Chapter 6

Industrial action

6.1 This chapter will discuss streamlined provisions covering industrial action by national system employees and employers. The current Workplace Relations Act regulates industrial action and allows for protected action to be taken during a bargaining period when certain requirements are met.

Proposed changes

6.2 Part 3-3 deals with industrial action and clause 406 provides an overview. The system for regulating industrial action will be broadly similar to that which currently applies. The dichotomy between protected and unprotected industrial action will be retained.

Protected industrial action

6.3 The new laws will distinguish between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside bargaining. Defined in clause 408, protected industrial action will be allowed in the course of bargaining in accordance with strict rules including a secret ballot of employees and three days' notice of intention to take action.[1] Clause 413 sets out the requirements for industrial action to be protected industrial action.

6.4 Subclause 413(3) stipulates a pre-condition for taking protected industrial action that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place. Protected action is not available to pursue matters that do not pertain to the employment relationship.

6.5 Clause 414 provides that employees and/or their bargaining representatives will be required to provide the employer with three days' written notice of their intention to take the protected industrial action.

Ballot process

6.6 Clause 409 retains the requirement to hold a mandatory secret ballot authorising industrial action by a majority of employees. Bargaining representatives or eligible employees will be able to apply to FWA for a secret ballot order. All protected action secret ballots will be conducted by the Australian Electoral

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1 Hon Julia Gillard MP, Minister for Employment and Workplace Relations, 'Introducing Australia's New Workplace Relations System', Speech to the National Press Club, 17 September 2008.

Commission (AEC) except where FWA may decide that a person other than the AEC is to be the protected action ballot agent (clause 444).

6.7 Departmental officials told the committee that there are matters which will now be left to the discretion of the AEC when it runs a ballot, including the timetable and how it will be carried out.[2] Officials also explained that as part of the streamlining process, previously 80 per cent of the cost was met by the AEC and now the full cost of the ballot will be met by the AEC or the Commonwealth.[3]

6.8 The Office of the Privacy Commissioner (OPC) noted that there is insufficient information in the bill and EM to be able to determine whether all non-AEC agents will be covered by the Privacy Act. It is also unclear whether the agents would be contracted to the AEC or the FWA which would make them Commonwealth contractors and subject to the provisions of section 95B of the Privacy Act. This situation may create inadequate privacy protection for individuals participating in a protected action ballot. The Office of the Privacy Commissioner preferred agents to deal with any potential gap in privacy protections through either contractual arrangements or the preparation of guidance material on best practice in consultation with the Privacy Commissioner.[4]

6.9 The committee majority notes that the government will review advice from the Office of the Privacy Commissioner, and consider amendments to clarify and improve privacy protections on information collected under the protected ballot provisions.

6.10 The TCFUA explained that in view of its preponderance of members from non-English speaking backgrounds, it would engage a ballot agent able to deal with their needs. It is concerned that in these circumstances the union may be liable for the costs of the protected action ballot and recommend that this be clarified.[5]

6.11 Despite assurances from DEEWR that the provisions establish a simpler and more streamlined process[6], some submissions suggested that procedures could be further simplified. Professor David Peetz contrasted the intent in *Forward with Fairness*, which outlined a fair and simple secret ballot process, with the 22 pages and 36 clauses in the bill which is 'only fives pages less than the WorkChoices provisions'. He advocated that these provisions be shortened and simplified to achieve the stated objective in clause 436 of a simple process. This request for simpler procedures,

2 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 47.

3 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 49.

4 Australian Government Office of the Privacy Commissioner, *Submission 138*, p. 4.

5 TCFUA, *Submission 11*, pp. 35-36.

6 DEEWR, *Submission 63*, p. 58.

particularly in relation to ballot procedures, was supported by others including the ASU and the Victorian Private Sector Branch of the ASU.[7]

6.12 Professor Peetz particularly noted subclause 443(1)(b) which requires FWA to be satisfied that the applicant has been genuinely trying to reach agreement with the employer. He argued that this requirement is an unnecessary impediment to determine whether employees wish to engage in protected action and would be more appropriately dealt with if industrial action takes place.[8]

