Senate Standing Committee on Education Employment and Workplace Relations

QUESTIONS ON NOTICE
Budget Estimates 2011-2012

Outcome 5 - Workplace Relations

DEEWR Question No.EW0052_12

JJ Richards Case

Question

Senator Abetz asked in writing:

"Does the Department agree with the Treasurer's statement of 2 June 2011 in relation to the JJ Richards Case that "The Fair Work Act has the same provisions in it when it comes to protected action as the previous Workplace Relations Act. So there's been no change there…"?
a. How many differences are there between the previous Workplace Relations Act and the Fair Work Act in relation to protected action?
b. Please list all differences between the two acts in relation to protected action. "

Answer

We understand this question refers to the Treasurer's interview on ABC Radio's AM program on Thursday 2 June 2011. During that interview the Treasurer responded to a question about the decision of a Full Bench of Fair Work Australia (FWA) in *J.J. Richards & Sons Pty Ltd v Transport Workers Union*[2011] FWAFB 3377 (JJ Richards). The department considers that the Treasurer's observations were reasonable and appropriate in this context.

In that decision, the FWA Full Bench dismissed an appeal by J.J. Richards & Sons Pty Ltd and the Australian Mining and Metals Association against an earlier FWA decision to grant a protected action ballot order sought by the Transport Workers Union, in circumstances where the employer had not agreed to bargain for an enterprise agreement. The Full Bench confirmed that in such circumstances, an applicant for a protected action ballot order must (under section 443 of the *Fair Work Act 2009* (FW Act)) show that it is genuinely trying to reach an agreement with an employer, but is not required to show that the employer has agreed, or is required, to bargain.

In circumstances where an employer refused to bargain,an order for a protected action ballot could also have been made bythe Australian Industrial Relations Commission (AIRC) under the *Workplace Relations Act 1996*(WR Act). Under section 461 of the WR Act, an applicant for a protected action ballot order had to show that it was genuinely trying to reach an agreement with an employer and that it was not engaged in pattern bargaining, but did not need to satisfy the AIRC that the employer had agreed to bargain.

For example, in *AMWU and CEPU v P&H Minepro Australasia Pty Ltd* [2007] AIRC 233, Deputy President McCarthy noted that an employer's refusal to negotiate did not mean that a union was not genuinely trying to reach an agreement. Deputy President McCarthy noted that the employer's refusal to negotiate left unions with the

choice of either seeking a protected action ballot order or abandoningagreement negotiations.

The FW Act framework for protected industrial action retained key elements of the WR Act framework in areas including the definition of industrial action, the purposes for which protected action can be taken, prerequisites for protected action and circumstances in which it can be terminated or suspended. However, the FWAct streamlined rules in this area and there are some differences as a result of:

- a different technical approach to drafting the provisions, including removal of theprocedural concept of the 'bargaining period' (but this did not reflect a substantive change, because under the WR Act such periods could be unilaterally commenced by a party without the consent of another party)
- removal of employers' capacity to preemptively lock out employees
- an additional ground for suspension or termination of protected action (where action is protracted and is threatening to cause significant economic harm to both an employer and employees)
- rules about strike pay (reflecting a distinction between payments withheld during periods of protected and unprotected industrial action and clarifying arrangements in relation to overtime bans).

A comprehensive comparison between the protected industrial action frameworks of the WR Act and the FW Act is set out in Attachment A.

Attachment A

Comparison of protected industrial action framework under *Workplace Relations Act 1996* (WR Act) and *Fair Work Act 2009* (FW Act)

