Benchbook

Industrial Action

About this benchbook

This benchbook has been prepared by staff of the Fair Work Commission (the Commission) to provide information about the regulation of protected industrial action and unprotected industrial action under the *Fair Work Act 2009* (Cth) (the Fair Work Act). Information is provided to parties to assist in the preparation of material before the Commission.

Disclaimer

The content of this benchbook should be used as a general guide only. The benchbook is not intended to be an authority to be used in support of a case at hearing.

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The information provided, including cases and commentary, are considered correct as of the date of publication. Changes to legislation and case law will be reflected in regular updates to this benchbook from time to time.

This benchbook is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish the names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this benchbook may inadvertently contain such names.

Case examples

Individual cases have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive.

The case examples used in this benchbook are interpretations of the decisions by Commission staff on specific issues which are addressed within the text. The case examples may not reflect all of the issues considered in the relevant decision. In the electronic version of the benchbook the original text of the decision can be accessed by clicking the link.

Links to external websites

Where this site provides links to external websites, these links are provided for the visitor's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

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Part 1 – How to use this benchbook

This part will provide information on:

- the Fair Work Commission
- the national workplace relations system
- referencing and case law in this benchbook, and
- common terms within a glossary.

This benchbook has been designed for electronic use and works best in that form. The electronic version has links to all of the cases referenced in the footnotes, as well as links to the legislation and other websites.

To access the electronic version please visit: www.fwc.gov.au/resources/benchbooks

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About the Commission

The Fair Work Commission (the Commission) is Australia's national workplace relations tribunal.

Australia has had a national workplace relations tribunal for more than a century and it is one of the country's oldest key institutions. Over time it has undergone many changes in jurisdiction, name, functions and structure. Throughout its history, the tribunal, currently known as the Fair Work Commission, and its predecessors have made many decisions that have affected the lives of working Australians and their employers. The Commission recognises the importance of promoting public understanding of the role of the tribunal and of capturing and preserving its history for display and research.

The Commission is responsible for applying the provisions of the *Fair Work Act 2009* (the Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act). The Commission has powers to:

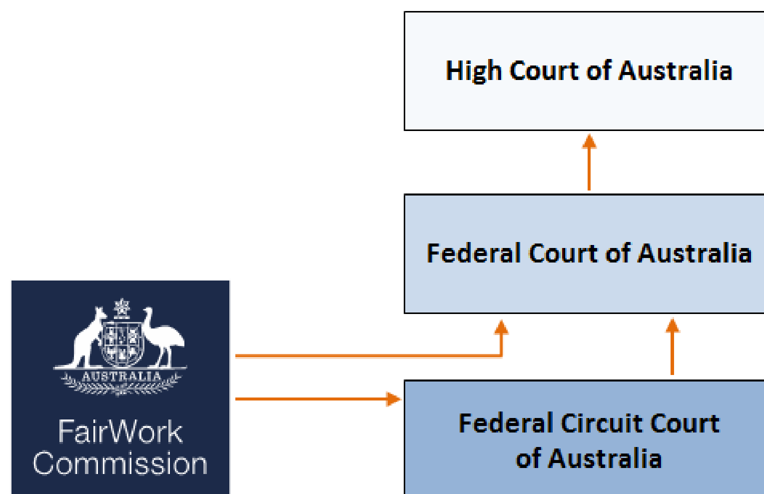
- make orders to facilitate enterprise bargaining (including orders for ballots on protected industrial action and good faith bargaining) and to deal with bargaining disputes
- make workplace determinations in certain circumstances in which enterprise bargaining parties have been unable to reach agreement
- make orders to stop or suspend industrial action
- deal with disputes about stand downs, and
- promote cooperative and productive workplace relations and prevent disputes.

Relationship between the Fair Work Commission and the Courts

The High Court of Australia is the highest court in the Australian judicial system. The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.

The Federal Court of Australia is a superior court of record and has a broad jurisdiction including over all civil and criminal matters arising in the Fair Work jurisdiction. The Court also has a substantial and diverse appellate jurisdiction, including dealing with applications for judicial reviews of certain Commission decisions.

Some matters lodged with the Commission are first conciliated at the Commission. If the matter does not settle there an applicant can then apply to start proceedings in the Federal Court or the Fair Work Division of the Federal Circuit Court.



The Commission Structure

The Commission is headed by a President, who is also a Judge of the Federal Court of Australia. Commission Members perform quasi-judicial functions under the Fair Work Act, including conducting public hearings and private conferences for both individual and collective matters. They also perform certain functions under the Registered Organisations Act, including determining applications for registration and cancellation of registration and for alterations to eligibility rules of employee and employer organisations. Commission Members are independent, statutory office holders appointed by the Governor-General on the recommendation of the Australian Government of the day. There are a number of different titles that may apply to Commission Members:

- President
- Vice President
- Deputy President
- Commissioner
- Expert Panel Member

Appearing at the Commission

There are standards for the conduct of all people attending a hearing or conference at the Commission. The standards help the Commission to provide fair hearings for all parties.

Providing fair hearings involves allowing all parties to put their case forward, and to have their case determined impartially and according to law.

The Commission and all parties appearing before it, including representatives, have responsibilities to each other and in providing a fair hearing for all participants.

When coming to the Commission:

- it is important to arrive early for the conference or hearing because proceedings begin on time
- notify the Commission staff upon arrival by approaching them in the hearing or conference room
- if delayed it is important that contact is made with the appropriate Commission staff before the hearing is due to start
- switch off mobile phone or other electronic devices in the hearing or conference room
- address the Member of the Commission by his or her title (eg Deputy President or Commissioner)
- in a hearing, stand when addressing the Member of the Commission or to question a witness, and
- bring enough copies of documents so everyone involved can have a copy (eg three copies: one to keep, one for the other party and one for the Member).

Name of the Tribunal

The name of the national workplace relations tribunal has changed a number of times throughout its history. For consistency, in this document, it has been referred to as the 'Commission'. The table below outlines the name of the national workplace relations tribunal at various periods.

Name	Short title	Dates
Fair Work Commission	The Commission	1 January 2013–ongoing
Fair Work Australia	FWA	1 July 2009–31 December 2012
Australian Industrial Relations Commission	AIRC, the Commission	1989–2009
Australian Conciliation and Arbitration Commission	The Commission	1973–1989
Commonwealth Conciliation and Arbitration Commission	The Commission	1956–1973
Commonwealth Court of Conciliation and Arbitration		1904–1956

Workplace relations legislation, Regulations and Rules

The following table sets out legislation dealing with workplace relations and the dates that the law was in operation. The current legislation is the Fair Work Act.

Name of legislation	Operative dates
Fair Work Act 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Workplace Relations Act 1996 **(Cth)** ***(Incorporating the Workplace Relations Amendment (Work Choices) Act 2005*** **(Cth))**	27 March 2006
Workplace Relations Act 1996 **(Cth)**	25 November 1996
Industrial Relations Act 1988 **(Cth)**	1 March 1989
Fair Work Regulations 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Fair Work Commission Rules 2013	6 December 2013

Coverage of national workplace relations laws

See Fair Work Act s.14

Only national system employees and national system employers can participate in protected industrial action under the Fair Work Act.[1]

A ***national system employee*** is an individual employed by a national system employer.[2]

A ***national system employer*** is an employer covered and bound by the national workplace relations laws.

Whether an employer is a national system employer depends on the location of the employment relationship (State or Territory) and, in some cases, the legal status and business of the employer.

Who is covered by national workplace relations laws?

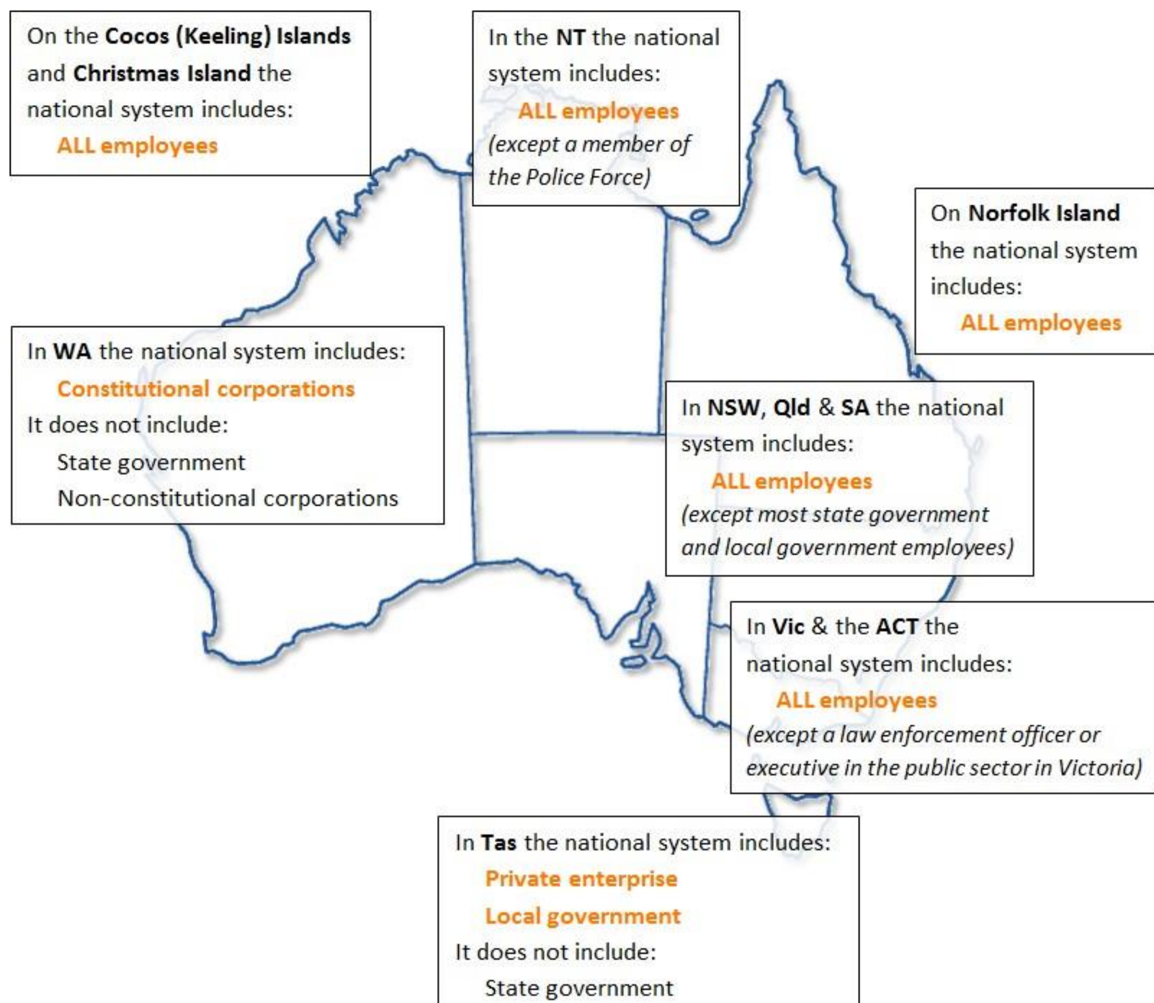
The national workplace relations system covers:

- all employees in Victoria (with limited exceptions in relation to State public sector employees), the Northern Territory and the Australian Capital Territory

[1] Fair Work Act s.407.
[2] Fair Work Act s.13.

- all employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- employees employed by private enterprise in New South Wales, Queensland, South Australia and Tasmania
- those employed by local government in Tasmania
- those employed by a constitutional corporation in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- those employed by the Commonwealth or a Commonwealth authority, and
- waterside employees, maritime employees or flight crew officers in interstate or overseas trade or commerce.

Who does the national system include?



Case law

Case law is comprised of previous decisions made by courts and tribunals which help interpret the meaning of legislation and how it applies in a specific case. When a decision is made by a court or tribunal, that interpretation of the law may form a precedent. Decisions of the High Court of Australia are authoritative in all Australian courts and tribunals.

A ***precedent*** is a legal decision which provides guidance for future, similar cases.

An ***authoritative*** decision is one that must be followed on questions of law by lower courts and tribunals.

Referencing

References in this benchbook use the following formats.

Note: In the electronic version of the Benchbook the cases referenced in the footnotes have all been hyperlinked and the cases can be accessed by clicking the links.

Cases

[41] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) at para. 13.
[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361].
[43] ibid.
[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22, [(2008) 174 IR 21]; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23, [(1995) 185 CLR 410 at p. 427].

The name of the case will be in italics.

The link will be to the original reference. If a case has been reported then there will also be a reference to the journal the case has been reported in. For example, some of the abbreviations used are:

- 'HCA' for 'High Court of Australia'
- 'FCAFC' for a 'Full Court of the Federal Court of Australia'
- 'FWCFB' for a 'Full Bench of the Fair Work Commission'
- 'FWA' for 'Fair Work Australia'
- 'IR' for 'Industrial Reports'
- 'CLR' for 'Commonwealth Law Reports'

Page or paragraph numbers are included at the end of the reference, to provide a pinpoint in the document where appropriate.

If a reference is identical to the one immediately before, the term 'ibid.' is commonly used.

Where one case refers to another case, the term 'citing' is used.

Item	Example
Case names	*Elgammal v BlackRange Wealth Management Pty Ltd* *Visscher v The Honourable President Justice Giudice*
Link to case	[2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) [2009] HCA 34 (2 September 2009), [(2009) 239 CLR 361]
Paragraph number	[2008] AIRCFB 1088 … at para. 22.
Page number	(1995) 185 CLR 410 at p. 427
Identical reference	[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361]. [43] ibid.
Reference to other case	[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23.

Legislation and Regulations

[3] *Acts Interpretation Act 1901* (Cth) s.36(2).
[4] Fair Work Act s.381(2).
[5] Fair Work Regulations reg 6.08(3).
[6] *Police Administration Act* (NT) s.94.
[7] *Fair Work (Commonwealth Powers) Act 2009* (Vic).
[8] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).
[9] *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

The name of the legislation or regulations will be in italics unless a shortened version is being used.

The jurisdiction of the legislation or regulations is included in brackets if the full name is cited. For example, some of the abbreviations used are:

- '(Cth)' is a Commonwealth law
- '(ACT)' is an Australian Capital Territory law
- '(NSW)' is a New South Wales law
- '(NT)' is a Northern Territory law
- '(Qld)' is a Queensland law
- '(SA)' is a South Australian law
- '(Tas)' is a Tasmanian law
- '(Vic)' is a Victorian law
- '(WA)' is a Western Australian law

Section, regulation or rule numbers are included at the end of the reference to provide a pinpoint in the legislation where appropriate.

Item	Example
Legislation or regulation name	*Acts Interpretation Act 1901* Fair Work Act Fair Work Regulations *Industrial Relations (Commonwealth Powers) Act 2009*
Jurisdiction	*Acts Interpretation Act 1901* (Cth) *Police Administration Act* (NT) *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld)
Section number	*Acts Interpretation Act 1901* (Cth) s.36(2) Fair Work Act s.381(2) Fair Work Regulations reg 6.08(3)

Guide to symbols

The symbols used in this benchbook are designed to provide assistance with identifying specific issues or to point to additional information that may assist the reader with their understanding of a particular issue.

Important information.

Related information – Links to information on related topics.

Helpful information.

Links to sections of legislation.

Links to forms.

Glossary of terms

The glossary explains common terms used throughout this benchbook while legislative terms are defined in the relevant sections.

Naming conventions

Employee organisations are generally referred to as unions, given the general use and understanding of that term.

The separate parties involved in industrial action have been referred to in this benchbook as 'employer', 'employee' and 'union'. At times the use of 'employer', 'employee' or 'union' may also be a reference to 'employers', 'employees' or 'unions' if that is appropriate.

AEC	The Australian Electoral Commission.
Alternative ballot agent	The Commission may decide that a person other than the AEC is to be the ballot agent for a protected action ballot
Appeal	An application for a Full Bench of the Commission to review a decision of a single member of the Commission and determine if the decision was correct. A person must seek the permission of the Commission to appeal a decision.
Applicant	A person who makes an application to the Commission.
Application	The way of starting a case before the Commission. An application can only be made using a form prescribed by the *Fair Work Commission Rules 2013* (Cth).
Arbitration	The process by which a member of the Commission will hear evidence, consider submissions and then make a decision in a matter. Arbitration generally occurs in a formal hearing and generally involves the examination and cross-examination of witnesses.
Ballot agent	A person nominated to conduct a protected action ballot. The AEC is the default ballot agent unless the Commission specifies another person in the protected action ballot order as the protected action ballot agent.
Bargaining	Bargaining is the process whereby the parties to a proposed enterprise agreement negotiate the coverage, terms and conditions of that agreement.

Bargaining representative	A bargaining representative is a person nominated to participate in bargaining for a proposed enterprise agreement. A bargaining representative can be an employer or an employee, or a union or industrial association. A union is the default bargaining representative for an employee if: • the employee is a member of the union, and • the union is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement. However, the union will not be the employee's bargaining representative if: • the employee revokes the status of the union as his or her bargaining representative, or • appoints another person, or appoints himself or herself, as bargaining representative for the agreement.[3]
Civil remedy provision	A provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the person who contravened the provision of the Act, or any other order the Court considers appropriate such as an injunction.
Commission Member	Someone appointed by the Governor-General as a Member of the Commission. A member may be a Commissioner, a Deputy President, a Vice President or the President.
Conference	A proceeding conducted by a Commission Member which is generally held in private.
Constitutional corporation	Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.[4]
Contravention	An act that violates or goes against a law or order of a court.
Court	In this benchbook, a reference to 'Court' generally means the Federal Court or Federal Circuit Court.

[3] Fair Work Act s.176(1)(b).
[4] *Australian Constitution* s.51(xx).

Day	What is a day? Understanding what constitutes a 'day' is important regarding any legal process with requirements to meet specific timelines. Section 36(1) of the *Acts Interpretation Act 1901* (Cth)[5] deals with the manner in which time is to be considered in interpreting the Fair Work Act. It reads: *(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.* This means that when calculating time you do not count the day on which the relevant act or event occurs or occurred.[6]
Decision	A determination made by a single member or Full Bench of the Commission[7]. A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.
Demarcation dispute	A demarcation dispute is a dispute between two or more organisations, or within an organisation, as to the rights, status, or functions of members in relation to the employment of those members. It includes a dispute about the representation of the industrial interest of employees by a union.[8]
Employee organisation	See **union**
Employer organisation	An organisation which represents the interests of employers which has been registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

[5] As in force 25 June 2009 (see Fair Work Act s.40A).
[6] *Re White's Discounts Pty Ltd t/as Everybody's IGA Everyday and Broken Hill Foodland* PR937496 (AIRCFB, Giudice J, Drake SDP, Lewin C, 12 September 2003) at paras 15–16, [(2003) 128 IR 68].
[7] The General Manager of the Commission, or a member of staff delegated powers under ss.625 or 671 of the Fair Work Act may also make a decision.
[8] *Butterworths Australian Legal Dictionary*, 1997, at p. 343.

Enterprise agreement	An enterprise agreement is an agreement made at the enterprise level and enforceable under legislation which sets out terms and conditions of employment of employees and their employer (or employers). An enterprise agreement sets out rights and obligations of the employees and the employer(s) covered by the agreement. An enterprise agreement must meet a number of requirements under the Fair Work Act before it can be approved by the Commission.
Error of law	An error of law is a common ground for legal review. It occurs when a Member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.
Evidence	Information which tends to prove or disprove the existence of a particular belief, fact or proposition. Certain evidence may or may not be accepted by the Commission, however the Commission is not bound by the rules of evidence. Evidence is usually set out in an affidavit or given orally by a witness in a hearing.
Explanatory Memorandum	An Explanatory Memorandum is a document that provides additional information about how proposed legislation is expected to operate and details about individual sections and provisions of that legislation.
Fair Work Act	The *Fair Work Act 2009* (Cth) is the legislation that covers workplace relations laws in Australia.
First instance	A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter.
Full Bench	A Full Bench of the Commission comprises at least three Commission members, one of whom must be a presidential member. Full Benches are convened to hear appeals, matters of significant national interest and various other matters specifically provided for in the Fair Work Act. A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members' opinions differ.
Greenfields agreement	An agreement relating to a genuine new enterprise (including a new business, activity, project or undertaking) which is made at a time where the employer or employers have not employed any of the persons who will be necessary for the normal conduct of the enterprise and who will be covered by the agreement.
Hearing	A proceeding or arbitration conducted before the Commission which is generally open to the public.

Independent advisor	A person who can give an alternative ballot agent advice and recommendations directed towards ensuring that the ballot will be fair and democratic.
Injunction	An injunction is a legal remedy imposed by a court and requires a person to do a specific thing or more commonly to refrain from beginning or continuing a specific action.
Jurisdiction	The scope of the Commission's power and what the Commission can and cannot do. The power of the Commission to deal with matters is specified in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament.
Lodge	The act of delivering an application or other document to the Commission.
Matter	Cases at the Commission are referred to as matters.
Member	See **Commission Member**
Minister	The Federal Minister for Employment.
National Employment Standards	Minimum standards that apply to the employment of all national system employees. They are set out in Part 2–2 of the Fair Work Act and relate to: • maximum weekly hours • requests for flexible working arrangements • parental leave and related entitlements • annual leave • personal/carer's leave and compassionate leave • community service leave • long service leave • public holidays • notice of termination and redundancy pay, and • the Fair Work Information Statement
Nominal expiry date	The date specified in an enterprise agreement which indicates the period of time that the parties intended the agreement to operate. The nominal expiry date cannot be more not more than four years after the day the Commission approves the agreement. An enterprise agreement has continuing operation, and continues to apply even after it has passed its nominal expiry date.

Order	A formal direction made by the Commission which gives effect to a decision and is legally enforceable.
Organisation	See **union** or **employer organisation**
Party	A person or organisation involved in a matter before the Commission.
Pattern bargaining	Pattern bargaining is a course of conduct by a person who is a negotiating party to two or more proposed enterprise agreements, seeking common wages or conditions for two or more of those agreements, where the conduct extends beyond a single business.
Pecuniary penalty	An order to pay a sum of money which is made by a court as a punishment.
Procedural fairness	Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made. Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself. The terms ‘procedural fairness’ and ‘natural justice’ have similar meaning and can be used interchangeably.
Proposed enterprise agreement	An enterprise agreement which has not been ‘made’ by a vote of employees.
Protected action ballot	A secret ballot allowing employees directly concerned to vote on whether or not they authorise industrial action to advance the claims for their proposed enterprise agreement.
Quash	To set aside or reject a decision or order, so that it has no legal effect.
Respondent	A party responding to an application made to the Commission.
Service (Serve)	Service of a document means delivering the document to another party or their representative, usually within a specified period. Documents can be served in a number of ways. The acceptable ways in which documents can be served are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.
Serving documents	See **service**
Transitional Act	*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

Union	An organisation which represents the interests of employees which has been registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). A union can also be referred to as an employee organisation.
Workplace determination	The terms and conditions of employment determined by a Full Bench of the Commission. The Commission can make: • low-paid workplace determinations • industrial action related workplace determinations, and • bargaining related workplace determinations. An industrial action related workplace determination must be made where protected industrial action has been terminated by the Commission or the Minister and the bargaining representatives have not settled all of the matters at issue during the post-industrial action negotiating period.[9] A workplace determination includes a nominal expiry date set by the Commission.

[9] See Fair Work Act s.266.

Part 2 – What is industrial action?

This part will provide information on:

- the definition of industrial action
- the differences between protected and unprotected industrial action
- how to stop unprotected industrial action
- the different types of protected industrial action
- common requirements for protected industrial action, and
- pattern bargaining.

Industrial action defined

Industrial action can either be protected or unprotected.

The concepts of protected action and a limited right to strike within a bargaining period were introduced in the *Industrial Relations Reform Act 1993* (Cth). The *Workplace Relations Act 1996* (Cth) then introduced prohibitions on industrial action during the life of an agreement and payment during strikes.

The purpose of taking protected industrial action is so that employees or employers can support or advance their claims during bargaining in relation to a proposed enterprise agreement.

The distinction between protected industrial action and unprotected industrial action is important due to the consequences that flow from the classification of the action. Where industrial action is 'protected', a limited immunity applies, meaning that the remedies that might otherwise be sought in relation to the industrial action are generally not available.[10]

Industrial action which is not protected may be stopped or prevented by the Fair Work Commission (the Commission) making orders, and the enforcement of those orders by the Court.[11]

State and Federal Courts also have powers under statute and the general law to grant remedies in relation to industrial action that is not protected. This benchbook does not address the powers of these Courts and instead focusses on the role of the Commission.

Related information

- Immunity

[10] Fair Work Act s.415.

[11] Explanatory Memorandum to Fair Work Bill 2008 at para. 1637.

Definition

See Fair Work Act s.19

Industrial action means action of any of the following kinds:

- the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice which results in:
  - a restriction, or limitation on, or
  - a delay in;

  the performance of work
- a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee
- a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work, or
- the lockout of employees from their place of employment by the employer.

The term ***the performance of work*** is not restricted to how the tasks associated with a particular job are performed. It involves for example, when work is performed, where work is performed, how work is performed and the conditions under which work is performed.[12]

Industrial action where there is a failure or refusal by employees to attend for work, or a failure or refusal to perform any work at all by employees who attend for work, is historically known as a ***strike***.

An employer ***locks out*** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

Industrial action **does not** include the following:

- action by employees that is authorised or agreed to by the employer of the employees
- action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer, or
- action by an employee if:
  - the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety, and
  - the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

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[12] *Australian Municipal, Administrative, Clerical and Services Union v Lend Lease* [2014] FWC 5676 (Bissett C, 20 August 2014) at para. 23; citing *Re Mornington Peninsula Shire Council* [2011] FWAFB 4809 (Watson SDP, Kaufman SDP, Gooley C, 22 July 2011) at para. 25, [(2011) 210 IR 419].

The definition of industrial action under the *Fair Work Act 2009* (Cth) (the Fair Work Act) is limited to conduct in connection to disputes of a particular kind and with bargaining. A note to the definition says that 'Action will not be industrial in character if it stands completely outside the area of disputation and bargaining'.[13]

A Full Court of the Federal Court has recently observed that the note is a guide to interpretation only and that '[u]ltimately, the question posed by s 19(1) of the FW Act is whether action can be said to be "industrial" in character. If action takes place outside the area of disputation and bargaining, that is relevant in determining whether the action is "industrial", but it is not determinative'.[14]

Employers may have various statutory and common law rights to respond to industrial action by employees and such responses will not constitute industrial action unless the employer's action is a lockout.

Example

An employee who does not attend for work on account of illness may not be engaging in industrial action, while an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment clearly is so engaged.[15]

Related information

- Payments for partial work bans
- Payments during a period of stand down

[13] Note to Fair Work Act s.19(1); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited* PR946290 (AIRCFB, Giudice J, Harrison SDP, Simmonds C, 11 May 2004) at para. 46, [(2004) 133 IR 197]; see also *Police Federation of Australia v Victoria Police/Chief Commissioner of Police* [2014] FWCFB 2063 (Smith DP, Gostencnik DP, Johns C, 11 April 2014) at para. 50, [(2014) 243 IR 1]; *Australian Capital Territory v Australian Education Union* [2010] FWA 3454 (Deegan C, 29 April 2010) at paras 31–32.
[14] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25 (6 March 2015) at para. 120.
[15] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited* PR946290 (AIRCFB, Giudice J, Harrison SDP, Simmonds C, 11 May 2004) at para. 44, [(2004) 133 IR 197].

Case example: **Providing material to media – Action found NOT to be industrial action**

Ambulance Victoria v United Voice [2014] FCA 1119 (17 October 2014).

Facts

A protected action ballot was conducted to determine whether members supported the taking of various forms of action. The ballot received the support of a majority of members. One of the actions approved in the ballot was that members who were acting or appointed as Team Managers and Senior Team Managers would make all response time data available to the media without the approval of Ambulance Victoria's Executive General Managers. This release of information would be in breach of Ambulance Victoria policies and the contracts of employment of the relevant employees.

The duties of the managers included the collection and analysis of information relating to response times of ambulances in their areas. It was not part of their duties to provide such information to persons outside Ambulance Victoria, including reporters and others engaged by media outlets.

Outcome

The Court found that it could not be said that managers making response time data available to the media, in breach of their contracts of employment, involved the performance of their normal work in a manner different from that in which it was customarily performed. Nor was it ban, limitation or restriction on the performance of their work. What was proposed was the taking of action above and beyond, and outside the range of their normal work, rather than the placing of a restriction on its performance.

Relevance

When considering whether action is industrial action as defined in ss.19(1)(a) and (b) of the Fair Work Act, it is necessary to look at the work of the employee and how it is normally performed. A lack of any connection between that work or how it is usually performed and the action suggests that the action is unlikely to fall within the definition of industrial action. Note however, that in this case the Court did comment that the action may have been characterised differently if the managers were interrupting other duties to provide the information to the media.

Case example: **Wearing campaign clothing – Action found to be industrial action**

Australian Nursing Federation (Victoria Branch) v Mornington Peninsula Shire Council
[2011] FWA 4235 (Lawler VP, 4 July 2011).

Confirmed on appeal
[2011] FWAFB 4809 (Watson SDP, Kaufman SDP, Gooley C, 22 July 2011), [(2011) 210 IR 419].

Facts

The ANF applied for an order for a protected action ballot. That application was granted in the first instance by the Commission. Mornington Peninsula Shire Council sought an appeal of that decision on the grounds that, among other things, the action being proposed regarding the wearing of campaign clothing did not constitute industrial action.

Outcome

The Full Bench dismissed the appeal and held that the term 'the performance of work' was not restricted to how the tasks associated with a particular job are performed. It involved when work is performed, where work is performed, how work is performed and the conditions under which work is performed. In relation to s.19(1)(b) it held that if an employee is only prepared to perform work if they are wearing a particular item of clothing then they are placing a limitation or restriction on the performance of work or on the acceptance or offering for work. Accordingly such action was capable of being characterised as industrial action.

Relevance

The Court may consider both the work an employee does and the circumstances in which they do the work. Sections 19(1)(a) and (b) describe different circumstances. In order to fulfil the definition in s.19(1)(a), the action must cause a particular result, namely a restriction or limitation on, or a delay in the performance of work. It is not necessary for the action to have that result to satisfy the definition in s.19(1)(b).

Case example: **Placing material on vehicles – Action found to be industrial action**

Australian Municipal, Administrative, Clerical and Services Union v Lend Lease [2014] FWC 5676 (Bissett C, 20 August 2014).

Facts

The union made an application for a protected action ballot order. Lend Lease raised issues with a number of specific items of industrial action proposed by the union, including:

- attaching, incorporating or distributing union and industrial campaign related material to outgoing correspondence
- wearing, distributing and posting union campaign material such as t-shirts, badges, written communications and stickers, and
- writing messages regarding agreement negotiations on vehicles.

Outcome

The Commission held that each of the items of proposed industrial action could constitute industrial action within the meaning of the Fair Work Act.

