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Protected Industrial Action and Voluntary Collective Bargaining Under the *Fair Work Act 2009*

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Abstract

This article explores the enactment of a right to strike in the Australian federal industrial relations system in order to ascertain what the legislation reveals about the commitment of successive federal governments to the principles of voluntary collective bargaining. The article reflects briefly on Australia's international obligations to respect the right to strike under ILO and UN Conventions before outlining the main features of protected industrial action under the federal system from 1993 through to the passage of the Fair Work Act 2009 (Cth). The discussion reveals that the right to strike in Australia is very limited, particularly with respect to the content and level of agreement making that may be supported by protected industrial action. Focusing on multi-enterprise agreement making in particular, the article concludes that the current legislative regime does not permit industrial parties to determine their own industrial agendas and support those agendas through protected industrial action.

Keywords

Australian industrial law; Fair Work Act; labour rights; multi-employer collective bargaining; protected industrial action; right to strike.

Introduction

Over the past twenty years, there has been a shift in many industrialised economies away from the industrial relations compromises that marked the post-World War II period, in particular the recognition of trade unions as social partners in 'economic and social processes through various tripartite arrangements and schemes facilitating collective bargaining' (Sharard 1996: 1). This was noted by the Committee on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization (ILO) in 1994 when it expressed concern at legislative trends giving precedence to individual rights over collective rights, and at structural changes used to undermine trade unions and

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fragment collective bargaining (ILO 1994: [236]). These changes occurred in Australia both during the later years of the Hawke-Keating Australian Labor Party (ALP) Governments and during the following eleven-years under the Howard Liberal Party-National Party Coalition Governments from 1996–2007. This shift towards individualism and the fragmentation of bargaining occurred in Australia during the transition from centralised fixation of employment conditions, through conciliation and arbitration processes, to the negotiation of wages and conditions through voluntary collective bargaining (see Cooper and Ellem 2008).

One component of this change in the federal regulation of industrial relations was the introduction of a limited 'right to strike' in federal industrial legislation in the form of protected industrial action in support of agreement making. The protected industrial action provisions, originally introduced through legislation in 1993, constitute the only context in which workers covered by the federal industrial relations system can lawfully exercise the 'right to strike'. Virtually all industrial action undertaken outside of that regime may be subject to some form of legal sanction arising either at common law (breach of contract, economic torts; see Ewing 1989) or under certain Statutes (boycott provisions in the *Trade Practices Act 1974* (Cth),[1] sanctions under federal industrial legislation) (see McCrystal 2010, ch 6). Introduction of a right to strike constituted recognition by the then ALP Government that if employees were to be encouraged to engage in collective bargaining over the terms and conditions of their employment, then they had to be provided with a right to strike in support of those claims in order to have leverage in negotiations. However, this was not the only effect of the legislation. Instead, as Gordon Anderson (1997: 158) has argued, governments implementing 'new-right' labour market policies 'were not slow to appreciate that the most effective way of implementing [their policies of individualisation and enterprise focus] was to remove or restrict the rights of workers to strike'. Recognition of a legal right to strike served dual purposes: to give employees leverage in bargaining but also to control the nature and extent of that leverage, limiting the circumstances in which it could be brought to bear. The nature of the legislative regime implementing the right to strike in Australia shows that this is something that successive governments have understood.

This article will outline the protected industrial action provisions in the federal industrial relations system, beginning with their enactment in 1993 and moving through to the provisions as they were most recently enacted under the *Fair Work Act 2009* (Cth) (*FW Act*). The discussion will begin by briefly outlining the obligation to respect the right to strike and to promote voluntary collective bargaining in international law. It will then examine the Australian legislative provisions, before reflecting on the degree to which the current ALP Government is committed to allowing industrial parties to pursue voluntary collective bargaining in order to determine their own industrial agendas. This commitment will be assessed by reference to a detailed discussion of multi-enterprise bargaining and the failure of the legislation to extend protection to industrial action taken in support of pattern bargaining and multi-enterprise agreements. The limitation of protected industrial action to enterprise specific bargaining in

the context of a legislative regime that draws no other substantive distinction between single enterprise and multi-enterprise bargaining illustrates the failure of the legislative regime to encompass truly *voluntary* collective bargaining.

