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Shae McCrystal

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RESTRICTIONS ON THE RIGHT TO STRIKE IN AUSTRALIA

Two recent decisions in Australia have restricted access to the right to strike for Australian employees. The decisions make it harder to take lawful strike action and make it more likely that lawful strike action that does occur will be prevented where the action has a negative impact on members of the public. The discussion will provide relevant context by setting out the legal rules with respect to access to the right to strike in Australia, and then review recent developments to demonstrate how access to the right to strike has been seriously compromised.

I - PROTECTED INDUSTRIAL ACTION

In Australia, the capacity of employees lawfully to take strike action is regulated by Part 3-3 of the *Fair Work Act 2009* (Cth) (FW Act). During negotiations for single-enterprise agreements, employees and their bargaining representatives may take protected industrial action in support of their claims in respect of the proposed agreement. Once employees have taken protected industrial action, employers may respond with their own protected industrial action in the form of a lockout of employees.

Protected industrial action is action which meets the definition of 'industrial action' in FW Act s 19, and which has satisfied the statutory pre-requisites to obtain the status of 'protected' action. The statutory pre-requisites for action to be protected are, amongst other things,

- The bargaining representative has obtained a protected industrial action ballot order from the FWC (FW Act s 443), and the proposed action has been approved in a subsequent ballot of relevant employees (FW Act s 409(2));¹
- The action is organised and engaged in to support or advance claims in relation to the proposed agreement (FW Act s 409(1));
- The bargaining representative is genuinely trying to reach an agreement at the enterprise concerned (FW Act s 413(3));
- Required notice of proposed industrial action has been given (FW Act ss 413(4), 414);
- The bargaining representative for the agreement has not 'contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement' (FW Act s 413(5));
- Any existing agreement has passed its 'nominal expiry date' (FW Act s 413(6)); and
- The FWC has not otherwise suspended or terminated industrial action in respect of the relevant negotiations (FW Act ss 423-426).

¹ As to the ballot requirement see further B. Creighton, C. Denvir and S. McCrystal, «Strike Ballots and the Law in Australia», *Australian Journal of Labour Law*, 2016, 29(2), 121.

Where protected industrial action complies with the pre-requisites and is commenced within 30 days of the declaration of the ballot approving the action, it can continue indefinitely unless an agreement is made, or the FWC orders that the action be suspended or terminated due to its impact on the bargaining parties themselves, or on third parties.

Action which is unprotected (which does not comply with the statutory pre-requisites) may be subject to injunctive relief or damages at common law for a range of potential liabilities, including breach of contract or the commission of an economic tort.² Further, action which is unprotected may be the subject of an order from the industrial tribunal, the Fair Work Commission (FWC) that the order stop, not occur or not be organised under FW Act s 418. If such an order is breached, injunctive relief or a civil penalty may be obtained from the Federal Court of Australia. As this overview demonstrates, access to lawful industrial action under the FW Act involves navigation of complex pre-requisites by bargaining representatives. Two recent decisions in Australia have made access to lawful action harder to obtain and easier to lose once won.

II - ACCESS TO THE RIGHT TO STRIKE

One of the pre-requisites to industrial action being protected is s 413(5) of the FW Act which provides that the relevant bargaining representative has not 'contravened any orders that apply to them and that relates to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement'.

The meaning of this section was recently considered by the High Court in *Esso Australia Pty Ltd v The Australian Workers Union (Esso)*.³ During negotiations for an enterprise agreement, the Australian Workers Union (AWU) engaged in industrial action in support of its position. The employer, Esso Australia, obtained an order under FW Act s 418 that the AWU stop organising unprotected industrial action. Believing that the action it was organising was protected industrial action, the AWU continued the action. However, it was subsequently held that the relevant industrial action was unprotected, meaning that the AWU had continued to take industrial action for a short period of time in breach of the FWC order.

The employer then sought a declaration from the Federal Court of Australia that FW Act s 413(5) had the effect that the union could no longer take any protected industrial action in relation to negotiations for the relevant agreement because the AWU had breached the order to stop taking unprotected industrial action.

2 For discussion of these potential exposures see A. Stewart et al, *Creighton and Stewart's Labour Law*, 6th ed, Federation Press, 2016, ch 26.
 3 [2017] HCA 54.

In accordance with the previous interpretation of the section, it was held in the lower courts that s 413(5) did not prevent protected industrial action occurring where the relevant breach of an order subsequently had been rectified or the order was spent.⁴ This meant that if the union rectified its breach, or was not in breach at the time it sought to take future industrial action, it could take protected industrial action again.