Relevance

The Commission found that the placing of a slogan on a car may well fall within the definition of ‘performance of work’ which includes when, where and how the work is performed and the conditions under which work is performed. However, the content of the message and the manner of affixing it to the vehicle may be relevant in determining if the action is industrial action. The Commission noted that if the action resulted in the destruction of or damage to property, the immunity provisions granted to protected industrial action would not apply.

Part 2.1 – Unprotected industrial action

Unprotected industrial action must have two elements, these being:

- the action must be industrial action, and
- the industrial action is not protected.

Industrial action **does not** include action by an employee if:

- the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety, and
- the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.[16]

Case example: **Action found to NOT be protected industrial action**

ASP Ship Management Pty Ltd v Maritime Union of Australia, The [2015] FWC 7898 (Cambridge C, 17 November 2015).

Permission to appeal refused [2015] FWCFB 8057 (Watson VP, Gooley DP, Gostencnik DP, 4 December 2015), [(2015) 254 IR 143].

Facts

Employees of ASP Ship Management, who were members of the MUA, were refusing to perform work as directed to enable the vessel *MV Portland* to sail from Portland, Victoria, to Singapore where the ship was to be sold. ASP made an application for an order that the industrial action stop, which was granted at first instance. On appeal, the MUA advanced that the action taken was not industrial action on the basis that the direction of the employer was not a reasonable or lawful direction. Further, the union asserted that the one-way voyage of the *MV Portland* from Australia to Singapore was outside the scope of employment and therefore did not constitute industrial action.

Outcome

The Commission found that uncertainties in relation to the details of the voyage (such as the arrangements for repatriation to Australia) did not render the direction of the employer unreasonable. The MUA's argument that the direction fell outside the scope of employment was also rejected.

The Commission determined that the action organised by the union and taken by its members satisfied the definition of industrial action under the Fair Work Act and that such action was not protected industrial action.

Relevance

A failure to comply with a lawful and reasonable direction to perform work may in some circumstances constitue industrial action within s.19 of the Fair Work Act.

[16] Fair Work Act s.19(2).

Case example: **Action found to NOT be protected industrial action once suitable alternative work made available**

The Australian Workers' Union v United Group Resources Pty Ltd; Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v United Group Resources Pty Ltd
[2010] FWA 14 (Blair C, 7 January 2010).

Facts

Employees were advised that a substance suspected to be asbestos had fallen onto a scaffold in the prefrack area during work on the Shell Geelong refinery refurbishment. Employees were advised to remain in the sheds until the matter was resolved. The incoming night shift presented for work at 7.00pm but did not commence work. At around 9.30pm a proposal was put forward by the respondent that work could commence in other areas. This was rejected by the workers and after further discussions the night shift employees left the site. The issue also impacted the day shift on the following Monday morning, after more suspect material had been discovered over the weekend. The day employees left the site after being advised at around 4.00pm that they would not be paid. In both instances the night shift and day shift employees believed that there were genuine concerns regarding occupational health and safety.

Outcome

The Commission was satisfied that the nightshift employees were not taking industrial action for the first two and half hours of their shift because, during that time, they held a reasonable concern about an imminent risk to their health or safety relating to the finding of asbestos, sufficient to activate the exclusion in s.19(1)(c). However, later in the shift suitable alternative work, within the meaning of s.19(1)(c)(ii) was available to them which would have enabled them to complete their shifts. They left the site rather than perform that suitable alternative work and in so doing commenced unprotected industrial action. In relation to the day shift on the Monday, the Commission was satisfied that for part of the shift the employees did hold a reasonable concern about an imminent risk to their health and safety. However their decision later in the day to leave the workplace was due to being advised that they would not be paid, rather than because of their concerns about their safety.

Relevance

The ceasing of work due to a reasonable concern about an imminent risk to health or safety may, in some circumstances, fall within the exceptions to the meaning of industrial action. The exception would only arise where alternate, appropriate and safe work is unavailable to be performed by the employees, either at the same site or another workplace. Importantly, where suitable alternative duties do not become available until some time after a risk is identified, it is possible that a refusal by employees to perform work may not be industrial action for a particular period, but will be industrial action for the period after that suitable work became available.

Case example: **Dismissal for active participation in unprotected action – Found to be valid reason for dismissal**

Petrunic v Q Catering Limited T/A Q Catering [2019] FWC 3981 (Hamberger SDP, 7 June 2019).

Facts

The applicant was dismissed after an investigation into her role in actively participating in unprotected industrial action by in attending her workplace on a rostered day off, as well as encouraging other employees to participate in unprotected industrial action by making and distributing posters.

The unprotected industrial action, and the associated blockade of staff vehicles, meant that the catering for flights due to leave from Sydney's international and domestic terminals on the morning of 15 June 2018 were not loaded. This resulted in 50 flights and over 7,500 customers being adversely affected. In particular 12 international flights were delayed, four of them by over two hours, (with consequent disruption to flight schedules that extended into that afternoon), and three flights to New Zealand departed without catering. There were also 22 domestic flights and 13 regional flights which were delayed by up to 31 minutes and departed without catering.

Outcome

The Commission was satisfied that the respondent had a valid reason to dismiss the applicant because of her conduct on 15 June 2018. The Commission also had regard to the dishonest responses the applicant gave to her employer when she was given the opportunity to respond to the allegations made against her.

The Commission was satisfied that the applicant's dismissal was neither harsh, nor unjust nor unreasonable. Accordingly, it was not unfair. The application was dismissed.

Relevance

The applicant was an active participant in the blockade of Q Catering's premises. While she was not actually at work that day, she supported and encouraged her colleagues to engage in the stoppage. The stoppage and the associated blockade was intended to, and did, have the effect of significantly impeding the respondent's operations that day, in support of certain employee demands. The action was not 'protected' by the Fair Work Act. The applicant's conduct in this regard was fundamentally inconsistent with the obligations she owed to her employer.

Orders to stop or prevent unprotected industrial action

See Fair Work Act s.418

If it appears to the Commission that unprotected industrial action by one or more employees or employers:

- is happening,
- is threatened, impending or probable, or
- is being organised,

the Commission must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period specified in the order (the ***stop period***).[17] Such an order may contain provisions that seek to achieve that purpose in direct terms, and additional terms that are necessary for, incidental to, or consequential upon the exercise of power for that purpose.[18]

The Commission may make the order on its own initiative, or on application by:

- a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action, or
- an organisation of which a person who is affected is a member.

In making the order, the Commission does not have to specify the particular industrial action, however the order must be directed at the industrial action (existing or potential) which has been identified, and be sufficient to disclose the legal operation of the order and provide sufficient certainty to allow compliance with it.[19] The Commission's power to make orders is limited to the industrial action that is the subject of the application before it.[20]

If the Commission is required to make an order stopping or preventing industrial action that was authorised by a protected action ballot:

- some or all of which has not been taken before the beginning of the stop period, or
- which has not ended before the beginning of that stop period, or
- beyond that stop period;

the Commission may state in the order whether another protected action ballot is required before the action can be engaged in after the end of that stop period.[21]

Making an application

An application for an order to stop or prevent unprotected industrial action made to the Commission must include a completed and signed application form [Form F14].

A draft order may also be included.

A draft order should identify industrial action by its nature and character in a way that is meaningful for the parties.[22]

Note: A party applying for an order should not seek to include a term in any order that is clearly beyond power or is contrary to authority. The Commission's powers in respect of these orders is limited to stopping or preventing the industrial action. The Commission has held that orders requiring that 'employees be available for work, and perform work as required' are clearly beyond power.[23]

[17] *United Voice v Foster's Australia Limited t/a Carlton and United Breweries Limited* [2014] FWCFB 4104 (Hatcher VP, Gooley DP, Lee C, 2 July 2014) at paras 39–41.
[18] ibid at para. 38.
[19] *Esso Australia Pty Ltd v The Australian Workers' Union* [2016] FCAFC 72 (25 May 2016) at paras 33, 48.
[20] *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26 (6 March 2008) at para. 39.
[21] Fair Work Act s.418(4).
[22] *Esso Australia Pty Ltd v The Australian Workers' Union* [2016] FCAFC 72 (25 May 2016) at para. 54.
[23] *E. Allen and Ors v Fluor Construction Services Pty Ltd* [2014] FWCFB 174 (Ross J, Gostencnik DP, Simpson C, 29 January 2014) at paras 45–47, [(2014) 240 IR 254].

Parties who are legally represented have a particular obligation to alert the Member to any term sought that is beyond power or contrary to authority and should be prepared to canvass with the Member the doubt as to power or argue that the contrary authority was incorrectly decided or is otherwise distinguishable.[24]

Links to application form

Form F14 – Application for an Order to Stop etc. (Unprotected) Industrial Action:

- www.fwc.gov.au/documents/forms/Form_F14.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F14.pdf (Adobe PDF)

All forms available on the Commission’s ‘Forms’ webpage:
www.fwc.gov.au/about-us/resources/forms

Case example: **Unprotected industrial action – Order made**

Hansen Yuncken Pty Ltd and Ors v Deegan and Ors [2013] FWC 7505 (O’Callaghan SDP, 26 September 2013).

Facts

The application was made after employees working on the new Royal Adelaide Hospital construction site (the nRAH) refused to return to work after expressing concern over various safety issues.

The applicants submitted that the employees had been engaging in frequent unprotected industrial action in the form of stoppages of work, a refusal to work overtime, and reduced work outputs. The applicants further submitted that most of this industrial action was taken on the basis of assertions that it was related to safety concerns which were not based on any reasonable concern about an imminent risk to employee health and safety such that work, or attendance at the nRAH was not possible.

The employees submitted that to the extent they had engaged in industrial action, that action was specifically and legitimately related to reasonable concerns about health and safety risks.

Outcome

The Commission considered the applicants’ detailed OHS policies as well as the *Work Health and Safety Act 2012* (SA). The Commission found that no basis for a stoppage of work on the grounds of concerns about imminent serious risks to employee health or safety had been established. The industrial action taken was unprotected. The Commission was satisfied it was appropriate to make an order that industrial action stop and not occur or be organised for a period of 6 months.

Relevance

Employee concern about safety risks must be represent reasonable concerns about imminent risks to employee health or safety. In this case the concern was not reasonable and the issues could have been dealt with in other ways.

[24] ibid at para. 47.

Case example: **Unprotected industrial action – Order made**

AGL Loy Yang Pty Ltd t/a AGL Loy Yang v Construction, Forestry, Mining and Energy Union & Anor [2017] FWC 432 (Roe C, 20 January 2017).

Facts

The application for an order under s.418 was made by AGL after it had been unable to adequately staff shifts leading to the continued shut down of units and consequent loss of income. The power station operated by AGL had four units. AGL had been unable to achieve the minimum staffing levels specified in the *Loy Yang Power Enterprise Agreement 2012* to operate all four units for nine of the last 11 shifts. AGL provided detailed evidence of the approaches made to individual employees to try and cover staffing levels after an unprecedented number of employees calling in sick and the refusal of other employees to cover staffing vacancies. AGL also gave evidence of previous average numbers of employees calling in sick.

Outcome

The Commission considered that industrial action was occurring and that it was likely that it would continue. The industrial action in question was a ban or limitation on the performance of overtime contrary to the Agreement or contrary to custom and practice regarding availability for the performance of overtime. It was also the taking of personal/carers leave under the Agreement or under the Fair Work Act in a manner that resulted in a restriction or limitation on the performance of work. Having found that the unprotected industrial action was occurring and probable, the Commission issued an Order that that it was to stop for a period of one month.

Relevance

The Commission must be satisfied that unprotected industrial action is happening, is probable or is being organised. It was not necessary in this matter for the ban or limitation on work to be a total prohibition, it was sufficient that there has been a change to the custom and practice in respect to these matters and that the change had been organised in order to harm AGL.

Case example: **Unprotected industrial action – Order made**

Victorian WorkCover Authority t/a WorkSafe Victoria v CPSU, the Community and Public Sector Union [2017] FWC 3645 (Wilson C, 10 July 2017).

Facts

The application for an order under s.418 was made by Victorian WorkCover Authority t/a WorkSafe Victoria (WorkSafe) after the CPSU circulated a newsletter on 5 July 2017 to members employed by WorkSafe indicating an intention to take industrial action in several forms. Worksafe argued that the matters indicated in the newsletter should be regarded as industrial action within meaning of s.19 of the Fair Work Act. The CPSU did not contest the newsletter, its terms, or its circulation to member employees. WorkSafe argued that the matters indicated in the newsletter would be contrary to its usual work practices if implemented, and would have a serious and negative impact on WorkSafe's capacity to undertake its work.

Outcome

The Commissioner found that items 2 to 6 of the CPSU newsletter were industrial action, and that each was not protected industrial action. The Commissioner was satisfied that the newsletter advised action to be taken by member employees and encouraged them to pass the newsletter on to non-member employees. The Commissioner was satisfied that the action in the newsletter amounted to industrial action within the meaning of s.19 of the Fair Work Act because if taken, the action would result in the performance of work by an employee in a manner different from that in which it is customarily performed or the adoption of a practice in relation to work, the result of which is a restriction or limitation on or delay in performance of work. Having found that the unprotected industrial action was threatened, impending, probable or was being organised, the Commissioner issued an Order that that it was to stop for a period of one month.

Relevance

The Commissioner must be satisfied that unprotected industrial action is happening, is threatened, impending probable, or is being organised. It was sufficient in this case that the Commissioner was satisfied that the threatened action, if taken, would result in the performance of work in a manner different from that in which it was customarily performed or the adoption of a practice in relation to the work, the result of which is a restriction or limitation on or delay in performance of work.

Case example: **Unprotected industrial action – Covert industrial action – Order made**

Hillsbus Co. P/L v Bajwa and Others [2018] FWC 6861 (Cambridge C, 12 November 2018).

Facts

Hillsbus sought an order that unprotected industrial action by employees stop. It alleged that 128 employees engaged in unprotected industrial action as part of bargaining for new enterprise agreement by commencing what was described as a ‘ collective personal leave campaign’. Hillsbus conducts a public transport business relevantly operating as a bus service in New South Wales.

On 7 November 2018 128 employees claimed personal leave. This ‘campaign’ significantly impacted the operations of Hillsbus, with the result that a substantial number of bus services were delayed, cancelled or otherwise disrupted. Significant numbers of members of the travelling public were adversely impacted as the employer was unable to operate approximately 300 specific services including school bus services, as a result of the extraordinary number of employees absent on personal leave that day.

Outcome

After the Commission issued an urgent notice of listing, a hearing was held on 8 November 2018. There was no appearance by or on behalf of any of the 128 named individual respondents.

The Commission was persuaded to issue Interim Orders and provide for a further hearing. The further hearing provided opportunity for the named respondents to be heard.

The material, submissions and statements provided by the various respondents broadly indicated the reason(s) for their individual personal leave absence on 7 November 2018. The Commission held that whilst this material would likely satisfy the basis which would oblige the employer to make payment in respect of the personal leave absence of that particular individual, it may not satisfy the Commission that the resultant collective personal leave campaign was anything other than unprotected industrial action.

The Commission was satisfied that the meaning of industrial action contained in s.19 of the Fair Work Act had occurred and that the industrial action was not protected. The Commission made an Order that the industrial action stop, not occur and not be organised for the stop period determined to be until 30 November 2018.

Relevance

The Commission found when properly examined the collective personal leave campaign represented covert industrial action involving large number of individuals making claim for personal leave such that there could be no proper basis to establish this event was nothing more than an unusual coincidence.

The determination that the respondents had taken unprotected industrial action meant that, although the individual applications for personal leave would otherwise require the employer to make payment for their absence on 7 November 2018, no payment could be made by the employer to any of the individual respondents in respect to the period during which they participated in unprotected industrial action. This means that the 128 employees will have their personal leave balance debited for their absence , however the employer is prohibited from making any payment in respect of the absence which has been found to have been unprotected industrial action.

Interim orders

See Fair Work Act s.420

Application must be determined within 2 days

As far as practicable, the Commission must determine an application for an order to stop or prevent industrial action within two days after the application is made.[25]

Despite the need for quick action, s.420 recognises that it may not be practicable for an application to be determined within the two day period. One of the practicalities is the obligation to give procedural fairness to the respondent. The provision of a reasonable opportunity for a party to present its case may in the circumstances of the particular case mean that the application cannot be determined within the two days. The content of the requirement to give procedural fairness is then affected by the obligation of the Commission under s.420(2) to make an interim order that the industrial action stop, not occur or not be organised, subject only to the public interest.[26]

The legislation does not pursue quick actionat all costs. The legislation does not make the determination of the application within two days a complete goal in itself, but requires that the period be taken into account and given weight in deciding what will be a reasonable opportunity for a party to present its case. Quick action does not trump procedural fairness.[27]

Related information

- What is a day?

Requirement to make an interim order

If the Commission is unable to determine the application within the two day period, the Commission must, within that period, make an interim order that the industrial action to which the application relates stop, not occur or not be organised (as the case may be).[28]

Before making an interim order the Commission must be satisfied that it is unable to determine the application within the two day period. If the Commission is not satisfied of this then it is under no duty, and has no power, to make an interim order.[29]

The requirements of procedural fairness apply to the making of an interim order under s.420(2), although depending on the circumstances the requirement to hear an affected party may be restricted by the time constraints imposed by ss.420(1) and (2).[30]

[25] Fair Work Act s.420(1); see for eg *Maritime Union of Australia, The v Patrick Stevedores Holdings Pty Limited* [2014] FWCFB 657 (Hatcher VP, Catanzariti VP, Roberts C, 31 January 2014) at para. 13, [(2014) 240 IR 146]; citing *McKewin v Lend Lease Project Management & Construction (Australia) Pty Ltd* [2013] FWCFB 2568 (Hatcher VP, Sams DP, Bull C, 3 May 2013) at para. 27, [(2013) 233 IR 252].

[26] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 (6 December 2013) at para. 132.

[27] ibid., at para.133.

[28] Fair Work Act s.420(2).

[29] *McKewin v Lend Lease Project Management & Construction (Australia) Pty Ltd* [2013] FWCFB 2568 (Hatcher VP, Sams DP, Bull C, 3 May 2013) at para. 28, [(2013) 233 IR 252]; see for eg *Construction, Forestry, Maritime, Mining and Energy Union v DP World Melbourne Limited and Others* [2019] FWCFB 6430 (Gostencnik DP, Millhouse DP, Spencer C, 19 September 2019).

[30] ibid., at paras 37–38.

However, the Commission must not make the interim order if the Commission is satisfied that it would be contrary to the public interest to do so.[31] For example, the Commission has refused to make an interim order in a matter which could not be determined within two days but would be resolved within 24 hours after the end of the two day period and where there was no evidence that anything of significance would happen before the matter was finalised.[32]

The obligation to make an interim order exists regardless of the strength or weakness of the case and regardless of whether the respondent has had a reasonable opportunity to present a case against the making of such an order.[33]

In making the interim order, the Commission does not have to specify in the order the particular industrial action.

An interim order continues in operation until the application is determined.

Case example: **Interim order made**

Construction, Forestry, Mining and Energy Union v Hooker Cockram Projects NSW Pty Ltd [2011] FWAFB 3658 (Harrison SDP, Richards SDP, Williams C, 21 June 2011), [(2011) 210 IR 397]; [2012] FWAFB 3738 (Harrison SDP, Richards SDP, Williams C, 3 May 2012).

Facts

Various actions taken by the union resulted in employees of the company ceasing work. The reasons for the stoppages were principally associated with health and safety issues. The company accepted that the project had generated health and safety concerns however it detailed action it had taken by identifying risks and undertaking remediation work. Work stoppages continued. Numerous meetings were held however the union and employees continued to have concerns about health and safety risks. The company was of the view that adequate steps had been taken to warrant the resumption of normal work.

The company made an application under s.418 for an order to stop the industrial action. The Commisison ruled that it could not deal with the s.418 application to completion within the two day period prescribed in s.420(1) and made an interim order stopping the industrial action.

The union appealed the decision on several grounds including challenging several aspects of the terms of the interim order.

Outcome

In considering the terms of the interim order the Full Bench had concerns about the scope of the order which issued. The order placed obligations on all employees of the company, both those who were members of the union and those who were not. The Full Bench found that the service of the initial application (and notice of the hearing) was only made on the union. This was not in accordance with the rules and no order for substituted service was sought. It seemed that no attempt was made by the company to bring the application to the attention of its employees.

The Full Bench also had concerns about the provisions of clause 6 of the interim order. The clause provided that whenever a person sought to rely on the health and safety

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[31] Fair Work Act s.420(3).
[32] See for eg *Australian Capital Territory v Australian Education Union* [2010] FWA 3454 (Deegan C, 29 April 2010).
[33] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 (6 December 2013) at para. 132.

Case example: **Interim order made**

exclusion set out in s.19(2)(c), that person had the burden of proving the exemption applied. The Full Bench could not identify a burden of proof provision in the definition of industrial action in s.19 nor in ss.418 and 420.

After consideration the Full Bench held that the public interest was not enlivened and permission to appeal was not granted.

Note: *The application made under s.418 was withdrawn by the company and no final order was made. With the withdrawal of the s.418 application the interim order ceased to operate.*

Relevance

In drafting a draft order a party must ensure that the scope of the order is appropriate, and that there are no requirements over and above the provisions of the legislation, such as the inclusion of the burden of proof requirement in this matter where there is no such requirement in the Fair Work Act.

Case example: **Interim order quashed – '48 hours' not the same as '2 days'**

Construction, Forestry, Maritime, Mining and Energy Union v DP World Melbourne Limited and Others [2019] FWCFB 6430 (Gostencnik DP, Millhouse DP, Spencer C, 19 September 2019).

Facts

At first instance the Commission made an interim order after determining that an application by DP World for an order that unprotected industrial action stop under s.418 of the Fair Work Act could not be determined within two days.

The application was lodged at approximately 4:35pm on 23 July 2019. The matter was listed for hearing at 3:30pm on 24 July 2019. Shortly after the hearing commenced, the CFMMEU applied for the hearing to be adjourned until 2:15pm on 25 July 2019, stating that it had not been in a position to obtain full instructions to enable it to prepare for a hearing and to cross examine witnesses to be called by DP World, and it had not had adequate opportunity to respond to DP World's materials served earlier that afternoon.

DP World opposed the adjournment and submitted 'We are 24 hours into the two day period and if … we were to accept his timetable and to be back here at 2.15, there's every prospect that this matter wouldn't be dealt with within the two day timeframe, which would take us to 4.35 tomorrow.'

After an adjournment the Deputy President announced that she was 'not persuaded, as it currently stands, that to resume the hearing at 2.15 tomorrow would enable the matter to be heard, including at least two witnesses, and you may have a third or more, and determined by 4.35 pm tomorrow.' The Deputy President adjourned the matter until 2 August and said that as she was 'unable to determine the application within two days of it being made and, accordingly, pursuant to section 420 of the Act, I consider I am required to make an interim order.' The Interim Order was issued later that evening (24 July 2019).

The CFMMEU appealed the order. The grounds for appeal included an allegation of a denial of procedural fairness, that the Deputy President erred in failing to attempt to determine the application within two days after it was made, and the proper construction

Case example: **Interim order quashed – '48 hours' not the same as '2 days'**

of the phrase 'within 2 days after the application is mad' in s.420(1) and consequently 'within that period' in s.420(2).

Outcome

The Full Bench granted permission to appeal and first looked at the proper construction of ss.420(1) and (2) of the Fair Work Act.

The Full Bench found that the Deputy President concluded that she could not determine the application within a period of 48 hours after the application was made (that is by 4:35pm on 25 July 2019). In so doing, the Deputy President misconstrued the requirements in ss.420(1) and (2). The requirement in s.420(1) is that as far as practicable, the Commission must determine an application for an order under ss.418 or 419 within '2 days' after the application is made, not '48 hours'. Therefore the Deputy President was required, as far as practicable, to determine DP World's application by midnight on 25 July 2019.

As a precondition to the making of the Interim Order under s.420(2), the Deputy President was required, within the 2 day period, to reach a conclusion that she is unable to determine the application within the period specified in s.420(1). Absent such a conclusion, the Commission is under no duty, and has no power, to make an interim order.

The Full Bench found that the Deputy President erred in her construction of s.420(1) and consequently of s.420(2). There was nothing on the face of the record or in the material in the Appeal Book which suggests that the Deputy President turned her mind to whether she was unable to determine the matter by midnight on 25 July 2019. There is also nothing in that material which would suggest that the Deputy President was unable to do so. In those circumstances, it cannot be said that a different outcome might not have been obtained. The application could have been heard and determined to finality and the CFMMEU could have succeeded in part or in whole in resisting the making of any order under s.418.

The Full Bench held that given the erroneous construction as to the period of time within which the application had to be determined and upon which the Deputy President proceeded to make the Interim Order, the Deputy President was neither required nor empowered to make it.

The appeal was upheld. The Interim Order and the decision to make it were quashed.

Relevance

Whether the Commission is unable to determine an application under, relevantly, s.418 within 48 hours is not the question posed by s.420(2). The requirement in s.420(1) is that as far as practicable, the Commission must determine an application for an order under ss.418 or 419 within '2 days' after the application is made, not '48 hours'. Therefore the Deputy President was required, as far as practicable, to determine DP World's application by midnight on 25 July 2019. The failure to reach the correct conclusion means in the circumstances of this case that the Deputy President was neither obliged nor empowered to make the Interim Order.

Industrial action outside the national system

As set out in Part 1 – How to use this benchbook, only **national system employees** and **national system employers** can participate in protected industrial action under the Fair Work Act. This means that industrial action taken by non-national system employees will not be protected industrial action under the Fair Work Act. However the Commission has power to make orders for industrial action taken by persons outside of the national system to stop, if the industrial action is likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation.

Stop orders etc.

If it appears to the Commission that industrial action by one or more non-national system employees or non-national system employers is:

- happening,
- threatened, impending or probable, or
- being organised, and

will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation; then the Commission must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period specified in the order.

The Commission may make the order on its own initiative, or on application by:

- a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action, or
- an organisation of which a person who is affected is a member.

In making the order, the Commission does not have to specify the particular industrial action.

Contravening an order

A person to whom an order to stop or prevent industrial action applies must not contravene a term of the order. This includes an interim order.

Note: *This is a civil remedy provision.*

However, a person is not required to comply with an order if:

- the order is an order that industrial action stop, not occur or not be organised (under s.418), or an interim order (under s.420) that relates to an application for an order that industrial action stop, not occur or not be organised, and
- the industrial action to which the order relates is, or would be, protected industrial action.

An order (or interim order) for employees or employers to stop or prevent industrial action only applies to unprotected industrial action.

Injunctions

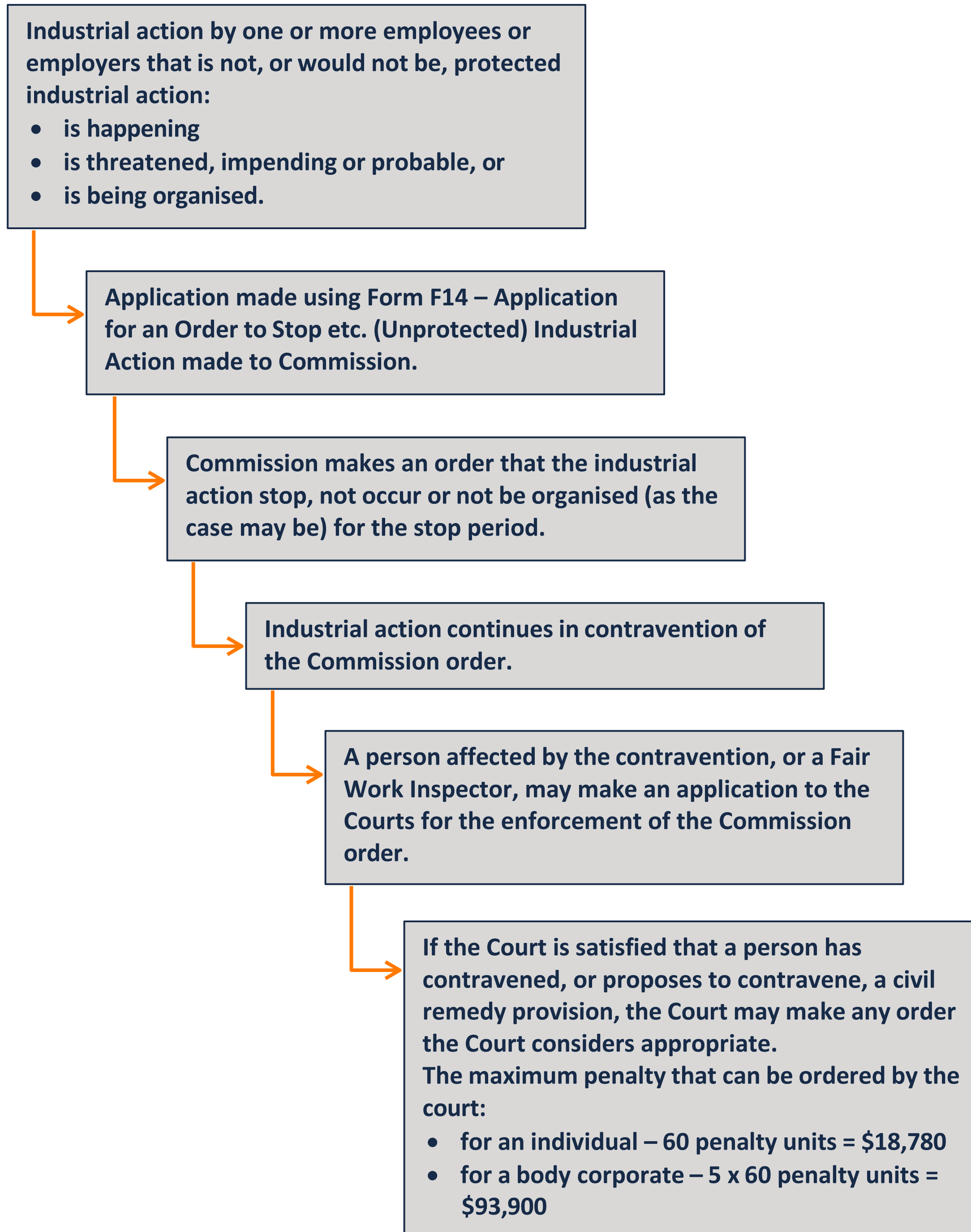
A court may grant an injunction on such terms as considered appropriate if:

- a person affected by the contravention or an inspector has applied for the injunction, and
- the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

Related information

- Interim orders

Contravening an order to stop – Flowchart



Part 2.2 – Protected industrial action

See Fair Work Act s.408

Industrial action can only be ***protected industrial action*** for a proposed enterprise agreement if it is one of the following:

- employee claim action for the agreement
- employer response action for the agreement, or
- employee response action for the agreement.

Under previous legislation there was scope for an employer to take employer claim action[34] however this was removed with the introduction of the Fair Work Act.

Under the Fair Work Act employer industrial action can only be protected where the employer locks out employees in response to employee industrial action.[35]

Related information

- Employee claim action
- Employer response action
- Employee response action
- Common requirements

Immunity

See Fair Work Act s.415

No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:

- personal injury
- wilful or reckless destruction of, or damage to, property, or
- the unlawful taking, keeping or use of property.