The Right to Strike and Voluntary Collective Bargaining

Australia is bound in international law to respect the right to strike under Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights, as a component of the principles of freedom of association protected by the Constitution of the ILO (ILO 1994: [146]) and as a component of the obligation to respect the right of workers to organise to protect their economic and social interests in Article 3 of the ILO's *Freedom of Association and Protection of the Right to Organise Convention*, 1948, No. 87 (ILO 1994: [149]; see further Creighton 1998; Creighton 2007; McCrystal 2009–2010). This obligation is not limited to protection of the right to strike for the purposes of collective bargaining, but extends to recognition of the right to strike for workers to protect and further their 'economic and social interests' (ILO 1994: [147], [165]; see also Novitz 2003 and Ewing 2004). Further, Article 4 of the ILO's *Right to Organise and Collective Bargaining Convention*, 1949, No. 98 requires ratifying States to encourage and promote the full development of voluntary collective bargaining between employers, their associations and workers' associations. The essential element of this obligation is the promotion of collective bargaining which is of a voluntary nature. This has been found to imply recognition of the autonomy of the bargaining parties (ILO 1994: [235]).

The ILO principles recognise a right to strike that is not limited to using industrial action as a bargaining tactic. The Australian protected industrial action model does not recognise that broader right, and so is not compliant with Australia's international obligations (McCrystal 2009–2010). Nevertheless, this article will evaluate the Australian model on its own terms: to what extent does it facilitate voluntary collective negotiation and ensure the autonomy of industrial parties in that process?

The essential issue raised by this question is whether recognition of the right to strike to support collective bargaining implies that the ALP Government has accepted that collectives of workers can and ultimately will use collective power to support their choices in bargaining. By 'choices' I am referring to the capacity of workers to choose both whom they associate with, their 'fellows'; and what they define as their interests — the range of issues over which they are prepared to exercise their collective power. For example, can university employees choose to identify their 'fellows' to include other university employees who work outside of their own universities? Can they choose to define their interests to include issues relating to higher education policy and funding, given the dependence of Australian universities on government funding and the impact of higher education policy on their working lives? The regulatory structure set up in the *FW Act* rejects the proposition that workers have a right to take industrial action to support these choices with respect to collective bargaining. Instead the current ALP Government approaches the regulation of industrial action in the same manner that successive governments have before it, including both

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the Keating ALP Government and the Howard Coalition Government. The *FW Act* only permits protected industrial action as a last resort option in protracted bargaining impasses, and even then only with respect to a much more limited range of choices over subject matter and bargaining partners (Orr and Murugesan 2007; McCrystal 2009). Access to industrial action is firmly controlled, and available only where workers' choices match up with the Government's regulatory agenda.

Protected Industrial Action in the Federal Industrial Relations System

The first legislated protected industrial action regime in the federal industrial relations system came through legislation introduced into the Commonwealth Parliament by the then Keating Labor Government in 1993. The *Industrial Relations Reform Act 1993* (Cth) amended the *Industrial Relations Act 1988* (Cth) (*IR Act*) to allow for protected industrial action to occur in support of union negotiated enterprise level agreements. Peaceful industrial action taken in accordance with the legislative regime was protected against liability under State and Territory laws, against most sanctions under the *IR Act*, and employees taking protected industrial action were protected against termination of employment. Without exploring the model in depth (see McCarry 1994), it is possible to outline the key features of the regime. Thus, to be 'protected':

- Industrial action could be taken only to support enterprise level bargaining by trade unions and their members who were negotiating an agreement with an employer. Only those union members directly employed by the relevant employer could take protected industrial action;
- Industrial action could only be taken where the relevant negotiating party was genuinely trying to reach agreement with the other negotiating parties for the agreement;
- Industrial action could only be taken after one party initiated a 'bargaining period' by providing 7 days' written notice to other relevant parties;
- Industrial action could only be taken in support of matters that 'genuinely pertained' to the relationship between an employer and employees, and could only be taken in support of the claims made for that agreement (for discussion of the 'genuinely pertains' requirement see Harris 2006);[2]
- Industrial action had to be authorised in accordance with the rules of each particular union and a procedure existed to allow union members to apply to the Australian Industrial Relations Commission (AIRC) for a ballot of members to authorise protected industrial action;[3]
- During the bargaining period industrial action could only be taken if a period of notice had been provided to other negotiating parties;
- Once protected industrial action had commenced, it could be brought to an end if the parties were not complying with the requirements for engaging in protected industrial action (not genuinely trying to reach agreement, engaged in a demarcation dispute or had failed to comply with an order of

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the AIRC). The only ground on which protected industrial action could be brought to an end by the AIRC if there was no 'fault' on the part of the party engaged in protected industrial action was where protected industrial action was a threat to life, personal safety or a significant part of the Australian economy;

- Protected industrial action in the form of a lockout could be taken by employers who were negotiating an enterprise level agreement with a trade union.

