

OUTLINE OF SUBMISSIONS TO FAIR WORK AUSTRALIA



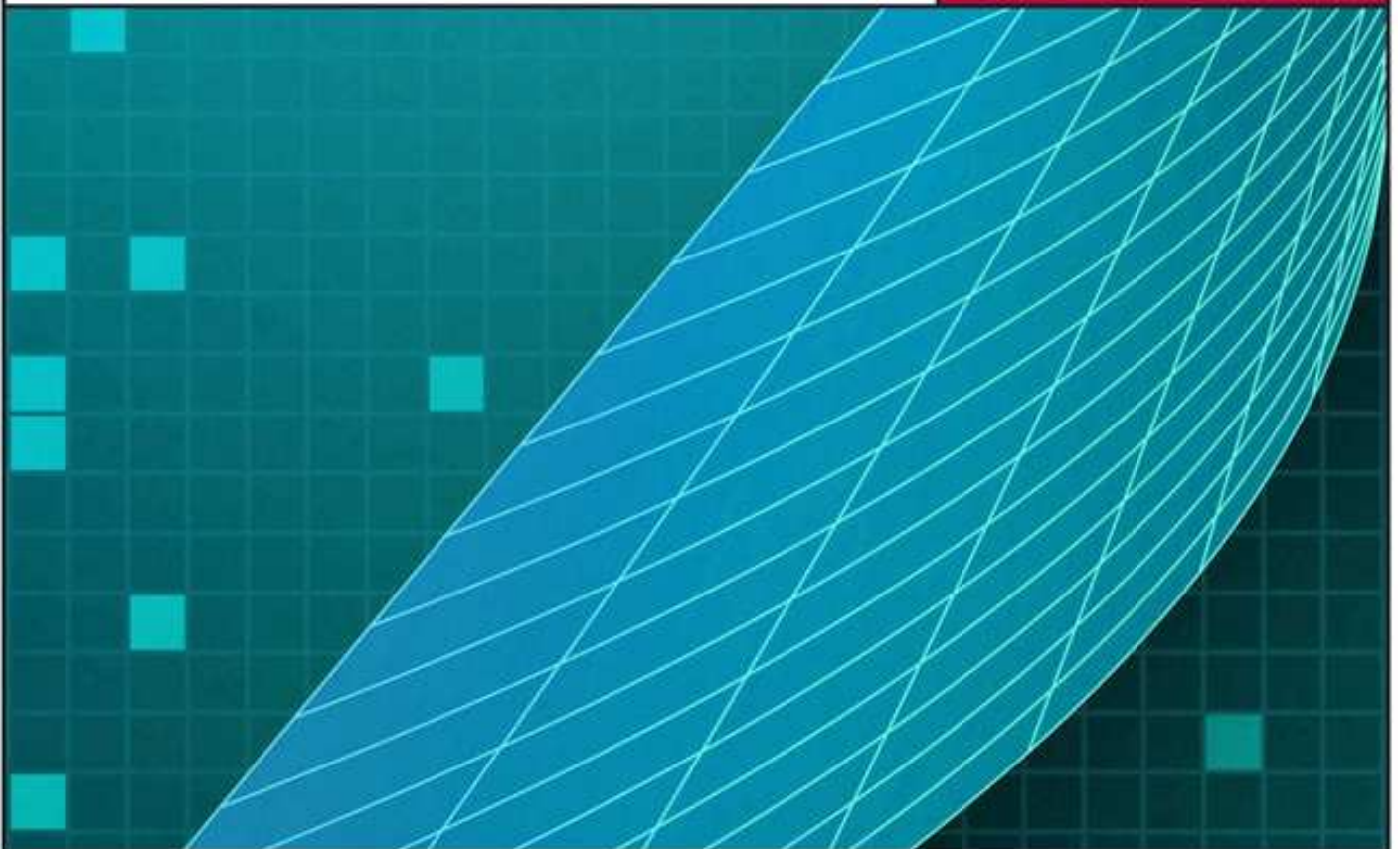
C2011/90 and C2011/3563

**Appeals against a decision and order of Commissioner
Harrison re. JJ Richards and Sons**



AUSTRALIAN INDUSTRY GROUP

15 April 2011



C2011 / 90 and C2011 / 3563

OUTLINE OF SUBMISSIONS

1. Introduction

1. Ai Group seeks leave to make submissions in these proceedings.
2. We submit that Commissioner Harrison has misinterpreted and incorrectly applied the law in a number of key areas.
3. Accordingly, we submit that the Commissioner's decision should be overturned and the protected action ballot order quashed.

2. Leave sought to make submissions

4. Section 590 of the *Fair Work Act 2009* (FW Act) gives FWA the power to inform itself in relation to any matter before it, in such manner as it considers appropriate. This includes granting a party with a substantial interest in the outcome the right to make submissions.
5. A "person who is aggrieved" by a decision of FWA may appeal to a Full Bench or intervene in an appeal lodged by another party: FW Act, s.604; *Tweed Valley Fruit Processors Pty Ltd v Ross* (1996) 137 ALR 70 at 90-91; (1996) 65 IR 393; *CFMEU v Woodside Burrup Pty Ltd* [2010] FWAFB 6021 at [3]–[5], and *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* [2010] FWAFB 4337 at [9]–[12].

6. Ai Group's interest in these proceeding meets the relevant tests.
7. Ai Group and its members have a direct and substantial interest in this matter.
8. The issues being considered by the Full Bench in this case have wide implications for employers who have existing enterprise agreements, those who wish to bargain and those who do not wish to bargain.
9. Ai Group is a major registered organisation which represents employers in a wide range of industries including manufacturing, construction, ICT, automotive, printing, transport, labour hire and numerous others.
10. Ai Group is a "peak council" within the meaning of the term defined in the FW Act and is formally recognised as a State Peak Council in the NSW Industrial Relations System. (This was held to be the case in *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* [2010] FWAFB 4337 at [9] – [12]).