6.13 These concerns were supported by Professor Andrew Stewart, who submitted that FWA would not be satisfied on this account without hearing from the employer, who might drag out the process by having an argument at a preliminary stage.[9]

6.14 The ACTU also described the process as 'complex and inefficient'. It noted the potential for employers to frustrate and delay a protected action ballot[10] because FWA must be satisfied that the bargaining representative is genuinely trying to reach agreement. It explained that:

> In the experience of our affiliates, employers readily invent a range of reasons for opposing the approval of a protected action ballot. Even where baseless, these employer claims have the intended effect of prolonging the approval process for weeks or even months.[11]

6.15 The ACTU recommended that there should not be any requirements for approval to hold a ballot. In addition, there should not be any capacity for employers to intervene in the ballot process as:

> The requirement for FWA to be satisfied that the bargaining representative is genuinely trying to reach agreement is irrelevant to the question of whether the workers authorise the bargaining representative to organise industrial action. This question may properly be asked at the point when workers are about to take industrial action.[12]

6.16 The TCFUA added that the complicated provisions impose additional difficulties for workers from non-English speaking backgrounds and are likely to discourage such workers from voting.[13]

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7 ASU, *Submission 56*, p. 47; ASU, Victorian Private Sector Branch, *Submission 79*, p. 10.

8 Professor David Peetz, *Submission 132*, pp. 17-18.

9 Professor Andrew Stewart, *Submission 98*, pp. 8-9.

10 This attempt to manipulate the process by employers to frustrate and delay bargaining was also noted by the ETU(Qld), Submission 141, p.5.

11 ACTU, *Submission 13*, p. 37.

12 Ibid.

13 TCFUA, *Submission 11*, p. 35.

6.17 DEEWR explained that in order to reduce attempts to frustrate industrial action, a ballot order cannot be stayed if a challenge to the ballot order is made. This was in line with the suggestion put forward by Senior Deputy President Watson of the AIRC to change current provisions to address this issue. DEEWR added that employers will still be able to apply to FWA if they believe the industrial action is unprotected.[14]

Payments for a period of industrial action

6.18 Part 3-3, Division 9 outlines payments relating to a period of industrial action. Under WorkChoices there was a requirement to withhold a mandatory four hours pay irrespective of the type of industrial action taken. Departmental officials explained that the current strike pay provisions prohibit the employer from paying wages effectively while a person is on strike. In particular the four hour rule continues to apply to unprotected action which means that if employees are on strike for 30 mins their pay is docked a minimum of four hours. However, it does not apply for protected action where it is a matter of deducting the amount of pay that reflects the time not at work.[15]

6.19 Clause 471 provides the employer with a choice of action in relation to protected action involving partial work bans or restrictions, either to accept the performance as full performance and pay the full amount of wages or to issue a partial work ban notice.[16] Officials explained that there will be a power in the regulations to prescribe how the proportion is to be worked out.[17]

6.20 The ACTU, in noting the requirement for an employer to deduct four hours pay during unprotected action regardless of whether poor management contributed to the stoppage, claimed that this requirement would have the perverse effect of encouraging stoppages of a minimum of four hours duration.[18] This view was supported by Professor Peetz who argued that while it is appropriate for employees to lose pay for the time they are absent from the job, it is inequitable to require that they are not paid for the hours that they do work. He offered the following examples to illustrate his point:

> …employees who stopped work for 20 minutes to collect money for the widow of a colleague killed at work were, technically engaged in unprotected industrial action. These employees lost, and would continue to lose under this provision, four hours pay for being off work for 20 minutes.

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14 DEEWR, *Submission 63*, p. 58-59.

15 Ms Natalie James, *Committee Hansard*, 11 December 2008, pp. 45-46.

16 Ibid, p. 46.

17 Ms Perdikogiannis, *Committee Hansard*, 11 December 2008, p. 47.

18 ACTU, *Submission 13*, pp. 44-45. See also Mr John Ryan, SDA, *Committee Hansard*, 17 February 2009, p. 7, Mr Anthony Tighe, National Secretary CEPU, *Committee Hansard*, 19 Febryary 2009, p. 23.