After a Coalition government was elected in 1996, the Commonwealth Parliament passed substantial amendments to the *IR Act* in the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). However, the newly named *Workplace Relations Act 1996* (Cth) (WR Act) left the protected industrial action model largely intact. The most significant changes were the extension of protected industrial action to include employees negotiating agreements through an employee negotiating party (rather than through a trade union) and the restriction of access to protected industrial action until after the nominal expiry date of any existing agreement. Further, it also included a model of protected industrial action for individual employers and employees negotiating the terms of individual statutory agreements called Australian Workplace Agreements (AWAs). It also prohibited employers from making payments to employees for any period during which they were engaged in industrial action (for discussion see McCarry 1997).

This was the structure of the protected industrial action model which remained in place throughout the first nine years of the Coalition Government's term in office. During this time, there were minor changes to the statutory regime and various decisions in the Federal Court which affected the operation of the model in practice (see Creighton and Stewart 2000; Creighton and Stewart 2005 for detail). However, the Coalition did not have sufficient seats in the Senate to achieve the more significant legislative changes that it had wanted to implement in 1996 and which it tried unsuccessfully to pass through the Commonwealth Parliament in 1999 (see O'Neil 2005; Pittard 1999a, 1999b).

The November 2004 federal election gave the Coalition Government control of the Senate from July 2005. Industrial relations returned to the top of the Government's legislative agenda, and in late 2005, the Commonwealth Parliament passed the *Workplace Relations Amendment (Work Choices) Act* (Cth) (Work Choices) which took effect in March 2006 (for discussion see *ELRR* (2006) v 16(2)). In common with the 1996 amendments, the Work Choices changes retained the basic structure of the protected industrial action model. However it made substantial changes to the detail of the provisions, making protected industrial action available in fewer circumstances (see McCrystal 2006). In particular, the changes:

- Reinforced the prohibition against industrial action in support of multi-enterprise or industry wide agreements through the introduction of anti 'pattern bargaining' provisions which explicitly prevented industrial action taken with the intention of securing 'common wages and conditions'

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across different enterprises. These provisions specifically targeted the use of co-ordinated industrial action to obtain standardised wage and condition outcomes in different enterprise agreements across an industry (for an example of pattern bargaining see the discussion of 'campaign 2000' in Ellem 2000, 2001).

- Reduced the number of claims that could be pursued by parties taking protected industrial action through the introduction of a list of 'prohibited content' which could not be sought in an enterprise agreement (while retaining the 'genuinely pertains' requirement);
- Imposed a requirement for both union and non union negotiating parties to apply to the AIRC to order a secret ballot of eligible employees to approve any proposed protected industrial action.[4] A ballot order from the AIRC was made conditional on demonstrating that the applicant for the ballot was genuinely trying to reach agreement with other negotiating parties and was not engaged in pattern bargaining (see Orr and Murugesan 2007);
- Required protected action ballots, if authorised, to be conducted by either the Australian Electoral Commission (AEC) or an independent ballot agent;
- Expanded the grounds on which protected industrial action could be brought to an end by the AIRC to include suspension or termination of a bargaining period where a third party could demonstrate that they had suffered significant harm or where one of the parties requested a cooling off period.
- Extended to the Minister for Employment and Workplace Relations the power of the AIRC to suspend or terminate protected industrial action on essential services grounds (where action constituted a threat to life, personal safety or to a significant portion of the Australian economy).

The Act also repealed the AWA protected industrial action provisions which, in practice, had largely been used by employers to lock out employees in support of individual agreements or to assist with de-unionisation strategies (see Briggs 2007: 215–216).[5]

The impact of the *Work Choices* amendments as a whole has been well traversed within the literature (see eg Forsyth and Stewart 2009), as has the concerted trade union campaign which assisted in the ALP's defeat of the Coalition at the 2007 federal election (see Muir 2008; Oliver 2008). The ALP had campaigned on a platform of 'tearing up' the *Work Choices* amendments and the passage of the FW Act by the Commonwealth Parliament in 2009 repealed almost all of the *WR Act*. In its place it introduced a system which contained fundamental changes (see Stewart 2009), including new 'good faith' bargaining obligations, and bargaining representative recognition rules and procedures to enable a majority of employees to force an employer to the bargaining table (see Forsyth