3. Nature of the appeal

11. The appeals are to a Full Bench of FWA and therefore will proceed by way of rehearing.¹
12. The powers of the Full Bench may only be exercised if it identifies some error on the part of the primary decision-maker.²

¹ See *McDonald's Australia Pty Ltd and SDAEA* [2010] FWAFB 4602 at paragraph [8]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) HCA 47 at paragraph [13]; and the Explanatory Memorandum to the *Fair Work Bill 2008* ("the Explanatory Memorandum") at paragraphs [2320] and [2321].

² See *McDonald's Australia* at paragraph [9], *Coal and Allied Operations* at paragraph [14], and the Explanatory Memorandum at paragraph [2322].

13. Ai Group submits that Commissioner Harrison erred in making the protected action ballot order.
14. It is Ai Group's contention that Commissioner Harrison made a number of errors of law, as well as other errors of the type referred to in *House v The King*.³

4. Principles of interpretation

15. The principles associated with statutory interpretation have been the subject of many books, papers, speeches and decisions of courts and tribunals.
16. Over the years, Parliament has taken a number of steps to ensure that legislation is interpreted in the manner in which Parliament intended. These steps have included:
 - The enactment of Commonwealth and State Interpretation Acts to overcome the uncertainties and problems associated with the traditional common law rules of statutory interpretation;
 - Amending the *Acts Interpretation Act 1901 (Cth)* in 1984 to insert section 15AB to give more weight to extrinsic materials; and
 - Drafting lengthier and more detailed Explanatory Memoranda, often with illustrative examples.

³ In *House v The King* (1936) 55 CLR 488 the errors which might be made in relation to judicial discretion were identified in the following terms: "*If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.*"

17. There are many different views and proposed approaches to statutory interpretation put forward by different parties with different objectives, but one thing is certain. Relevant provisions of the *Acts Interpretation Act 1901 (Cth)* need to be adhered to, including sections 15AA and 15AB:

15AA Regard to be had to purpose or object of Act

- (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

15AB Use of extrinsic material in the interpretation of an Act

- (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
 - (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
- (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;
 - (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;
 - (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;
 - (d) any treaty or other international agreement that is referred to in the Act;
 - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

- (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
 - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
 - (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.
- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

(Emphasis added)

18. A careful reading of s.15AB of the *Acts Interpretation Act 1901* confirms that the absence of ambiguity, obscurity, absurdity or unreasonableness does not prevent consideration of extrinsic material to assist in the interpretation of a provision of an Act. Section 15AB(1)(a) of the *Acts Interpretation Act 1901* enables extrinsic material to be referred to “to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act”.

19. Section 15AB(1)(a) was considered by Lindgren J in *NAQF v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 781 (29 July 2003), at [69]:

“Where the circumstances attract s15AA (see [66] above), the first task is to attempt to identify “the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act” (par 15AB(1)(a)). But in any case where the provision is ambiguous or uncertain, or in a case where the ordinary meaning conveyed as described “leads to a result that is manifestly absurd or is unreasonable”, extrinsic materials may be considered to

ascertain the true meaning of the provision (par 15AB(1)(b)). Even absent ambiguity or obscurity or manifest absurdity or unreasonableness of result, extrinsic materials may be considered in order to "confirm" that the ordinary meaning so conveyed as described is the true meaning of the provision (par 15AB(1)(a)).

(Emphasis added)

20. The utility of section 15AB(1)(a) was also considered by Madgwick J in *Parrett v Secretary, Department of Family & Community Services* [2002] FCA 716:

"[32] Section 15AB(1)(a) has sometimes been considered as being of limited utility - see Pearce and Geddes op cit pp 60-62. The view seems to have been taken that one cannot look to extrinsic material under para (1)(a) of s 15AB if the effect of such resort would be to depart from the ordinary meaning of the statutory text. However, with respect, para (1)(a) permits resort to extraneous material for the purpose of confirming ("to confirm") that the real meaning of the text is its ordinary meaning. Para (1)(a) does not prohibit sensible use of a contrary indication resulting from a lack of such confirmation after looking at the non-statutory material, nor would it seem logical or profitable that such a prohibition should be implied, having regard to the far-reaching effect, which I take now to be settled, of s 15AA."

(Emphasis added)

21. In *JJ Richards and Sons v TWU* [2010] FWA 9963 (*JJ Richards*), the Majority made the following statement:

[30] *It is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory interpretation. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning. Section 15AB does not permit recourse to explanatory memoranda or other extrinsic material for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable.*

22. The statement of the Majority in para [30] of *JJ Richards* that "it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction" has been drawn from the following passage in the dissenting judgment of Brennan and Guadron JJ in *Catlow v Accident Compensation Commission*, [1989] HCA 43 in which s.35 of the *Interpretation of Legislation Act 1984* (Vic) was discussed:

“This provision is extremely broad. Unlike s.15AB of the Acts Interpretation Act 1901 (Cth), s.35 does not restrict the purposes for which it is permissible to consider the extrinsic materials referred to in that section. Whether or not extrinsic material is considered in interpreting a statutory provision, it is clear that the meaning attributed to the statute must be consistent with the statutory text. If the meaning which would otherwise be attributed to the statutory text is plain, extrinsic material cannot alter it. It is only when the meaning of the text is doubtful (to use a neutral term rather than those to be found in s.15AB(1) of the Acts Interpretation Act), that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction. If, when that is done, the meaning of the statutory text is not doubtful, there is no occasion to look to the extrinsic material. In our opinion, that is the present case.”