However, this does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

[34] *Workplace Relations Act 1996* (Cth) s.435(3).
[35] Fair Work Act ss.408(b), 410.

Case example: **NO immunity from legal action**

BlueScope Steel (AIS) Pty Ltd v Australian Workers' Union (No 1) [2012] FCA 935 (28 August 2012), [(2012) 226 IR 149].

Facts

BlueScope operate a blast furnace which produces 300 tonnes of molten iron ore per hour. The AWU gave BlueScope notice of the intention of its members to take 'protected industrial action'. It proposed that both the day shift and the night shift would stop for four hours.

BlueScope submitted that it was not feasible to have two stoppages of four or more hours unless there was at least 16 hours between the stoppages. There were considerable difficulties in turning the blast furnace on and off. The furnace must also be regularly emptied of the molten iron ore which collects at its base. If this is not done, molten iron ore will do significant internal damage to the furnace. Bluescope sought an interlocutory injunction to prevent the industrial action from occurring.

Outcome

The Federal Court held that there was a triable issue as to whether the potential abandonment or neglect of the blast furnace, in the manner proposed by the AWU in taking the industrial action, involved or was likely to involve 'reckless destruction of, or damage to, property'. Accordingly, there was a triable issue as to whether the immunity on the protected industrial action conferred by s.415(1) of the Fair Work Act was lifted. As a consequence, there was a triable issue as to whether Bluescope was entitled to pursue a claim in tort against the AWU in relation to that industrial action.

The Court directed that the parties agree on a form of order which included that:

- stoppages not exceed four hours in duration
- stoppages to have at least 16 hours between them, and
- there was to be no stoppage if there was a disruption of, or irregularity within, the blast furnace at the time the stoppage was due to start.

Relevance

Just because industrial action is 'protected' under s.408 does not mean that legal action cannot be taken in regard to the industrial action where the exceptions in the immunity provisions of s.415(1) are met.

Note: *This was a decision about whether to issue an interlocutory injunction.*

Common requirements

See Fair Work Act s.413

Protected industrial action must meet the common requirements set out in the Fair Work Act.

The common requirements for industrial action to be protected industrial action for a proposed enterprise agreement are:

- that the proposed agreement is not a greenfields agreement or multi-enterprise agreement
- that the parties are genuinely trying to reach an agreement
- that the parties have met any notice requirements set out in the Fair Work Act
- that the parties have complied with orders made relating to industrial action which relates to the proposed agreement or bargaining
- that no industrial action can commence before the enterprise agreement being replaced has passed its nominal expiry date, and
- that there are no current suspension or termination orders, or serious breach declarations, in relation to the agreement.

These requirements are set out in detail below.

Type of proposed enterprise agreement

The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.

A ***greenfields agreement*** is an enterprise agreement relating to a genuine new enterprise (including a new business, activity, project or undertaking) which is made at a time when the employer or employers have not yet employed any of the persons who will be necessary for the normal conduct of the enterprise and who will be covered by the agreement.

A ***multi-enterprise agreement*** is an enterprise agreement made between two or more employers (that are not engaged in a joint venture or common enterprise and are not related bodies corporate) and employees.

Note: The **Enterprise Agreements Benchbook** contains detailed information and links to cases setting out types of agreements and the process involved to make, vary and terminate them; including information on types of agreement.

You can access the Benchbook through the following link:
www.fwc.gov.au/resources/benchbooks/enterprise-agreements-benchbook

Genuinely trying to reach an agreement

The persons organising or engaging in industrial action, including where there are bargaining representatives for a proposed enterprise agreement, must be genuinely trying to reach agreement. There are no rigid rules regarding the the required point of negotiation that must be reached before this requirement is met. All the relevant circumstances must be assessed to establish whether this test has been met.[36]

The existence of claims for non-permitted matters does not support a finding that an organisation was not genuinely trying to reach an agreement.[37]

There is no reason why questions of scope cannot be included in bargaining in the context of a single interest employer authorisation and the mere fact that a bargaining representative puts scope in issue does not mean the bargaining representative is not genuinely trying to reach an agreement.[38]

Notice requirements

The notice requirements set out in the Fair Work Act must have been met in relation to the industrial action.

The notice requirements for each of the three types of protected industrial action differ and are set out in detail in Part 3.3.

Related information

- Notice requirements

Compliance with orders

Section 413(5) is concerned with contraventions of orders that have been made during the course of bargaining for the agreement. This can include a contravention of an order that subsequently has ceased to apply.[39] The section provides that bargaining representatives and employees organising or engaging in industrial action must not have contravened any orders that apply to them and that relate to the agreement, a matter that arose during bargaining for the agreement, or related industrial action.

If any bargaining representatives or employees organising or engaging in industrial action have contravened an order, then any industrial action organised or engaged in will not be protected industrial action.[40]

[36] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 (Watson VP, Hamberger SDP, Roberts C, 9 October 2009); see also *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union and Ors* [2015] FWCFB 210 (Ross J, Hatcher VP, Simpson C, 10 February 2015) at paras 34–35, 57–59.
[37] *Construction, Forestry, Mining and Energy Union-Mining and Energy Division v AGL Loy Yang Pty Ltd T/A AGL Loy Yang* [2016] FWCFB 6332 (Drake SDP, Asbury DP, Cambridge C, 21 Sertember 2016) at para. 40.
[38] *Stuartholme School and Others v Independent Education union of Australia* [2010] FWAFB 1714 (Giudice J, Hamberger SDP, Spencer C, 3 March 2010) at para. 25.
[39] *Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54 (6 December 2017) at paras 41, 51–52.
[40] ibid., at para. 64.

It is not necessary that the order must be one that continues in operation at the time of the proposed protected industrial action, or with which it is still possible to comply at that time, or that it be an order that would apply to the proposed protected industrial action.[41]

The Commission has broad powers under s.603 of the Fair Work Act to vary or revoke orders, including power to vary or revoke orders retrospectively.[42]

Hence, if a document cannot be filed within the time specified in an order made by the Commission, an application might be made for the time to be enlarged, or alternatively for the order to be revoked and a new order made allowing greater time, and, if there were good reason for the failure to file the document timeously, no doubt time would be enlarged, especially when it is appreciated that to refuse to enlarge time would preclude the possibility of protected industrial action by reason of s.413(5).[43]

If, in exercise of the power conferred by s.603, an order were made by the Commission varying or revoking a previous order with effect from a time earlier than the alleged contravention, the effect would be that there would not have been a contravention of the order.[44]

No industrial action before agreement's nominal expiry date

The person organising or engaging in the industrial action must not organise or engage in the industrial action before the nominal expiry date of an existing enterprise agreement which is being replaced.

Related information

- No action to be taken before nominal expiry date of current agreement

No suspension or termination order is in operation

None of the following must be in operation in relation to the agreement:

- an order suspending or terminating industrial action
- a Ministerial declaration terminating industrial action, or
- a serious breach declaration.

A ***serious breach declaration*** can be made by the Commission where there are serious and sustained contraventions of a bargaining order that significantly undermine the bargaining process for a proposed enterprise agreement.[45]

[41] *Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54 (6 December 2017) at para. 41.
[42] ibid., at para. 49.
[43] ibid., at para. 50.
[44] ibid., at para. 50.
[45] Fair Work Act s.235.

Employee claim action

See Fair Work Act s.409

The majority of protected industrial action taken is employee claim action. The following diagram illustrates the process by which industrial action may be taken that is protected.

Employee claim action process under the Fair Work Act

Application for protected action ballot order made by bargaining representative:
- Cannot be made earlier than 30 days before nominal expiry date of enterprise agreement
- There must have been a notification time in relation to the proposed enterprise agreement

↓

Within 24 hours of making application applicant must give copy of application to employer

↓

Commission must, as far as practicable, determine application within 2 working days

↓

Protected action ballot order made by Commission

↓

Protected action ballot conducted by Australian Electoral Commission or other specified ballot agent

↓

Vote by employees included on roll of voters

↓

Protected action ballot agent must declare and inform about result
(Commission must publish result on website)

↓

If industrial action is authorised by protected action ballot...
Employees have 30 days to commence action

↓

Written notice of at least 3 working days must be given to the employer
The Commission may extend the notice period where there are exceptional circumstances
(Notice must specify the nature of the action and the day on which it will start)

↓

Protected employee claim action taken

If industrial action is NOT authorised by protected action ballot then any industrial action taken will NOT be protected

Employee claim action is industrial action for a proposed enterprise agreement:

- that is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement, and
- where the claims are only about, or reasonably believed to be about, permitted matters.

The industrial action must be organised or engaged in:

- against an employer that will be covered by the proposed enterprise agreement, and:
    - by a bargaining representative of an employee who will be covered by the proposed enterprise agreement, or
    - by an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action.

Note: If a union is a bargaining representative of an employee who will be covered by the proposed enterprise agreement, the reference to a bargaining representative of the employee includes a reference to an officer of the union.[46]

What constitutes a ***reasonable belief*** depends on the circumstances of the case and the person concerned.[47]

Example

The Commission would expect an official of a union with extensive experience in enterprise bargaining to have a greater appreciation of the limits of the permitted matters than a novice employee bargaining representative who has been appointed by his or her colleagues to represent them in bargaining with the employer.[48]

Permitted matters

See Fair Work Act s.172(1)

The following matters are permitted to be included in an enterprise agreement:

- matters pertaining to the employer – employee relationship
- matters pertaining to the employer – union relationship
- terms about deductions from wages, and
- terms about how the agreement will operate.

[46] Fair Work Act s.409(7).
[47] *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union and Ors* [2015] FWCFB 210 (Ross J, Hatcher VP, Simpson C, 10 February 2015) at para. 40; citing *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia-Communications Division* [2010] FWAFB 344 (Kaufman SDP, Ives DP, Lewin C, 20 January 2010) at para. 48.
[48] Explanatory Memorandum to Fair Work Bill 2008 at para. 1642.

Note: The **Enterprise Agreements Benchbook** contains detailed information and links to cases setting out types of agreements and the process involved to make, vary and terminate them; including information on types of agreement.

You can access the Benchbook through the following link:
www.fwc.gov.au/resources/benchbooks/enterprise-agreements-benchbook

Requirements for employee claim action

See Fair Work Act s.409

The Fair Work Act sets out specific requirements which must be met before employee claim action can be taken:

- employee claim action must be authorised by a protected action ballot
- employee claim action must not be in support of or to advance claims to include unlawful terms in the agreement
- a bargaining representative of an employee who will be covered by the proposed enterprise agreement must not be engaging in pattern bargaining in relation to the proposed enterprise agreement, and
- the employee claim action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene a Commission order that relates to a significant extent to a demarcation dispute.

Related information

- Common requirements
- Part 3.1 – Protected action ballots
- Pattern bargaining

Unlawful terms

See Fair Work Act s.194

Employee claim action must not be in support of or to advance claims to include unlawful terms in an enterprise agreement.[49] A term of an enterprise agreement is an unlawful term if it is:

- a discriminatory term
- an objectionable term
- a term that would allow an employee or employer to opt-out of coverage of the agreement
- an objectionable emergency management term

[49] Fair Work Act s.409(3).

- a term, where an employee would be protected from unfair dismissal after completing the minimum employment period, that confers an entitlement or remedy in relation to unfair termination of the employee's employment before the employee has completed that period
- a term that excludes the application of the unfair dismissal provisions in Part 3–2 of the Fair Work Act to a person, or modifies the application of these provisions in a way that is detrimental to, or in relation to, a person
- a term that is inconsistent with a provision of Part 3–3 of the Fair Work Act (which deals with industrial action)
- a term that provides for an entitlement to enter premises for certain purposes, which is not in accordance with the right of entry provisions in Part 3–4 of the Fair Work Act
- a term that provides for the exercise of a State or Territory OHS right other than in accordance with the right of entry provisions in Part 3–4 of the Fair Work Act, or
- a term that requires or permits superannuation contributions for a default fund employee to be made to a superannuation fund that does not satisfy one of the following:
  - offers a MySuper product
  - is an exempt public sector scheme, or
  - is a fund of which a relevant employee is a defined benefit member.

Meaning of 'discriminatory' term

As set out above, a discriminatory term is also an unlawful term. A ***discriminatory term*** is a term that discriminates against an employee covered by the enterprise agreement because of, or for reasons including race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion or political opinion, national extraction or social origin.[50]

A term of an enterprise agreement does not discriminate against an employee:

- if the reason for the discrimination is the inherent requirements of the particular position concerned, or
- merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
  - in good faith, and
  - to avoid injury to the religious susceptibilities of adherents of that religion or creed.

A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:

- all junior employees, or a class of junior employees, or
- all employees with a disability, or a class of employees with a disability, or
- all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

An ***inherent requirement*** is something essential to the position, rather than something added to it.[51]

[50] Fair Work Act s.195.
[51] *Qantas Airways Ltd v Christie* [1998] HCA 18 (19 March 1998) at para. 31, [(1998) 193 CLR 280]; see also *Cramer v Smithkline Beecham* [1997] FCA 606 (2 July 1997).

Meaning of 'objectionable' term

As noted above, an objectionable term is also an unlawful term. Employee claim action must not be in support of or seek to advance claims to include unlawful terms in an enterprise agreement.

An ***objectionable term*** is a term that requires or permits a contravention of the Fair Work Act's general protections provisions or the payment of a bargaining services fee.[52]

A ***bargaining services fee*** is any fee payable to an industrial association, or to someone in lieu of an industrial association, for the provision of bargaining services. This does not include membership fees.[53] Industrial associations can offer bargaining services on a fee for service basis where an individual voluntarily enters into a contract.[54]

Meaning of 'objectionable emergency management' term

As set out above, a objectionable emergency management term is also an unlawful term. Employee claim action must not be in support of or seek to advance claims to include unlawful terms in an enterprise agreement.

A term of an enterprise agreement is an ***objectionable emergency management term*** if an employer covered by the agreement is a designated emergency management body and the term has, or is likely to have, the effect of:

- restricting or limiting the body's ability to do any of the following:
  - engage or deploy its volunteers
  - provide support or equipment to those volunteers
  - manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers
  - otherwise manage its operations in relation to those volunteers, or
- requiring the body to consult, or reach agreement with, any other person or body before taking any action for the purposes of doing anything mentioned in s.195A(1)(a), or
- restricting or limiting the body's ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community, or
- requiring or permitting the body to act other than in accordance with a law of a State or Territory, so far as the law confers or imposes on the body a power, function or duty that affects or could affect its volunteers.[55]

However, a term of an enterprise agreement is not an ***objectionable emergency management term*** if:

- both of the following apply:
  - the term provides for the matters required by s.205(1)–(1A) (which deal with terms about consultation in enterprise agreements)
  - the term does not provide for any other matter that has, or is likely to have, the effect referred to in s.195A(1), or
- the term is the model consultation term.

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[52] Fair Work Act s.12.
[53] Fair Work Act s.353(2).
[54] Explanatory Memorandum to Fair Work Bill 2008 at para. 1436.
[55] Fair Work Act s.195A.

Sections 195A(1)(a), (b), (c) and (d) do not limit each other.

Meaning of designated emergency management body

A body is a ***designated emergency management body*** if:

- either:
  - the body is, or is a part of, a fire-fighting body or a State Emergency Service of a State or Territory, or
  - the body is a recognised emergency management body that is prescribed by the regulations[56] for the purposes of s.195A(4), and
- the body is, or is a part of a body that is, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

However, a body is not a ***designated emergency management body*** if the body is, or is a part of a body that is, prescribed by the regulations[57] for the purposes of this subsection.

Meaning of volunteer of a designated emergency management body

A person is a ***volunteer*** of a designated emergency management body if:

- the person engages in activities with the body on a voluntary basis (whether or not the person directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity), and
- the person is a member of, or has a member-like association with, the body.

Limited application of objectionable emergency management term for certain terms

If:

- a term of an enterprise agreement deals to any extent with the following matters relating to provision of essential services or to situations of emergency:
  - directions to perform work (including to perform work at a particular time or place, or in a particular way)
  - directions not to perform work (including not to perform work at a particular time or place, or in a particular way), and
- the application of s.195A(1) in relation to the term would (apart from this subsection) be beyond the Commonwealth's legislative power to the extent that the term deals with those matters;

then s.195A(1) does not apply in relation to the term to that extent.

Note: See paragraph (l) of the definition of **excluded subject matter** in s.30A(1) and s.30K(1).

[56] As at the date of publication of this Benchbook no regulations have been made.
[57] As at the date of publication of this Benchbook no regulations have been made.

Employer response action

See Fair Work Act s.411

Employer response action for a proposed enterprise agreement means industrial action that:

- is organised or engaged in as a response to industrial action by:
  - a bargaining representative of an employee who will be covered by the proposed enterprise agreement, or
  - an employee who will be covered by the proposed enterprise agreement; and
- is organised or engaged in by an employer that will be covered by the proposed enterprise agreement against one or more employees that will be covered by the proposed enterprise agreement.

Employer response action must be in response to industrial action, as defined, that is happening. Employer response action cannot, by definition, be in response to industrial action that is threatened, impending, probable or even imminent at the time that the employer's industrial action is implemented.[58]

As defined, the only form of employer response action is a lockout.[59]

An employer may also take other action, which is not 'employer response action', in response to employee claim action. This other action can include:

- standing-down employees in accordance with Part 3–5 of the Fair Work Act, or
- declining to pay employees for partial work bans in accordance with partial work bans under s.471(4).

The trigger for employer response action is that employees have taken employee claim action.[60]

In *Australian and International Pilots Association v Fair Work Australia*[61] the Full Court of the Federal Court considered whether there needed to be a link between employer response action and industrial action taken by employees. The Court found that the terms of the Fair Work Act limit an employer to some form of causally connected response to employee industrial action.

The words 'as a response' require only that the lockout be seen as causally connected to employees' industrial action. It does not have to be reasonable, proportionate or rational.[62]

[58] *Australasian Meat Industry Employees Union, The v JBS Australia Pty Ltd* [2014] FWC 2254 (Bartel DP, 4 April 2014) at para. 20.
[59] Fair Work Act s.19(1)(d).
[60] *United Voice v MSS Security Services Pty Ltd* [2013] FWC 4087 (Cloghan C, 27 June 2013) at para. 56.
[61] [2012] FCAFC 65 (10 May 2012) at para. 116.
[62] *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65 (10 May 2012) at para. 155.

A ***causal connection*** is the relation of cause and effect.[63]

In this context the 'cause' is the employee industrial action and the 'effect' is the employer response action.

Employer response action can be protected industrial action if it is engaged in in accordance with s.411 of the Fair Work Act in response to employee industrial action which is or is not protected action.[64]

Employer may refuse to make payments to employees

If an employer engages in employer response action against employees, the employer may refuse to make payments to the employees in relation to the period of the action.[65]

An employer may lockout its employees and refuse to pay them in order to support or advance the employer's claims during bargaining in relation to a proposed enterprise agreement.

Employers have various statutory and common law rights to respond to industrial action by employees and such responses will not constitute industrial action unless the employer's action is a lockout. For example, in particular circumstances an employer may have the right to respond to industrial action by:

- standing-down employees in accordance with Part 3–5 of the Fair Work Act, or
- declining to pay employees for partial work bans in accordance with partial work bans under s.471(4).

Related information

- Part 4 – Payments relating to industrial action

Continuity of employment not affected

Employer response action for a proposed enterprise agreement does not affect the continuity of employment of the employees who will be covered by the proposed enterprise agreement.[66]

The Fair Work Regulations set out purposes for which continuity of employment is not affected by an employer taking industrial action. These are:

- superannuation
- remuneration and promotion which may be affected by seniority, and
- any entitlements under the National Employment Standards.[67]

[63] *Butterworths Australian Legal Dictionary*, 1997, at p. 172.
[64] *Construction, Forestry, Mining and Energy Union v Bechtel Construction (Australia) Pty Ltd and another* [2014] FWCFB 8490 (Catanzariti VP, Richards SDP, Booth C, 15 December 2015) at para. 14; citing *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65 (10 May 2012) at para. 24, [(2012) 202 FCR 200].
[65] Fair Work Act s.416.
[66] Fair Work Act s.416A.
[67] Fair Work Regulations r.3.09.

This means that an employee's period of employment with an employer is not broken by the employer engaging in industrial action.

For instance, if an employer locks out its employees for one day each week, the employees are still considered to be employees for the purposes of things like superannuation even though the employees may not be getting paid. The employees' employment does not stop when the employer takes industrial action and then start again after the industrial action has finished.

An employee remains employed regardless of the industrial action taking place.

Related information

- Coverage of national workplace relations laws

Accrual of annual leave

There is no entitlement to annual leave (a NES entitlement) for the lockout period when the industrial action is valid employer response action under the Fair Work Act. The entitlement to annual leave in s.87 is for 'service'. A period of lockout does not count as employee 'service' by reason of s.22(2)(b).[68]

22 Meanings of *service* and *continuous service*

…

(2) [Exceptions to meaning of service]

The following periods do not count as service:

…

(b) any period of unpaid leave or unpaid authorised absence other than;

(i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or

(ii) a period of stand down under Part 3-5, under an Enterprise Agreement that applies to the employee, or under the employee's contract of employment; or

(iii) a period of leave or absence of a kind prescribed by the regulations;

…[69]

[68] *Construction, Forestry, Mining and Energy Union and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Carter Holt Harvey Woodproducts Australia Pty Ltd T/A Carter Holt Harvey* [2018] FWC 6 (Gostencnik DP, 16 January 2018); upheld on appeal [2018] FWCFB 2731 (Hamberger SDP, Colman DP, Harper-Greenwell C, 15 May 2018).
[69] Fair Work Act s.22(2)(b).

Case example: **Action found NOT to be employer response action**

Australasian Meat Industry Employees Union, The v JBS Australia Pty Ltd [2014] FWC 2254 (Bartel DP, 4 April 2014).

Facts

The AMIEU made an application for an order pursuant to s.418 that industrial action taken by JBS stop.

JBS operate a meat works plant in Bordertown SA. It was in negotiations with the AMIEU for an enterprise agreement to replace an expired agreement.

The AMIEU provided written notice to JBS of protected industrial action to commence on 2 April 2014 in the form of multiple stoppages. On 31 March 2014 JBS provided notice to AMIEU of employer response action, stating that JBS was unable to provide employment on 2 April 2014, or on any other day in which employees could not be reasonably employed.

The AMIEU contended that the employer response action was not protected industrial action because no industrial action had taken place by the employees.

Outcome

The Commission was satisfied that the action taken by JBS was a lockout of employees and that this action was not protected industrial action because it did not meet the definition of ‘employer response action’ in s.411.

Relevance

Employer response action must be in response to industrial action that is happening. It cannot be in response to industrial action that is threatened, impending, probable or even imminent at the time that the employer’s industrial action is implemented.

Case example: **Action taken by employer after employee claim action had ceased found to be employer response action**

United Voice v MSS Security Services Pty Ltd [2013] FWC 4087 (Cloghan C, 27 June 2013).

Facts

United Voice made an application to the Commission under s.418 for an order that proposed employer response action by MSS stop.

UV and MSS had been bargaining for a proposed enterprise agreement. UV had given notice of employee claim action. In response MSS gave notice to UV of employer response action in the form of a lockout of five employees, advising that the lockout was being organised and engaged in as a response to the industrial action. Subsequently UV gave MSS notice of employee response action as a direct response to the lockout of the five employees. The notice advised that all members of UV would be engaging in a 24 hour stoppage of work.

MSS gave notice of further employer response action in the form of a lockout of nine employees. The notice stated that the lockout was being organised and engaged in as a response to the industrial action that had been taken and provided that the lockout would ‘continue indefinitely’.

UV contended that the employer response action was not protected industrial action because the employee claim action had occurred and was ‘no longer action which is happening, threatened, impending, probable or being organised’.

Outcome

The Commission held that employer response action could only occur in response to employee claim action that is or has taken place. The Commission was satisfied that the employer response action was in reply to, and in answer to, the employee claim action, and that the employer response action was protected industrial action.

Relevance

There is no condition in the Fair Work Act which prevents an employer from taking employer response action because a particular occurrence of employee claim action has ceased.

Employee response action

See Fair Work Act s.410

Employee response action for a proposed enterprise agreement means industrial action that:

- is organised or engaged in as a response to industrial action by an employer, and
- is organised or engaged in, against an employer that will be covered by the proposed enterprise agreement, by:
    - a bargaining representative of an employee who will be covered by the proposed enterprise agreement, or
    - an employee who will be covered by the proposed enterprise agreement.

Note: If a union is a bargaining representative of an employee who will be covered by the proposed enterprise agreement, the reference to a bargaining representative of the employee includes a reference to an officer of the union.[70]

The industrial action taken by an employer can be either protected or unprotected industrial action.[71]

The Commission has found that s.411 of the Fair Work Act (employer response action) is not relevantly different to the form of wording used in s.410 (employee response action), such that the decision in *Australian and International Pilots Association v Fair Work Australia*[72] was equally applicable to a consideration of employee response action.[73]

In *Australian and International Pilots Association v Fair Work Australia* the Full Court of the Federal Court considered whether there needed to be a link between employer response action and industrial action taken by employees. The Court found that the terms of the Fair Work Act limit an employer to some form of causally connected response to employee industrial action.[74]

A ***causal connection*** is the relation of cause and effect.[75]

In this context the 'cause' is the employer response action and the 'effect' is the employee response action.

Employee response action must not relate to a demarcation dispute

The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene a Commission order that relates to a significant extent to a demarcation dispute.

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[70] Fair Work Act s.410(3).
[71] Explanatory Memorandum to Fair Work Bill 2008 at para. 1649.
[72] [2012] FCAFC 65 (10 May 2012).
[73] *Chubb Fire and Security Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2012] FWA 9076 (Bissett C, 30 October 2012) at para. 15.
[74] *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65 (10 May 2012) at para. 116.
[75] *Butterworths Australian Legal Dictionary*, 1997, at p. 172.

Pattern bargaining

See Fair Work Act s.412

Pattern bargaining is a course of conduct by a person who is a negotiating party to two or more proposed enterprise agreements, seeking common wages or conditions for two or more of those agreements, where the conduct extends beyond a single business.[76]

The Fair Work Act does not actually proscribe pattern bargaining as such: rather it denies protection to industrial action taken in support of it, and makes specific provision for the grant of an injunction to stop or prevent such action.[77]

A course of conduct by a person is ***pattern bargaining*** if:

- the person is a bargaining representative for two or more proposed enterprise agreements
- the course of conduct involves seeking common terms to be included in two or more of the agreements, and
- the course of conduct relates to two or more employers.

Meaning of 'common' in 'common terms'

There is no error in interpreting the expression 'common' to mean the 'same' or 'identical'.[78]

It is correct to find that a union is not seeking 'common wages' if, at the time [that the application for an order to stop unprotected industrial action is made] the union has indicated a preparedness to negotiate different increments for different employers (even if the cumulative arithmetic of the increases ended up the same).[79]

Exception – genuinely trying to reach an agreement

The course of conduct, to the extent that it relates to a particular employer, is NOT pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.

The factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular employer, include whether the bargaining representative:

- is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement
- is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees, and
- is meeting the good faith bargaining requirements.

[76] A Forsyth and A Stewart, *FAIR WORK The New Workplace Laws and the Work Choices Legacy* (1st ed, 2009), at p. 146.
[77] B Creighton and A Stewart, *Labour Law* (5th ed, 2010), at para. 22.40.
[78] *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia, The* [2014] FWC 8130 (Johns C, 17 November 2014) at para. 39; citing *Re Trinity Garden Aged Care and another* PR973718 (AIRCFB, Watson SDP, Acton SDP, Smith C, 21 August 2006) at paras 21–22, [(2006) 155 IR 124].
[79] ibid., at paras 28–31.

Proof

A bargaining representative bears the burden of proving that they were genuinely trying to reach an agreement. This is known as a reverse onus of proof. A reverse onus of proof applies because the bargaining representative is in a better position to know and to provide evidence of reasons for engaging in particular conduct.[80]

Definition

This exception for pattern bargaining does not affect, and is not affected by, the meaning of the expression 'genuinely trying to reach an agreement' used elsewhere in the Fair Work Act.[81]

In the context of this provision, the expression 'genuinely trying to reach an agreement' is limited to the issue as to whether pattern bargaining is occurring.[82]

Related information

- Responding to pattern bargaining

Template agreements

The use of template agreements is common in certain industries, particularly where there may be many small businesses that are contracting for work within a larger project. An example of this is within the building and construction industry. Bargaining representatives may use template agreements as a starting point for negotiations based on their interests. However, if a union is seeking common terms in two or more agreements with two or more employers, then this may be considered pattern bargaining.

The existence and promotion of a template agreement is not of itself pattern bargaining.[83]

[80] Explanatory Memorandum to Fair Work Bill 2008 at para. 1662; see also Fair Work Act s.412(4).
[81] Fair Work Act s.412(5); see also *John Holland Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2010] FWAFB 526 (Giudice J, Watson SDP, Blair C, 29 January 2010) at paras 31–39, [(2010) 194 IR 239].
[82] Explanatory Memorandum to Fair Work Bill 2008 at para. 1663.
[83] *Re Pinarello Blues Pty Ltd as Trustee for Judds Discretionary Trust T/A Yankalilla Hotel* [2015] FWCA 7698 (Bartel DP, 19 November 2015) at para. 88.

Case example: **Course of conduct found to NOT be pattern bargaining**

Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia, The [2014] FWC 8130 (Johns C, 17 November 2014).

Facts

The union applied for, and was issued, a protected action ballot order for members to vote on taking industrial action in support of a proposed enterprise agreement. A ballot was conducted and industrial action was authorised.

The company argued that the union was engaging in pattern bargaining, and was not genuinely trying to reach an agreement. Specifically, the company submitted that the union was pursuing the company and other operators that were part of the wider industry bargaining, for the following claims:

- a '4 Week Swing' shift pattern
- payment for travel days, and
- the same expiry date for all agreements.

Outcome

The Commission held the union was not seeking common conditions of employment for two or more proposed enterprise agreements, and was therefore not engaged in pattern bargaining according to s.412(1)(b) of the Fair Work Act. The Commission pointed to the fact that the union had indicated a preparedness to negotiate with the wider industry about the 4 Week Swing claim, however it had never even hinted at abandoning the 4 Week Swing claim with the company. The union was therefore not pursuing the same course of conduct as between the wider industry and the company.

Relevance

In determining the meaning of 'common' for the definition of pattern bargaining in s.412(b) of the Fair Work Act, the Commission applied the principle from *Trinity Garden* which defines 'common' to mean the 'same' or 'identical'. The principle also states that a union is not seeking 'common wages' if the union has indicated a preparedness to negotiate different increments for different employers.

Case example: **Course of conduct found to NOT be pattern bargaining**

De Martin & Gasparini Pty Ltd and De Martin & Gasparini Pumping Pty Ltd T/A Boral De Martin & Gasparini v Construction, Forestry, Mining and Energy Union - Construction and General Division, New South Wales Divisional Branch [2015] FWC 477 (Riordan C, 19 January 2015).

Facts

The company applied to the Commission seeking orders to stop the proposed industrial action from occurring. The company argued that the CFMEU was participating in pattern bargaining with 21 concrete placement and concrete pumping companies, because it was saying that it would only sign the CFMEU template enterprise agreement.