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2009; Rathmell 2008). However, the provisions regulating protected industrial action were re-enacted in the *FW Act* in substantially the same form (see McCrystal 2009). In particular, the *FW Act*:

- Retains the requirement that industrial action can only be taken in support of enterprise level bargaining (ss 409(1), 410(1)) and continues to prohibit protected industrial action involving 'pattern bargaining' in support of industry wide agreement making (s 409(4));[6]
- Reduces the list of 'prohibited content' to a shorter list of 'unlawful terms' (s 194);[7] and expands the 'genuinely pertains' requirement to include both matters that pertain to the relationship between an employer and an employee and matters that relate to the relationship between a union and an employer (s 172(1)).[8] These changes increase the range of claims that may be supported by protected industrial action;
- Removes the requirement for negotiating parties to initiate a 'bargaining period' that had been in place since 1993 but retains the prohibition on protected industrial action during the currency of a collective agreement;
- Retains the compulsory ballot requirement but tightens the procedure (s 409(2)). In particular, it retains the requirement that applicants for a ballot establish before Fair Work Australia that they are 'genuinely trying to reach agreement'. It also maintains the requirement for the ballot to be conducted by the AEC or a ballot agent.[9]
- Retains the existing grounds to suspend or terminate protected industrial action (ss 424–426) and adds a new ground allowing Fair Work Australia to suspend or terminate industrial action and arbitrate if an intractable bargaining dispute is causing significant economic harm to the bargaining parties themselves (s 423); and
- Abolishes the ability of employers to engage in proactive lockouts, restricting employer access to protected industrial action to action taken in response to employee industrial action only (s 411).

This overview of the federal protected industrial action laws from 1993 shows a regulatory continuum along which it is accepted at all times by both the ALP and the Coalition that protected industrial action may not be undertaken by employees to support their claims to bargain at a multi-employer or industry level; and can only be used to support 'acceptable' claims, those with a genuine occupational connection that have not otherwise been deemed to be 'prohibited' or 'unlawful'. Further, as we shift along the continuum from 1993–2009, the regulatory tolerance of the consequences of permitting workers to take industrial action to support this limited range of claims in bargaining gradually reduces (see Table 1). At first protected industrial action which is otherwise in accordance with the provisions of the Act is only to be halted in circumstances where it affects 'essential services' as defined in the Act. However, this is expanded in

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Table 1: Protected Industrial Action Under Federal Industrial Relations Legislation

Years	**1993–2006** *Industrial Relations Act 1988* **(as amended in 1993)** *Workplace Relations Act 1996*	**2006–2009** *Workplace Relations Act 1996* **(as amended by the Work Choices Legislation)**	**July 2009 →** *Fair Work Act 2009*
Main Features	Protected industrial action could be taken to support negotiations for enterprise level bargaining by either unions (1993–2006), groups of workers (1996–2006) or employers;* The party taking industrial action had to be 'genuinely trying to reach agreement' with other negotiating parties.	Protected industrial action could be taken to support negotiations for enterprise level bargaining by either unions, groups of workers or employers; The party taking industrial action had to be 'genuinely trying to reach agreement' with other negotiating parties. Industrial action in support of industry or multi-employer claims was subject to direct injunctive relief under anti pattern bargaining provisions.	Protected industrial action can be taken to support negotiations for enterprise level bargaining by either unions or groups of workers. The party taking industrial action must be 'genuinely trying to reach agreement' with other negotiating parties. Industrial action in support of industry or multi-employer wide claims is subject to direct injunctive relief under anti pattern bargaining provisions. Employer protected industrial action limited to 'defensive' action.
	Protected industrial action could only be taken in support of matters that 'genuinely pertained' to the employment relationship.	Protected industrial action could only be taken in support of matters that 'genuinely pertained' to the employment relationship and could not be taken in support of a lengthy list of 'prohibited content'.	Protected industrial action can only be taken in support of matters that 'genuinely pertain' to the relationship between employees and their employer; and any union to be covered by the agreement and the employer; but cannot support claims for 'unlawful content'.