23. The assertion of the Majority in para [30] of *JJ Richards* that “[s]tatements as to legislative intention made in explanatory memorandum or by Ministers, however clear or empathetic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning” was drawn from the decision of the High Court by French CJ, Gummow, Hayne, Crennan and Kiefel JJ in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23. In that decision, the High Court took the view that the Explanatory Memorandum for the *Migration Act 1958 (Cth)* provided little assistance in interpreting section 51A(1) of the Act because it simply repeated the words in that section.
24. The modern approach to statutory interpretation was summarised by McHugh ACJ, Gummow and Hayne JJ in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14 (that is, 20 years after the dissenting judgement in *Catlow*):

“Statutory interpretation

10. *The submissions for Nine initially eschewed any detailed consideration of the anterior legal and historical context in the United Kingdom; this was despite the significance of the British legislation which then followed, upon the later Australian legislation. Nine also stressed the significance of what were said to be the plain words of the provisions of the Act immediately in issue and sought to discount any reaction to the decision of the Full Court which emphasised that the construction favoured by the Full Court appeared to be at odds with the overall scheme of the Act. Accordingly, it is convenient now to restate several of the relevant principles or precepts of statutory interpretation.*
11. In *Newcastle City Council v GIO General Ltd*, McHugh J observed:

“[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them

a meaning that will give effect to any purpose of the legislation that can be deduced from that context."

His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*. There, Brennan CJ, Dawson, Toohey and Gummow JJ said:

*"It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."*

12. *The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability of the result obtained in the Full Court, and a close consideration of the text of various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed."*

(Emphasis added)

25. Since the FW Act came into operation, the Tribunal has made sensible use of the Explanatory Memorandum for the *Fair Work Bill* ("Explanatory Memorandum"). Numerous Full Bench and single FWA Member decisions refer to the Explanatory Memorandum. Such a sensible and practical approach is consistent with the objects of the Act, the manner in which FWA is required to perform its functions under the FW Act, and the sensible manner in which the Tribunal has carried out its functions over time.

26. Ai Group disagrees with the apparent criticism of the Majority at para [31] in *JJ Richards* that “One may observe in the decisions of this and other tribunals a tendency when interpreting statutory provisions to have resort to the relevant explanatory memorandum without observing the full rigour of these principles.” This criticism is especially surprising given that the Majority relied on extrinsic material (i.e. International Conventions) at para [68] of their decision.
27. The Government drafted a very detailed Explanatory Memorandum for the *Fair Work* legislation:
- To convey its intent in drafting the legislation;
 - To preserve outcomes arrived at after extensive consultations with employer and union representatives during the development of the legislation; and
 - To ensure that provisions which were hard fought between employer and union representatives were not lost through unintended interpretations being applied by FWA or courts.
28. It would not be sensible, fair or appropriate for FWA to change the approach reflected in a large number of FWA Full Bench and single Member decisions and give less weight to the Explanatory Memorandum, as supported by the Majority in *JJ Richards*.
29. At para [72] of their decision, the Majority in *JJ Richards* said “*If, consistent with the principles we have outlined, it was permissible to have resort to the Explanatory Memorandum in interpreting s.443(1)(b), we accept that this would likely lead to the adoption of the construction for which the appellant contends.*”

30. Not only is it permissible for FWA to have regard to the Explanatory Memorandum, it is necessary for FWA to have regard to it. We submit that the Majority in *JJ Richards* adopted an incorrect approach in interpreting and applying the provisions of the FW Act, and in deciding that they were not permitted to consider the Explanatory Memorandum.

5. The purpose and objects of the *Fair Work Act* and coercion by the minority

31. As explained in Section 4 above, in interpreting provisions of the FW Act a central consideration is the purpose and objects of the legislation.
32. Such objects include:
- “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action” (s.3(f));
 - “to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits (s.171(a)); and
 - “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 agreement (s.436).
33. The purpose and objects also include implementing a workplace relations system where bargaining is compulsory for employers in circumstances where the majority of employees in a fairly chosen group support collective bargaining.

34. The *Fair Work* bargaining system is very different to the voluntary bargaining system which was in place prior to the FW Act. A five Member Full Bench of the AIRC in *Asahi Diamond Industrial Australia and AFMEU* (Print L9800) expressed the following comments about the voluntary nature of the previous bargaining system (in section 9.1 of the decision):

“We should, in the light of some of the submissions in this appeal, say that we see nothing inappropriate in the Act not making negotiation compulsory (assuming, for the moment, that it were possible to do so). Our main reason for this view is that the award system remains in place to regulate the wages and conditions of employees to the extent that they are not covered by an agreement.....Another reason for our view that there is nothing inappropriate in the Act not making negotiation compulsory is that, subject to the provisions of the Act, a union may be able to take industrial action to try to persuade an employer to negotiate. (And an employer may be able to lockout employees in circumstances where the lockout is protected action).”

35. As highlighted in the above extract, under the previous voluntary bargaining system, unions faced with the refusal of an employer to negotiate a collective agreement (as was the case with Asahi) had two options:

- To organise industrial action by the employees who they were representing (even if such employees represented only a small minority of the company’s employees); or
- To accept that a collective agreement would not be negotiated and that the safety net, plus any over-award conditions would apply.

36. The *Fair Work* bargaining system has a different purpose and operates in a different manner to the previous bargaining system. Unions faced with the refusal of an employer to negotiate an enterprise agreement have the following options:

Option 1: They can apply to FWA for a majority support determination to establish that the majority of employees in a fairly chosen group of employees support the negotiation of an enterprise agreement; and

Once a majority support determination has been obtained and a genuine attempt made to reach agreement, they can apply for a protected action ballot order; **OR**

Option 2: They can accept that a collective agreement will not be negotiated and that the safety net, plus any over-award conditions will apply.

37. The abolition of the voluntary bargaining system which had been in place for more than 15 years and its replacement with a system which imposed an obligation upon employers to bargain where the majority of employees supported a collective agreement was a major concession which the Government made to the unions. The concession was strongly opposed by Ai Group and other employer groups. While unions won a compulsory bargaining system, Ai Group submits that a key aspect of the previous voluntary bargaining system was discontinued, that is, the right to organise and take protected industrial action to coerce an employer to bargain regardless of whether the majority of employees support a collective agreement.
38. The right which existed to take industrial action regardless of the level of support amongst employees for a collective agreement was understandable under the voluntary bargaining system in the old legislation. However, this right has no place under the *Fair Work Act* where bargaining is compulsory if the majority of a fairly chosen group of employees support collective bargaining and where employers have no obligation to bargain if the majority of the fairly chosen group do not want a collective agreement.
39. The relevant groups of employees for the purposes of majority support determinations and protected action ballot orders are completely different.

