.
- ²⁸ Workplace Relations Act 1996 s.170MW(3).
- ²⁹ Crimes Act 1914 ss.30J and 30K.
- ³⁰ Observation 89th ILC session (2001). Observation 91st ILC session (2003). Observation 95th ILC session (2006).
- ³¹ The nature of the criticisms, so far as the right to strike is concerned, can be gauged from the following passage: "The Committee once again requests the Government to indicate in its next report any measures taken or contemplated with a view to: (i) amending sections 36, 37 and 38 of the Building and Construction Industry Improvement Act, 2005, which refer to "unlawful industrial action" (implying not simply liability in tort vis-à-vis the employer, but a wider responsibility towards third parties and an outright prohibition of industrial action); (ii) amending sections 39, 40 and 48-50 of the Act so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry ..." Observation 96th ILC session (2007).
- ³² Observation 96th ILC session (2007).
- ³³ Workplace Relations Act 1996, ss. 421, 439, 461(1)(C) and 497.
- ³⁴ Sections 356 and 436.
- ³⁵ Section 430(3)(C)(II).
- ³⁶ Sections 433(1)(D) and (2)(C).

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- ³⁷ Sections 498, 500A and 504(3).
- ³⁸ Section 407.
- ³⁹ Observation 99th ILC session (2010).
- ⁴⁰ Observation and Direct request relating to Convention No.87 and Direct request relating to Convention No. 98 103rd ILC session (2014).
- ⁴¹ Fair Work (Bargaining Processes) Bill 2014.
- ⁴² (1996) 187 CLR. 416.
- ⁴³ At 546.
- ⁴⁴ At 545.
- ⁴⁵ Governing Body debate 11 November 2014, Agenda item 5.
- ⁴⁶ For a detailed argument in support of the implication see Vogt, The Right to Strike <http://www.ituc-csi.org/the-right-to-strike-and-the-ilo?lang=en>
- ⁴⁷ Isaac, Keynes versus the Classics in the 1970s, ABL Vol 38 No 2, 2012
- ⁴⁸ Source: ABS, Industrial disputes, Australia, Sep 2014, Catalogue No. 6321.0.55.001; ABS, Industrial disputes, Mar 2007, Catalogue No. 6321.0.55.001.
- ⁴⁹ Source: ABS: Labour Force Catalogue No.6202.0. These data include the self-employed. The Australian Council of Trade Unions estimates there are approximately 1.8 million union members. See ACTU publication "*Urgency and Opportunity*" 2013
- ⁵⁰ Source: ABS, Employee Earnings, Benefits and Trade Union Membership, Catalogue No. 6310.0; ABS, Trade Union Members, Catalogue No. 6325.0. Note that data prior to 1986 are not strictly comparable with 1986 and subsequent data because of minor differences in definitions. See <http://www.abs.gov.au/ausstats/abs@.nsf/0/24331DB49DAE9BB4CA2570EC000E4155?opendocument>
- ⁵¹ Endnote 16 above, p.58.
- ⁵² Cited above.
- ⁵³ Fair Work Commission 2015.
- ⁵⁴ ABS Average Weekly Earnings, Australia Catalogue No. 6302 (Full Time Adult Ordinary Time Earnings); ABS Consumer Price Index, Australia Catalogue No. 6401.0.
- ⁵⁵ Annual Reports of the AIRC, FWA and FWC.
- ⁵⁶ Under the legislation which operated from 1993 to 2005 the Commission could order that the bargaining period be suspended or terminated. If such an order was made the protected action ceased to be protected.
- ⁵⁷ Annual Reports of the AIRC, FWA and FWC.
- ⁵⁸ FW Act s.423.
- ⁵⁹ FW Act s.424.
- ⁶⁰ The odd one out concerned the grounding of the entire fleet of the national airline Qantas as a result of which the Full Bench terminated the protected action: [2011] FWAFB 7444.
- ⁶¹ FW Act s.426
- ⁶² Fair Work Commission public records.
- ⁶³ Globalisation and Core Labour Standards: Compliance Problems with ILO Conventions 87 and 98. Comparing Australia and other English-Speaking Countries with EU Member States, Biffel & Isaac, International Journal of Comparative Labour Law and Industrial Relations, Autumn 2005 page 405at pp.440-441.
- ⁶⁴ At present protected action is not permitted in support of claims which are "unlawful." FW Act s.194.
- ⁶⁵ FW Act, see paragraph (d) of the definition of "objectionable term" in s 12; ss.470-475.
- ⁶⁶ FW Act ss.470-475.
- ⁶⁷ See paragraph 44 above.

⁶⁸ CFMEU v Woodside Burrup Pty Ltd [2010] FWAFB 6021 in relation to FW Act s.426.

⁶⁹ *Ausgrid*, etc [2015] FWC 1600

⁷⁰ FW Act Chapter 3 Division 8 and ss. 413-414.

⁷¹ ILO Normlex Database.

⁷² Biffi & Isaac, cited above, at 439.