The CFMEU argued that the issue of pattern bargaining did not arise in this situation because the terms of the proposed agreement were unique. To support this argument the CFMEU submitted that under the existing agreement employees were engaged on weekly hire, were paid a tool allowance and received a higher weekly superannuation payment all of which were superior to the industry standard and would be included in the proposed enterprise agreement. The CFMEU also gave evidence, which was accepted by the Commission, that the company was aware that the superior conditions would form part of the proposed agreement.

Outcome

The Commission found that the negotiations did not form part of any purported pattern bargaining. The company had always had a different enterprise agreement to the rest of the industry and there was no evidence before the Commission that this would change in the proposed agreement. The application for orders to stop proposed industrial action was dismissed.

Relevance

The Commission applied the definition of ‘common’ in s.412(1)(b) to mean the ‘same’ or ‘identical’ from *Trinity Garden*. Therefore, for the CFMEU to be involved in pattern bargaining with the company, the relevant terms of the proposed agreement would have to be identical to that of another employer.

Responding to pattern bargaining

Injunction

See Fair Work Act s.422

The courts may grant an injunction against industrial action if a bargaining representative is engaging in pattern bargaining.

A court may grant an injunction on such terms as the court considers appropriate if:

- a person has applied for the injunction, and
- the court is satisfied that:
  - employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable, and
  - a bargaining representative of an employee who will be covered by the proposed enterprise agreement is engaging in pattern bargaining in relation to the agreement.

Part 3 – Taking protected industrial action

This part will provide information on:

- when protected industrial action can be taken and who can take it
- the process for protected action ballots, including voting requirements
- notice requirements for taking protected industrial action, and
- limits on when protected industrial action can be taken.

When can protected industrial action be taken?

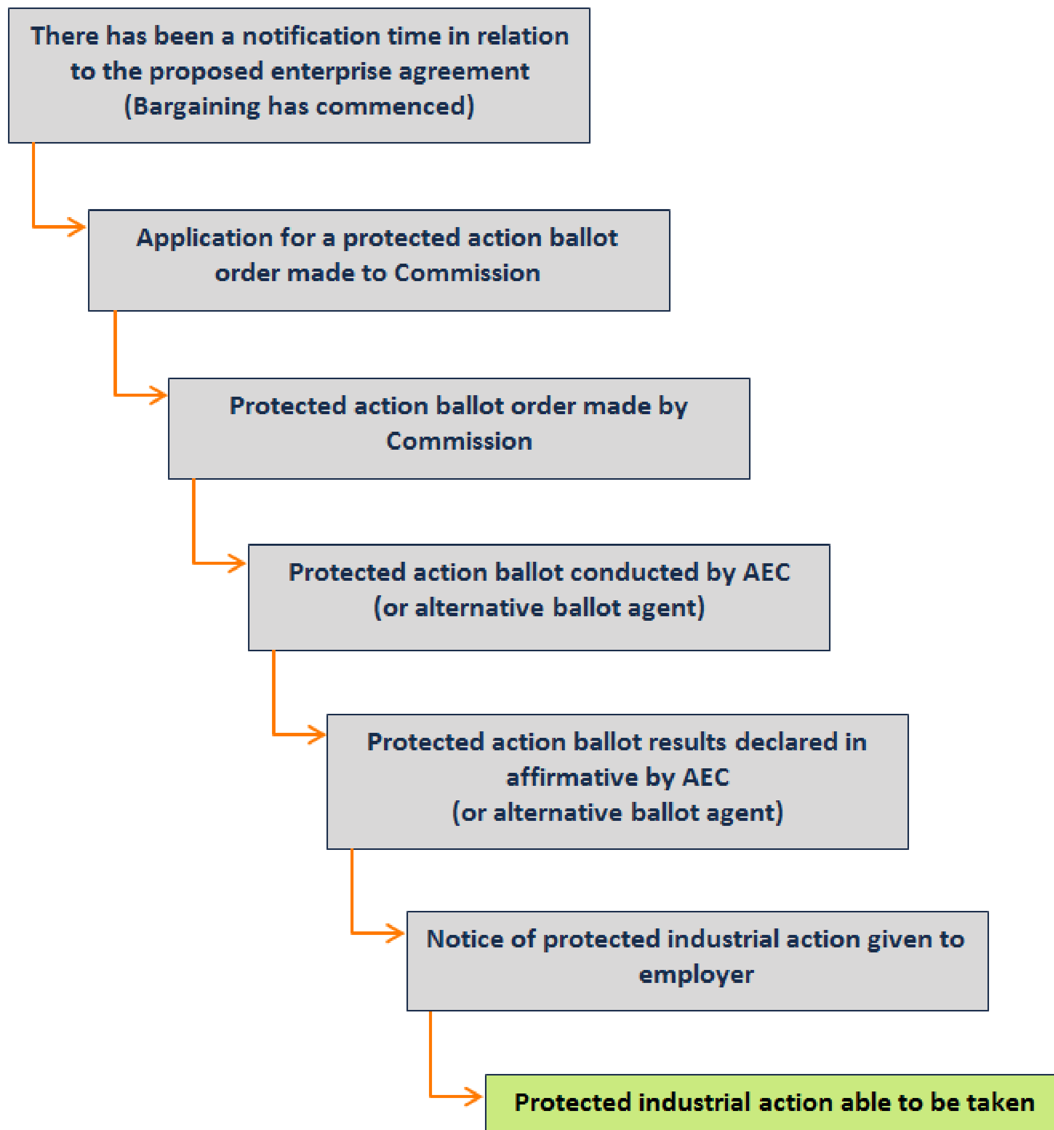
Protected employee claim action can only be taken after the proposed action has been approved by a vote in a protected action ballot.

This does not apply to employee response action because it is only taken in response to employer response action, which has been taken in response to protected employee claim action. The protection from the initial employee claim action flows on to the employee response action.

The protected industrial action must commence within the 30 day period starting on date of declaration of the results of the ballot, or if the Commission has extended that period by a further 30 days, within that period. Where a ballot authorises various types of industrial action, a particular type of industrial action must be commenced within the 30 day period, in order for that industrial action to remain protected after the 30 day expires.[84]

[84] *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 8674 (O'Callaghan SDP, 10 November 2010); *United Colleries Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) FCA 904 (14 July 2006).

Before protected industrial action can be taken the following steps **MUST** be completed:



Related information

- Part 3.1 – Protected action ballots
- Part 3.2 – Voting
- Part 3.3 – Taking protected industrial action

Who can take protected industrial action?

The *Fair Work Act 2009* (Cth) (the Fair Work Act) sets out the basic requirements for who can take protected industrial action in a variety of sections. These sections can be summarised as follows:

To be eligible to take protected employee claim action an employee must:

- be in the group of employees specified in the protected action ballot order[85]
- be covered by the proposed enterprise agreement,[86] and
- either:
    - be represented by a bargaining representative who is an applicant for the protected action ballot order, or
    - be a bargaining representative for themself but also a member of a union (if that union is an applicant for the protected action ballot order);[87] and
- be eligible to be included on the roll of voters.[88]

If an employee is not eligible to vote, they will not be able to take protected industrial action.

An employee will be eligible to be included on the roll of voters for a protected action ballot after the protected action ballot order was made, but before the close of the roll of voters if they are otherwise eligible to vote in the protected action ballot (for example, because they are a new employee).[89]

[85] Fair Work Act ss.409(1)(b)(ii), 437(3)(a).
[86] Fair Work Act s.437(5)(a).
[87] Fair Work Act ss.437(5)(b), 453(b).
[88] Fair Work Act s.456.
[89] Explanatory Memorandum to Fair Work Amendment Bill 2012 at para. 198.

Part 3.1 – Protected action ballots

See Fair Work Act s.437

The Fair Work Act includes provisions to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement. This is done by conducting a secret ballot known as a protected action ballot.

Who may apply?

A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or two or more such bargaining representatives (acting jointly), may apply to the Fair Work Commission (the Commission) for a protected action ballot order requiring a protected action ballot to be conducted to determine whether employees represented by the bargaining representative(s) wish to engage in particular protected industrial action for the agreement.

Making an application

See Fair Work Act s.437

An application for a protected action ballot order made to the Commission must include the following documentation:

- a completed and signed application form [Form F34]
- a draft order in the terms sought by the applicant, and
- a statutory declaration by the applicant setting out the basis on which the Commission can be satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted [Form F34B].[90]

Links to application form

Form F34 – Application for a protected action ballot order:

- www.fwc.gov.au/documents/forms/Form_F34.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F34.pdf (Adobe PDF)

Form F34B – Statutory declaration in support of an application for a protected action ballot order:

- www.fwc.gov.au/documents/forms/Form_F34B.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F34B.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[90] Fair Work Commission Rules r.8(2) and r.31.

Related information

- Example of draft order
- Genuinely trying to reach an agreement

Matters to be specified in application

The application must specify:

- the group or groups of employees who are to be balloted, and
- the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

Group of employees

A group of employees is taken to include only employees who:

- will be covered by the proposed enterprise agreement, and
- either:
  - are represented by a bargaining representative who is an applicant for the protected action ballot order, or
  - are bargaining representatives for themselves but are members of a union that is an applicant for the protected action ballot order.

Questions to be put to employees

The questions should describe the industrial action in such a way that employees are capable of responding to them.[91]

Ballot questions should be sufficiently clear so employees can make an informed choice. The questions should indicate what work would and would not be done and the implications for employees while at work.[92]

Bargaining representatives should frame ballot questions in a way which minimises the possibility that the industrial action eventually taken will fall outside the action authorised by the ballot.[93]

[91] *John Holland Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2010] FWAFB 526 (Giudice J, Watson SDP, Blair C, 29 January 2010) at para. 19, [(2010) 194 IR 239].
[92] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 (Watson VP, Hamberger SDP, Roberts C, 9 October 2009).
[93] See *John Holland Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2010] FWAFB 526 (Giudice J, Watson SDP, Blair C, 29 January 2010) at para. 16, [(2010) 194 IR 239].

Example

In support of reaching an enterprise agreement with your employer, do you support the taking of protected industrial action against your employer which involve one or more of the following:

***Question 1** – An unlimited number of bans or limitations on answering or making telephone calls, responding to voicemails, or sending or responding to email?*

☐ *Yes* ☐ *No*

***Question 2** – An unlimited number of bans or limitations on processing of paperwork?*

☐ *Yes* ☐ *No*

***Question 3** – An unlimited number of indefinite bans on the working of overtime?*

☐ *Yes* ☐ *No*

***Question 4** – An unlimited number of stoppages of work for 1 hour?*

☐ *Yes* ☐ *No*

***Question 5** – An unlimited number of stoppages of work for 2 hours?*

☐ *Yes* ☐ *No*

***Question 6** – An unlimited number of stoppages of work for 4 hours?*

☐ *Yes* ☐ *No*

***Question 7** – An unlimited number of stoppages of work for 8 hours?*

☐ *Yes* ☐ *No*

***Question 8** – An unlimited number of stoppages of work for 24 hours?*

☐ *Yes* ☐ *No*

***Question 9** – An unlimited number of stoppages of work for seven days?*

☐ *Yes* ☐ *No*

If the questions are ambiguous or lack clarity there may be consequences for the bargaining representative and the employees if reliance is placed on the result of the ballot in taking industrial action. If the question or questions give rise to ambiguity, the conclusion may be reached that the industrial action specified was not authorised by the ballot and that the action is not protected.[94]

This could result in the industrial action being considered unprotected and the Commission making an order that the industrial action stop under s.418. Contravention of such an order may result in an injunction or a civil penalty being ordered by a Court.[95]

[94] *National Tertiary Education Industry Union v RMIT University* [2013] FWCFB 9549 (Catanzariti VP, Kovacic DP, Roe C, 5 December 2013) at para. 23, [(2013) 237 IR 264]; citing *John Holland Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2010] FWAFB 526 (Giudice J, Watson SDP, Blair C, 29 January 2010) at para. 19, [(2010) 194 IR 239].

[95] Fair Work Act s.421(1).

Ballot agent

If the applicant wishes a person other than the Australian Electoral Commission (AEC) to be the protected action ballot agent for the protected action ballot, the application must specify the name of the person.

Note: The protected action ballot agent will be the AEC unless the Commission specifies another person in the protected action ballot order as the protected action ballot agent (see Fair Work Act s.443(4)).

Related information

- Nominating an alternative ballot agent

When application may be made

See Fair Work Act s.438

An application for a protected action ballot must not be made earlier than 30 days before the nominal expiry date of any existing enterprise agreement which covers the employees, and must not be made before there has been a 'notification time' in relation to the proposed enterprise agreement. The notification time will arise where the employer has initiated bargaining or has agreed to bargain, or the Commission has issued a majority support determination, scope order or low paid authorisation.[96]

If more than one enterprise agreement covers the employees who will be covered by the proposed enterprise agreement, an application for a protected action ballot order must not be made earlier than 30 days before the latest nominal expiry date of those enterprise agreements.

If a protected action ballot is conducted before the nominal expiry date of an existing agreement, it is unlawful to organise or take industrial action pursuant to the ballot before that nominal expiry date. If industrial action is taken before the nominal expiry date, even if that action was approved by the protected action ballot, the industrial action will be unprotected.[97]

Making an application for a protected action ballot order does not constitute organising industrial action. Generally industrial action has some type of effect on the performance of work, whether in the form of work bans or strike action.

Related information

- Restrictions on commencing protected industrial action
- Industrial action defined

[96] Fair Work Act s.437(2A).
[97] Fair Work Act ss.413(6), 417; Explanatory Memorandum to Fair Work Bill 2008 at para. 1763.

Notice of application

See Fair Work Act s.440

Within 24 hours after making an application for a protected action ballot order, the applicant must give a copy of the application to the employer of the employees who are to be balloted, and:

- if the application specifies a person that the applicant wishes to be the protected action ballot agent – that person, or
- otherwise – the AEC.

The Commission must not determine an application for a protected action ballot order unless the applicant has notified the affected employer of the application.[98]

Note: If the application seeks that the AEC is the protected action ballot agent, the copy of the application sent to the AEC should be accompanied by a completed information form that is available at www.aec.gov.au/ieb/pab.htm.

Related information

- AEC – Protected action ballot information form

Electronic copy to be provided

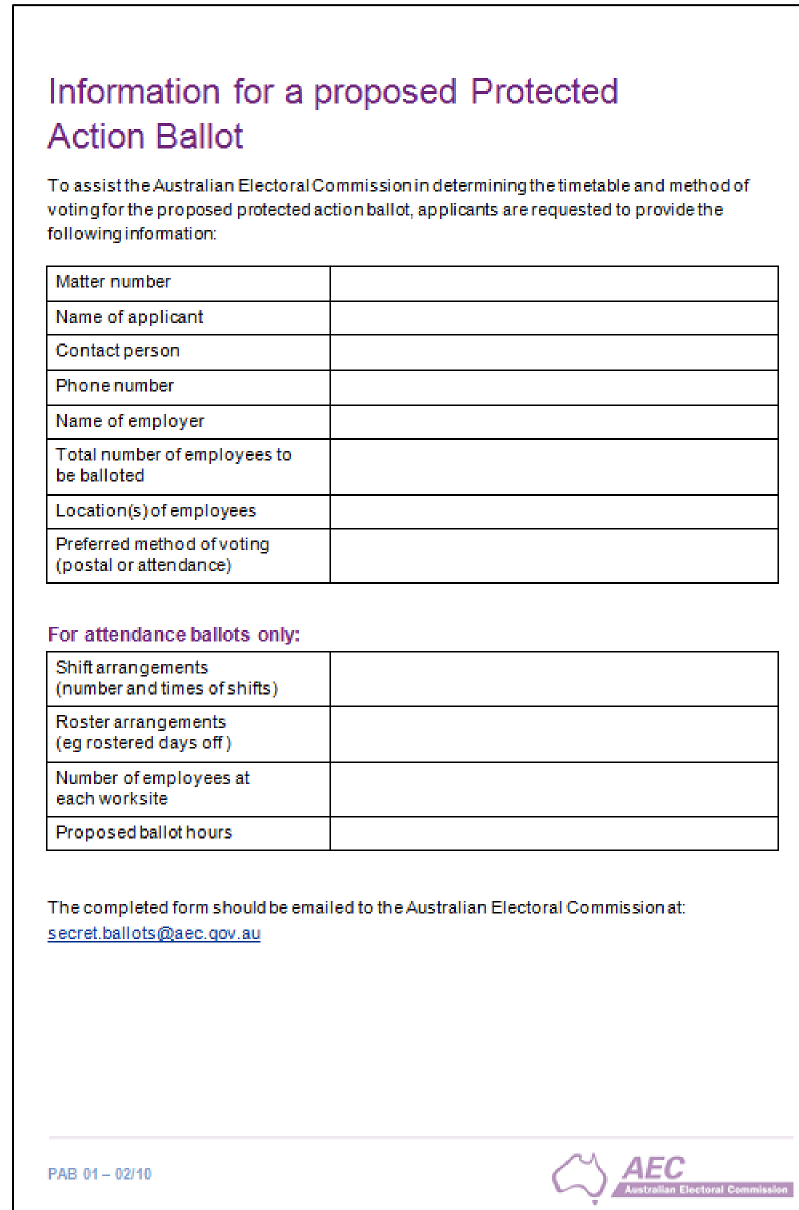
Unless the application has been lodged with the Commission by fax, email or using the Commission's electronic lodgment facilities, an application for a protected action ballot order and the accompanying draft order must be emailed to the chambers of the Commission Member named in the notice of listing issued by the Commission in the matter as soon as practicable after the applicant has received the notice of listing.[99]

Note: The approved email addresses for Commission Members' chambers are available at www.fwc.gov.au/disputes-at-work/how-the-commission-works/lodge-an-application.

[98] Fair Work Act s.441(2).
[99] Fair Work Commission Rules r.31(2)

AEC – Protected action ballot information form

Image of form that is available at www.aec.gov.au/ieb/pab.htm.



Information for a proposed Protected Action Ballot

To assist the Australian Electoral Commission in determining the timetable and method of voting for the proposed protected action ballot, applicants are requested to provide the following information:

Matter number	
Name of applicant	
Contact person	
Phone number	
Name of employer	
Total number of employees to be balloted	
Location(s) of employees	
Preferred method of voting (postal or attendance)	

For attendance ballots only:

Shift arrangements (number and times of shifts)	
Roster arrangements (eg rostered days off)	
Number of employees at each worksite	
Proposed ballot hours	

The completed form should be emailed to the Australian Electoral Commission at: secret.ballots@aec.gov.au

PAB 01 – 02/10

AEC Australian Electoral Commission

Example of draft order

Fair Work Act 2009

s.437 – Application for a protected action ballot order

Applicant(s):

[Insert the name of each Applicant for the protected action ballot order.]

v

DRAFT ORDER

Respondent(s):

[Insert the name of each Respondent.]

Commission matter no:

[Insert the Commission matter number.]

COMMISSION MEMBER DATE

Proposed protected action ballot by employees of [insert name of employer]

Pursuant to s.443 of the *Fair Work Act 2009* (the Act) the Fair Work Commission orders:

1. PROTECTED ACTION BALLOT TO BE HELD

The *[Insert name of bargaining representative]* is to hold a protected action ballot of employees of *[Insert name of Employer].*

2. NAME OF PERSON AUTHORISED TO CONDUCT THE BALLOT

The ballot is to be conducted by *[Insert Australian Electoral Commission or name of Protected Action Ballot Agent].*

3. GROUP OR GROUPS OF EMPLOYEES TO BE BALLOTED

[Insert group or groups of employees to be balloted]

4. TYPE OF BALLOT

[Delete this clause and renumber remaining clauses if the Australian Electoral Commission is the ballot agent

or

Insert proposed ballot type (e.g. attendance ballot, postal ballot) if the Australian Electoral Commission is not the ballot agent]

5. DATE VOTING CLOSES

[Insert date by which voting in the protected action ballot closes]

6. QUESTIONS

[Insert ballot questions, including the nature of the proposed industrial action]

Note: Ballot questions should be sufficiently clear so employees can make an informed choice. The questions should indicate what work would and would not be done and the implications for employees while at work.

Commission process

Application to be determined within 2 days after it is made

See Fair Work Act s.441

The Commission must, as far as practicable, determine an application for a protected action ballot order within two working days after the application is made.

The relevant employer generally has the right to be heard in relation to the prerequisites for the making of a protected action ballot order (specified in s.443) before the application is determined.[100]

If there is no objection to a protected action ballot order being made by the employer, the matter may be heard on the papers.

Dealing with multiple applications together

See Fair Work Act s.442

The Commission may deal with two or more applications for a protected action ballot order at the same time if:

- the applications relate to industrial action by:
  - employees of the same employer, or
  - employees at the same workplace, and
- the Commission is satisfied that dealing with the applications at the same time will not unreasonably delay the determination of any of the applications.

For example, an employer may have employees represented by three different unions involved in bargaining for a proposed enterprise agreement and each union makes an application for a protected action ballot. In this situation the Commission can deal with the three applications at the same time.

Related information

- When the Commission must make an order

Documents to accompany application

The application must be accompanied by any documents and other information prescribed by the Fair Work Regulations.

Note: The Fair Work Regulations do not currently prescribe any documents and other information to accompany an application for a protected action ballot order.

However, the Fair Work Commission Rules specify that an application for a protected action ballot order must be accompanied by a draft order in the terms sought by the applicant.[101]

[100] *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWAFB 599 (Acton SDP, Hamilton DP, Blair C, 12 October 2009).
[101] Fair Work Commission Rules r.31(1).

Exclusions

A bargaining representative cannot apply for a protected action ballot order if the proposed enterprise agreement is:

- a greenfields agreement, or
- a multi-enterprise agreement.[102]

A bargaining representative cannot apply for a protected action ballot order unless there has been a notification time in relation to the proposed enterprise agreement.[103]

The ***notification time*** for a proposed enterprise agreement is the time when:

- the employer agrees to bargain, or initiates bargaining, for the proposed agreement
- a majority support determination in relation to the proposed agreement comes into operation
- a scope order in relation to the proposed agreement comes into operation, or
- a low-paid authorisation in relation to the proposed agreement that specifies the employer comes into operation.[104]

When the Commission must make an order

See Fair Work Act s.443

Requirements

The Commission must make a protected action ballot order in relation to a proposed enterprise agreement if:

- an application has been made, and
- the Commission is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

Related information

- Genuinely trying to reach an agreement

Content

A protected action ballot order must specify the following:

- the name of each applicant for the order
- the group or groups of employees who are to be balloted
- the date by which voting in the protected action ballot closes, and
- the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

[102] Fair Work Act s.437(2).
[103] Fair Work Act s.437(2A).
[104] Fair Work Act ss.173(2), 437(2A).

Date

The Commission must specify a date by which voting in the protected action ballot closes that will enable the protected action ballot to be conducted as expeditiously as practicable.

Related information

- Timetable for protected action ballot

Ballot agent

If the Commission decides that a person other than the AEC is to be the ballot agent for the protected action ballot, the protected action ballot order must also specify:

- the person that the Commission decides is to be the alternative ballot agent, and
- the person (if any) that the Commission decides is to be the independent advisor for the ballot.

An ***independent advisor*** is a person who can give the alternative ballot agent advice and recommendations directed towards ensuring that the ballot will be fair and democratic.

Related information

- Nominating an alternative ballot agent
- Independent advisor

Notice period before taking action

The minimum period of written notice required before commencing employee claim action is 3 working days.

If the Commission is satisfied that there are exceptional circumstances justifying a longer period of notice, the protected action ballot order may specify a period of up to 7 working days.[105]

Related information

- Notice requirements

[105] Fair Work Act s.414.

Protected action ballot order may require multiple ballots to be held at the same time

See Fair Work Act s.446

If the Commission has made a protected action ballot order, and:

- the Commission proposes to make another protected action ballot order or orders, and
- the orders would require a protected action ballot to be held in relation to industrial action by employees of the same employer or employees at the same workplace;

then the Commission may make, or vary, the protected action ballot orders so as to require the protected action ballots to be held at the same time if the Commission is satisfied:

- that the level of disruption of the employer's enterprise, or at the workplace, could be reduced if the ballots were held at the same time, and
- that requiring the ballots to be held at the same time will not unreasonably delay either ballot.

Related information

- Dealing with multiple applications together

Notification when protected action ballot order made

See Fair Work Act s.445

As soon as practicable after making a protected action ballot order, the Commission must give a copy of the order to:

- each applicant for the order, and
- the employer of the employees who are to be balloted, and
- the ballot agent for the protected action ballot.

Notifying employees

The Fair Work Regulations[106] set out procedures to be followed for notifying employees in relation to the conduct of a protected action ballot.

Content of notice

The ballot agent for the ballot must, as soon as practicable after the Commission makes the protected action ballot order, take all reasonable steps to notify each employee who is eligible to be included on the roll of voters that the Commission has made the order.

[106] Fair Work Regulations r.3.13.

The notice must include:

- any matter specified by the Commission in the ballot order, and
- the voting method or methods to be used, and
- each location (if any) at which the ballot will be conducted, and
- either:
  - the date or dates on which the ballot will be conducted, or
  - the period during which the ballot will be conducted; and
- contact details for the ballot agent, and
- contact details for the independent advisor (if any).

The notice must also include:

- a statement that the employee may contact the ballot agent to find out whether the employee is on the roll of voters, and
- a statement that the employee may ask the ballot agent to add or remove the employee's name from the roll of voters, and
- a statement that the employee may raise any concerns or complaints about the conduct of the ballot (including any alleged irregularity) with:
  - the ballot agent, or
  - if the ballot agent is not the AEC – the Commission, or
  - the independent advisor (if any).

Related information

- Compilation of roll of voters

Manner of notification

The ballot agent may give the notice to an employee by doing any of the following:

- giving the notice to the employee personally;
- sending the notice by pre-paid post to:
  - the employee's residential address, or
  - a postal address nominated by the employee;
- sending the notice to:
  - the employee's email address at work, or
  - another email address nominated by the employee;
- sending to the employee's email address at work (or to another email address nominated by the employee) an electronic link that takes the employee directly to a copy of the notice on the employer's intranet

- faxing the notice to:
  - the employee's fax number at work, or
  - the employee's fax number at home, or
  - another fax number nominated by the employee;
- displaying the notice in a conspicuous location at the workplace that is known by and readily accessible to the employee.

Note: This does not prevent a ballot agent from giving notice to an employee by another means.

Protected action ballot agent – access to workplace

An employer must allow the ballot agent access to the workplace for the purpose of notifying employees of the information about the protected action ballot.

Note: *This is a civil remedy provision.*

An employer must allow the ballot agent access to the workplace for the purpose of preparing for, or conducting, the protected action ballot.

Note: *This is a civil remedy provision.*

Nominating an alternative ballot agent

See Fair Work Act s.444

The Commission may only decide that a person other than the AEC is to be the ballot agent for a protected action ballot if:

- the person is specified in the application for the protected action ballot order as the person the applicant wishes to be the ballot agent, and
- the Commission is satisfied that:
  - the person is a fit and proper person to conduct the ballot, and
  - any other requirements prescribed by the Fair Work Regulations are met.

Requirements for alternative ballot agent

The Fair Work Regulations[107] set out other requirements that the Commission must be satisfied have been met before a person other than the AEC becomes the ballot agent for a protected action ballot.

The requirements are that the person must:

- be capable of ensuring the secrecy and security of votes cast in the ballot
- be capable of ensuring that the ballot will be fair and democratic
- be capable of conducting the ballot expeditiously
- have agreed to be a ballot agent
- be bound to comply with the *Privacy Act 1988* (Cth) in respect to the handling of information relating to the protected action ballot, and

[107] Fair Work Regulations r.3.11.

If the person is an industrial association or a body corporate, the Commission must be satisfied that:

- each individual who will carry out the functions of the ballot agent for the industrial association or body corporate is a fit and proper person to conduct the ballot, and
- the above requirements are met for the individual.

The description 'fit and proper person' is not defined in the Fair Work Act and standing alone, it carries no precise meaning. Generally though, the description is used as a measure of suitability to perform or carry out a particular function, to be appointed to a particular position or to be given a particular right or privilege. However, the description will take its meaning from its context, from the activities in which the person to be assessed is or will be engaged and the ends to be served by those activities.[108]

Examples of persons the Commission has appointed as an alternative ballot agent includes:

- a former Member of the Commission, and
- private companies set up exclusively to conduct ballots or elections.

Independent advisor

If the Commission appoints a person other than the AEC as the ballot agent then the Commission can also appoint an independent advisor to provide the alternative ballot agent with advice and recommendations directed towards ensuring that the ballot will be fair and democratic.

If the applicant for a protected action ballot order is seeking an alternative ballot agent to conduct the vote and the employer does not agree, then the Commission may appoint an independent advisor to assist with the process.[109]

The Commission may decide that a person is to be the independent advisor for a protected action ballot if:

- the Commission has decided that a person other than the AEC is to be the ballot agent for the ballot, and
- the Commission considers it appropriate that there be an independent advisor for the ballot, and
- the Commission is satisfied that:
  - the other person is sufficiently independent of each applicant for the protected action ballot order, and
  - any other requirements prescribed by the Fair Work Regulations are met.

[108] *National Tertiary Education Industry Union v Navitas Bundoora Pty Ltd T/A La Trobe Melbourne* [2014] FWC 2977 (Wilson C, 12 May 2014) at para. 26; citing *Re The Maritime Union of Australia* [2014] FWCFB 1973 (Gostencnik DP, Wells DP, Blair C, 26 March 2014) at para. 23, [(2014) 241 IR 216].

[109] *National Tertiary Education Industry Union v Navitas Bundoora Pty Ltd T/A La Trobe Melbourne* [2014] FWC 2977 (Wilson C, 12 May 2014) at para. 13.

Requirements for independent advisor

The Fair Work Regulations[110] set out other requirements that the Commission must be satisfied have been met before a person becomes the independent advisor for a protected action ballot.

The requirements are that:

- the person must be capable of giving the ballot agent:
  - advice that is directed towards ensuring that the ballot will be fair and democratic, and
  - recommendations that are directed towards ensuring that the ballot will be fair and democratic, and
- the person must have agreed to be the independent advisor.

Varying a protected action ballot order

See Fair Work Act s.447

An applicant for a protected action ballot order or the ballot agent for a protected action ballot can apply to the Commission to vary the order for a variety of reasons. There is no requirement for the Commission to approve a variation.

Making the application

An applicant for a protected action ballot order may apply to the Commission to vary the order.

Example

Situations that may lead to an application to vary a protected action ballot order include:

- *if there has been a change to the employees eligible to be included on the role of voters, or*
- *to correct an error in the original application.*

An applicant for a protected action ballot order may also apply to vary the order to change the date that voting in the ballot closes.

The ballot agent for a protected action ballot may apply to the Commission to vary the protected action ballot order to change the date by which voting in the ballot closes.

[110] Fair Work Regulations r.3.12.