40. A majority support determination must apply to a fairly chosen group (s.237(2)(c)). For example in a manufacturing plant a fairly chosen group may comprise the production and maintenance employees covered by the *Manufacturing and Associated Industries and Occupations Award 2010*.
41. Further, an agreement can only be made with a fairly chosen group (s.186(3)).
42. In contrast, a protected action ballot order applies to employees who will be covered by the proposed enterprise agreement and are represented by the bargaining representative who is the applicant for the ballot order (s.437(5) and s.453). For example in the abovementioned manufacturing plant the group of employees to be balloted may be the AMWU members who comprise 10% of the production and maintenance employees covered by the *Manufacturing and Associated Industries and Occupations Award 2010*. In this example, the group of employees to be balloted comprises only 10% of the fairly chosen group.
43. If the legislature intended for protected action ballots to operate as an alternative to majority support determinations as a mechanism to force an employer to bargain, then it is sensible and logical in the context of the bargaining and agreement-making framework in the FW Act that the fairly chosen group requirement would apply to protected action ballot orders. If such a requirement applied, all of the employees in the fairly chosen group would be able to vote for or against the taking of industrial action in pursuit of a collective agreement.
44. In a workplace where only a minority of employees are union members, it is not logical or fair for the union members to be granted the right to take industrial action to coerce the employer to bargain if the majority of employees in the fairly chosen group have not expressed support for the negotiation of a collective agreement.

45. The group of union members in the fairly chosen group, whilst representing a relatively a relatively small minority, may be in important roles and/or have critical skills which the company depends upon.
46. Interpreting the FW Act to permit industrial action to be taken in circumstances where a majority support determination has not been applied for or in circumstances where a majority support determination has been applied for but not issued because of a lack of support amongst employees, would be inconsistent with the following important rights:
- The right of employees to not negotiate a collective agreement unless the majority of employees in the fairly chosen group support such negotiations;
 - The right of an employer to refuse to negotiate a collective agreement unless the majority of the employees in a fairly chosen group wish to negotiate a collective agreement;
 - The right of employees to not be stood-down or subjected to other adverse consequences, as a consequence of industrial action taken by a minority of employees in the fairly chosen group; and
 - The right of an employer to not be subjected to damage as a consequence of industrial action taken by a minority of employees.
47. The majority in *JJ Richards* and Commissioner Harrison in his decision have adopted the interpretation that a union has the right to apply for a protected action ballot order as an alternative to applying for a majority support determination. Under the interpretation that they have adopted, Ai Group can see no reason why a union would not have the right to apply for a protected action ballot order even if a majority support determination had previously been applied and the majority of employees had expressed opposition to the negotiation of a collective agreement. We submit that such an interpretation conflicts with the purpose and objects of the FW Act.

6. The commencement of bargaining

48. An employer who will be covered by a “proposed enterprise agreement” that is not a greenfields agreement must take all reasonable steps to give a notice of employee representational rights to each employee who will be covered by the agreement (s.173(1)).
49. The content and form of the notice is prescribed in Schedule 2.1 of the *Fair Work Regulations 2009*. The notice provides information on:
- What is an enterprise agreement?
 - An employee’s right to appoint a bargaining representative;
 - Who to contact if an employee has any questions.
50. The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time (s.173(3)).
51. Under s.173(2) of the FW Act, the “notification time” is the time when:
- (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
 - (b) a majority support determination in relation to the agreement comes into operation; or
 - (c) a scope order in relation to the agreement comes into operation; or
 - (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.
52. Ai Group submits that the logical interpretation of the bargaining, industrial action and related provisions of the FW Act is that bargaining commences at the “notification time” for a proposed enterprise agreement.

53. It would not be logical for the Act to require that a notice be given explaining what an agreement is and the rights of an employee to appoint a bargaining representative, at a time other than at the commencement of bargaining.
54. Further, it would not be logical for the FW Act to formally recognise bargaining between bargaining representatives at a time when bargaining orders are not available. Bargaining orders are only available if:
- (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement; or
 - (b) a majority support determination in relation to the agreement is in operation; or
 - (c) a scope order in relation to the agreement is in operation; or
 - (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

(See s.230).

55. In his decision, Commissioner Harrison held that *“the Act does not require a bargaining agent to seek a majority support determination, good faith bargaining orders, or scope orders as a prerequisite to seeking a protected action ballot order where an employer refuses to commence bargaining”* (para [24]). In effect, the Commissioner decided that bargaining can commence and industrial action can be taken before the notification time. We submit that this is an error of law and the decision should be overturned.

7. The term “proposed enterprise agreement”

56. The term “proposed enterprise agreement”, is used many times in the FW Act.
57. For example, an employer who will be covered by a “proposed enterprise agreement” that is not a greenfields agreement must take all reasonable steps to give a notice of employee representational rights to each employee who will be covered by the agreement (s.173(1)).
58. The term “proposed enterprise agreement” is not defined in the FW Act but the following extract from the Explanatory Memorandum confirms that the Parliamentary draughtspersons had a particular meaning in mind when using this term in the Act:

“643. The term ‘proposed enterprise agreement’ is a generic term that is used in Part 2-4 and in Part 3-3 (Industrial action) to describe ‘an agreement’ that is being negotiated with a view to being approved as an enterprise agreement (see the observations of French J in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737; 138 IR 362). A proposed agreement can be an idea, or it can be a series of claims on behalf of a group of employees whose bargaining representatives seek to negotiate with the employer with a view to it becoming an agreement that is ultimately approved by FWA.”

(Emphasis added)

59. It can be seen from the above extract that the term is intended to mean an agreement *“that is being negotiated”* and one where the negotiations are taking place with a view to the agreement *“being approved as an enterprise agreement”*.
60. Ai Group submits that an “agreement” cannot be a *“proposed enterprise agreement”* for the purposes of the FW Act, until negotiations / bargaining has commenced under the Act. This cannot be before the notification time in s.173(2).

