



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.

A ballot is not required if the employees are taking protected industrial action in response to industrial action taken by their employer, without a secret ballot.

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

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.