Example

Situations that may lead to an application to vary a protected action ballot order by a ballot agent to change the date that voting in the ballot closes include:

- *if the applicant was intending to have the vote conducted as an attendance ballot and the AEC advised that it is only able to conduct the vote by postal ballot, the ballot period can be extended to allow for the change in ballot process, or*
- *if the AEC needs a longer period to conduct the ballot than was previously considered when the application for a protected action ballot order was made.*

An application may be made:

- at any time before the date by which voting in the protected action ballot closes, or
- if the ballot has not been held before that date and the Commission consents – after that time.

An application to vary a protected action ballot order made to the Commission must include the following documentation:

- a completed and signed application form [Form F35], and
- a copy of the protected action ballot order to which the application relates.[111]

Powers of the Commission

If an application is made to vary a protected action ballot order, the Commission may vary the protected action ballot order.

If the Commission makes a decision or order, a copy of the decision or order must be published on the Commission's website (or by any other means) as soon as practicable.[112]

Links to application form

Form F35 – Application for variation of a protected action ballot order:

- www.fwc.gov.au/documents/forms/Form_F35.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F35.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[111] Fair Work Commission Rules r.31(3).
[112] Fair Work Act s.601.

Revoking a protected action ballot order

An applicant for a protected action ballot order can apply to have the protected action ballot order revoked. This means that the order to conduct a ballot is cancelled. For example, this may be used in circumstances where the parties have come to an agreement on the terms of the proposed enterprise agreement and there is no further need to consider taking employee claim action.

Making the application

An applicant for a protected action ballot order may apply to the Commission, at any time before voting in the protected action ballot closes, to revoke the order.

An application to revoke a protected action ballot order made to the Commission must include the following documentation:

- a completed and signed application form [Form F36], and
- a copy of the protected action ballot order to which the application relates.[113]

Powers of the Commission

If an application to revoke a protected action ballot order is made, the Commission must revoke the order.

Links to application form

Form F36 – Application for revocation of a protected action ballot order:

- www.fwc.gov.au/documents/forms/Form_F36.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F36.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage: www.fwc.gov.au/about-us/resources/forms

[113] Fair Work Commission Rules r.8(2) and r.31(3).

Part 3.2 – Voting

Ballot agents

See Fair Work Act s.449

Voting for a protected action ballot must be arranged and overseen by an authorised ballot agent. The ballot agent must ensure that the ballot is conducted efficiently and meets all of the requirements set by the Commission and the Fair Work Act and Regulations.

A protected action ballot must be conducted by:

- if a person is specified in the protected action ballot order as the protected action ballot agent for the ballot – that person, or
- the AEC.

The ballot agent must conduct the protected action ballot quickly and in accordance with the following:

- the protected action ballot order
- the timetable for the ballot
- sections 449–458 of the Fair Work Act
- any directions given by the Commission
- any procedures prescribed by the Fair Work Regulations.

Directions about ballot paper

The ballot agent for a protected action ballot may provide with the ballot paper:

- directions to be followed by an employee entitled to vote in the ballot so that the vote complies with the Fair Work Act and Fair Work Regulations, and
- other directions that the agent reasonably believes may assist in ensuring an irregularity does not occur in the conduct of the ballot, and
- notes to assist an employee who is entitled to vote in the ballot by informing him or her of matters relating to conduct of the ballot.[114]

[114] Fair Work Regulations r.3.14.

Directions for conduct of protected action ballot for alternative ballot agent

See Fair Work Act s.450

The Commission must give the alternative ballot agent (ie ballot agent that is not the AEC) written directions in relation to the following matters relating to the protected action ballot:

- the development of a timetable
- the voting method, or methods, to be used (which cannot be a method involving a show of hands) – examples of voting methods are attendance voting, electronic voting and postal voting
- the compilation of the roll of voters
- the addition of names to, or removal of names from, the roll of voters
- any other matter in relation to the conduct of the ballot that the Commission considers appropriate.

Note: A ballot agent must not contravene a term of a direction given by the Commission in relation to a protected action ballot.[115]

To enable the roll of voters to be compiled, the Commission may direct, in writing, either or both of the following:

- the employer of the employees who are to be balloted
- the applicant for the protected action ballot order

to give to the Commission or the ballot agent:

- the names of the employees included in the group or groups of employees specified in the protected action ballot order, and
- any other information that it is reasonable for the Commission or the ballot agent to require to assist in compiling the roll of voters.

If:

- an applicant for a protected action ballot order, or
- the employer of an employee who is to be balloted;

provides information as directed, the applicant or employer must include with the information a declaration in writing that the applicant or employer reasonably believes that the information is complete, up-to-date and accurate.[116]

[115] Fair Work Act s.463(2).
[116] Fair Work Regulations r.3.15.

Timetable for protected action ballot

See Fair Work Act s.451

The following provisions apply if:

- the ballot agent is the AEC, or
- the Commission has directed the alternative ballot agent to comply with this section.

Note: If the following provisions do not apply, the ballot agent must comply with directions given by the Commission in relation to the matters dealt with by this section.

As soon as practicable after receiving a copy of the protected action ballot order, the ballot agent must, in consultation with each applicant for the order and the employer of the employees who are to be balloted:

- develop a timetable for the conduct of the protected action ballot, and
- determine the voting method, or methods, to be used for the ballot (which cannot be a method involving a show of hands) – examples of voting methods are attendance voting, electronic voting and postal voting.

Who may vote – roll of voters

See Fair Work Act s.456

An employee may vote in the protected action ballot only if the employee's name is on the roll of voters for the ballot.

Compilation of roll of voters

See Fair Work Act s.452

This section applies if:

- the ballot agent is the AEC, or
- the Commission has directed the alternative ballot agent to comply with this section.

Note: If this section does not apply, the ballot agent must comply with directions given by the Commission in relation to the matters dealt with by this section.

As soon as practicable after receiving a copy of the protected action ballot order, the ballot agent must compile the roll of voters for the protected action ballot.

For the purpose of compiling the roll of voters, the ballot agent may direct, in writing, the employer of the employees who are to be balloted, or the applicant for the order (or both), to give to the ballot agent:

- the names of the employees included in the group or groups of employees specified in the protected action ballot order, and
- any other information that it is reasonable for the ballot agent to require to assist in compiling the roll of voters.

If:

- an applicant for a protected action ballot order, or
- the employer of an employee who is to be balloted;

provides information as directed, the applicant or employer must include with the information a declaration in writing that the applicant or employer reasonably believes that the information is complete, up-to-date and accurate.[117]

Who is eligible to be included on the roll of voters

See Fair Work Act s.453

An employee is only eligible to be included on the roll of voters for the protected action ballot if:

- the employee will be covered by the proposed enterprise agreement to which the ballot relates, and
- the employee is included in a group of employees specified in the protected action ballot order and either:
  - is represented by a bargaining representative who was an applicant for the order, or
  - is the bargaining representative for himself or herself but is also a member of a union that was an applicant for the order.

Variation of roll of voters

See Fair Work Act s.454

Variation by protected action ballot agent on request

The provisions relating to adding or removing names to the roll of voters apply if:

- the protected action ballot agent is the AEC, or
- the Commission has directed the alternative ballot agent to comply with those subsections.

Note: If the provisions relating to adding or removing names to the roll of voters do not apply, the ballot agent must comply with directions given by the Commission in relation to the matters dealt with by those subsections.

Adding names to the roll of voters

The ballot agent must include an employee's name on the roll of voters for the protected action ballot if:

- the ballot agent is requested to do so by:
  - an applicant for the protected action ballot order, or
  - the employee, or
  - the employee's employer, and

[117] Fair Work Regulations r.3.15.

- the ballot agent is satisfied that the employee is eligible to be included on the roll of voters, and
- the request is made before the end of the working day before the day on which voting in the ballot starts.

Removing names from the roll of voters

The ballot agent must remove an employee's name from the roll of voters for the protected action ballot if:

- the ballot agent is requested to do so by:
  - an applicant for the protected action ballot order, or
  - the employee, or
  - the employee's employer, and
- the ballot agent is satisfied that the employee is not eligible to be included on the roll of voters, and
- the request is made before the end of the working day before the day on which voting in the ballot starts.

The ballot agent must remove a person's name from the roll of voters for the protected action ballot if:

- the person (the ***former employee***) is no longer employed by the employer (the ***former employer***) of the employees who are to be balloted, and
- the ballot agent is requested to do so by:
  - an applicant for the protected action ballot order, or
  - the former employee, or
  - the former employer, and
- the request is made before the end of the working day before the day on which voting in the ballot starts.

Variation by AEC on its own initiative

If the ballot agent is the AEC, the AEC may, on its own initiative and before the end of the working day before the day on which voting in the ballot starts:

- include an employee's name on the roll of voters for the protected action ballot if the AEC is satisfied that the employee is eligible to be included on the roll of voters, or
- remove an employee's name from the roll of voters for the protected action ballot if the AEC is satisfied that the employee is not eligible to be included on the roll of voters, or
- remove a person's name from the roll of voters for the protected action ballot if the person is no longer employed by the employer of the employees who are to be balloted.

Ballot papers

See Fair Work Act s.455

The ballot paper for the protected action ballot must:

- be in the form prescribed by the Fair Work Regulations, and
- include any information prescribed by the Fair Work Regulations.

Form of ballot paper

The form of a ballot paper for a protected action ballot that is to be conducted by attendance voting or postal voting is set out in Form 1 of Schedule 3.2 to the Fair Work Regulations.

A ballot paper for a protected action ballot that is to be conducted by electronic voting must include the information and the content set out in Form 1 of Schedule 3.2 to the Fair Work Regulations.[118]

Ballot paper means:

- for a voting method that is not an electronic voting method – a paper ballot paper, or
- for an electronic voting method – an electronic ballot paper.

Related information

- Form 1 – Ballot paper under Part 3 of Chapter 3

Authorisation of ballot

The ballot agent for the ballot must:

- for attendance voting or postal voting – issue to each employee who is to be balloted a ballot paper that bears:
    - the agent's initials, or
    - a facsimile of the agent's initials, and
- for electronic voting – ensure that the protected action ballot identifies the ballot agent who is authorised to conduct the protected action ballot.

A ballot paper may be issued to an employee by post, email or electronically.[119]

[118] Fair Work Regulations r.3.16.
[119] Fair Work Regulations r.3.18(2)–(2A).

Voting procedure

The procedures for conducting either a postal vote or electronic vote are detailed below. Because the ballot agent will be present at an attendance vote the Fair Work Regulations do not set out a specific procedure for conducting an attendance vote, however information on providing a replacement ballot paper for an attendance vote is also included below.

Postal voting procedure

If the ballot is conducted by postal voting, the ballot agent must, as soon as practicable, post to each employee who is to be balloted a sealed envelope that contains:

- the ballot paper, and
- information about:
  - the closing date of the ballot, and
  - the time, on the closing date, by which the agent must receive the employee's vote, and
- an envelope in which the employee must place his or her ballot paper, and
- a prepaid envelope addressed to the ballot agent and that may be posted without cost to the employee, and
- any other material that the ballot agent considers to be relevant to the ballot.[120]

The envelope must:

- set out a form of declaration that the employee has not voted before in the ballot, and
- have a place on which the employee can sign the envelope, and
- be able to fit into the prepaid envelope provided to return the ballot to the agent.[121]

Replacement ballot paper – postal voting

An employee who is to be balloted by postal voting may ask the ballot agent for a replacement ballot paper because:

- the employee did not receive a copy of the protected action ballot order or the associated documents, or
- the employee did not receive a ballot paper in those documents, or
- the ballot paper has been lost or destroyed, or
- the ballot paper has been spoilt.[122]

[120] Fair Work Regulations r.3.18(3).
[121] Fair Work Regulations r.3.18(4).
[122] Fair Work Regulations r.3.18(5).

Related information

- Content of notice

The request for a replacement ballot paper must:

- be received by the ballot agent on or before the closing day of the ballot, and
- state the reason for the request, and
- if practicable, be accompanied by evidence that verifies, or tends to verify, the reason, and
- include a declaration by the employee that the employee has not voted at the ballot.[123]

The ballot agent must give the employee a replacement ballot paper if satisfied that:

- the reason for the request is a reason mentioned in subregulation 3.18(5), and
- the request is in accordance with the requirements mentioned in subregulation 3.18(6), and
- the employee has not voted at the ballot.[124]

Replacement ballot paper – attendance voting

If:

- an employee is to be balloted by attendance voting, and
- the employee satisfies the ballot agent, before depositing the ballot paper in the repository that serves to receive or hold ballot papers, that the employee has accidentally spoilt the paper;

the ballot agent must give the employee a replacement ballot paper.[125]

The protected ballot agent must also:

- mark 'spoilt' on the ballot paper and initial the marking, and
- keep the ballot paper.[126]

Conduct of protected action ballot by electronic voting

If a protected action ballot is conducted by electronic voting, the ballot agent must ensure that:

- only employees on the roll of voters are provided with access to the electronic voting system, and
- each employee to be balloted can vote only once in the ballot, and
- there is a record of who has voted, and
- there is no way of identifying how any employee has voted, and
- the sum of the votes cast for each proposition and the votes cast against each proposition is the same as the total votes cast.[127]

[123] Fair Work Regulations r.3.18(6).
[124] Fair Work Regulations r.3.18(7).
[125] Fair Work Regulations r.3.18(8).
[126] Fair Work Regulations r.3.18(9).
[127] Fair Work Regulations r.3.16A.

Electronic voting procedure

If the ballot is conducted by electronic voting, the ballot agent must, as soon as practicable, issue to each employee who is to be balloted the following:

- instructions that allow the employee to access the relevant electronic voting program, including a unique identifier that allows the employee to access the relevant electronic voting program
- information about the closing date for the ballot and the time, on the closing date, by which the ballot agent must receive the employee's vote, and
- any other material that the ballot agent considers to be relevant to the ballot.[128]

Examples of unique identifiers are:

- a username and password, or
- a username and a personal identification number.

Replacement information – electronic voting

An employee may ask the ballot agent for a replacement of the information provided regarding the electronic voting procedure if:

- the employee did not receive information about how to access the electronic voting system, or
- the information regarding the electronic voting procedure has been lost or destroyed, or
- the unique identifier provided for the electronic voting procedure did not allow the employee to access the electronic voting system.[129]

A request for the replacement of the information provided regarding the electronic voting procedure must:

- be received by the ballot agent on or before the closing day for the ballot, and
- state the reason for the request, and
- if it is available, be accompanied by evidence that verifies, or tends to verify, the reason given for the request, and
- include a declaration by the employee that the employee has not voted in the ballot.[130]

The ballot agent must give an employee replacement information if satisfied that:

- the reason for the request is a reason mentioned in subregulation 3.18(7A), and
- the request is in accordance with the requirements mentioned in subregulation 3.18(7B), and
- the employee has not voted in the ballot.[131]

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[128] Fair Work Regulations r.3.18(4A).
[129] Fair Work Regulations r.3.18(7A).
[130] Fair Work Regulations r.3.18(7B).
[131] Fair Work Regulations r.3.18(7C).

Schedule 3.2 – Ballot papers

(regulation 3.16)

Form 1 – Ballot paper under Part 3 of Chapter 3

(regulation 3.16)

Fair Work Act 2009, Chapter 3, Part 3.3, Division 8

BALLOT OF MEMBERS OF (*Name of organisation*) **BALLOT PAPER IN RESPECT OF** **PROTECTED ACTION BALLOT** CLOSING DATE OF BALLOT:(*Date*)	(Initials, or facsimile of initials, of the person conducting the ballot)

The proposed protected industrial action to which this ballot applies is *[description]*.

DIRECTIONS TO VOTERS

1. Record your vote on the ballot paper as follows:

• if you approve the proposed protected industrial action, mark the **YES** box opposite the question;

• if you do not approve the proposed protected industrial action, mark the **NO** box opposite the question.

2. Do not place on this paper any mark or writing that may identify you.

QUESTION(S) FOR VOTERS

(Text of question or questions as ordered by Fair Work Commission)	**YES**	
	NO	

INFORMATION FOR VOTERS

1. The applicant(s) for the protected action ballot order is or are *[name(s)]*. [1]

1. The agent of the applicant(s) for the protected action ballot order is *[name]*. [1]

[1] *omit if inapplicable*

2. The employees who are to be balloted are *[description]*.

3. The protected action ballot agent authorised to conduct the ballot is *[name]*.

YOUR VOTE IS SECRET, AND YOU ARE FREE

TO CHOOSE WHETHER OR NOT TO SUPPORT

THE PROPOSED INDUSTRIAL ACTION.

Scrutiny of the ballot

See Fair Work Regulations r.3.19

Counting votes

The ballot agent for the protected action ballot ballot must determine the result of the ballot by conducting a scrutiny in accordance with Regulation 3.19.

As soon as practicable after the close of the ballot, the ballot agent must:

- admit the valid ballot papers and reject the informal ballot papers, and
- count the valid ballot papers, and
- record the number of votes:
  - in favour of the question or questions, and
  - against the question or questions, and
- count the informal ballot papers.

Informal votes

A vote is informal only if:

- for an attendance vote or a postal vote – the ballot paper does not bear:
  - the initials of the ballot agent, or
  - a facsimile of the ballot agent's initials, or
- the ballot paper is marked in a way that allows the employee to be identified, or
- the ballot paper is not marked in a way that makes it clear how the employee meant to vote, or
- a direction about the ballot paper that was to be followed by an employee entitled to vote in the ballot has not been complied with.

Related information

- Directions about ballot paper

However, a vote is not informal because the ballot paper does not bear:

- the initials of the ballot agent, or
- a facsimile of the ballot agent's initials;

if the ballot agent is satisfied that the ballot paper is authentic.

If the protected action ballot agent is informed by a scrutineer that the scrutineer objects to a ballot paper being admitted as formal, or rejected as informal, the ballot agent must:

- decide whether the ballot paper is to be admitted as formal or rejected as informal, and
- for an attendance vote or a postal vote – endorse the decision on the ballot paper and initial the endorsement.

Related information

- Scrutineers

Error during scrutiny

If the ballot agent conducting the ballot is informed by a scrutineer to the effect that, in the scrutineer's opinion, an error has been made in the conduct of the scrutiny, the ballot agent must:

- decide whether an error has been made, and
- if appropriate, direct what action is to be taken to correct or mitigate the error.

Secrecy

To preserve the secrecy of a postal vote or an electronic vote, the ballot agent must ensure that the independent advisor or a scrutineer does not have access to any evidence that may allow the ballot paper to be identified as having been completed by a particular employee.

Control of scrutiny process

If a person:

- is not entitled to be present, or to remain present, at a scrutiny, or
- interrupts the scrutiny of a ballot, except to perform a function related to counting votes;

the ballot agent conducting the ballot may direct the person to leave the place where the scrutiny is being conducted.

If any direction is given to a person by the ballot agent conducting the ballot, that person must comply with the direction.

Note: *This is a civil remedy provision.*

Scrutineers

See Fair Work Regulations r.3.20

Regulation 3.20 sets out matters relating to the qualifications, appointment, powers and duties of scrutineers for a protected action ballot.

Appointment

Both the employer and the applicant for a protected action ballot may appoint one or more scrutineers to perform the functions set out in this regulation.

An appointment as a scrutineer must be made by an instrument signed on behalf of the employer or applicant.

A person who has not been appointed as a scrutineer:

- is not a scrutineer, and
- is not permitted to attend the scrutiny of ballot material as a scrutineer, and
- is not permitted to perform the functions set out in regulation 3.20.

Functions

A scrutineer may be present at the scrutiny of ballot material as follows:

- if the ballot is conducted by postal voting or by electronic voting, the scrutineer may be present after the ballot agent has removed evidence of an employee's identity, or
- if the ballot is not conducted by postal voting or by electronic voting, the scrutineer may be present when the ballot agent is ready to conduct the scrutiny of the ballot material.

However:

- the total number of scrutineers in attendance at a particular time at the scrutiny of the ballot material must not exceed the total number of people who are:
  - performing functions and duties as, or on behalf of, the ballot agent, and
  - engaged on the scrutiny of the ballot material at that time; and
- if a person fails to produce the person's instrument of appointment as a scrutineer for inspection by the ballot agent for the ballot, when requested by the ballot agent to do so, the ballot agent may refuse to allow the person to attend or act as a scrutineer.

At the scrutiny of the ballot material:

- if the scrutineer objects to a decision that a vote is formal or informal, the scrutineer may inform the ballot agent of the objection, and
- if the scrutineer considers that an error has been made in the conduct of the scrutiny, the scrutineer may inform the ballot agent of the scrutineer's opinion.

Results of the ballot

As soon as practicable after voting in the protected action ballot closes, the ballot agent must, in writing:

- make a declaration of the results of the ballot, and
- inform the following persons of the results:
  - each applicant for the protected action ballot order
  - the employer of the employees who were balloted, and
  - the Commission.

The Commission must publish the results of the protected action ballot, on its website or by any other means that the Commission considers appropriate, as soon as practicable after it is informed of them.

The Commission publishes the results of protected action ballots on its website, as soon as practicable after being informed of them.

You can access the ballot results page through the following link: www.fwc.gov.au/resolving-issues-disputes-and-dismissals/industrial-action/protected-action-ballots

When is industrial action authorised?

See Fair Work Act s.459

Industrial action is authorised if:

- the industrial action was the subject of the ballot
- at least 50 per cent of employees on the roll of voters for the ballot voted in the ballot
- more than 50 per cent of the valid votes cast were votes approving the industrial action, and
- the industrial action commences within the 30 day period starting on date of declaration of the results of the ballot, or if the Commission has extended that period by a further 30 days, within that period. Where a ballot authorises various types of industrial action, a particular type of industrial action must be commenced within the 30 day period, or any further 30 day period allowed by the Commission, in order for that industrial action to remain protected after the 30 day expires.[132]

If the protected action ballot includes questions or a series of questions specifying periods of industrial action of a particular duration and does not specify that consecutive periods of industrial action may be organised or engaged in, only the first period is taken as the subject of the ballot.

A previous failed protected action ballot is no impediment to seeking a fresh application.

Commission can extend period to commence action

If an applicant applies to the Commission, the initial 30 day period to commence action may be extended by 30 days if the period has not previously been extended.

[132] *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 8674 (O'Callaghan SDP, 10 November 2010); *United Colleries Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) FCA 904 (14 July 2006).

Case example: **Less than 50 per cent of employees on the roll of voters voted**

Australian Municipal, Administrative, Clerical and Services Union v Endeavour Energy
[2015] FWC 1190 (Harrison SDP, 27 February 2015).

Facts

A protected action ballot order authorising the balloting of employees at Endeavour Energy was issued on 12 January 2015.

On 11 February the ballot agent declared that less than 50 per cent of the employees on the roll of voters had voted in the ballot. The ballot was therefore incapable of authorising the relevant industrial action, as it did not comply with s.459(1)(b) of the Fair Work Act which requires at least 50 per cent of the employees on the roll of voters for the ballot to vote.

The union made a subsequent application in the same terms.

Outcome

The Commission was satisfied the requirements for a protected action ballot order had been met and that it had no discretion to refuse to grant an order simply because an earlier ballot was held and failed. The parties had agreed that the new protected action ballot would be conducted by postal vote.

Relevance

If the requirements under the Fair Work Act for a protected action ballot are satisfied, the application for a protected action ballot order will not be refused simply because an earlier ballot was held and failed.

Case example: **Industrial action commenced within the 30-day period – Consecutive forms of industrial action**

Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union [2010] FWA 8674 (O'Callaghan SDP, 10 November 2010).

Facts

Asurco lodged a s.418 application seeking an order that industrial action proposed by the CFMEU to commence on 11 November 2010 stop, or not occur. On 19 July 2010 the Commission issued a protected action ballot order, the ballot result was declared on 6 August 2010, with each of the ballot questions being authorised. On 5 November 2010 the CFMEU provided notice in the following terms:

> *'We wish to advise that the employees of Asurco will commence protected industrial action as listed below:*
>
> - *A 48 hour stoppage on Thursday 11th of November 2010 and Friday 12th of November 2010 as approved in question 4 of the ballot a 48 Hour Stoppage.*
> - *A ban on working overtime on Saturday 13th August as approved in question 6 of the ballot, ban on working overtime.'*

The CFMEU later amended this notice to withdraw the part of the notice which referred to a ban on Saturday overtime as per Question 6 of the Protected Action Ballot. The CFMEU confirmed that the notification relating to a 48 hour stoppage on Thursday 11th November and Friday 12th of November remained in place.

Asurco asserted that this 48-hour stoppage was outside of the 30 day period specified in s.459(1)(d) and must consequently be unprotected industrial action which should be stopped pursuant to s.418(1).

Outcome

At the hearing Asurco conceded that an earlier 48-hour stoppage had occurred on 26 and 27 August 2010, within the 30-day period. However, Asurco asserted that the gap between the first 48-hour stoppage and the stoppage proposed for 11 and 12 November 2010 meant that these actions could not be regarded as consecutive actions. Further, Asurco asserted that the CFMEU notice of 5 November 2010 referred to action that 'will commence' and, as such, the proposed 48-hour stoppage must be regarded as a new or discreet form of action commencing outside of the specified 30-day period.

The Commission held that the protected action ballot authorisation relied upon in this situation authorised one or more 48-hour stoppages either separately, or consecutively, or concurrently with other authorised actions. The initiation of the 48-hour stoppage within the 30-day period specified in section 459(1)(d) means that, pursuant to section 459(2), further 48-hour stoppages outside of that initial 30-day period may be considered consecutive forms of industrial action. The Commission was also not persuaded that the use of the phrase 'will commence industrial action' established that the 48-hour stoppage proposed for 11 and 12 November 2010 was a new form of industrial action, unrelated to the 48-hour stoppage of August 2010.

Relevance

Because the CFMEU had given notice of the stoppage on 26 and 27 August 2010, which was within the 30-day period, and given that the protected action ballot order authorised one or more 48-hour stoppages consecutively, the industrial action had commenced within the 30-day period.

Interference with protected action ballot

See Fair Work Act s.462

A person must not do any of the following in relation to a protected action ballot:

- hinder or obstruct the holding of the ballot
- use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person
- threaten, offer or suggest, or use, cause or inflict, any violence, injury, punishment, damage, loss or disadvantage because of, or to induce:
    - any vote or omission to vote, or
    - any support of, or opposition to, voting in a particular manner;
- offer an advantage (whether financial or otherwise) to a person entitled to vote in the ballot because of or to induce:
    - any vote or omission to vote, or
    - any support of, or opposition to, voting in a particular manner;
- counsel or advise a person entitled to vote to refrain from voting
- impersonate another person to obtain a ballot paper to which the first person is not entitled, or impersonate another person for the purpose of voting
- do an act that results in a ballot paper or envelope being destroyed, defaced, altered, taken or otherwise interfered with
- fraudulently put a paper ballot paper or other paper:
    - into a repository that serves to receive or hold paper ballot papers, or
    - into the post;
- fraudulently deliver or send an electronic ballot paper or other document to a repository that serves to receive or hold electronic ballot papers
- fraudulently deliver or send a ballot paper or other paper to a person receiving ballot papers for the purposes of the ballot
- record a vote that the first person is not entitled to record
- record more than one vote
- forge a ballot paper or envelope, or utter[133] a ballot paper or envelope that the first person knows to be forged
- provide a ballot paper without authority
- obtain or have possession of a ballot paper to which the first person is not entitled
- request, require or induce another person:
    - to show a ballot paper to the first person, or

[133] Definition provided in Fair Work Act s.462(2).

   - to permit the first person to see a ballot paper in such a manner that the first person can see the vote;

  while the vote is being made, or after the vote has been made, on the ballot paper, or

- do an act that results in a repository that serves to receive or hold ballot papers being destroyed, taken, opened or otherwise interfered with.

Note: *This is a civil remedy provision.*

A person who is performing functions or exercising powers for the purposes of a protected action ballot must not show to another person, or permit another person to have access to, a ballot paper used in the ballot, except in the course of performing those functions or exercising those powers.

Note: *This is a civil remedy provision.*

Contravening a protected action ballot order

A person must not contravene:

- a term of a protected action ballot order, or
- a term of an order made by the Commission in relation to a protected action ballot order or a protected action ballot.

Note: *This is a civil remedy provision.*

A person must not contravene a direction given by the Commission, or a ballot agent, in relation to a protected action ballot order or a protected action ballot.

Note: *This is a civil remedy provision.*

Exclusion – AEC

However, an order regarding these civil remedy provisions cannot be made in relation to a contravention (or alleged contravention) by the AEC.[134]

Report about conduct of protected action ballot

Protected action ballot conducted by the AEC

If:

- the ballot agent is the AEC, and
- the AEC:
  - receives any complaints about the conduct of the protected action ballot, or
  - becomes aware of any irregularities in relation to the conduct of the ballot;

the AEC must prepare a written report about the conduct of the ballot and give it to the Commission.

[134] Fair Work Act s.463(3).

Protected action ballot conducted by an alternative ballot agent

If:

- the ballot agent is not the AEC, and
- the ballot agent or the independent advisor (if any) for the protected action ballot:
  - receives any complaints about the conduct of the ballot, or
  - becomes aware of any irregularities in relation to the conduct of the ballot;

the ballot agent or the independent advisor (as the case may be) must prepare a report about the conduct of the ballot and give it to the Commission.

Note: *This is a civil remedy provision.*

If:

- the ballot agent is not the AEC, and
- the Commission:
  - receives any complaints about the conduct of the protected action ballot, or
  - becomes aware of any irregularities in relation to the conduct of the ballot;

the Commission must, in writing, direct the ballot agent or the independent advisor (if any) for the ballot (or both) to prepare a report about the conduct of the ballot and give it to the Commission.

Conduct of a protected action ballot includes, but is not limited to, the compilation of the roll of voters for the ballot.

An ***irregularity***, in relation to the conduct of a protected action ballot, includes, but is not limited to, an act or omission by means of which the full and free recording of votes by all employees entitled to vote in the ballot, and by no other persons is, or is attempted to be, prevented or hindered.

A report about the conduct of the ballot must be prepared in accordance with the Fair Work Regulations.

Report about conduct of protected action ballot – independent advisor

For the purpose of preparing the report, the independent advisor may:

- be present at the conduct of any part of a protected action ballot (including the scrutiny of the roll of voters), and
- request information held by the ballot agent for the ballot, and
- make a recommendation to the ballot agent for the purpose of ensuring the conduct of the protected action ballot will be fair and democratic, and
- set out in his or her report:
  - a description of any recommendation made, and
  - whether the ballot agent complied with the recommendation.135

[135] Fair Work Regulations r.3.17.

Costs of protected action ballot conducted by the AEC

See Fair Work Act s.464

The Commonwealth is liable for the costs incurred by the AEC in relation to the protected action ballot, whether or not the ballot is completed.

However, except as provided by regulations the Commonwealth is not liable for any costs incurred by the AEC in relation to legal challenges to matters connected with the protected action ballot.