8. Protected industrial action can only be taken “for a proposed enterprise agreement”

61. The FW Act permits protected industrial action to be taken in pursuit of a “*proposed enterprise agreement*” (as referred to in ss. 408, 409, 413(1), 413(2), 437(5), 443(1) and 443(2)).
62. It follows from the arguments set out in section 7 above that protected industrial action cannot be taken before the notification time.
63. Protected industrial action can only be taken in pursuit of a “*proposed enterprise agreement*” and an “agreement” cannot be a “*proposed enterprise agreement*” for the purposes of the FW Act, until negotiations / bargaining has commenced under the Act. This cannot be before the notification time in s.173(2).
64. Commissioner Harrison made a protected action ballot order in circumstances where bargaining had not commenced and a “*proposed enterprise agreement*” had not come into being. Accordingly, the Commissioner erred and the ballot order should be quashed.

9. Majority support determinations

65. Majority support determinations have a vital role in the *Fair Work* compulsory bargaining system.
66. As outlined in section 5, where an employer refuses to bargain a union has two options:

Option 1: It can apply to FWA for a majority support determination to establish that the majority of employees in a fairly chosen group of employees support the negotiation of an enterprise agreement; and

Once a majority support determination has been obtained and a genuine attempt made to reach agreement, it can apply for a protected action ballot order; **OR**

Option 2: It can accept that a collective agreement will not be negotiated and that the safety net, plus any over-award conditions will apply.

67. An integral requirement for a majority support determination is that FWA is satisfied that the employer/s who will be covered by the proposed agreement have not agreed to bargain or initiated bargaining (paragraph 237(2)(b)).

68. The vital role of majority support determinations is explained in the following extracts from the Explanatory Memorandum and other materials:

- **Explanatory Memorandum:**

“651. If an employer does not agree to bargain with its employees, a bargaining representative for an employee may apply to FWA for a majority support determination. If FWA determines that there is majority support among employees for collective bargaining, the employer is required to bargain. If the employer still refuses to bargain, the employee bargaining representative may seek a bargaining order to require the employer to meet the good faith bargaining requirements. Where there is a dispute about which classes or groups of employees will be covered by the proposed enterprise agreement, FWA has power to make scope orders. A scope order is available on application by a bargaining representative.”

(Emphasis added)

- **Explanatory Memorandum:**

“948. If an employer has not agreed to bargain with its employees, an employee bargaining representative may apply for a majority support determination. If FWA determines that there is majority support for collective bargaining and an employer continues to not participate in bargaining, a bargaining representative

for the employees may seek a bargaining order. Where the agreement is a single-enterprise agreement not subject to a single interest employer authorisation, a bargaining representative may apply to FWA for a scope order to determine which classes or groups of employees are to be covered by a proposed enterprise agreement.”

(Emphasis added)

- **Explanatory Memorandum:**

“976 There is no penalty for contravening a majority support determination. If FWA determines that there is majority support for collective bargaining and an employer still refuses to bargain, the employee bargaining representative may seek a bargaining order to require the employer to bargain”.

(Emphasis added)

- **Evidence given by Ms Sandra Parker, Group Manager, Workplace Relations Policy Group, DEEWR to the Senate Inquiry into the Fair Work Bill 2008 (Public Hearing, 11 December 2008, Hansard, EEWR9):**

Ms Parker—In terms of enterprise agreements, there will be a single stream of agreement making. There will no longer be the concept of a union agreement or a non-union agreement. An agreement will be made when it is approved by a majority of employees who vote. The union involved in bargaining can then apply to have the agreement apply to it. Single-interest employers may bargain for a single enterprise agreement. We will talk about that in a bit more detail a little further on.

Every employee must be notified of the right to be represented in bargaining at least 21 days before an agreement can be put to the vote. The union is the bargaining representative for its members, or an employee can appoint another bargaining representative. An employer must recognise the role of the bargaining representative as representative of the employees. If an employer refuses to bargain, Fair Work Australia can determine if there is majority support for collective bargaining and order an employer to bargain collectively. This is a majority support determination. If there is a dispute over the scope of coverage of the proposed agreement, Fair Work Australia can make a scope order.

Parties must comply with good-faith bargaining requirements, and they include meeting, exchanging information, responding, genuinely considering responses and refraining from capricious or unfair conduct. Fair Work Australia can make orders to force compliance. Serious and sustained breaches of bargaining requirements by bargaining representatives may lead to a workplace determination by Fair Work Australia. A statement will be included in the legislation to make clear that the good-faith bargaining requirements do not require a bargaining representative to make concessions or make an agreement where they do not agree to its terms.

(Emphasis added)

69. Senior Deputy President O’Callaghan in his minority decision in *JJ Richards* acknowledged the fundamental role of majority support determinations where there is no agreement to bargain:

“[177] Where there is no agreement to bargain, the majority support determination becomes fundamental to the agreement making process in so far as it represents the formal mechanism whereby employee support for the commencement of bargaining for an agreement can be tested independently and entirely separately from the protected action ballot process, so as to determine whether a majority of employees support the taking of industrial action. If that majority support exists, s.173(2) requires the employer to agree to bargain.”

10. The requirement that bargaining must have commenced before protected industrial action can be taken

70. It is Ai Group’s contention that a protected action ballot order cannot be made unless bargaining has commenced and, subsequent to the commencement of bargaining, the union and employees have genuinely tried to reach agreement with the employer.
71. In circumstances where an employer has refused to bargain and where a scope order or low-paid determination have not been issued, a union must obtain a majority support determination to enable bargaining to commence.
72. This interpretation is supported by the following extracts from the Explanatory Memorandum and other relevant materials:

- **Explanatory Memorandum:**

“r.283. Protected industrial action will continue to be available only during negotiations for an enterprise agreement.

r.284. A pre-condition for taking protected industrial action will be that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place.

r.285. The requirement to hold a mandatory secret ballot authorising industrial action will be retained. However, provisions will be streamlined and simplified, impacting positively on users of the system. Further details are provided below.

r.286. The protected action provisions will also be changed so that an “unprotected” person joining protected action will be subject to orders and penalties, but the action and its protected participants will not. This change will address any actual or perceived inequities in the current arrangements.

r.287. These requirements are aimed at ensuring that industrial action is only taken during genuine bargaining and not for spurious reasons. This is consistent with minimising the economic impact of industrial action.”