** Protected industrial action was also available for individual employees and employers in the context of negotiations over AWAs from 1996–2006.*

Years	**1993–2006** *Industrial Relations Act 1988* **(as amended in 1993)** *Workplace Relations Act 1996*	**2006–2009** *Workplace Relations Act 1996* **(as amended by the Work Choices Legislation)**	**July 2009 →** *Fair Work Act 2009*
	Authorisation of protected industrial action for unions had to comply with the rules of each particular union; but union members could apply to the AIRC for a ballot of members.	Required all employee (union or non union) protected industrial action to be authorised in a ballot ordered by the AIRC. The AIRC was required to refuse to order a ballot if the applicant had not been 'genuinely trying to reach agreement' or 'pattern bargaining'.	Requires all employee (union or non union) protected industrial action to be authorised in a ballot ordered by FWA. FWA is required to refuse to order a ballot if the applicant has not been 'genuinely trying to reach agreement'; Good faith bargaining orders are also available against bargaining representatives.
Main Features	Where parties were otherwise acting in accordance with the legislation and AIRC orders, protected industrial action could only be brought to an end by the AIRC where it threatened life, safety or an important part of the Australian economy.	Where parties were otherwise acting in accordance with the legislation and AIRC orders, protected industrial action had to be brought to an end by the AIRC where it threatened life, safety or an important part of the Australian economy; or where parties requested a cooling off period; or where significant harm was being inflicted on a third party to the dispute.	Where parties are otherwise acting in accordance with the legislation and FWA orders protected industrial action must be brought to an end by FWA where it threatens life, safety or an important part of the Australian economy; where parties request a cooling off period; or where significant harm is being inflicted on a third party to the dispute. FWA may suspend or terminate protected industrial action which is causing significant economic harm to the bargaining participants.

** Protected industrial action was also available for individual employees and employers in the context of negotiations over AWAs from 1996–2006.*

2006 to include circumstances where one of the parties wants a break (a cooling off period) or where unacceptable harm is caused to a third party to the dispute. In 2009, unacceptable harm to the bargaining parties themselves is added to the list.

Despite this, some aspects of the *FW Act* modify the *Work Choices* approach. In particular, restricting employer protected industrial action to 'response' action brings Australia into line with the OECD mainstream with respect to employer industrial action. Very few OECD countries permit employers to engage in 'offensive' lockouts (Briggs 2005). Further, the extension of the 'matters pertaining' requirement to the relationship between unions and employers has the potential to open up new areas for agreement making. However, neither of these changes has made any substantive difference to the regulatory agenda which underlies the protected industrial action provisions: to control the choices of industrial parties with respect to the use of protected industrial action. The ALP Government could have abolished the 'genuinely pertains' requirement, which is a test that evolved from the old requirement for an 'industrial dispute' when federal industrial relations legislation was jurisdictionally based on the constitutional conciliation and arbitration power (see Williams 1998). The test has not been constitutionally mandated at least since the jurisdictional basis of the enterprise bargaining provisions was largely shifted to the constitutional power over corporations in 1993 (McCarry 1994).[10] However, the ALP chose to retain this requirement in the *FW Act*, although it no longer has any clear constitutional rationale and has proven to be extremely difficult to apply in practice (Harris 2006; Stewart 2009: 29).[11] Further the ALP could have allowed protected industrial action to occur to support multi-enterprise agreements, but it chose to retain the enterprise focus of the legislation which has been in place since 1993.

This discussion demonstrates that the *FW Act* retains the fundamental elements of the pre-existing approach to the regulation of protected industrial action. The *FW Act* continues to restrict employee and union choices over the use of industrial action in support of the level at which employees want to engage in collective bargaining and the subject matter of such bargaining. Further, the *FW Act* tightly controls the potential consequences of any protected industrial action by containing extensive provisions to limit damage to the economy, third parties or the negotiating parties themselves. All of these elements undermine the role of protected industrial action as a component of a system of voluntary collective bargaining in which the collective may take industrial action to support their participation and their choices within the bargaining process. Further, they reduce the role of industrial action to a mechanism to resolve insoluble bargaining disputes, a role which may be diminished in practice by the extent to which Fair Work Australia chooses to exercise its ability to suspend or terminate protected industrial action.