> Another group of workers were two minutes late back to work after a meeting with a Member of Parliament and had four hours pay deducted from their pay packets, while yet others lost four hours after a safety meeting started late and ran 30 minutes into work time.[19]

6.21 While welcoming the reforms to partial work bans, Professor Stewart also questioned why they were confined to protected action. He argued that such action is becoming rare and can be halted by FWA or the courts. He submitted that employers would welcome the flexibility to make a proportionate deduction with unprotected action as well because:

> …in many cases it is not clear until after the event whether action was protected or not.[20]

6.22 In a supplementary submission made at the request of the committee, Professor Stewart described the practical difficulties that can arise in distinguishing between protected and unprotected industrial action. He outlined the following instance: supposing industrial action lasted for an hour and the employer, believing it was protected, deducted an hour's pay from the employee's wages. If the action turns out to be unprotected, the employer would have breached clause 474(1) and the employees clause 475(1). While he acknowledged prosecution of either party is unlikely, he suggested it would be better to close this loophole by abandoning the protected or unprotected distinction and:

> …apply the rules set out in clauses 470–473 of the Bill to all forms of action, whether protected or not. But if that approach were rejected, clauses 474 and 475 could still be amended so as to provide a defence where the party concerned reasonably believed that the action was protected, in circumstances where the conduct in question would have been lawful had that belief been correct.[21]

6.23 The NTEU sought clarification regarding the following issue: 'when an employer stands down without pay an employee taking a protected partial ban, the employees are not required to continue working with no wages, and if they do not continue working, they are not taking unprotected action'.[22]

Committee view

6.24 The committee majority notes that while the bill may attract some criticisms as recorded above, the new system allows for a fairer and more proportional response than under the current arrangements. In addition, the provisions provide clarity and flexibility for employers to respond. It notes the process for apportioning pay will be detailed in the regulations.

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19 Professor David Peetz, *Submission 132*, p. 18.

20 Professor Andrew Stewart, *Submission 98*, pp. 9-10.

21 Professor Andrew Stewart, *Supplementary Submission*, pp. 5-6.

22 NTEU, *Submission 105*, p. 6.

Suspending or terminating protected industrial action by FWA

6.25 Where protected action is causing or is threatening to cause significant harm to the economy or part of it, clause 423 authorises FWA to order the suspension or termination of the industrial action. Clause 424 provides that where the protected industrial action threatens the safety, health or welfare of the community or part of it, FWA must make an order to suspend or terminate it. Clause 426 provides that FWA may suspend protected industrial action if the action is causing significant harm to the relevant employer and employees.[23]

6.26 Senator Cameron raised questions about Australia's international obligations in relation to the suspension of protected action and DEEWR advised:

> The Department considers that the provisions of clauses 423, 424 and 426 are consistent with Australia's international obligations under the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87), the Right to Organise and Collective Bargaining Convention, 1949 (Convention 98) and the principles adopted by the ILO Governing Body Committee on Freedom of Association (CFA).[24]

6.27 Clause 426 of the bill permits FWA to suspend industrial action for a period if, among other requirements, it is satisfied that the protected industrial action occurring is causing, or threatening to cause, significant harm to any person other than a bargaining representative for the agreement or an employee who will be covered by the agreement. Sub-clause (4) sets out certain matters to be taken into account. The committee majority notes that the provisions dealing with significant harm to the bargaining participants use the concepts of significant economic harm and also require that where the industrial action is threatening to cause such harm, that the threat is imminent. The committee majority considers that it would be desirable to ensure consistency of the drafting and concepts between these two provisions, to avoid any unintended consequences in the interpretation of the provisions.

Recommendation 8

6.28 **The committee majority recommends that it would be desirable to ensure consistency of the drafting between these two provisions by providing that where industrial action threatens harm, the threat should be imminent, and the harm to the third party should be economic harm.**

Conclusion

6.29 The committee majority notes the high threshold for FWA to order the suspension or termination of industrial action. It notes the likelihood that this power

23 Factsheet 10, 'clear, tough rules for industrial action'.

24 DEEWR, Supplementary information, tabled papers.

would be exercised only rarely in recognition of the right for employees to take protected action.