(Emphasis added)

- **Explanatory Memorandum:**

“1629. It is intended that industrial action that is organised or taken in the context of legitimate collective bargaining and meets certain prerequisites is permissible and therefore protected action.

1630. The current WR Act regulates industrial action and allows for protected action to be taken during a bargaining period so long as certain requirements are met. Although the Bill no longer contains the concept of a bargaining period, protected industrial action is only available during bargaining for an enterprise agreement.”

(Emphasis added)

- **Explanatory Memorandum:**

“1771. For joint applications, each applicant must be and must have been, genuinely trying to reach an agreement with the relevant employer. A finding by FWA that there is no majority support for collective bargaining is not of itself intended to be determinative of the question of whether the applicant is genuinely trying to reach an agreement with the employer.”

“1772. It could be the case that an applicant engaged in pattern bargaining (as defined in clause 412) in relation to the relevant employer would not be genuinely trying to reach an agreement, based on the indicia listed in subclause 412(3) (e.g., the applicant may not have been prepared to take into account the individual circumstances of the employer in bargaining for the agreement).”

(Emphasis added)

- **Explanatory Memorandum:**

“1708. The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases...”

(Emphasis added)

73. The Australian Government’s fact sheet in the **Annexure** also confirms that *“Protected industrial action will only be available during collective bargaining”*.⁴

74. At para [72] in *JJ Richards*, the Majority said *“If, consistent with the principles we have outlined, it was permissible to have resort to the Explanatory Memorandum in interpreting s.443(1)(b), we accept that this would likely lead to the adoption of the construction for which the appellant contends.”*

75. As argued in section 4 above, we submit that the Majority in *JJ Richards* has adopted an incorrect approach in interpreting and applying the provisions of the FW Act, and in deciding that they were not permitted to consider the Explanatory Memorandum.

76. In *Ford Motor Company v CEPU and others* [2009] FWAFB 1240, the majority said:

“[39] If, indeed, protected industrial action may only be taken during bargaining for an enterprise agreement it would seem odd that an application for a protected action ballot to authorise such action could occur prior to bargaining commencing.

[40] In our view the scheme of the Act demonstrates that that is the case. There is nothing to indicate that it was intended that a protected action ballot order be made, or that protected action be able to be taken, prior to bargaining commencing.”

⁴ The fact sheet is available at:

http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/FactSheets/FactSheet_10.pdf

77. In his Minority decision in *JJ Richards*, Senior Deputy President O’Callaghan concluded:

[175] In summary terms, the Explanatory Memorandum and the Second Reading Speech indicate the intention of the legislation is to provide for agreements to be made between employers and employees, through mandatory employee representation arrangements and a series of mechanisms designed to facilitate bargaining processes. While these mechanisms can require an employer to bargain, they do not require that agreement must be reached through the bargaining process. Importantly, the Explanatory Memorandum and Second Reading Speech confirm that the taking of protected industrial action is limited to the bargaining process.

[176] Where parties are bargaining for an agreement, a protected action ballot may be sought to authorise protected industrial action to support the claims being made. The use of protected industrial action outside of a bargaining situation appears counter intuitive, inconsistent with the objective intention of the FW Act as a whole and inconsistent with the intention of the legislation.

78. Ai Group concurs with the views expressed by the Majority in *Ford* and by Senior Deputy President O’Callaghan in *JJ Richards*.
79. Commissioner Harrison issued a protected action ballot order in circumstances where bargaining had not commenced and accordingly the Commissioner has made an error of law.

11. The requirement that each applicant “has been, and is, genuinely trying to reach an agreement with the employer”

80. As set out in previous sections, it is Ai Group’s contention that Commissioner Harrison did not have the power to make the protected action ballot order because:
- Bargaining had not commenced (see sections 6 and 10);

- A “proposed enterprise agreement” for the purposes of the Act did not exist (see sections 7 and 8); and

- When an employer refuses to bargain, a union has two options:

Option 1: It can apply to FWA for a majority support determination to establish that the majority of employees in a fairly chosen group of employees support the negotiation of an enterprise agreement; and

Once a majority support determination has been obtained and a genuine attempt made to reach agreement, it can apply for a protected action ballot order; **OR**

Option 2: It can accept that a collective agreement will not be negotiated and that the safety net, plus any over-award conditions will apply.

(See sections 5 and 9)

81. If despite Ai Group’s submissions, the Full Bench forms the view that all other requirements of the FW Act have been met and the only issue left for consideration is whether or not the Commissioner was able to be “*satisfied that each applicant has been and is genuinely trying to reach agreement with the employer of the employees who are to be balloted*” (s.443(b)), the following submissions are relevant.

82. In his decision, Commissioner Harrison expressed the view that:

[15] Having regard to the wording of the above extracts of the Act there is nothing in the legislation which expressly precludes a protected action ballot order other than that the applicant is genuinely trying to reach agreement. The tribunal must make an order if it is satisfied the applicant has been and is genuinely trying to reach an agreement”. (The Commissioner’s emphasis)