Industrial Action and Multi-Enterprise Agreement Making

The use by the current ALP Government of the protected industrial action provisions to tightly control the choices of industrial parties with respect to the right to strike, limiting their autonomy in bargaining, is illustrated by the ap-

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proach taken in the *FW Act* to the level at which collective bargaining supported by industrial action can take place. The ALP Government has maintained the focus in the federal legislation on enterprise level bargaining. Industrial action can only be taken to support negotiations for a single enterprise agreement and industrial parties must be genuinely trying to reach agreement at that single enterprise in order to get a protected action ballot or to actually take protected industrial action. However, despite this, the *FW Act* does not retain the level of control over potential multi-employer or industry level agreement making that have been features of the federal legislation since 1993. In particular, parties who wish to negotiate and enter into multi-employer agreements no longer need to convince the federal regulatory agency that a multi-employer agreement is in the public interest in order to negotiate (the situation after the *Work Choices* amendments) or register (the situation before the *Work Choices* amendments) a multi-employer agreement. Parties are now free to engage in multi-employer or industry level negotiations and register multi-enterprise agreements without scrutiny or oversight. Further, where multi-employer bargaining could be of assistance to overcome a history of long term reliance on awards, low pay or failure to undertake collective bargaining in low paid sectors, Fair Work Australia can require employers to bargain in good faith at a multi-employer level. First contract arbitration is available in the low paid bargaining stream where bargaining does not produce an agreement.

Under these changes to the federal legislation, the express legislative bias in favour of enterprise level agreement making has been removed.[12] It is no longer presumed in the legislation that the public interest is best served by enterprise level bargaining unless the bargaining parties can demonstrate a public interest case for multi-employer bargaining. Further, multi-employer bargaining is mandated in cases where access to such bargaining can be shown to be necessary to move certain industries and occupations off a history of award reliance. However, industrial action is not available to support the choice of workers to engage in multi-enterprise collective bargaining. Protected industrial action is only available for enterprise level agreement making and cannot be in support of pattern bargaining. This means that while workers can request multi-employer bargaining and can participate in such bargaining, they cannot support either their choice to engage in such bargaining or their particular claims through protected industrial action. Further, even where multi-employer negotiations are mandated by Fair Work Australia in the context of the low paid bargaining stream, industrial action cannot be undertake to support negotiations. Although first contract arbitration is available, this does not empower the workers concerned to negotiate or to act collectively, and does not offer them a means to back up their negotiating claims with respect to any further collective agreements, unless they choose to revert to a single enterprise agreement.

What this demonstrates is that despite the theoretical removal of the substantive differences between single enterprise and multi-enterprise agreement making in the *FW Act*, there has been no shift away from the refusal to accept that voluntary collective bargaining entails recognition of the autonomy of the industrial parties, and in particular their right to set their own bargaining agenda.

This reflects the ongoing failure of successive federal governments to accept the logical dictates of allowing voluntary collective bargaining supported by a right to strike: that the parties themselves can choose the issues over which they are prepared to engage in industrial action.

The issue of bargaining level and the right to strike is an important one if the coverage of collective bargaining is to increase in Australia. Collective bargaining in Australia currently only occurs in any significant way in the public sector and in large unionised private enterprises (van Wanrooy et al 2009). Traditionally non unionised sectors (for example services sectors), low skilled and low paid workers often have low union density rates, poor bargaining infrastructure in their workplaces and remain unlikely to engage in collective bargaining (van Wanrooy et al 2009). These workers have historically relied upon the award system for the maintenance of their terms and conditions of employment, a system in which trade unions as institutional actors assisted in raising the living standards of workers who were neither their members or employed in the workplaces of their members (Cooper and Ellem 2008). With the change in the award system from 'living wage' to 'safety net' and the change in the setting of awards from industrial party-driven arbitration to AIRC-led regulation (see Murray and Owens 2009), these workers are no longer benefiting from the gains made by the union movement generally. The inability of the union movement to support their claims to industry wide or multi-employer bargaining through protected industrial action compounds the difficulty of spreading the gains made through bargaining to these sectors of the community. Enterprise level bargaining, particularly across small enterprises, is significantly more resource intensive. It costs more to organise and more to negotiate. Further, the impact of any actual enterprise level industrial action is significantly more contained (Anderson 1997). In examining the bargaining cultures of Japan, the United States and the United Kingdom, Peter Sheldon has demonstrated that an enterprise only bargaining culture entrenches coverage in agreement making at levels that closely approximate union density levels (Sheldon 2008). In these countries the benefits of agreement making are confined to strongly unionised workplaces and enterprise bargaining has failed to spread the benefits of rising prosperity beyond actively unionised workplaces (Sheldon 2008). The failure to permit unions to take protected industrial action in support of multi-enterprise agreement making will perpetuate these problems within the Australian industrial relations system.