This approach was rejected on appeal by the High Court in *Esso* by a majority of 4:1. Considering the statutory context and history of the provision, the majority concluded that a bargaining representative could not meet the pre-requisites to take protected industrial action if, at any point during negotiations for the agreement, they had breached any order of the FWC or a court. Casting the right to take protected industrial action as a 'privilege', the majority observed that the apparent purpose of the provision was 'to ensure that persons who have shown that they cannot be trusted to comply with orders relating to the agreement or matters arising from bargaining for the agreement are not to be trusted with the immunity afforded in relation to protected industrial action'.⁵

This finding effectively rules out protected industrial action for employees where their bargaining representative has breached any order of the FWC or a court during bargaining for that agreement irrespective of the circumstances surrounding the breach or where the breach is minor, inadvertent or merely technical. Lawful industrial action is prevented until bargaining commences for a subsequent agreement.

The scheme of the FW Act gives the FWC the power to make a range of orders in relation to bargaining for an agreement including good faith orders and orders in relation to industrial action, to facilitate fair, efficient and flexible agreement making. Orders are part of the scheme of the Act, and inadvertent (or otherwise) breaches are a common occurrence. Requiring strict compliance with all orders, on pain of loss of access to protected industrial action, has the effect in practice of further juridifying a system which should be flexible enough to accommodate the natural ebb and flow of industrial disputation that accompanies collective bargaining. It restricts access to the right to strike as a 'punishment' for past transgressions, however minor. In dissent in the High Court, Gageler J observed that the approach created industrial outlaws, and was not consonant with a statutory scheme designed to be 'fair, flexible and efficient'.⁶

III - RESTRICTIONS ON TAKING STRIKE ACTION

The second decision with profound implications for access to the right to strike in Australia is *Sydney Trains*.⁷ Sydney Trains is the company responsible for the train network in Suburban Sydney. The Australian Rail, Tram & Bus Industry Union (RTBU) represents employees of Sydney Trains. During prolonged negotiations for a new enterprise agreement the RTBU notified protected industrial action in the form of indefinite overtime bans, and a 24-hour work stoppage. However, before the action could commence, Sydney Trains brought proceedings in the FWC seeking suspension of the protected industrial action.

4 *Esso v AWU* (2015) 253 IR 304; *Esso v AWU* (2016) 245 FCR 39.

5 [2017] HCA 54 [53].

6 [2017] HCA 54 [103], [104].

7 [2018] FWC 632.

FW Act s 424 provides that the FWC must suspend or terminate protected industrial action which is threatening to endanger the life, personal safety or health, or the welfare, of the population or part of it, or to cause significant damage to the Australian economy or a part of it. Where action is suspended, it may resume after the suspension. If it is terminated, the parties enter a post termination negotiation period. If they cannot reach agreement on outstanding matters, the FWC may arbitrate those matters remaining in dispute.

Sydney Trains and the Minister argued that the proposed industrial action would endanger the welfare of Sydney commuters and cause damage to the local economy. The FWC suspended the industrial action for six weeks, finding that the welfare of part of the population was endangered due to the large number of commuters who rely on the train system to get to work, school or to 'go about their business', and the increased congestion on the roads that would occur.⁸ There would also be resultant damage to the economy of Sydney from the impact of commuters being unable to attend for work.⁹

Because the proposed industrial action was suspended, not terminated, the dispute did not proceed to arbitration. After six weeks, the RTBU could, in theory, take industrial action again. However, as the circumstances would be the same, it would be likely that a further order would issue, although an order terminating the action could lead to arbitration of any outstanding matters in dispute.

FW Act s 424 is designed to balance the right of employees to strike against the need to protect the community from potential harms caused by strike action. Restricting strikes by workers in essential services industries, like ambulance drivers, hospital workers and fire fighters is sensible given the likely impact of strikes by these workers on public health and safety.

However, the interpretation of the phrase 'endanger welfare' in s 424 of the FW Act extends well beyond what would ordinarily be thought of as an essential service. In an earlier decision, *Monash University v NTEU*¹⁰ protected industrial action by university academics was suspended because it was held that a ban on releasing exam results endangered the welfare of university students. Suspension of the action for two weeks meant that all results were released, and the impact of the strike was undermined. Likewise, the decision in *Sydney Trains* decision may effectively rule out access to industrial action for public transport workers where the proposed action impacts substantially on access to public transport. In these cases, the right to strike was forced to give way in the face of inconvenience and worry on the part of those affected by it. This hardly seems to strike the right balance.

Conclusion

The two cases under discussion in this column illustrate that the right to strike in the FW Act is not a right at all, but a privilege. Access to this privilege is removed where parties transgress either intentionally or otherwise against the legal rules, or where industrial action does what it is supposed to do – has an impact.

⁸ *Ibid.* at [44].

⁹ *Ibid.* at [46].

¹⁰ [2013] FWC 5982.