83. Ai Group submits that such a view is not correct. There are numerous requirements in the FW Act which must be met before a protected action ballot order can be issued. Some of these requirements have been discussed in earlier sections of this submission. Some other requirements are set out in s.413 and 437 of the Act.
84. One issue which arises is the meaning of the word “*is satisfied*” in s.443(b). The term is important in determining how much discretion a particular FWA Member has in applying the statutory requirements.
85. The concept of a Tribunal Member being “*satisfied*” was the subject of a great deal of focus by the High Court of Australia in *Coal and Allied Operations*⁵ and in the related decisions of the AIRC and the Federal Court.
86. In their majority Judgment, Gleeson CJ, Gaudron and Hayne JJ stated:
- “18. *The Full Court was in error in thinking that the nature of an appeal under s 45 differs according to the nature of the decision under appeal. However, it was correct to hold that, in the case of a discretionary decision, the exercise by a Full Bench of the Commission of its powers under s 45(7) of the Act depends on the decision at first instance being attended by appealable error. That being so, it is necessary to consider the manner in which the Full Bench determined the appeal from Boulton J. Before doing so, however, it is convenient to say something as to the concept of “a discretionary decision”.*
19. *“Discretion” is a notion that “signifies a number of different legal concepts”. In general terms, it refers to a decision-making process in which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result.” Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.*
20. *In the present case, the decision by Boulton J to terminate the bargaining period involved, in effect, two discretionary decisions. The first was as to his satisfaction or otherwise that the industrial action being pursued posed a threat for the purposes of s 170MW(3) of the Act. Although that question had to be*

⁵ *Coal and Allied Operations Pty Ltd v AIRC* (2000) HCA 47.

determined by reference to the facts and circumstances attending the industrial action taken in support of claims with respect to a certified agreement, the threat as to which his Honour had to be satisfied was one that involved a degree of subjectivity. In a broad sense, therefore, that decision can be described as a discretionary decision. And if Boulton J was satisfied that there was a threat for the purposes of s 170MW(3), that necessitated the making of a further discretionary decision as to whether the bargaining period should be terminated.

21. Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in House v The King in these terms:

"If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

(Emphasis added and endnotes not included)

87. Accordingly, a decision by an FWA Member to make a protected action ballot order because the Member is "satisfied" that the requirements of s.443(1)(b) and (2) have been met, can be overturned on appeal if that Member has made an error of the type identified in *House v The King* (1936) 55 CLR 488, namely:

- acted upon a wrong principle;
- been guided by irrelevant factors;
- mistaken the facts; or
- failed to take some material consideration into account.

88. Also, just because a provision of the Act is couched in terms of a requirement for FWA to "be satisfied" does not mean that such a requirement is not a question of law. It is Ai Group's contention that Commissioner Harrison made errors of law, as well as other errors of the type referred to in *House v The King*.

89. Another issue which arises is the meaning of the term “*genuinely trying to reach agreement with the employer*” in circumstances where the employer has refused to bargain. We submit that a union cannot be validly held to have genuinely tried to reach agreement when it has failed to apply for a majority support determination.

90. In *Ford*, the majority said:

“[47] Our analysis of the Act strongly suggests that bargaining must have been, and be, occurring before it can be said that an applicant for a protected action ballot order can be said to have been, and be, genuinely trying to reach an agreement. In her second reading speech, consistently with the extracts from the Explanatory Memorandum to which we have referred, the Minister for Employment and Workplace Relations observed that the “bill distinguishes between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside of bargaining.”

91. The following extract from the minority decision of Senior Deputy President O’Callaghan in *JJ Richards* is also relevant to this issue:

“[181] In a situation where a bargaining representative requests an employer to bargain and the employer refuses, the objective intention of the FW Act dictates that the concept of genuinely trying to reach an agreement requires that the bargaining representative must pursue a majority support determination to establish the majority view of all of the employees to be covered by the proposed agreement. If this is established, the employer is then obligated to issue the notices of employee representational rights and to engage in the bargaining process. At that point, if all of the bargaining representative claims are rejected, or the employer refuses to meet and negotiate, a protected action ballot could be available to a bargaining representative where Fair Work Australia is satisfied about the genuineness of the bargaining endeavour.

[182] In such a circumstance, the absence of action on the part of a bargaining representative to initiate the bargaining process consistent with Part 2-4 means that the bargaining representative has not utilised the only way in which an agreement can be put into effect, and the mechanism which requires an employer to bargain, and cannot thus be regarded as genuinely trying to reach an agreement for the purposes of s.443. It may be the case that the bargaining representative clearly wants to reach an agreement but absence of any agreement to bargain must require that the mechanism to start the bargaining process is activated.

[183] In Total Marine Services the concept of “genuinely trying to reach an agreement” was expressed in the following terms:

[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.

[32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement.”

[184] *I have adopted that general principle on the basis that I do not understand that the subsequent series of minimum normal expectations must be literally applied such that they deprive parties negotiating about how, for instance, an overall employment cost should be packaged, of the capacity to demonstrate that they are genuinely trying to reach an agreement.*

[185] *To this general principle I would add that where there is no agreement to bargain at all, the concept of genuineness for the purposes of s.443 should incorporate recognition that the only way in which an agreement can be ultimately achieved is consistent with the requirements of Part 2-4. Within this part, s.236 provides the mechanism to deal with an employer’s refusal to bargain and the capacity to require the employer to bargain. In such circumstances a failure to utilise this mechanism cannot be generally consistent with the genuine pursuit of an agreement under the FW Act.*

[186] *Conceivably, there may be situations where a bargaining representative can establish that the population of employees which it represents is synonymous with the overall employee population such that a protected action ballot can be considered. I think this is unlikely but, even then, until action is taken consistent with Part 2-4, to initiate the bargaining process, it will be very difficult for a bargaining representative to establish that it has been genuinely trying to reach an agreement. That circumstance was not established before Harrison C.*

[187] *Further, it is conceivable that there could be no dispute that negotiations have been occurring but no notice of employee representational rights has been issued despite the requirements of s.173. In that instance, the capacity to access a protected action ballot order will depend on the information provided to Fair Work Australia. That circumstance clearly does not apply here*

92. It is a simple process for a union to apply for a majority support determination and FWA is required to issue the determination if some relatively straightforward tests are met. Therefore, we submit that a bargaining representative cannot be held to have “genuinely tried to reach agreement” when it fails to make application for a majority support determination, in circumstances where an employer has refused to bargain.

93. A further relevant consideration in these proceedings is that the employer has not refused to meet with the union to discuss the union's claim for a collective agreement. At para [8] of his decision, Commissioner Harrison said:

“[8] Ms K Richards, appearing for JJR, submitted the company was not refusing to bargain but nor has it agreed:

“We do have reservations in regard to entering bargaining due to the fact that, at this stage, there is no contractual certainty.