Costs of protected action ballot conducted by alternative ballot agent

See Fair Work Act s.465

The applicant for the protected action ballot order is liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

If the application for the protected action ballot order was made by joint applicants, each applicant is jointly and severally liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

The ***costs of conducting a protected action ballot*** are:

- if the ballot agent is an applicant for the protected action ballot order – the costs incurred by the applicant in relation to the ballot, or
- otherwise – the amount the ballot agent charges to the applicant or applicants in relation to the ballot.[136]

However, the ***costs of conducting a protected action ballot*** do not include any costs incurred by the ballot agent in relation to legal challenges to matters connected with the ballot.[137]

Costs of legal challenges

See Fair Work Act s.466

The Fair Work Regulations may provide for who is liable for costs incurred in relation to legal challenges to matters connected with a protected action ballot.

Regulations made for this purpose may also provide for a person who is liable for costs referred to in that subsection to be indemnified by another person for some or all of those costs.

Note: The Fair Work Regulations do not currently provide for who is liable for costs incurred in relation to legal challenges to matters connected with a protected action ballot.

[136] Fair Work Act s.465(4).
[137] Fair Work Act s.465(5).

Information about employees on roll of voters not to be disclosed

A person who:

- is the alternative ballot agent for a protected action ballot, or
- is the independent advisor for a protected action ballot, or
- acquires information from, or on behalf of, the alternative ballot agent or independent advisor in the course of performing functions or exercising powers for the purposes of the ballot;

must not disclose to any other person information about an employee who is on the roll of voters for the ballot if the information will identify whether or not the employee is a member of a union.

Note: *This is a civil remedy provision.*

Exception – disclosure

The prohibition of disclosure provision does not apply if:

- the disclosure is made in the course of performing functions or exercising powers for the purposes of the protected action ballot, or
- the disclosure is required or authorised by or under a law, or
- the employee has consented, in writing, to the disclosure.

Note: Personal information given to the Commission, the AEC or an alternative ballot agent under this Division may be regulated under the *Privacy Act 1988* (Cth).

Note: The President of the Commission may, in certain circumstances, disclose, or authorise the disclosure of, information acquired by the Commission or a member of the staff of the Commission, in the course of performing functions or exercising powers as the Commission.

Records

The ballot agent for a protected action ballot must keep the following ballot material:

- the roll of voters for the ballot
- the ballot papers, envelopes and other documents and records relating to the ballot, and
- any other material prescribed by the Fair Work Regulations.

The ballot material must be kept for one year after the day on which the protected action ballot closed.

The ballot agent must comply with any requirements prescribed by the Fair Work Regulations relating to how the ballot material is to be kept.

Note: The Fair Work Regulations do not currently prescribe any other ballot material that must be kept by the protected action ballot agent, nor any requirements relating to how the ballot material is to be kept.

Part 3.3 – Taking protected industrial action

Notice requirements

See Fair Work Act s.414 and s.443(5).

Before a person engages in protected industrial action they must give notice of the action. The notice must specify the nature of the action and the day on which it will start.

Different notice requirements apply to employee claim action, employer response action and employee response action.

The purpose of the notice requirement for employee claim action is to give the employer the opportunity to respond to the action by making relevant preparations. The response may involve making arrangements to deal with unavailability of labour, including making appropriate arrangements in relation to customers, suppliers and other contractors. Whether the terms of the notice are adequate may depend on the nature of the employer's operations including their size, the number of employees, the number of locations, the time at which the action is to occur and the employees potentially taking the industrial action.[138]

Related information

- Employee claim action – notice period
- Employer response action – notice period
- Employee response action – notice period

Notice must specify the nature of the action

A notice of protected industrial action must contain a sufficiently detailed description of the nature of the action, to put the employer in a position to make reasonable preparations to deal with the effect of the industrial action.[139]

Whether a particular notice meets the requirements in s.414(6) will depend upon the terms of the notice and the industrial context.[140]

[138] *Linfox Armaguard Pty Ltd v Transport Workers' Union of Australia* [2014] FWC 2645 (Hampton C, 30 April 2014) at para. 31; citing *Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWAFB 1698 (Giudice J, Acton SDP, Whelan C, 15 December 2009) at para. 12, [(2009) 190 IR 342].
[139] *Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWAFB 1698 (Giudice J, Acton SDP, Whelan C, 15 December 2009) at para. 16, [(2009) 190 IR 342].
[140] ibid., at para. 18.

Case example: **Nature of industrial action specified**

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Pinnacle Career Development Pty Ltd [2010] FCA 1350 (3 December 2010), [(2010) 190 FCR 581].

Facts

The union issued a valid notice to the employer that protected industrial action would commence. In response, the employer issued a notice which included the following text:

> *'In response to the industrial action threatened by you, we put you on notice that any employee that engages in such action will be the subject of an indefinite lockout'*

The union argued that the employer's notice did not identify the day on which the responsive action would start, and was therefore invalid.

Outcome

The Federal Court found that the employer's notice must be read in the context of the employee's own notice of industrial action. The Court held that because the notice of an 'indefinite lockout' was *responsive* to the employee's notice of protected industrial action, the employees were left in no doubt that the employer's action would start in reference to the employee's intended industrial action.

Relevance

Notice of responsive action must be read in the context of the industrial action notice. The Federal Court applied the principle from Telstra v CEPU and highlighted that the purpose of the notice requirement is to give the 'recipient' of the notice an opportunity to respond to the action by making relevant preparations or considering a particular response.

Case example: **Nature of industrial action NOT specified**

Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2009] FWAFB 1698 (Giudice J, Acton SDP, Whelan C, 15 December 2009), [(2009) 190 IR 342].

Facts

The CEPU gave notice to Telstra that included the following text:

> *'The employee claim action will take the form of an unlimited number of indefinite stoppages of work by those CEPU members whose normal place of work is all States and Territories of Australia.*
>
> *The employee claim action will occur between the hours of 12:01 am and 11:59 pm on Wednesday 2 December, 2009'.*

Telstra argued that the terms of the notice ('indefinite stoppage') were too vague, and could never amount to a specification for the purposes of s.414(6).

The CEPU contended that the section did not require the union to provide detailed particulars of the action, only the nature of the action it intended to take.

Outcome

The Full Bench found the notice was invalid as it failed to specify the nature of the industrial action. The Full Bench held that the description of the action contained in the notice should be sufficient to put the employer in a position to make reasonable preparations to deal with the effect of the industrial action. Although the Full Bench disagreed with Telstra that 'indefinite stoppage' could never comply with the specification requirement from s.414(6), given the scale of Telstra's operations and the number of employees, the notice was inadequate and Telstra was not in a position to make reasonable preparations to deal with the effects of the industrial action.

Relevance

The decision highlights the importance of specifying the nature of the industrial action as required by s.414(6) of the Fair Work Act. Whether notice is specific in any given circumstance will depend on the context in which it appears, including the employer's operations, its size and number of locations.

Employee claim action – notice period

See Fair Work Act s.414(1)–(3)

For employee claim action, a bargaining representative of an employee who will be covered by the enterprise agreement must give written notice of the action to the employer.

The minimum notice period is three working days or any longer period of notice specified in a protected action ballot order of up to seven working days.

Notice must not be given until after the results of the protected action ballot have been declared.

Commission can extend period of notice

If the Commission is satisfied when making a protected action ballot order that there are exceptional circumstances justifying the period of written notice for employee claim action being longer than 3 working days, it may specify a longer period of up to 7 working days.[141]

Exceptional circumstances are circumstances which are:

- out of the ordinary course
- unusual
- special, or
- uncommon.[142]

They need not be:

- unique
- unprecedented, or
- very rare.[143]

Exceptional circumstances are NOT regularly, routinely or normally encountered.[144]

Exceptional circumstances may be a single exceptional event or a series of events that together are exceptional.[145]

The Commission is not simply concerned with determining whether there are exceptional circumstances. There must be exceptional circumstances 'justifying' the specification of a longer notice period.[146]

Related information

- What is a day?

[141] Fair Work Act s.443(5).
[142] *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (26 March 2007) at para. 25; citing *R v Kelly* [2000] QB 198 at p. 208; cited in *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 (Lawler VP, Sams DP, Williams DP, 16 February 2011) at para. 13, [(2011) 203 IR 1].
[143] ibid.
[144] ibid.
[145] ibid., at para. 26.
[146] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation* [2007] AIRC 848 (Lawler VP, 9 October 2007) at para. 11, [(2007) 167 IR 4].

Case example: **Period of written notice for employee claim action extended**

Transport Workers' Union of Australia v Linfox Armaguard Pty Ltd [2016] FWC 1275 (Kovacic DP, 29 February 2016).

Facts

The TWU applied for a protected action ballot order in respect of employees of Armaguard who were 'Road Crew' members of the TWU. Armaguard objected, claiming that there were exceptional circumstances which justified the period of written notice being extended to five days. In particular Armaguard cited contingency arrangements that would be needed to minimise cash holdings on clients' premises, as well as a general requirement to maintain constant availability of cash to retailers and ATM facilities.

Outcome

The Commission found exceptional circumstances existed, referring to the potential for a heightened security risk to Armaguard's employees, clients, clients' employees and the wider public. Along with this there was also potential economic impact on third parties – resulting from interruptions to cash collection and distribution – that when considered together constituted exceptional circumstances.

Relevance

The Commission made its determination based on evidence of timeframes involved in arranging appropriate contingency measures, some of which exceeded three working days.

Case example: **Period of written notice for employee claim action NOT extended**

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation [2007] AIRC 848 (Lawler VP, 9 October 2007), [(2007) 167 IR 4].

Facts

The CEPU obtained a protected action ballot order in respect of certain employees of Australia Post. Australia Post made an application to vary the order to allow for a 7 day written notice period, rather than 3 days as specified in the order. This was claimed to be necessary owing to Australia Posts' statutory obligations regarding service standards, the size and number of its businesses and due to the effect industrial action would have on its operations during a seasonal peak and election period to the detriment of the community.

Outcome

Following a weighing of competing factors, the Commission was not persuaded that the circumstances relied on were so exceptional as to justify an extension of the period and reduction in the effectiveness of the employee bargaining position it would entail.

Relevance

While circumstances relied upon in an application may be considered as 'exceptional', the onus is on the applicant to show exceptional circumstances justify an extension of the notice period.

Employer response action – notice period

See Fair Work Act s.414(5)

For employer response action, the Fair Work Act does not specify a time period for the provision of notice, just that it must be written and given before the employer response action commences.

The employer proposing to take the action must:

- give written notice to each bargaining representative of an employee who will be covered by the proposed enterprise agreement, and
- take all reasonable steps to notify employees who will be covered by the proposed enterprise agreement.

Employee response action – notice period

See Fair Work Act s.414(4)

For employee response action, the Fair Work Act does not specify a time period for the provision of notice, just that it must be written, given before the employee response action commences and specify the nature of the action and the date that it starts.

A bargaining representative of an employee who will be covered by the enterprise agreement must give written notice of the action to the employer.

Related information

- Employee claim action
- Employer response action
- Employee response action

Commencing protected industrial action

See Fair Work Act s.459(1)

In order for employee claim action[147] to be authorised and protected it must commence:

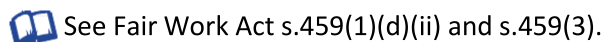
- during the 30 day period starting on the date of the declaration of the results of the ballot, or
- if the Commission has granted an extension to the 30 day period, during the extended period.

Once commenced, the form of protected industrial action taken can continue beyond the 30 day period provided it is in line with the ballot endorsed action.[148]

There is no requirement that the specific instances of protected industrial action specified in the notice given to the employer under s.414 of the Fair Work Act are commenced within the 30 day period. It is sufficient that the genus of industrial action commences within the 30 day period.[149]

The 30 day period is a time limit for commencement of industrial action, not a time limit for completion of industrial action. The purpose of the time limit is to ensure that the employees are voting upon a real proposal based upon relatively contemporaneous circumstances. A commitment to relatively prompt action is involved, rather than simply giving an authority which can be held up the sleeve of those negotiating for the employees.[150]

Commission can extend period for commencement of protected industrial action


See Fair Work Act s.459(1)(d)(ii) and s.459(3).

The Commission may extend the period for the commencement of protected industrial action by up to 30 days if an applicant for the protected action ballot order makes an application to the Commission, and the period has not previously been extended.

The period may be extended after the initial 30 day period has expired, including pursuant to an application made after the expiry of the initial 30 day period.[151]

Related information

- What is a day?

[147] Fair Work Act s.409(2).

[148] *Maritime Union of Australia v DP World Adelaide Pty Ltd* [2010] FWA 7638 (Hampton C, 1 October 2010) at para. 31.

[149] *RMIT University v National Tertiary Education Industry Union* [2009] FWA 1183 (Kaufman SDP, 23 November 2009) at para. 22.

[150] *United Colleries Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) FCA 904 (14 July 2006) at para. 21.

[151] *EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2022 (Lawler VP, Sams DP, Lewin C, 4 April 2013) at para. 27, [(2013) 231 IR 254].

Case example: **Period for commencement of protected industrial action extended**

EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FCAFC 8 (19 February 2014), [(2014) 218 FCR 316].

Facts

The CFMEU applied for an extension of the 30-day period for the commencement of protected industrial action. The Commission extended the period. EnergyAustralia made an application to the Full Court of the Federal Court contending that the Commission was wrong to conclude it could extend the period after the initial 30-day period had expired.

Outcome

A majority of the Full Court held that this period can be extended by the Commission up to 30 days under s.459(3), even if the initial 30-day period had expired.

Relevance

An extension of up to a further 30 days which the Commission may grant is to be calculated by reference to the day ballot results are declared, and not the day from which any extension is granted. Only action that 'commences' in the extended period will be protected under s 459(1)(d)(ii). If action has commenced prior to the making of the extension order the action will not be authorised.

Restrictions on commencing protected industrial action

No action to be taken before nominal expiry date of current agreement

Industrial action must not be organised or engaged in before the nominal expiry date of a current enterprise agreement (the ***existing agreement***) or workplace determination has passed.

This requirement applies to

- an employer, employee, or union, who is covered by the existing agreement or determination, or
- an officer of a union that is covered by the existing agreement or determination, acting in that capacity.

Note: *This is a civil remedy provision.*

If a protected action ballot is conducted before the nominal expiry date of an existing agreement, it is unlawful to organise or take industrial action pursuant to the ballot before that nominal expiry date. If industrial action is taken before the nominal expiry date, even if that action was approved by the protected action ballot, the industrial action will be unprotected.[152]

Related information

- Industrial action defined

[152] Explanatory Memorandum to Fair Work Bill 2008 at para. 1763.

Injunctions

The Federal Court or Federal Circuit Court may grant an injunction or make any other order the Court considers appropriate to stop or remedy the effects of a breach of s.417 on application by:

- an employer, employee or union covered by the enterprise agreement or workplace determination
- a person affected by the industrial action, or
- an inspector.

Case example: **Industrial action NOT taken before nominal expiry date of current agreement**

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2015] FCAFC 25 (6 March 2015).

Facts

The CFMEU formulated a general policy concerning bans on overtime regarding employees of a mine site. This policy was posted in the crib room of the site where the employees represented by the union were covered by a current enterprise agreement.

Outcome

In considering whether the union contravened the Fair Work Act by promulgating the policy – namely if it had 'organised' industrial action before the agreement's nominal expiry date – a distinction was drawn between organising industrial action and organising 'for' industrial action. The Full Court of the Federal Court considered that organising 'for' industrial action does not provide a basis for a breach of s.417. The Full Court found the union did not contravene s.417.

In addition to this finding, the Full Court also considered that an 'attempt' to organise or an 'attempt' to engage in industrial action would not contravene s.417.

Action taken by the CFMEU could not have been considered as 'Industrial action taken' in accordance with s.19(1)(b) as it was not taken by an employee or employer.

Relevance

A contravention of s.417 only occurs if a person has organised industrial action by employees or employers or if employees or employers have engaged in such action. Conduct which attempts, but fails, to organise the taking of industrial action is not in contravention of s.417(1).

Case example: **Industrial action taken before nominal expiry date of current agreement**

Director of the Fair Work Building Industry Inspectorate v Adams [2015] FCA 828 (12 August 2015).

Facts

Crown Construction Services Pty Ltd (CCS) was sub-contracted by a lead contractor to perform work at a Hospital. The employees on site were covered by the *Crown Construction Services Pty Ltd Enterprise Agreement 2012*, which had a nominal expiry date of 31 October 2014.

The employees submitted CCS authorised or agreed to the action taken in accordance with s.417(1) of the Fair Work Act.

The Director of the Fair Work Building Industry Inspectorate disputed this and relied on s19(c) to establish that each of the 74 employees in question engaged in industrial action.

Outcome

The Federal Court of Australia held that the respondents' industrial action was taken while an enterprise agreement was in place and therefore contravened s.417(1) of the Fair Work Act.

The Court found that the failure of the respondents to attend for work at the site on 28 February 2013, or perform any work at all if they did attend the site, amounted to unprotected industrial action.

Relevance

The decision demonstrates the consequences in particular circumstances where industrial action is taken before the nominal expiry date of a current agreement expires.

Case example: **Industrial action taken before nominal expiry date of current agreement**

Power Projects International Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); The Australian Workers' Union [2011] FWAFB 1327 (Watson SDP, Harrison SDP, Rafaelli C, 1 March 2011).

Facts

Power Projects International (PPI) held maintenance contracts at the Eraring Power Station with the work undertaken by its employees under the *Power Projects International Certified Agreement 2008*. PPI won contracts for the upgrade of turbo-generators and boilers at the Eraring Power Station (the upgrade project work).

The 2008 Agreement was expressed to apply to employees of PPI, within any of the occupations of the agreement, 'whilst engaged in the life extension, maintenance, repair and/or rehabilitation on industrial or power station sites'. The agreement applied to all work and activities on such sites, including areas deemed as a 'Construction Site', except where there was a specific mandatory 'Site Agreement' in operation at the commencement of the work.

Two s.437 applications were made by the unions, as bargaining representatives for their members, following approaches to PPI to negotiate an enterprise agreement to apply to the upgrade project work. The unions contended that the upgrade project work was properly to be defined as construction work and therefore beyond the scope of the 2008 Agreement, which they characterised as a maintenance agreement.

At the time the s.437 applications were made the 2008 Agreement still had several months to run.

At first instance the Commission found that the unions s.437 applications complied with item 17 of Schedule 13 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act) which set out a 'Restriction on when protected action ballot orders may be made' and that the upgrade project work was not of the character of work within the scope of the 2008 Agreement. Protected action ballot orders were made.

Outcome

At appeal the Full Bench held that if any of the employees covered by the 2008 Agreement were included within the group to be covered by the proposed agreement the applications for ballot orders could proceed no further.

The Full Bench found there were employees who did maintenance work on plant and equipment under the 2008 Agreement who would do maintenance work on that plant and equipment and would be covered by the proposed enterprise agreement. The s.437 applications did not comply with item 17 of Schedule 13 of the Transitional Act and the ballot orders were quashed.

Relevance

Even though the 2008 Agreement provided for 'Site Agreements', the employees who would be covered by the proposed agreement were, at the time the s.437 applications were made, covered by the 2008 Agreement which which still had several months to run. As a result the s.437 applications (organising industrial action) were made before the nominal expiry date of the current agreement and were prohibited by s.417.

No action to be taken before commencement of bargaining

Protected industrial action cannot be taken until after the employer agrees to bargain, initiates bargaining, or is required to bargain by the issue of a relevant majority support determination or scope order (the ***notification time***).[153]

This includes where the scope of the proposed single-enterprise agreement is the only matter in dispute.[154]

A notification time for a proposed multi-enterprise agreement cannot be used as a notification time for a proposed single-enterprise agreement.[155]

[153] Fair Work Act ss.173(2), 437(2A); *Maritime Union of Australia, The v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894 (Ross J, Watson VP, Gostencnik DP, 31 March 2016) at para. 33.
[154] See note in Fair Work Act s.437(2A); *Swinburne University of Technology v National Tertiary Education Industry Union* [2016] FWCFB 6838 (Hatcher VP, Lawrence DP, McKenna C, 27 September 2016) at para. 30.
[155] *Swinburne University of Technology v National Tertiary Education Industry Union* [2016] FWCFB 6838 (Hatcher VP, Lawrence DP, McKenna C, 27 September 2016) at para. 37.

Part 4 – Payments relating to industrial action

This part will provide information on the requirements for an employer as well as the entitlements and requirements of employees regarding payment for industrial action including:

- partial work bans, and
- unprotected industrial action.

The ‘no work-as-directed, no pay’ principle has been derived from the common law.[156] Since 1996, the Workplace Relations Act has prohibited employers from making a payment to an employee in relation to a period in which the employee takes industrial action. It is also prohibited for employees to demand or accept such a payment from an employer.[157]

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) introduced the ***four-hour rule*** which required that an employer must withhold four hours pay for a period of industrial action of less than four hours. For industrial action longer than four hours, the employer must not pay the employee for the total duration of the action on that day.[158]

The four-hour rule for strike pay was retained in the *Fair Work Act 2009* (Cth) (the Fair Work Act) for unprotected industrial action only. Additional options were also introduced to provide employers with flexibility and discretion in managing partial work bans.[159]

It is unlawful for an employer to pay, or an employee to demand or to accept strike pay for any period of protected or unprotected action.[160]

Protected industrial action – payments

Restrictions on the making of payments for protected action – employers

See Fair Work Act s.470

If an employee engaged, or engages, in protected industrial action against an employer on a day the employer **must not** make a payment to the employee in relation to the total duration of the industrial action on that day.

To be clear, the requirement that the employer not make a payment to an employee relates to the total period of the industrial action and not necessarily the whole day.

[156] See for eg *Re Unilever Australia Limited* Print K2892 (AIRCFB, Peterson J, Harrision DP, Simmonds C, 15 May 1992).
[157] Introduction to Explanatory Memorandum to Fair Work Bill 2008 at para. 259.
[158] Introduction to Explanatory Memorandum to Fair Work Bill 2008 at para. 260.
[159] Introduction to Explanatory Memorandum to Fair Work Bill 2008 at para. 293.
[160] Introduction to Explanatory Memorandum to Fair Work Bill 2008 at para. 294.

If protected industrial action is taken on a public holiday, payment at the applicable penalty rate (if any), must be withheld.[161]

The prohibition of payment does **NOT** apply to a partial work ban, which is addressed later in this Part.

Note: *This is a civil remedy provision.*

Related information

- Partial work bans

Restrictions on accepting or seeking payments for protected action – employees and unions

See Fair Work Act s.473

An employee must not ask for, or accept, a payment from an employer if the employer would contravene the prohibition of payment in s.470 of the Fair Work Act by making the payment.

A union, or an officer or member of a union, must not ask an employer to make a payment to an employee if the employer would contravene s.470 of the Fair Work Act by making the payment.

Note: *These are civil remedy provisions.*

Note: Acts of coercion, or misrepresentations, relating to such payments may also contravene the general protections provisions in ss.348 or 349 of the Fair Work Act.

The **General Protections Benchbook** contains detailed information and links to cases setting out eligibility and the Commission process, including information on coercion and misrepresentation.

You can access the Benchbook through the following link:
www.fwc.gov.au/resources/benchbooks/general-protections-benchbook

Information on coercion is contained under *Division 4 – Industrial Activities* in *Part 6 – The protections*.

[161] Explanatory Memorandum to Fair Work Bill 2008 at para. 1864.

Overtime bans

If the industrial action is, or includes, an overtime ban the prohibition of making a payment to an employee, as set out in s.470 of the Fair Work Act, only applies in circumstances where:

- the employer requested or required the employee to work the period of overtime, and
- the employee refused to work the period of overtime, and
- the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

In such circumstances, the total duration of the industrial action for the purpose of s.470 will be or include the period of overtime to which the ban applies.

> **An example** is provided in the Explanatory Memorandum:[162]
>
> *A term of an enterprise agreement might allow an employee to decline a request to work overtime on the ground of family responsibilities. If an employee declines to work overtime and complies with that term, the prohibition on the payment of strike pay will not apply because the employee has not engaged in industrial action.*

What constitutes a 'payment'?

The High Court of Australia has held that the phrase 'payment to an employee' in s.470(1) does not include every type of economic benefit transferred by an employer to an employee during a period of protected industrial action.[163]

The purpose of s.470(1) is to prohibit strike pay, that is, payments by an employer to make up, in whole or in part, wages not earned by the employee during the period of industrial action. There is no suggestion that the purpose of s.470(1) is to suspend the entirety of the employer's obligations under the relationship of employment. Indeed, the Act contemplates the continued subsistence of the employment relationship during and after the industrial action.[164]

Whether the prohibition of 'a payment to an employee in relation to the total duration of the industrial action on that day' is apt to capture any given payment may depend on the circumstances of the case. For example, a payment of a gift might be caught if the circumstances show that it was made to compensate for wages not earned.[165]

In some circumstances allowances may still be payable to employees who engaged, or engage, in protected industrial action.[166]

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[162] Explanatory Memorandum to Fair Work Bill 2008 at para. 1867.
[163] *CFMEU v Mammoet* [2013] HCA 36 (14 August 2013), [(2013) 248 CLR 619].
[164] *Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FWCFB 5530 (Hatcher VP, Catanzariti VP, Johns C, 2 October 2015) at para. 39; referring to *CFMEU v Mammoet* [2013] HCA 36 (14 August 2013), [(2013) 248 CLR 619].
[165] ibid.
[166] ibid.

Case example: **Safety & Production Allowance – NOT a 'payment'**

Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union [2015] FWCFB 5530 (Hatcher VP, Catanzariti VP, Johns C, 2 October 2015).

Facts

Employees of Thiess Pty Ltd and Mt Owen Pty Ltd were covered by an enterprise agreement which required that the employees be paid a Safety & Production Allowance.

Employees of both companies engaged in protected industrial action. A dispute subsequently arose as to whether the companies were required to pay employees their Safety & Production Allowance for the weeks during which they engaged in the protected industrial action in accordance with the agreement, or whether the payment would be prohibited by s.470 of the Fair Work Act.

Outcome

The Full Bench held that the companies were obliged under the terms of the agreement to pay the fixed amount of the Allowance each week, notwithstanding that protected industrial action occurred in that week. The Full Bench found that the payment of the Allowance did not bear a relationship to the performance of work or otherwise in any particular period, as there was no mechanism in the agreement for a pro-rata payment of the Allowance.

Relevance

When determining the question of what constitutes a 'payment' to employees who engage in industrial action, it is important to consider the relevant enterprise agreement in its entire historical and industrial context.

For example, where an enterprise agreement includes terms that reflect an intention that payment of an allowance will remain fixed and non-variable, the employer may be obliged to pay that allowance to employees who engage in protected industrial action.

Case example: **Provision of accommodation – NOT a 'payment'**

CFMEU v Mammoet [2013] HCA 36 (14 August 2013), [(2013) 248 CLR 619].

Facts

An employer provided its employees on a mining site with accommodation on location for the duration of their work at that location. Some of those employees intended to engage in protected industrial action. The employer sought to cease providing them with accommodation.

The union submitted that 'payment' in s.470(1) did not include the provision of non-monetary benefits such as accommodation.

The company argued that the entitlement to accommodation constituted a 'payment' under s.470(1), and therefore it was prohibited from providing it to employees during protected industrial action.

Outcome

The High Court held that the provision of accommodation by an employer to an employee in these circumstances, did not constitute 'payment' within the meaning of s.470(1). The Court found that the provision of that accommodation was a benefit to which the relevant employees were entitled upon attending at the work site unless and until they were directed to return to their usual place of residence. It was neither a payment of money, nor provided in relation to the non-performance of work during the period of industrial action.

Relevance

The prohibition of 'payments' to employees during protected industrial action may not extend to non-monetary benefits such as the provision of accommodation. For the purposes of s.470(1), the fact that a benefit may be capable of being measured in monetary terms, does not by itself mean that there has been a payment from the employer to the employee.

Partial work bans

Industrial action may take the form of a ***partial work ban*** which is defined as industrial action that is not:

- a failure or refusal by an employee to attend for work
- a failure or refusal by an employee who attends for work to perform any work at all, or
- an overtime ban.[167]

A partial work ban is industrial action that falls short of a total stoppage of work.[168]

For instance, a work ban that is limited to a refusal by teachers to mark homework could be considered a partial work ban.[169]

[167] Fair Work Act s.470(3).
[168] Explanatory Memorandum to Fair Work Bill 2008 at para. 1866.
[169] Explanatory Memorandum to Fair Work Bill 2008 at para. 1865.

Payments for partial work bans

The prohibition of payment to an employee in s.470 does not apply to partial work bans that are protected industrial action, other than for overtime bans.

In the case of a partial work ban employers have discretion, subject to the notice requirements, to either:

- accept the partial performance of work and pay an employee in full, or
- make a reduced payment to an employee based on the partial performance of work by the employee, or
- refuse to accept the performance of any work by an employee, until the employee is prepared to perform all of his or her normal work, and not pay the employee during the period of the industrial action.[170]

Related information

- Overtime bans
- Reduction in payments based on partial work ban
- Employer gives notice of non-payment
- Employer does not give notice – no reduction in payments

Reduction in payments based on partial work ban

See Fair Work Act s.471

If an employee engaged, or engages in protected industrial action that is a partial work ban, and the employer gives the employee a written notice stating that because of the partial work ban, the employee's payments will be reduced by the proportion specified in the notice, then the employee's payments are reduced by that proportion in relation to the industrial action period.

The ***industrial action period*** is the period:

- starting at the later of:
  - the start of the first day on which the employee implemented the partial work ban, or
  - the start of the next day, after the day on which the notice was given, on which the employee performs work; and
- ending at the end of the day on which the ban ceases.[171]

[170] Fair Work Act s.471(4).
[171] Fair Work Act s.471(5).

An illustrative example is provided in the Explanatory Memorandum:[172]

Allison works at the Sandy Shores Private Clinic which operates seven days a week. On Friday 13 May 2011, Allison's bargaining representative provides her employer with three working days' notice of protected industrial action by employees it represents that will take the form of partial work bans over a two week period, commencing the following Thursday. The bans include refusing to admit new patients before noon on each day.

On the Monday, Allison's employer decides that the employees' payments will be reduced by 40 per cent on account of any partial work bans and gives the bargaining representative and affected employees written notice of the proposed reductions over the two week period. The reductions begin on the Thursday, the first day on which the bans are implemented.

In calculating a reduced payment based on the partial performance of work, an employer should be guided by the Fair Work Regulations which prescribe how the proportion is to be worked out.[173]

The reduction in payments cannot simply be arrived at by estimating the potential cost impact of the industrial action and allocating this cost to the employees undertaking industrial action.[174]

If the Commission has ordered under s.472 that the employee's payments be reduced by a different proportion – then they are to be reduced by the proportion specified in the order.

The rest of the terms of the modern award, enterprise agreement or contract of employment that applies to the employee's employment will continue to have effect.

Working out proportion of reduction of employee's payments

The proportion of any reduction for an employee or class of employees is worked out by carrying out the following steps:

Step 1 Identify the work that an employee or a class of employees is failing or refusing to perform, or is proposing to fail or refuse to perform.

Step 2 Estimate the usual time that the employee or the class of employees would spend performing the work during a day.

Step 3 Work out the time estimated in Step 2 as a percentage of an employee's usual hours of work for a day.