Conclusion

The unwillingness of the ALP Government to respect the right to strike and to accept the logical dictates of voluntary collective bargaining is part of a broader problem with the *FW Act* that is being voiced by a range of scholars. The Act gives primacy and protection to individual rights but does little to actively foster collective rights or collective action (see Stewart 2009, Sheldon 2008, Ewing 2008). This leaves individuals with what appears to be a greater ability to exert their statutory and safety net rights; but ultimately impoverishes their capacity to contribute to workplace democracy and to actively participate in determining the terms and conditions under which they work.[13] Industrial action, or at least

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the threat of such action, has always been an important component in allowing workers to assert their rights, to have a voice in the workplace and in ensuring a 'spread' of the gains of bargaining across the board. The stage managed regulatory approach adopted in the *FW Act* will not assist in reinvigorating the role and place of collectives in our workplaces or in increasing the coverage of collective bargaining in Australia.

Notes

1. As a consequence of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth), the *Trade Practices Act* will be renamed the *Competition and Consumer Act 2010* (Cth) as of 1 January 2011.
2. As to the meaning of 'genuinely pertains to the relationship between an employer and an employee' see further *Electrolux Home Products v AWU* (2004) 221 CLR 309.
3. These provisions were rarely used in practice. For example only 8 applications for ballots were made to the AIRC from July 2001–June 2005 (AIRC 2004–2005: 61–62).
4. Since the introduction of the secret ballot provisions in 2006 at the time of writing there had been only one reported application made by an employee negotiating party to the AIRC or FWA for a protected action ballot. In *Canning v Fremantle Port Authority* [2008] AIRC 309, Michael Canning, a member of the Maritime Union of Australia (MUA) applied to AIRC for a protected action ballot order after it was determined that the MUA did not have industrial coverage at the relevant workplace.
5. For example, see *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* (2000) 104 FCR 80 which involved an eight month AWA lockout.
6. As to the meaning of the definition of 'pattern bargaining' in s 412 of the *FW Act* see *NTEU v University of Queensland* [2009] FWA 90.
7. A term of an enterprise agreement will be an unlawful term under *FW Act* s 174 if it is a discriminatory term (one which discriminates against an employee covered by the agreement), an objectionable term which is a term which requires or permits a breach of the general protections under the *FW Act* or which provides for the collection of a bargaining services fee from employees subject to the agreement) or if it is a term which modifies the application of the *FW Act* in any one of three areas: the qualifying period for unfair dismissal, the industrial action provisions and aspects of the right of entry provisions.
8. Under *FW Act* s 172(1) permitted matters in enterprise agreements may also include deductions from wages for any purpose authorised by an employee who will be covered by the agreement. Such terms have previously been found not to pertain to the employment relationship, see *Re K L Ballantyne & NUW (Laverton Site Agreement) 2004* (2004) AIRC PR 952656, 22nd October. Agreements may also contain provisions that deal with the operation of the agreement.

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9. It is theoretically possible under the *FW Act* for the bargaining representative who has applied for the protected action ballot order to be appointed the ballot agent for the purposes of administering the ballot (in which case it is likely that Fair Work Australia would also appoint an independent advisor).
10. It is unclear whether the requirement was constitutionally necessary at all given the High Court decision in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 which found that the meaning of industrial dispute under s 51(35) of the Constitution was wider than the statutory definition of 'industrial dispute' (which was defined as a dispute about matters pertaining to the relationship between an employer and an employee) under s 4(1) of the *Industrial Relations Act 1988* (Cth).
11. The 'genuinely pertains' requirement has been a source of confusion during the first year operation of the *FW Act* from 1 July 2009, particularly with respect to union claims which seek to restrict or impact upon the hiring of independent contractors or labour hire workers. See eg: *Australian Postal Corporation v CEPU* [2009] FWAFB 599; *AMWU v Bitzer Australia Pty Ltd t/as Buffalo Trident* [2009] FWA 962; *AWU v Alcoa World Australia* [2009] FWA 796; *Australian Postal Corporation v CEPU* [2010] FWAFB 344.
12. It should, however, be noted that one of the express objectives of the *FW Act* (s 3(f)) is to achieve productivity and fairness 'through an emphasis on enterprise-level collective bargaining'.
13. For discussion of similar problems in the UK see Wedderburn 2002.

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