So we don't believe that there's been a refusal. Obviously we haven't accepted, we have not engaged in bargaining and we do not wish to engage in bargaining at this time. However, we believed that we were in the process of discussing whether negotiations should or should not commence; we have not, as such, given a direct refusal. However, as I've explained, we definitely have not assented to agree to bargaining.”

94. On this basis, it is logical that the union would need to put in a much greater effort to establish that it has *“genuinely tried to reach agreement”* than where an employer has simply refused to meet

12. Conclusion

95. For the reasons set out in this submission, the decision of Commissioner Harrison should be overturned and the protected action ballot order quashed.



Australia's Fair Work system

10. Clear, tough rules for industrial action

In the Australian Government's new workplace relations system, industrial action is governed by clear tough rules. These rules took effect on 1 July 2009.

Protected industrial action

Employees may take protected industrial action to support or advance claims during collective bargaining. Action initiated by or on behalf of employees will only be protected if it has been authorised by a mandatory secret ballot and it is in accordance with all other requirements specified in the Act. Bargaining representatives are required to provide the employer with at least three working days written notice of their intention to take the protected industrial action.

Bargaining representatives may apply to Fair Work Australia for a protected action ballot order. While the Australian Electoral Commission will conduct secret ballots by default, ballot applicants can nominate a ballot agent that is not the AEC. Fair Work Australia may decide the nominated agent can conduct the ballot if it is satisfied that the agent meets certain requirements.

Where protected industrial action has been authorised by a secret ballot under the *Workplace Relations Act 1996*, Fair Work Australia will, in very limited circumstances, be able to make orders preserving the authorisation after 1 July 2009.

Employers may also take protected industrial action by locking out employees who have taken industrial action.

A ballot is not required if the employees intend to take protected industrial action in response to industrial action taken by their employer.

Suspending or terminating protected industrial action

Where protected action is causing or is threatening to cause significant harm to the Australian economy or part of it, or endangers the safety, health or welfare of the population or part of it, Fair Work Australia is required to order the parties to stop taking industrial action. If further conciliation does not lead to an agreement, Fair Work Australia may determine a settlement.

Fair Work Australia may similarly act to end the industrial action and determine a settlement for the bargaining participants where protected industrial action is protracted, is causing or threatening to cause imminent significant economic harm to the bargaining participants and the dispute will not be resolved in the foreseeable future.

The criteria Fair Work Australia will use to determine a settlement will include matters such as:

- the merits of the case
- the interests of the negotiating parties and the public interest
- how productivity might be improved in the business or part of the business concerned
- the conduct of the bargaining representatives during bargaining and the extent to which they have complied with good faith bargaining requirements, and
- any incentives to continue to bargain.

Unprotected industrial action

Industrial action will not be protected where, for example, it is taken before the nominal expiry date of an enterprise agreement, where the bargaining representatives are engaging in pattern bargaining, where the parties taking industrial action are not genuinely trying to reach agreement, or where there is a serious breach declaration in place.

Fair Work Australia may issue orders to prevent or stop any unprotected industrial action. If Fair Work Australia is unable to determine whether the action is unprotected within 2 days they are required to issue interim orders to stop industrial action, unless such an order would be contrary to the public interest.

Strike Pay

Under the Government's new workplace relations system it is unlawful for an employer to pay or an employee to demand or request strike pay. The new system will provide effective dispute resolution processes.

Unprotected action such as snap strikes, taken outside of bargaining, is not an acceptable means of resolving workplace issues.

Under Work Choices, there was a requirement to withhold a mandatory four hours pay irrespective of the type of industrial action taken. In the new system, the four hour rule only applies to unprotected industrial action. Employers are required to withhold four hours pay for any incident of unprotected industrial action of up to four hours duration. For incidents of unprotected action of more than four hours, employers are required to withhold payment for the duration of the action.

Unprotected action, such as a snap strike, is unlawful. Because employers often have no opportunity to prepare for the impact of such action, it can cause significant damage to an employer's business. The four hour rule is designed to provide serious consequences for employees and to discourage the taking of unprotected action.

Industrial action that is protected action will be treated differently.

Where protected industrial action is taken that results in the complete withdrawal of labour (in the form of a strike), an employer must withhold payment for the actual period of industrial action. This will ensure that employees only lose pay for the actual period of action taken. This is a fairer and more proportional response than the former arrangements.

The Fair Work Act also clarifies the issue of payment for overtime bans. If an employee refuses an employer's request or requirement to work overtime and the refusal is a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment, and the refusal is protected industrial action, payment will be withheld for the period when the employee would otherwise have been working overtime. There will be no further deduction of pay. If the overtime ban is unprotected action, then the 'four hour' rule will apply.

There was confusion and uncertainty about how the Work Choices' strike pay rules applied when employees were at work but took protected action by performing only part of their duties (partial work bans). The Fair Work Act includes provisions to provide both clarity and flexibility for employers to respond proportionally to the bans.

This new process permits the employer to choose to either pay full pay or (after notifying the employee) dock part of the employee's wages, proportional to the duties the employee has refused to perform. An employer may also withhold payments altogether, provided they give the employee notice of non-payment. The Fair Work Regulations prescribe a formula for calculating the proportion of the reduction of employees' payments in relation to partial work bans. If an employer chooses to withhold all payment for partial work bans, employees can decide to return to work as directed. If employees continue the bans and the employer withholds all payment, an employee who subsequently withdraws their labour by not attending the workplace will be deemed to be taking protected action.

Case Study

Nurses are very committed to patient care and are therefore very reluctant to take industrial action that would affect their patients' safety. Where they legitimately wish to take action in pursuit of better pay and conditions through bargaining for a new enterprise agreement some may prefer to institute limited work bans such as not making beds, rather than going on strike. Under Work Choices, employers were legally required to dock their pay for a mandatory four hours for limited work bans. The Fair Work Act allows employers more discretion in dealing with these bans.

Information regarding rules for industrial action is available at www.fairwork.gov.au/Industrial-action