The solution from working through the above steps is the proportion by which the employee's payment will be reduced.[175]

'Work' is capable of meaning something more than just the physical task that is banned and that is the impact of that task on the 'work' of the employee.[176]

[172] Explanatory Memorandum to Fair Work Bill 2008 at para. 1875.
[173] Fair Work Regulations r.3.21.
[174] *United Voice - Northern Territory Branch v Commissioner for Public Employment for the Northern Territory* [2014] FWC 1185 (Catanzariti VP, 17 February 2014) at para. 22.
[175] Fair Work Regulations r.3.21.
[176] *Transport Workers Union v Department of Territory and Municipal Services (ACTION)* [2010] FWA 4558 (Deegan C, 19 June 2010) at para. 34.

Form of partial work ban notice

A notice about the reduction of an employee's payments due to a partial work ban must be in a legible form and in English.[177] Communication should have regard to the needs of the workforce, particularly regarding the cultural diversity of the employees and their language skills.

Content of partial work ban notice

A notice about a partial work ban given to an employee must:

- specify the day on which the notice is issued
- specify the industrial action engaged in, or proposed to be engaged in, that constitutes the partial work ban
- state that the notice will take effect from the later of:
  - the start of the first day of the partial work ban
  - the start of the first day after the day on which the notice is given to the employee, if the employee performs work on that day, and
- state that the notice will cease to have effect at the end of the day on which the partial work ban ceases.

If the notice is a notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice, it must also:

- state that the employee's payments will be reduced by an amount specified in the notice for each day the employee engages in the partial work ban
- specify an estimate of the usual time the employer considers an employee would spend during a day performing the work that is the subject of the work ban, and
- specify the amount by which the employee's payments will be reduced for each day the employee engages in the work ban.

If the notice is a notice stating that, because of the ban the employee will not be entitled to any payments, it must also state that the employee will not be entitled to any payment for a day on which the employee engages in the partial work ban.[178]

Manner of giving notice

The employer is taken to have given a notice about partial work bans to the employee if the employer:

- has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any), receives the notice, and
- has complied with any requirements, relating to the giving of the notice, prescribed by the Fair Work Regulations.

[177] Fair Work Regulations r.3.22.
[178] Fair Work Regulations r.3.23.

Giving notice about partial work bans

An employer may give notice to an employee about reduction in payments relating to a partial work ban in one of the following ways:

The employer may give the notice to the employee personally.

The employer may send the notice by pre-paid post to:

- the employee's residential address, or
- a postal address nominated by the employee.

The employer may send the notice to:

- the employee's email address at work, or
- another email address nominated by the employee.

The employer may fax the notice to:

- the employee's fax number at work
- the employee's fax number at home, or
- another fax number nominated by the employee.[179]

Orders by the Commission relating to partial work bans

The Commission may make an order varying the proportion by which an employee's payments are reduced, however the Commission may only make an order if a person has applied for it.

An employee, or the employee's bargaining representative, may apply to the Commission for an order if a notice has been given stating that the employee's payments will be reduced.

In considering making such an order, the Commission must take into account:

- whether the proportion specified in the notice about the reduction of payments was reasonable having regard to the nature and extent of the partial work ban to which the notice relates, and
- fairness between the parties taking into consideration all the circumstances of the case.

An illustrative example is provided in the Explanatory Memorandum:[180]

Allison's bargaining representative applies to the Commission to reduce the proportion of Sandy Shores' proposed deduction. After taking into account whether the 40 per cent deduction was reasonable having regard to the nature and extent of the partial work bans and fairness between the parties, the Commission orders Sandy Shores to reduce the deduction to 15 per cent and to pay the difference to the employees.

[179] Fair Work Regulations r.3.24.
[180] Explanatory Memorandum to Fair Work Bill 2008 at para. 1880.

Application for an order in relation to partial work bans

An application to the Commission for an order to vary the proportion by which an employee's payments are reduced must include the following documentation:

- a completed and signed application form [Form F39], and
- a copy of the written notice given by the employer to the employee.[181]

Links to application form

Form F39 – Application for an order in relation to partial work bans:

- www.fwc.gov.au/documents/forms/Form_F39.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F39.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

Case example: **Order varying the proportion by which an employee's payments have been reduced**

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ASC Pty Ltd
[2012] FWA 1377 (Bartel DP, 16 February 2012).

Facts

Protected industrial action in the form of bans on work activities including overtime and call outs was taken by Supervisors engaged by ASC. A Notice of Reduction in Payment was issued by the respondent, indicating that reductions in daily rates of pay would be implemented '… based on the amount of time Supervisors would usually spend during a day performing the work subject to a work ban.'

Outcome

The Commission found that the employer overestimated the extent of the bans and that its approach led to an overstating of the percentage deduction. After taking into account the effect of overtime bans in calculating the extent of the partial work bans, it was determined that the proportional reductions implemented by the employer should be modified. The Commission also took into account the additional cost impact on the employer caused by disruption to the work of other employees as a result of the bans.

Relevance

The Commission held that the appropriate approach to the assessment of a proportional reduction in payment in this circumstance was to identify the time spent on banned work, calculated as a percentage of average weekly hours.

[181] Fair Work Commission Rules r.8(2) and r.33.

Case example: **Order varying the proportion by which an employee's payments have been reduced**

United Voice - Northern Territory Branch v Commissioner for Public Employment for the Northern Territory [2014] FWC 1185 (Catanzariti VP, 17 February 2014).

Facts

United Voice members organised protected industrial action regarding their employment with the Northern Territory Fire and Rescue Service. The Commissioner for Public Employment for the Northern Territory issued a notice of his intention to deduct $124 for each shift on which industrial action was taken. United Voice then notified the respondent of its intention to apply for an order varying this amount to $11 per shift, and also notified that it had advised members not to participate in the industrial action until the application was determined.

Outcome

The Commission considered the respondent's approach to calculating this reduction not only erroneous but also inherently flawed, in that it estimated the potential cost impact of the industrial action and allocated it to the employees undertaking the action. While the respondent's approach was rejected, the applicant's submission was also not accepted.

Having regard to evidence and submissions of both parties, the Commission ordered that the amount by which payments should be reduced was 15 per cent of the amount that would otherwise be paid for the completion of a shift.

Relevance

Given the difficulties in determining wages for individual shifts, a proportionate reduction in the form of a percentage of total wages per shift was considered a more appropriate form for expressing the reduction in payments. The Commission held this to be consistent with the authorities and stated the correct approach is to look at all of the circumstances of the case.

Case example: **Order varying the proportion by which an employee's payments have been reduced**

Transport Workers Union v Department of Territory and Municipal Services (ACTION)
[2010] FWA 4558 (Deegan C, 19 June 2010).

Facts

The TWU gave notice of an intention to impose a partial work ban on the collection of cash fares by bus drivers for a period of one week. The respondent issued notices informing employees of a two-thirds reduction in payment for each day they took part in the partial work ban. The TWU asserted this reduction was unreasonable as the collection of fares accounted for no more than five or six minutes of a driver's time per shift.

Outcome

In considering whether the proposed pay reduction was 'reasonable', the Commission found the ban would affect revenue and may inconvenience passengers. It also took into account that a bus service would continue to be provided by drivers taking part in the industrial action, and that a large part of the operating cost was funded by government subsidy and not the collection of revenue. As such, it was determined that the most appropriate factor was the percentage fare collection contributed to the overall cost. An order was made reducing employee payments by 20.1 per cent.

Relevance

The Commission determined that in this circumstance the most appropriate method was to reduce the employee's pay by the same amount as the employer revenue was reduced by the work ban.

Case example: **Order varying the proportion by which an employee's payments have been reduced**

Independent Education Union (South Australia) Incorporated v Catholic Schools Endowment Society Incorporated (Catholic Education Office) [2016] FWC 892 (Hampton C, 15 February 2016); [2016] FWC 1057 (Hampton C, 23 February 2016).

Facts

The IEU notified six Catholic schools in South Australia of the intention to take protected industrial action including partial work bans. The employers notified all staff that participation in some of the partial work bans would result in a percentage reduction in their salaries.

The IEU sought an order from the Commission to reduce the salary reductions to zero on the basis that the notices were not valid under the Fair Work Act because the employers did not provide the notice, or take reasonable steps to provide the notice, to the employees' bargaining representatives. In the alternative, the IEU sought a significant decrease in the salary reductions on the basis that the employers' proposals were not consistent with the legislation and were unfair.

Outcome

The Commission found that the notices had been provided to the employees as relevantly required by the Fair Work Act. The Commission held that there was no requirement that the notices must also be provided to the bargaining representatives if they have been given (directly) to each of the employees as required by s.471(1)(c).

The Commission found that the employers' approach to the calculation of the proposed reductions was fundamentally compliant with the legislative scheme however there was no identifiable allowance made for any (other) meaningful work that might be undertaken by the employee during that time. The Commission varied the notices to change the reduction from 7 per cent to 5 per cent for partial work bans on undertaking relief teaching.

Relevance

It would generally be prudent for an employer to also provide the notice to the bargaining representative(s) given that it may not always be possible to demonstrate the actual provision of the s.471 notice to every employee.

The formula adopted by employers to calculate a reduction in salary must not result in an unreasonable reduction when applied to one of the particular partial work bans given the circumstances applying to that work under the Enterprise Agreement.

Case example: **Assessment undertaken prospectively not retrospectively – Order NOT varying the proportion by which an employee's payments have been reduced**

The Australian Institute of Marine and Power Engineers v Port of Brisbane Pty Ltd [2011] FWA 4653 (Simpson C, 23 August 2011).

Facts

An application was made by AIMPE seeking an order that union members engaged in partial work bans have the reduction determined by the employer altered from 35 per cent to 4.16 per cent while work bans were in effect. This reduction excluded periods of work where such bans were suspended in order to ensure the safety of vessel, crew and marine environment.

Outcome

While finding that some errors were made by the respondent in the methodology it used to assess the reduction percentage, the Commission was satisfied that the adoption of 35 per cent was not unreasonable at the time. The Commission was not satisfied that a reduction of this percentage was warranted on the basis of the nature and extent of the partial work ban. As the applicant did not provide sufficient evidence to persuade the Commission that the 35 per cent proportionate reduction should be disturbed, the application was dismissed.

Relevance

The Commission held that an assessment of whether a proportionate reduction is reasonable should have regard to the nature and extent of a partial work ban. The Commission also found that this assessment is to be undertaken prospectively at the time of issuing the notice, rather than retrospectively after the partial work ban ceases.

Employer gives notice of non-payment

If an employee engaged, or engages, in protected industrial action that is a partial work ban on a day and the employer gives to the employee a written notice stating that, because of the ban:

- the employee will not be entitled to any payments, and
- the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties;

then the employee is not entitled to any payments in relation to the industrial action period.[182]

Failure or refusal to attend for, or perform work

If an employer has given an employee a notice of non-payment, and the employee fails or refuses to attend for work, or fails or refuses to perform any work at all if he or she attends for work, during the industrial action period, then:

- the failure or refusal is ***employee claim action*** if the original protected industrial action is employee claim action, or
- the failure or refusal is ***employee response action*** if the original protected industrial action is employee response action.[183]

[182] Fair Work Act s.471(4).
[183] Fair Work Act s.471(4A).

Employer does not give notice – no reduction in payments

If an employee engaged, or engages, in a partial work ban against an employer, and the employer does not give the employee a notice about the reduction of payments or non-payment, then the employee's payments for the day are not to be reduced because of the ban.[184]

Unprotected industrial action – payments

Prohibition on the making of payments for unprotected action – employers

See Fair Work Act s.474

If an employee engaged, or engages, in industrial action that is not protected industrial action against an employer on a day, the following applies:

- where the period of the industrial action taken is less than 4 hours on that day, the employer **must** withhold 4 hours payment from the employee, or
- if the period of the industrial action is 4 or more hours on that day, the employer **must** withhold payment for the total duration of the industrial action.

For example:

- if an employee takes unprotected industrial action for 2 hours – the employer must withhold payment for 4 hours, or
- if an employee takes unprotected industrial action for 5½ hours – the employer must withhold payment for 5½ hours.

Note: *This is a civil remedy provision.*

Compliance with s.474 by employers is not voluntary. Failure to comply with s.474 may attract the imposition of a civil penalty, and further, an employer which unlawfully permits its employees to engage in non-protected industrial action without any consequence in terms of loss of pay should not be surprised that such employees repeatedly resort to the use of such industrial action as a pressure tactic when industrial disputes arise.[185]

Exception – Imminent risk to health or safety

If employees take action related to issues about workplace health and safety, the action is not considered industrial action if:

- the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety, and
- the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.[186]

[184] Fair Work Act s.471(8).
[185] *Maritime Union of Australia, The v Patrick Stevedores Holdings Pty Limited* [2014] FWCFB 657 (Hatcher VP, Catanzariti VP, Roberts C, 31 January 2014) at para. 79, [(2014) 240 IR 146].
[186] Fair Work Act s.19(2)(c).

As a result the prohibition of payment to an employee, as set out in s.474 of the Fair Work Act, does not apply.[187]

Wages cannot be deducted in reliance on s.474 of the Fair Work Act for taking action if that action meets the requirements of s.19(2) of the Fair Work Act.

Overtime bans

However, if the industrial action is, or includes, an overtime ban, s.474 does not apply, in relation to a period of overtime to which the ban applies, unless:

- the employer requested or required the employee to work the period of overtime, and
- the employee refused to work the period of overtime, and
- the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

Note: An employee is able to refuse to work additional hours if they are unreasonable.[188] There may be other circumstances in which an employee can lawfully refuse to work additional hours.

If:

- the industrial action is, or includes, an overtime ban, and
- section 474 applies in relation to a period of overtime to which the ban applies;

then, for the purposes of section 474:

- the total duration of the industrial action is, or includes, the period of overtime to which the ban applies, and
- if the total duration of the industrial action on that day is less than 4 hours – the period of 4 hours includes the period of overtime to which the ban applies.

If:

- the industrial action is during a shift (or other period of work), and
- the shift (or other period of work) occurs partly on one day and partly on the next day;

then, for the purposes of this section, the shift is taken to be a day and the remaining parts of the days are taken not to be part of that day.

Overtime is taken not to be a separate shift.

> **Example**
>
> *An employee, who is working a shift from 10 pm on Tuesday until 7 am on Wednesday, engages in industrial action that is not protected industrial action from 11 pm on Tuesday until 1 am on Wednesday. That industrial action would prevent the employer making a payment to the employee in relation to 4 hours of the shift, but would not prevent the employer from making a payment in relation to the remaining 5 hours of the shift.*

[187] See Explanatory Memorandum to Fair Work Bill 2008 at para. 254.
[188] See Fair Work Act s.62(2).

Prohibition on accepting or seeking payments for unprotected action – employees and unions

See Fair Work Act s.475

An employee must not ask for, or accept, a payment from an employer if the employer would contravene the prohibition of payment to an employee in s.474 of the Fair Work Act, by making the payment.

A union, or an officer or member of a union, must not ask an employer to make a payment to an employee if the employer would contravene s.474 of the Fair Work Act by making the payment.

Note: *These are civil remedy provisions.*

Note: Acts of coercion, or misrepresentations, relating to such payments may also contravene the general protections provisions in ss.348 or 349 of the Fair Work Act.

The **General Protections Benchbook** contains detailed information and links to cases setting out eligibility and the Commission process, including information on coercion and misrepresentation.

You can access the Benchbook through the following link: www.fwc.gov.au/resources/benchbooks/general-protections-benchbook

Information on coercion is contained under *Division 4 – Industrial Activities* in *Part 6 – The protections*.

Other responses to industrial action unaffected

See Fair Work Act s.476

If an employee engaged, or engages, in industrial action against an employer, these provisions of the Fair Work Act do not affect any right of the employer, under the Fair Work Act or otherwise, to do anything in response to the industrial action that does not involve payments to the employee.

This includes the rights that the employer has under common law or by taking employer response action or standing down the employee.[189]

[189] Explanatory Memorandum to Fair Work Bill 2008 at para. 1904.

Standing down employees

See Fair Work Act s.524–525

Stand down under terms of Fair Work Act

An employer may stand down an employee during a period in which the employee cannot usefully be employed because of a number of circumstances including:

- industrial action (other than industrial action organised or engaged in by the employer)
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown, or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Payments during a period of stand down

If an employer stands down an employee during a period in accordance with s.524 of the Fair Work Act then the employer is not required to make payments to the employee for that period.

Section 524 is intended to relieve an employer of the obligation to pay wages to employees who cannot be usefully employed in certain limited circumstances. The consequences of a stand down can be severe for an employee as the employee may be deprived of wages for a lengthy period. Whether a particular employee can be usefully employed is a question of fact to be determined having regard to the circumstances that face the employer.[190]

Stand down under terms of enterprise agreement or contract of employment

An employer may not stand down an employee under s.524 of the Fair Work Act if:

- an enterprise agreement, or a contract of employment, applies to the employer and the employee, and
- the agreement or contract provides for the employer to stand down the employee during the relevant period if the employee cannot usefully be employed during that period because of industrial action (other than industrial action organised by the employer), or a breakdown of machinery or stoppage of work for which the employer cannot reasonably be held responsible .

Note: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

If the terms of an enterprise agreement or contract of employment provide for the standing down of employees, then the employer will generally need to rely upon the terms of the enterprise agreement or contract of employment to effect a stand down of an employee.[191]

[190] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Ltd* [2013] FWC 2554 (Gostencnik DP, 26 April 2013) at para. 31.
[191] ibid., at para. 17.

Case example: **Stand down – Employees could be usefully employed**

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Ltd [2013] FWC 2554 (Gostencnik DP, 26 April 2013).

Facts

The company stood down 31 maintenance employees after the unions representing the employees gave notice of an intention to take employee claim action in the form of: '[A]n indefinite ban on filling in paper work, excluding health and safety matters' (the Paper Work Ban).

Before the commencement of industrial action, the company advised its employees that anyone who participated in the Paper Work Ban would be stood down without pay.

The company submitted that it was entitled to stand down the employees because the Paper Work Ban amounted to a stoppage of work for any cause for which the employer could not reasonably be held responsible [s.524(1)(c)].

Outcome

The Commission held that the employer did not have a proper basis to stand down the employees, ordering that the stand down cease, and that the employees be paid the wages they would have earned had they been permitted to work.

The Commission found that the alleged absence of useful employment for the employees cannot be said to have been caused by industrial action, as no industrial action had taken place at the time the employees were stood down. The stoppage occurred because the employer would not permit maintenance employees to carry out maintenance work while the Paper Work Ban was in place, rather than because employees refused to perform work. It could not therefore be said to have been for a cause for which the employer could not reasonably be held responsible.

Relevance

In order for an employer to validly exercise its right under s.524(1)(a) of the Fair Work Act, the employee who is to be the subject of a stand down must, at the time of being stood down, be engaging in the industrial action (or have previously engaged in industrial action) which causes the unavailability of useful employment; or be unable to work because of others engaging in, or having engaged in industrial action which has a flow-on effect. The Commission also doubted whether reliance could be placed on s.524(1)(c) in circumstances where the stoppage of work would be industrial action and therefore caught by s.524(1)(a).

Employee not stood down during a period of authorised leave or absence

An employee is not taken to be stood down during a period when the employee:

- is taking paid or unpaid leave that is authorised by the employer, or
- is otherwise authorised to be absent from his or her employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down.[192]

[192] Fair Work Act s.525.

Powers of the Commission in relation to stand down disputes

See Fair Work Act s.526

The Commission may deal with a dispute in relation to stand downs on application by an employee, or an employee organisation that is entitled to represent the industrial interests of an employee:

- who has been, or is going to be, stood down or purportedly stood down, under s.524(1), or
- who has made a request to take leave to avoid being stood down, or purportedly stood down, under s.524(1), where the employee's employer has authorised the leave.

A Fair Work Inspector can also make an application to deal with a stand down dispute.[193]

A former employee cannot make an application under s.526.[194]

The Commission may deal with the dispute by arbitration. The Commission may also deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion.

In dealing with the dispute, the Commission must take into account fairness between the parties concerned.[195]

Types of disputes

Applications to deal with stand down disputes must relate to the operation of the stand down provisions of the Fair Work Act. For example, a person may argue that a stand down contravenes s.524 of the Fair Work Act because the employee that has been stood down could be usefully employed.

The Commission has no power to order that an employer pay an employee wages during a period of stand down.[196]

The Commission is not a court. It cannot exercise judicial power, and as a result cannot make binding determinations as to whether an employer has acted lawfully in standing down an employee. The Commission cannot declare that an employer has failed to comply with s.524, or order that an employer pay wages due to an employee because of that failure. Only a court can make those sorts of orders.[197]

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[193] Fair Work Act ss. 12 and 526(3)(d).
[194] See for eg *Richards v Automotive Brands Group Pty Ltd* [2020] FWC 4168 (Colman DP, 10 August 2020) at para. 7.
[195] Fair Work Act s.526(4).
[196] See for eg *Bristow Helicopters Australia Pty Ltd v Australian Federation of Air Pilots* [2017] FWCFB 487 (Catanzariti VP, Gooley DP and Wilson C) at para. 58.
[197] See for eg *Richards v Automotive Brands Group Pty Ltd* [2020] FWC 4168 (Colman DP, 10 August 2020) at para. 8.

Part 5 – Suspension or termination of protected industrial action

This section will provide information on:

- suspending protected industrial action, and
- terminating protected industrial action.

While protected industrial action is lawful during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease – at least temporarily.[198]

The Explanatory Memorandum to the Fair Work Bill 2008 states that '[i]t is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.'[199]

Related information

- Part 5.1 – Powers of the Commission
- Part 5.2 – Powers of the Minister

[198] Explanatory Memorandum to Fair Work Bill 2008 at para. 1708.
[199] Explanatory Memorandum to Fair Work Bill 2008 at para. 1709.

Part 5.1 – Powers of the Commission

The Fair Work Commission (the Commission) has the power to make orders terminating or suspending protected industrial action. In some circumstances, the Commission has discretion whether to exercise this power. In other circumstances, the Commission is compelled to exercise this power.

The suspension of protected industrial action by the Commission is a suspension of the protection or immunity which attaches to the industrial action under the *Fair Work Act 2009* (Cth) (the Fair Work Act).[200]

Once a determination is made by the Commission that suspension is appropriate, the order that is required to be made is one which suspends, for the duration of the order, the protection attaching to ***any*** industrial action.[201]

Protected industrial action may be resumed after any period of suspension, but will be subject to any requirements for the giving of notice before any action may be taken.[202]

Related information

- When the Commission **may** suspend or terminate
- When the Commission **must** suspend or terminate

When the Commission MAY suspend or terminate

Significant economic harm

See Fair Work Act s.423

Where the action is employee claim action, the Commission may make an order suspending or terminating the protected industrial action that is being engaged in if satisfied that the action is causing, or threatening to cause, significant economic harm to:

- the employer or any of the employers that will be covered by the proposed enterprise agreement, **and**
- any of the employees who will be covered by the proposed enterprise agreement.

Where the action is employee response action or employer response action, the Commission may suspend or terminate the protected industrial action that is being engaged in if satisfied that the action is causing, or threatening to cause, significant economic harm to any of the employees who will be covered by the proposed enterprise agreement.

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[200] *The Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 711 (Hatcher VP, Catanzariti VP, Bull DP, 8 February 2016) at para. 35; citing *National Tertiary Education Industry Union v University of South Australia* [2010] FWAFB 1014 (Boulton J, Ives DP, Gay C, 14 April 2010) at para. 11, [(2010) 194 IR 30].

[201] *The Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 711 (Hatcher VP, Catanzariti VP, Bull DP, 8 February 2016) at para. 37.

[202] Explanatory Memorandum to Fair Work Bill 2008 at para. 1706.

The Commission may only be 'satisfied' if its decision to that effect is based upon relevant considerations and the evidence.[203]

In other words, if industrial action is being undertaken by the employer (whether protected or not), the Commission is only required to consider the harm to the employees. This reflects the fact that an employer that has locked out its employees should not then be able to have the employees' protected industrial action terminated based on the significant harm being caused to it.[204]

Relevant factors – significant economic harm

Factors relevant to working out whether the protected industrial action is causing, or threatening to cause, significant economic harm include:

- the source, nature and degree of harm suffered, or likely to be suffered
- the likelihood that the harm will continue to be caused or will be caused
- the capacity of the person to bear the harm
- the views of the person and the bargaining representatives for the agreement
- whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement, and
- the objective of promoting and facilitating bargaining for the agreement.

If the Commission is considering terminating the protected industrial action, the following will also be relevant:

- whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement, and
- whether there is no reasonable prospect of agreement being reached.

If the protected industrial action is threatening to cause significant economic harm, the Commission **must** be satisfied that the harm is imminent.

The Commission must also be satisfied that:

- the protected industrial action has been engaged in for a protracted period of time, and
- the dispute will not be resolved in the reasonably foreseeable future.

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[203] *Coal and Allied v AIRC* [2000] HCA 47 (31 August 2000) at para.48; citing *Coal & Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* Print P8382 (AIRCFB, Giudice J, Munro J, Larkin C, 29 January 1998) at p. 17, [(1998) 80 IR 14].

[204] Explanatory Memorandum to Fair Work Bill 2008 at para. 1713.

Causing significant economic harm

> *'…the expression "significant harm" in s.426(3) should be construed as having a meaning that refers to harm that has an importance or is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action.*
>
> *In this context, the word "significant" indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context.'*[205]

Links to application form

Form F37 – Application for an order to suspend or terminate of protected industrial action:

- www.fwc.gov.au/documents/forms/Form_F37.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F37.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[205] *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd and Kentz E & C Pty Pty Ltd* [2010] FWAFB 6021 (Lawler VP, Ives DP, Roe C, 6 August 2010) at para. 44, [(2010) 198 IR 360].

Case example: **Significant ecomonic harm imminent**

Nyrstar Port Pirie Pty Ltd v Construction, Forestry, Mining and Energy Union and Others
[2009] FWA 1148 (O'Callaghan SDP, 16 November 2009).

Facts

Nyrstar lodged an application seeking the suspension of protected industrial action, asserting that the planned protected industrial action would occur at a time which would cause it significant economic harm.

Nyrstar operate a substantial silver, lead and zinc smelter at Port Pirie. Continued operation was dependent on the continued functioning of the blast furnace. Consequently, the operation of the blast furnace would potentially be affected by protected industrial action, meaning there was an imminent risk that the blast furnace would need to be shut down.

A planned progressive shut down of the blast furnace was the least expensive option for Nyrstar but, in the event that an urgent shutdown was necessitated, the blast furnace would then need to be partially dismantled in order to recommence operations. The cost of ceasing production was estimated at $600,000 per day, together with an estimate of $400,000 to recommence operation of the blast furnace. Depending on the way in which the blast furnace was shut down, six to ten days would be required to recommence operations. In the event that the blast furnace was shut down, there was concern that Nyrstar Port Pirie management may not be given corporate approval to immediately restart the facility in the current economic environment.

Outcome

The Commission was satisfied that the threat of economic harm to Nyrstar was imminent; however s.423 of the Fair Work Act requires that the protected industrial action has been engaged in for a protracted period of time, and that it will not be resolved in the foreseeable future. The fundamental issue was that, at the time of the hearing of this matter, the protected industrial action had not commenced at all. As a result the Commission found that suspension or termination of the protected industrial action could not be considered.

Relevance

Section 423 requires that the Commission must be satisfied that protected industrial action is occurring and is either causing economic harm, or threatening to do so in a fashion which warrants intervention in the normal bargaining process.

Case example: **Significant ecomonic harm NOT imminent**

United Voice v MSS Security Pty Ltd [2013] FWC 4557 (Cloghan C, 17 July 2013).

Facts

United Voice and the employer were bargaining representatives for a replacement enterprise agreement. There had been a number of applications to the Commission during the bargaining process.

On the same day that protected industrial action was commenced by the employees, employer response action was taken by the employer, locking out employees indefinitely. The lockouts affected 25 employees. At the time the application was made the longest period of lockout was approximately one month and the shortest period was nine days.

United Voice made an application to terminate the employer's lockouts, claiming that due to the ongoing and indefinite period of the lockout, all employees locked out were either facing financial harm or would be if the industrial action was not terminated as a matter of urgency. United Voice had been providing limited financial assistance to its members who had been locked out.

Outcome

The Commission found that the lockout was not causing significant economic harm, however it was necessary to consider whether the potential of the lockout continuing would result in that harm being imminent.

The Commission held that while it was obvious that there would be a financial impact on employees who were not receiving an income, there was no evidence that employees would transfer from a state of financial hardship to one of experiencing significant economic harm. The application was dismissed.

Relevance

For the Commission to exercise the discretion to suspend or terminate industrial action it must be satisfied that the harm in question is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that commonly occurs during industrial action.

Orders – significant economic harm

The Commission may make an order under s.423:

- on its own initiative, or
- on application by any of the following:
  - a bargaining representative for the agreement
  - the Minister
  - if the industrial action is being engaged in a State that is a referring State as defined in section 30B or 30L – the Minister of the State who has responsibility for workplace relations matters in the State

- if the industrial action is being engaged in in a Territory – the Minister of the Territory who has responsibility for workplace relations matters in the Territory,
- a person prescribed by the Fair Work Regulations.

Note: The Fair Work Regulations do not currently prescribe any additional persons.

Related information

- Orders to stop or prevent unprotected industrial action

When the Commission must suspend or terminate

See Fair Work Act s.424

The Commission must make an order suspending or terminating protected industrial action that is being engaged in or is threatened, impending or probable, if satisfied that the protected industrial action has threatened, is threatening or would threaten:

- to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
- to cause significant damage to the Australian economy or an important part of it.

It has been established that the following terms are to be given their ordinary meanings.[206] The following dictionary definitions have been adopted previously:

Threaten – constitute a threat to, be likely to injure, be a source or harm or danger.[207]

Threat – a declaration of an intention to inflict pain, injury or other punishment.[208]

Related information

- Threats to life, personal safety, health or welfare
- Threats to the economy
- Suspending industrial action – cooling off period
- Suspending industrial action – significant harm to a third party

[206] *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 3410 (Asbury C, 31 May 2011) at para. 8.

[207] *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 (Kaufman SDP, 3 August 2009) at para. 29, [(2009) 187 IR 119]; see also *University of South Australia v National Tertiary Education Industry Union* [2009] FWA 1535 (O'Callaghan SDP, 4 December 2009) at para. 32.

[208] *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 (Kaufman SDP, 3 August 2009) at para. 30, [(2009) 187 IR 119].

Threats to life, personal safety, health or welfare

Section 424 of the Fair Work Act states that the Commission must suspend or terminate protected industrial action that is being engaged in or is threatened, impending or probable, if satisfied that the protected industrial action has threatened, is threatening or would threaten:

- to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
- to cause significant damage to the Australian economy or an important part of it.