Issue	WR Act (Work Choices) (Part 9)	FW Act (Part 3-3)
What is 'industrial action'?	*Industrial action*meant (ss4(1), 420): • refusal by employees to attend or perform work, • bans, limitations, restrictions on and delays in the performance of work by employees, • the performance of work by employees in a manner different from that in which it is customarily performed, or • lock outs by employers (whether in response to employee action or pre-emptively). Industrial action did not include: • actions authorised or agreed to by the employer, or • action based on a reasonable concern by an employee about an imminent risk to his or her health and safety (a person seeking to rely on this ground had the burden of proof) (ss420(1)(e)-(g)).	*Industrial action*means (s19(1)): • refusal by employees to attend or perform work, • bans, limitations, restrictions on and delays in the performance of work by employees, • the performance of work by employees in a manner different from that in which it is customarily performed, or • lock outs by employers in response to employee claim action (pre-emptive action is no longer protected). Industrial action does not include: • action authorised or agreed to by the employer, or • action based on a reasonable concern by an employee about an imminent risk to his or her health and safety (s 19(2)).
Permitted purposes of protected industrial action	Protected industrial action could be taken to support or advance claims for a collective agreement (s 435(2)), other than: • a greenfields agreement, • a workplace agreement involving two or more employers that are treated as one employer (e.g. joint venture)(s 423(1)), or • a multiple-business agreement(s 423(1)).	Protected industrial action can be taken in relation to support or advance claims for an enterprise agreement, other than (s 413(2)): • a greenfields agreement, or • a multi-enterprise agreement. As noted above, employers can only take protected industrial action in response to employee action.

Issue	WR Act (Work Choices)	FW Act
Prerequisites for protected industrial action	Protected industrial action could only be taken (Part 9, Division 3): • if authorised by a protected action ballot (PAB) (s445), • during a bargaining period* (s435), • in support of claims that would not be prohibited content (s 436), • by persons who were protected for that action (such as employers, employees and unions that were negotiating parties to a proposed agreement) (s 438), • where the relevant employee organisation had complied with relevant orders of the AIRC (s 443), • after the nominal expiry date (NED) of an existing agreement (ss 440, 494, 495), • by employees, employers and unions who were genuinely trying to reach an agreement and who were not pattern bargaining (ss 439, 444), • after written notice to the employer of the nature of the action and when it would start (s 441), and • where it was authorised by the relevant union's management committee and rules (where union members engaged in industrial action)(s 446). If these requirements were not met, industrial action was not protected and was subject to stop orders under s 496 (and in some cases, suspension or termination orders under Division 2 of Part 9). *A bargaining period could be unilaterally initiated by a negotiating party that wanted to try to make a collective agreement. This involved procedural obligations such as giving written notice to other negotiating parties. Initiation of a bargaining period did not require consent of (or agreement to bargain by) other negotiating parties. A bargaining period came to an end if suspended or terminated by the AIRC or the Minister; if a collective agreement was made, or if the initiating party advised that it no longer wanted to bargain (s 428).	Protected industrial action can only be taken (Part 3-3, Division 2): • if authorised by a PAB (s 409(2)), • after PAB results are declared and written notice provided to the employer, until protected industrial action is suspended or terminated or an enterprise agreement comes into operation (s 414(3)), • in support of claims about permitted matters that are not unlawful terms (s 409(3)), • where it does not relate to a demarcation dispute (s 409(5)), • by employees to whom the PAB order applies (i.e. that would be covered by a proposed enterprise agreement and who are represented by the applicant for the protected action ballot order) (ss 409(1),410(1)), • where persons organising orengaging in action have complied with any relevant orders (s 413(5)), • after the NED of an existing agreement (s 417), • by employees, employers and unions who are genuinely trying to reach an agreement and who are not pattern bargaining(s 413(3)), and • after written notice to the employer of the nature of the action and when it would start (s 414). If these requirements are not met, industrial action is not protected and is subject to stop orders (under s 418). *There is no concept of a bargaining period under the FW Act. However, there is no substantial difference in relation to when protected action can be taken. This is because (like the WR Act) protected action can only be taken by employees under the FW Act after a PAB (and written notice to the employer) until the action is suspended or terminated, or an enterprise agreement comes into operation. Similarly, a party proposing to take protected action does not require the consent of the other party but must provide notice of the action.
Significance of industrial action being protected industrial	Immunity from suit unless the action has involved or is likely to involve (s 447): • personal injury, or	Immunity from suit unless the action has involved or is likely to involve (s415): • personal injury, or