It has been established that the following terms are to be given their ordinary meanings.[209] The following dictionary definitions have been adopted previously:

Health – the general condition of the body or mind with reference to soundness or vigour.[210]

Welfare – the state of faring well, well-being.[211]

Has threatened, is threatening or would threaten

The appropriate test is not whether the protected industrial action 'would' endanger, but rather whether it would 'threaten' to endanger.[212]

The simple existence of a threat to safety or health, or welfare, is insufficient, even if it exists as a result of the protected industrial action. The danger must be probable, rather than simply a possible eventuality.[213]

Endanger life, personal safety or health

Conduct that puts a person's physical or mental state at risk of material detriment, or that materially hinders or prevents improvements in a person's poor physical or mental state, may qualify as conduct that endangers personal health or safety.[214]

Even if conduct is not serious enough to endanger life, it might constitute a significant risk to personal safety or health.[215]

The impact of the conduct must be more than merely to cause inconvenience to the persons concerned. It must expose them to danger.[216]

Welfare

The term ***welfare*** is not limited to situations where life, personal safety or health is endangered.[217]

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[209] *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 3410 (Asbury C, 31 May 2011) at para. 8.
[210] *University of South Australia v National Tertiary Education Industry Union* [2009] FWA 1535 (O'Callaghan SDP, 4 December 2009) at para. 35.
[211] *State of Victoria - Department of Health and Community Services v Health Services Union of Australia* Print L9810 (AIRCFB, McIntyre VP, Williams DP, Hingley C, 3 March 1995) at para. 15.
[212] *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 (Kaufman SDP, 3 August 2009) at para. 29, [(2009) 187 IR 119].
[213] *State of Victoria - Department of Human Services v Health Services Union* [2012] FWA 8376 (Gregory C, 4 October 2012) at para. 80, [(2012) 225 IR 306].
[214] *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 (Boulton J, Acton SDP, Lewin C, 15 December 2011) at para. 51, [(2011) 214 IR 148].
[215] ibid.
[216] ibid.
[217] *State of Victoria - Department of Health and Community Services v Health Services Union of Australia* Print L9810 (AIRCFB, McIntyre VP, Williams DP, Hingley C, 3 March 1995) at para. 15.

Population or part of it

The term 'population' refers to the total number or the body of the inhabitants of Australia.[218] The reference to 'part' of the population should be read as having a more collective meaning than simply 'individuals'.[219]

Case example: **Action threatening to endanger life, etc. – Protected industrial action terminated or suspended**

Ausgrid and Others v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others [2015] FWC 1600 (Harrison SDP, 13 March 2015).

Facts

The applicants sought the termination or the suspension of protected industrial action which the CEPU and the AMWU, acting as bargaining representatives for their members, had notified. The unions had given notices of intention to take industrial action comprising a four hour stoppage of work.

Ausgrid's electricity network covers about 22,275 square kilometres, supplying electricity to 1.64 million customers, which include residential, large and small businesses, as well as major industry including mining, shipping, tourism, manufacturing and agriculture. All businesses within Sydney's CBD are within the supply area.

Outcome

The Commission was satisfied that it was probable an emergency event or events, such as vehicle impacts and storms, and disconnection and reconnection of customers, would occur during the period of the protected industrial action. The Commission found that the notified action would likely delay the restoration of power in the event of a power interruption. Delays in the restoration of power are such as to threaten to endanger the safety, health and/or welfare of persons impacted by the power interruptions. Orders suspending the protected industrial action were made.

Relevance

The action in this case had the potential to impact a large part of the state of NSW including residential and commercial areas as well as the Sydney CBD. It also threatened to endanger patients in hospitals, nursing homes or facilities with no, or inadequate, back-up power. Some of these patients were on life support.

The Commission commented that s.424(1)(c) is concerned with action that threatens to endanger persons in the manner described and the section does not require a finding that it will endanger such persons in respect of their welfare, health or safety. It may be that, ultimately, no such adverse impact in fact occurs.

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[218] *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 3410 (Asbury C, 31 May 2011) at para. 9.

[219] *Coal & Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* Print P8382 (AIRCFB, Giudice J, Munro J, Larkin C, 29 January 1998) at p. 20, [(1998) 80 IR 14].

Case example: **Action threatening health and welfare – Protected industrial action terminated or suspended**

Monash University v National Tertiary Education Industry Union [2013] FWCFB 5982 (Hatcher VP, Catanzariti VP, Lee C, 26 August 2013).

Facts

The NTEU had sent a 'Notice of Intention to Take Protected Industrial Action' to the University. The Notice did not identify any cessation date for any of the industrial action, meaning that it was indefinite in nature. One of the forms of industrial action was 'a ban on recording, or transmission to the employer, of assessment results, with the exception of results for which an exemption has been granted by the NTEU Exemptions Committee' (the Results Ban).

Outcome

The Full Bench was satisfied that the Results Ban threatened to endanger student health and welfare by heightening student stress and anxiety. The Full Bench found that the indefinite nature of the Results Ban would aggravate its potential and actual effects on students. The Full Bench issued an order suspending protected industrial action in the form of the Results Ban for a period of two weeks.

Relevance

In this case evidence was given by the University's Director of Mental Health (a psychologist) about the vulnerability of university-aged students to mental health disorders as well as the possible impact of the results ban. Her evidence was that one in four young people suffer from a diagnosable mental health disorder in any one year. The university had 13,000 students and this was considered sufficient in number to be characterised as 'part of the population'.

It was admitted that there was no direct evidence of anyone actually suffering harm as a consequence of the ban, however the Full Bench stressed that the section was concerned with threatened endangerment, not actual harm.

Case example: **Action threatening the personal safety or health or welfare of a part of the population – Protected industrial action terminated or suspended**

Victorian Hospitals' Industrial Association v Australian Nursing Federation [2011] FWAFB 8165 (Boulton J, Acton SDP, Lewin C, 15 December 2011), [(2011) 214 IR 148].

Facts

Protected industrial action was being engaged in by the ANF and its members in support of claims being pursued for nurses and midwives employed in the Victorian public health system. The action had the effect of closing, with certain exceptions, one in every three operational beds across the Victorian public health system.

The VHIA, supported by the Government of Victoria, made an application for an order terminating protected industrial action being taken by the ANF in the Victorian public health system. The application was opposed by the ANF and the Health Services Union, submitting that if an order were made, it should be for suspension rather than termination.

Outcome

The Full Bench found that although the industrial action had only been taken over a few days, there was substantial evidence about the serious impact that it had on public health services and on the safety, health and welfare of some patients. The protected industrial action would add extra pressure to a system already under pressure.

The Full Bench was satisfied that the protected industrial action being engaged in by the ANF and its members was threatening or would threaten to endanger the personal safety or health, or the welfare, of people in need of public health care services in Victoria and suspended the protected industrial action for a period of 90 days.

Relevance

The High Court decision in *Coal and Allied v AIRC* was applied to explain that a careful consideration of the evidence is required in each case before the Commission can be satisfied that an order should be made. In this case there was significant evidence from senior administrators about the detrimental effect that the industrial action was having and was likely to continue to have on the public health system. The action would cause more than just inconvenience to users of the public health system and was found to endanger their safety or health or their welfare.

Case example: **Action NOT threatening to endanger life, etc. – Protected industrial action NOT terminated or suspended**

Re KDR Victoria Pty Ltd T/A Yarra Trams [2015] FWC 6282 (Lee C, 9 September 2015).

Facts

An application was lodged by Yarra Trams for an order to terminate protected industrial action that was being taken by the the ARTBIU and its members. The industrial action was for a four hour stoppage of all work commencing at 10am.

Yarra Trams submitted that the industrial action was threatening to endanger the personal safety or health or the welfare of a part of the population of Melbourne who rely on public transport generally and tram services in particular.

Outcome

The Commission held that while the industrial action would undoubtedly have an effect on the travelling public, it was not satisfied that the protected industrial action by the ARTBIU had threatened, was threatening or would threaten to endanger the personal safety or health or the welfare of a part of the population within the meaning of the Fair Work Act. The application was dismissed.

Relevance

Yarra Trams had provided options for passengers to make alternative arrangements for travel using combinations of replacement buses, trains and other modes of transport. The Commission recognised that this would not be as convenient to the passenger if a tram was their preferred mode of travel. However it was not a sufficient basis to establish that the collective welfare was in danger or peril.

Threats to the economy

Section 424 of the Fair Work Act states the Commission must suspend or terminate protected industrial action that is being engaged in or is threatened, impending or probable, if satisfied that the protected industrial action has threatened, is threatening or would threaten:

- to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
- to cause significant damage to the Australian economy or an important part of it.

Significant damage

Significant is defined as being 'Important, notable; consequential'.[220]

The length of time over which the economic damage is sustained is a relevant consideration.

The Australian economy or an important part of it

Important in this context has been defined based on the dictionary meaning:

> ***1.*** *of much significance or consequence; an important event.*
> ***2.*** *mattering much (fol. by to): details important to a fair decision.*
> ***3.*** *of more than ordinary title to consideration or notice: an important example.*
> ***4.*** *prominent: an important part.*
> ***5.*** *of considerable influence or authority, as a person, position, etc.*[221]

[220] *Sucrogen Australia Pty Ltd v The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FWA 6192 (Spencer C, 27 August 2010) at para. 10; citing *The New Shorter Oxford English Dictionary*.

[221] *BHP Coal Pty Ltd; Hay Point Services Pty Ltd v Construction, Forestry, Mining and Energy Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* PR903492 (AIRC, Bacon C, 17 April 2001) at para. 38; citing the *Macquarie Dictionary* (2nd Revised Edition).

Case example: **Significant damage to the Australian economy or an important part of it – Protected industrial action terminated or suspended**

Minister For Tertiary Education, Skills, Jobs And Workplace Relations [2011] FWAFB 7444 (Giudice J, Watson SDP, Roe C, 31 October 2011).

Facts

The Minister for Tertiary Education, Skills, Jobs and Workplace Relations made an application to Fair Work Australia for the termination of protected industrial action by Qantas and three unions representing Qantas employees. The unions had engaged in protected industrial action in furtherance of their bargaining claims. Qantas planned to take protected industrial action in response, consisting of a lock-out of its workforce and a grounding of its fleet worldwide.

Evidence was given on behalf of the Minister as to the importance of airline passenger and cargo transport to the economy and the effect of the grounding of the Qantas fleet.

Outcome

The Commission found that it was unlikely that the protected industrial action taken by the three unions, even if taken together, threatened to cause significant damage to the tourism and air transport industries. However, the Commission held that the action proposed by Qantas, if taken, threatened to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services.

In determining whether to suspend or terminate the protected industrial action, the Commission held that suspension would not provide sufficient protection against the uncertainty to the particularly vulnerable tourism industry, and for that reason ordered that the industrial action be terminated.

Relevance

It was submitted that the tourism industry, including aviation, contributed approximately 2.6 per cent to GDP and had 500,000 employees. The value of inbound tourism was estimated at $24 billion per year. It was found that the response action by Qantas threatened to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services. The Qantas evidence was that the cost to it alone was $20 million per day. This was held to be significant.

In contrast, the protected industrial action by the unions was estimated to have only cost approximately $70 million.

Case example: **Significant damage to the Australian economy or an important part of it – Protected industrial action NOT terminated or suspended**

BHP Coal Pty Ltd and Another v Construction, Forestry, Mining and Energy Union and Others PR903492 (AIRC, Bacon C, 17 April 2001).

Facts

BHP and its subsidiary, Hay Point Services, applied to the Commission for an order terminating the bargaining period (pursuant to s.170MH of the Workplace Relations Act) because of the significant damage it argued would be caused to the region of 'Central Queensland'.

BHP engaged a professor of economics at the University of Melbourne to provide a report setting out the economic effect of the industrial action.

Outcome

The Commission found that the borders of the 'Central Queensland region' were totally arbitrary, and that there was insufficient material on which to find that the 'Central Queensland region' could be characterised as 'part' of the Australian economy, and therefore could not be considered an 'important part'.

Relevance

The report stated that the effect of the work stoppages to the region was an economic loss of between 3.1 to 3.8 per cent over a two week period. This was not enough to be considered 'significant'. The Commission commented that if the same loss had occurred over a year it may have been significant. The length of time over which the economic loss occurs is a relevant consideration when determining whether a loss is 'significant'.

Orders – threats to life, personal safety, health or welfare or to the economy

The Commission may make an order under s.424:

- on its own initiative, or
- on application by any of the following:
  - a bargaining representative for the agreement
  - the Minister
  - if the industrial action is being engaged in in a State that is a ***referring State*** as defined in ss.30B or 30L – the Minister of the State who has responsibility for workplace relations matters in the State
  - if the industrial action is being engaged in in a Territory – the Minister of the Territory who has responsibility for workplace relations matters in the Territory,
  - a person prescribed by the Fair Work Regulations.

Under Regulation 3.10 the following persons may apply for an order suspending or terminating protected industrial action for a proposed enterprise agreement:

- if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is not a referring State as defined in section 30B or 30L of the Act – the Minister of the State who has responsibility for workplace relations matters in the State'
- an organisation or other person directly affected, or who would be directly affected, by the industrial action other than an employee who will be covered by the proposed enterprise agreement.[222]

Related information

- Orders to stop or prevent unprotected industrial action

Suspending industrial action – cooling off period

See Fair Work Act s.425

The Commission must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the Commission is satisfied that the suspension is appropriate taking into account the following matters:

- whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue
- the duration of the protected industrial action
- whether the suspension would be contrary to the public interest or inconsistent with the objects of the Fair Work Act,
- any other matters that the Commission considers relevant.[223]

The Commission may make the order only on application by:

- a bargaining representative for the agreement, or
- a person prescribed by the Fair Work Regulations.

Note: The Fair Work Regulations do not currently prescribe any additional persons.

[222] Fair Work Regulations r.3.10.
[223] See for eg *Nyrstar Port Pirie Pty Ltd v Construction, Forestry, Mining and Energy Union and Others* [2009] FWA 1144 (O'Callaghan SDP, 17 November 2009).

Suspending industrial action – significant harm to a third party

See Fair Work Act s.426

The Commission must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the following requirements are met.

Requirement – adverse effect on employers or employees

The Commission must be satisfied that the protected industrial action is adversely affecting:

- the employer, or any of the employers, that will be covered by the proposed enterprise agreement, or
- any of the employees who will be covered by the proposed enterprise agreement.

Requirement – significant harm to a third party

The Commission must also be satisfied that the protected industrial action is threatening to cause significant harm to any person other than:

- a bargaining representative for the proposed enterprise agreement, or
- an employee who will be covered by the proposed enterprise agreement.

For the purposes of this specific requirement, the Commission may take into account any matters it considers relevant, including the extent to which the protected industrial action threatens to:

- damage the ongoing viability of an enterprise carried on by the person
- disrupt the supply of goods or services to an enterprise carried on by the person
- reduce the person's capacity to fulfil a contractual obligation, or
- cause other economic loss to the person.

Requirement – suspension is appropriate

The Commission must also be satisfied that the suspension is appropriate taking into account the following:

- whether the suspension would be contrary to the public interest or inconsistent with the objects of the Fair Work Act,
- any other matters that the Commission considers relevant.

Case example: **Industrial action NOT suspended – significant harm to a third party**

Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd and Kentz E & C Pty Pty Ltd [2010] FWAFB 6021 (Lawler VP, Ives DP, Roe C, 6 August 2010), [(2010) 198 IR 360].

Facts

In the decision at first instance the Commission considered whether Woodside, Kentz and United (the Third Parties) were under threat of significant harm being caused to them by the protected industrial action undertaken by employees of Mammoet Australia Pty Ltd (Mammoet) at the Pluto Liquid Natural Gas Project on the Burrup Peninsula. The Construction, Forestry, Mining and Energy Union (the CFMEU) was the bargaining representative for the Mammoet employees.

The Commission found that as a consequence of the protected industrial action significant harm was threatening to be caused to Woodside, Kentz and United and it suspended the protected industrial action for a period of three months.

Outcome

The CFMEU appealed the decision. The focus of the arguments on appeal was the proper meaning of the expression 'significant harm' in s.426(3).

The Full Bench found that the Commission had erred in failing to appreciate that on the proper construction of s.426, 'significant harm' required the identification of harm that was over and above harm of the sort that is commonly a consequence of protected industrial action; and that the period of suspension ordered almost certainly had the practical effect of terminating the protected industrial action rather than merely providing a temporary respite from the effects of that action. Permission to appeal was granted.

On rehearing the Full Bench found that the sort of harm complained of by the Third Parties was the sort of harm that would be caused by industrial action by employees on any large construction project where such action affects the critical path of the project. The appeal was allowed and the Full Bench quashed the decision and order at first instance.

Relevance

'Significant harm' in relation to a third party requires the identification of harm that is over and above harm of the sort that is commonly a consequence of protected industrial action.

Orders – significant harm to a third party

The Commission may make an order under s.426 only on application by:

- an organisation, person or body directly affected by the protected industrial action other than:
  - a bargaining representative for the proposed enterprise agreement
  - an employee who will be covered by the proposed enterprise agreement
- the Minister
- if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L – the Minister of the State who has responsibility for workplace relations matters in the State
- if the industrial action is being engaged in in a Territory – the Minister of the Territory who has responsibility for workplace relations matters in the Territory,
- a person prescribed by the Fair Work Regulations.

Note: The Fair Work Regulations do not currently prescribe any additional persons.

Related information

- Orders to stop or prevent unprotected industrial action

Links to application form

Form F37 – Application for an order to suspend or terminate protected industrial action:

- www.fwc.gov.au/documents/forms/Form_F37.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F37.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

Requirements relating to a period of suspension

The Commission must specify the period of suspension

See Fair Work Act s.427

The Commission must specify, in an order suspending protected industrial action, the period for which the protected industrial action is suspended.

Notice period

The Commission may specify, in the order, a longer period of notice of up to seven working days for the minimum period of notice for taking employee claim action (under s.430) if satisfied that there are exceptional circumstances justifying that longer period of notice.

Extension of a period of suspension

See Fair Work Act s.428

The Commission may make an order extending the period of suspension specified in an order (the ***suspension order***) suspending protected industrial action for a proposed enterprise agreement if:

- the person who applied, or a person who could have applied, for the suspension order, applies for the extension, and
- the Commission has not previously made an order under this section in relation to the suspension order, and
- the Commission is satisfied that the extension is appropriate taking into account any matters the Commission considers relevant including the matters specified in the provision under which the suspension order was made.

If the Commission is permitted to make an order extending the period of suspension:

- the Commission must specify, in the order, the period of extension, and
- the Commission may specify, in the order, a longer period of notice for taking employee claim action (under s.430) of up to seven working days for the minimum period of notice if satisfied that there are exceptional circumstances justifying that longer period of notice.

An application for an order extending a suspension of protected industrial action must be accompanied by a copy of the order to suspend protected industrial action to which the application relates.[224]

Links to application form

Form F38 – Application for an order for an extension of a suspension of protected industrial action:

- www.fwc.gov.au/documents/forms/Form_F38.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F38.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[224] Fair Work Commission Rules r.32.

Employee claim action after a period of suspension

See Fair Work Act s.429

This section applies in relation to employee claim action for a proposed enterprise agreement if:

- an order suspending the employee claim action has been made, and
- a protected action ballot authorised the employee claim action:
  - some or all of which had not been taken before the beginning of the period (the ***suspension period***) of suspension specified in the order, or
  - which had not ended before the beginning of the suspension period, or
  - beyond the suspension period; and
- the suspension period (including any extension) ends, or the order is revoked before the end of that period.

Further protected action ballot not required to engage in employee claim action

A person may engage in the employee claim action without another protected action ballot.

For the purposes of working out when the employee claim action may be engaged in, the suspension period (including any dates authorised by the protected action ballot as dates on which employee claim action is to be engaged in) must be disregarded.

Nothing in this section authorises employee claim action that is different in type or duration from the employee claim action that was authorised by the protected action ballot.

This means that the protected industrial action that was initially approved by the protected action ballot can continue after the period of suspension has ended.

Notice of employee claim action after a period of suspension

See Fair Work Act s.430

Before a person engages in employee claim action for a proposed enterprise agreement after a suspension period, a bargaining representative of an employee who will be covered by the proposed enterprise agreement must give written notice of the action to the employer of the employee.

The period of notice must be at least:

- three working days, or
- if the Commission specified a longer period of notice in an order relating to the employee claim action – that period of notice.

The notice must state the nature of the employee claim action and the day on which it will start.

Part 5.2 – Powers of the Minister

Ministerial declarations

See Fair Work Act ss.431–434

The Federal Minister for Industrial Relations (the ***Minister***) may make a declaration, in writing, terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that:

- the industrial action is being engaged in, or is threatened, impending or probable, and
- the industrial action is threatening, or would threaten:
  - to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
  - to cause significant damage to the Australian economy or an important part of it.

A Ministerial declaration terminating protected industrial action for a proposed enterprise agreement:

- comes into operation on the day that it is made, and
- is not a legislative instrument.

Informing people of declaration

If the Minister makes a declaration terminating protected industrial action for a proposed enterprise agreement:

- the declaration must be published in the *Gazette*
- the Minister must inform the Commission of the making of the declaration, and
- the Minister must, as soon as practicable, take all reasonable steps to ensure that the bargaining representatives for the proposed enterprise agreement concerned are made aware:
  - of the making of the declaration, and
  - of the effect of Part 2–5 of the Fair Work Act (which deals with workplace determinations).

Gazette means the Government Notices Gazette.

Gazette notices contain a range of information about legislation, including proclamations and notices of Commonwealth government departments and Courts, and other notices required under Commonwealth law.

Ministerial directions to remove or reduce threat

If a declaration terminating protected industrial action for a proposed enterprise agreement is in operation, the Minister may give directions, in writing, requiring the following persons to take, or refrain from taking, specified actions:

- specified bargaining representatives for the proposed enterprise agreement, or
- specified employees who will be covered by the proposed enterprise agreement.

The Minister may only give directions that the Minister is satisfied are reasonably directed to removing or reducing the threat:

- to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
- to cause significant damage to the Australian economy or an important part of it.

A Ministerial direction to remove or reduce threat is not a legislative instrument.

Contravening a Ministerial direction

A person to whom a Ministerial direction applies must not contravene the direction.

Note: *This is a civil remedy provision.*

Part 6 – Enforcement and Appeals

This part will provide information on:

- the enforcement of Commission orders and the role of the Courts, and
- the Commission's appeals process.

Enforcement of Commission orders

The powers of the Fair Work Commission (the Commission) are different to the powers of the courts. The Commission is a tribunal and does not have the power to enforce the orders that it can make under the *Fair Work Act 2009* (Cth) (the Fair Work Act). The enforcement role is performed by either the Federal Court or the Federal Circuit Court. The powers of the courts (including powers to grant injunctions and make declarations) are not limited by any term of the Fair Work Act.

Role of the Federal Courts

If a person does not comply with a Commission order, a person affected may seek enforcement of the Commission's order through civil remedy proceedings in the Courts.

Typically applications of this kind are made to the Federal Circuit Court.

The Fair Work Acts provides a table in s.539 which details who may make an application to the Court for the various civil remedy provisions. Provisions relating to industrial action are set out in Items 14–24.

Failure to comply with an order may result in the Court imposing a pecuniary penalty or making other orders.

Related information

- Orders to stop or prevent unprotected industrial action

Types of orders made by the Courts

See Fair Work Act ss.545, 546 and 570

The types of orders the Courts may generally make in respect of a contravention or proposed contravention of a civil remedy provision include the following:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest), or
- a pecuniary penalty order.

Orders awarding compensation for loss are not available under the Fair Work Act in relation to contraventions of stop orders made under ss.418, 419 or 420 (see s.421(4)).

Orders awarding compensation for loss are available under s.417.

Pecuniary penalty orders

The Courts may, on application, order a person to pay a pecuniary penalty considered appropriate if satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in s.539 of the Fair Work Act.

In the case of a body corporate, the maximum penalty is five times the maximum for an individual.

A ***penalty unit*** is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening s.421 of the Fair Work Act (which prohibits a person contravening an order stopping industrial action) is 60 penalty units.

From 1 July 2023 a penalty unit was $313.[225]

- for an individual – 60 penalty units = $18,780
- for a body corporate – 5 x 60 penalty units = $93,900

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

Costs orders by the Courts

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.

[225] *Crimes Act 1914* (Cth) s.4AA and Crimes (Amount of Penalty Unit) Instrument 2023.

Appeals

The following information is limited to providing general guidance for appeals against decisions made by the Commission in dealing with applications related to industrial action.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal Proceedings Practice Note.

Note: The examples used in this section include decisions related to a variety of types of matters heard by the Commission. These examples have been used because they help explain the principles behind the appeal process.

Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.[226]

A ***person who is aggrieved*** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as, in some circumstances, a union or an employer association.[227]

In determining whether a person is a 'person aggrieved' for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context.[228]

Intervention

There is no provision of the Fair Work Act expressly dealing with intervention however the Commission has used the broad procedural power in s.589(1) to empower it to permit intervention in an appropriate case.[229]

Time limit for appeal – 21 days

An appeal must be lodged with the Commission **within 21 days** after the date the decision being appealed was issued.[230] If an appeal is lodged late, an application can be made for an extension to the time limit.[231]

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[226] Fair Work Act s.604(1).
[227] See for eg *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2015] FWCFB 7090 (Watson VP, Kovacic DP, Roe C, 27 October 2015).
[228] *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).
[229] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 (Lawler VP, O'Callaghan SDP, Bissett C, 23 December 2010) at para. 9.
[230] Fair Work Commission Rules r.56(2)(a)–(b).
[231] Fair Work Commission Rules r.56(2)(c).

Related information

- What is a day?

Considerations

In each appeal, a Full Bench of the Commission needs to determine two issues:

- whether permission to appeal should be granted, and
- whether there has been an error in the original decision.

Permission to appeal

The Fair Work Act provides that the Commission ***must*** grant permission to appeal if it is satisfied that it is in the public interest to do so.[232]

Public interest

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[233]

Some considerations that the Commission may take into account in assessing whether there is a public interest element include:

- where a matter raises issues of importance and general application
- where there is a diversity of decisions so that guidance from a Full Bench of the Commission is required
- where the original decision manifests an injustice or the result is counter intuitive, or
- that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[234]

The public interest test is not satisfied simply by the identification of error or a preference for a different result.[235]

[232] Fair Work Act s.604(2).
[233] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].
[234] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].
[235] See for eg *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) at para. 58, [(2012) 223 IR 177]; *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 (Catanzariti VP, Watson VP, Gostencnik DP, 22 May 2015) at para. 18.

Grounds for appeal

Error of law

An error of law may be a jurisdictional error, which means an error concerning the tribunal's power to do something, or it may be a non-jurisdictional error concerning any question of law which arises for decision in a matter.

In cases involving an error of law, the Commission is concerned with the correctness of the conclusion reached in the original decision, not whether that conclusion was reasonably open.[236]

Error of fact

An error of fact can exist where the Commission makes a decision that is 'contrary to the overwhelming weight of the evidence'.[237]

In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts.[238] If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision.[239]

It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker.[240] The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.[241]

Links to application form

Form F7 – Notice of Appeal:

- www.fwc.gov.au/documents/forms/Form_F7.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F7.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[236] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].
[237] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 155–156.
[238] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].
[239] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499].
[240] ibid.
[241] ibid.

Case example: **Interpretation and misapplication of provisions of the Fair Work Act – Permission to appeal granted**

McDonald's Australia Pty Ltd [2010] FWAFB 4602 (Watson VP, Kaufman SDP, Raffaelli C, 21 July 2010).

Facts

This decision involved an appeal against the decision of the Commission not to approve an enterprise agreement.

Outcome

The Full Bench determined that the Commission had misstated relevant tests in the Fair Work Act and misapplied relevant provisions central to the decision not to approve the agreement. On this basis, permission to appeal was granted and the original decision quashed.

Relevance

The Full Bench may only intervene and quash an original decision where it finds that an error has been made, in this instance the misapplication of relevant provisions.

Case example: **Public interest – Permission to appeal granted**

Re G.J.E. Pty Ltd [2013] FWCFB 1705 (Acton SDP, Smith DP, Ryan C, 3 April 2013).

Facts

This decision involved an appeal against a decision of the Commission not to approve an enterprise agreement. The employer had sought approval for the enterprise agreement on the basis that the employees were award free.

Outcome

The Commission disagreed with the employer, determining that the employees were covered by the General Retail Award 2010. On that basis, the agreement could not be approved because it did not pass the BOOT.

Relevance

The Full Bench considered that the appeal raised general issues regarding the coverage of modern awards and on that basis was satisfied that it was in the public interest to grant permission to appeal. However, the Full Bench was not satisfied that the Commission's decision was affected by error, and confirmed the original decision.

Case example: **Misapplication of statutory test – Permission to appeal granted**

Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), [(2011) 203 IR 18].

Decision at first instance [2010] FWA 9958 and order PR505584 (Ryan C, 30 December 2010).

Facts

This decision involved an appeal against a decision of the Commission reinstating an employee on the basis that the employee's dismissal was without valid reason, and therefore harsh, unjust or unreasonable.

Outcome

In deciding the initial application, the Full Bench determined that there had been a failure to properly consider whether there was a valid reason for termination in accordance with s.387(a). This misapplication of the statutory test was significant and productive of a plainly unjust result. The appeal was allowed, the order quashed, and the original application dismissed on rehearing.

Relevance

The Full Bench determined that the preservation of public confidence in the administration of justice was a matter of public interest and could be undermined by decisions that were manifestly unjust.

Case example: **Interpretation of provisions of the Fair Work Act – Permission to appeal granted**

Ulan Coal Mines Limited v Honeysett [2010] FWAFB 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010), [(2010) 199 IR 363].

Decision at first instance [2010] FWA 4817 (Raffaelli C, 12 July 2010).

Facts

These were two appeals against a decision determining whether certain dismissals were the result of genuine redundancies.

Outcome

The Full Bench concluded that the Commission's decision was open on the evidence and other material before it and did not involve any error in interpretation of the section.

Relevance

These appeals concerned the interpretation of the redeployment exclusion set out in s.389(2) of the Fair Work Act. This provision of the Fair Work Act had not been considered by a Full Bench before, therefore the Full Bench determined that it was in the public interest to grant permission to appeal.

Case example: **No error in findings of fact or exercise of discretion – Permission to appeal refused**

Cotton On Group Services Pty Ltd v National Union of Workers [2014] FWCFB 8899 (Watson VP, Gostencnik DP, Bissett C, 23 December 2014).

Facts

Cotton On applied for permission to appeal a decision of the Commission to make a majority support determination regarding Cotton On employees.

Outcome

The Full Bench was required to consider whether the Commission had erred in finding that the group of employees covered by the majority support determination was 'fairly chosen'. The Full Bench was not satisfied that Cotton On had established any error in the way the discretion was exercised. Accordingly, permission to appeal was refused. It was not sufficient to argue that a different result should have been reached in the exercise of the discretion.

Relevance

A discretionary decision can only be overturned on appeal if it is established that there was an error in the way the discretion had been exercised.

Staying decisions

See Fair Work Act s.606

If the Commission hears an appeal from, or conducts a review of a decision, the Commission may order that the operation of the whole or part of the decision be stayed by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate, until a decision in relation to the appeal or review is made, or the Commission makes a further order.

If a Full Bench is hearing the appeal or conducting the review, a stay order in relation to the appeal or review may be made by:

- the Full Bench
- the President
- a Vice President, or
- a Deputy President.

Exception – Protected action ballot order

A decision to make a protected action ballot order cannot be stayed.[242]

[242] Fair Work Act s.606(3).