Issue	WR Act (Work Choices)	FW Act
action	• wilful or reckless destruction of, or damage to, property, or • the unlawful taking, keeping or use of property. An employer could not dismiss an employee, injure an employee in his or her employment, alter the position of an employee to his/her prejudice or threaten to do any of the above (s448).	• wilful or reckless destruction of, or damage to, property, or • the unlawful taking, keeping or use of property. This does not prevent an action for defamation in relation to anything that occurred in the course of the industrial action. An employer cannot take adverse action against an employee who takes protected industrial action (ss 341 and 346(b)).
Suspension/termination of protected industrial action	*By the Minister* (s498) The Minister could terminate a bargaining period (and consequently industrial action) by declaration if: • industrial action was occurring or was threatened, impending or probable, and • the action was threatening to endanger the life, personal safety or health of the population (or part of it), or to cause significant damage to the Australian economy or an important part of it. The Minister could declare that specified persons were not entitled to initiate a new bargaining period in relation to specific matters, or could only initiate a new bargaining period on specified conditions. The Minister could also direct negotiating parties or the relevant employees to take or refrain from taking specified action (s 499). *By AIRC* The AIRC could suspend or terminate a bargaining period (and consequently industrial action) in certain circumstances described above (see *prerequisites for industrial action*), as well as: • if action was being taken, or was threatened, impending or probable and threatened to endanger life, personal safety or health of the population (or part of it), or cause significant harm to the economy (or an important partof it) and that is adversely affecting the employer or employees (s 430(3)), • if action related to a demarcation dispute (s 430(8)), • to allow for 'cooling off' (s 432), or • if the action threatened significant harm to a third party (s433).	*By the Minister*(ss 431, 432) The Minister can terminate protected action by declaration if: • industrial action is being taken or is threatened, impending or probable, and • the action threatens to endanger the life, personal safety or health, or welfare of the population (or part of it), or to cause significant damage to the Australian economy or an important part of it. The Minister can direct the parties to take or not take certain actions, with a view to removing or reducing the threat (s 433). *By FWA* FWA can suspend or terminate protected industrial action: • if action is being taken, or is threatened, impending or probable and threatens to endanger life, personal safety or health of the population (or part of it), or cause significant harm to the economy (or an important part of it) (s 424), • to allow for 'cooling off' (suspension only) (s 425), • if the action is adversely affecting the employer(s) and any employees that will be covered by the proposed agreement and is threatening significant harm to a third party (s 426), or • where action is protracted and is causing or is threatening to cause significant economic harm to both an employer and employees (s423).
Stop orders for unprotected industrial action	The AIRC could make orders to stop or prevent unprotected industrial action(s496). Civil penalties applied for failure to comply and orders were enforced by the Court.	FWA can make orders to stop or prevent unprotected industrial action (s418). Civil penalties apply for failure to comply and orders can be enforced by the Court.
Injunctions against	The Court could grant an injunction against industrial action that	The Court can grant an injunction against industrial action that is

Issue	WR Act (Work Choices)	FW Act
pattern bargaining	was being engaged in, or is threatened, impending or probable and a negotiating party was engaged in pattern bargaining (s497).	occurring, threatened, impending or probable and a bargaining representative is engaging in pattern bargaining (s422).
Arbitration	If the AIRC or the Minister terminated a bargaining period (and consequently protected industrial action) the AIRC could make a workplace determination setting terms and conditions of employment (Part 9, Division 8).	If FWA or the Minister terminates protected industrial action, FWA can make a workplace determination setting terms and conditions of employment (Part 2-5, Divisions 3). FWA can also make workplace determinations under the good faith bargaining framework (which did not exist under the WR Act), where(Part 2-5, Divisions 2 and 4): • there is a low-paid bargaining authorisation in operation and the bargaining representatives cannot reach agreement, or • non-compliance with a bargaining order is serious and sustained and there is no prospect of parties reaching an enterprise agreement in the foreseeable future.
Strike pay	Employers were required to withhold a minimum of four hours pay for periods of industrial action (whether the industrial action was protected or unprotected). Employers were required to withhold pay for the total duration of industrial action where that action occurred for more than four hours (Part 9, Division 9).	The FW Act distinguishes between payments withheld during periods of protected and unprotected industrial action(Part 3-3, Division 9). Employers must deduct pay for the actual period of protected industrial action. Where employees engage in partial work bans, employers may deduct pay in proportion to the duties not being performed - if they accept partial work. If an employer does not accept partial work, the employer can withhold payment for the entire period of action. For unprotected industrial action of less than 4 hours duration, employers are required to withhold 4 hours pay. For more than 4 hours of unprotected industrial action, pay is withheld for the duration of the action.