

FIREWALLING THE RIGHT TO STRIKE IN AUSTRALIA?

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Introduction

I argue for the repeal of Australia's penal powers against strikes. I advocate the firewall right to strike.

The Australian Labor government's *Fair Work Act*, in force July 1st 2009, retains the same repression of legitimate industrial action as former Prime Minister John Howard.

PM Howard's neo-liberal right-wing government was voted out in Australia's election on 24 November 2007 and the PM lost his seat in Parliament. This defeat was due to voters rejecting his extreme anti-worker *Workplace Relations Act* legislation, that was called *WorkChoices* (2006), the name being political 'spin', as there was no choice for employees.

PM Howard rushed *WorkChoices* through the Australian Parliament in 2005 when he obtained for the first time since elected in 1996 control of the Australian Senate. The Howard government had to earlier negotiate with minority party Senators with the balance of power.

Australian unions through the Australian Council of Trade Unions (ACTU) mounted the largest union campaign in labour movement history. The *Your Rights at Work Worth Fighting and Voting For* campaign YRAW, funded with \$30 million, with mass community assemblies, with sophisticated TV print radio and web-based communication <http://www.rightsatwork.com.au/> and the unprecedented political mobilisation of unionists and community groups with the message against unfair work laws. Muir (2009) records this successful campaign in key marginal political seats that convinced working families to vote against *WorkChoices*.

The Australian Labor Party ALP had new leaders, Kevin Rudd and Julia Gillard who promised to repeal *WorkChoices*. The ALP won a majority of seats in the Australian House of Representatives and thus government. But not in the Senate, where the Greens and minority right-wing Senators hold the balance of power. YRAW was successful in defeating the Howard government, but as we shall see, not in obtaining all the workplace rights campaigned for, the right to strike, the focus in this article.

The Labor government with Kevin Rudd Prime Minister and Julia Gillard as Deputy Prime Minister (DPM), Minister for Employment and Workplace Relations, Minister for Education and Minister for Social Inclusion implemented industrial relations reforms through the Parliament in the *Fair Work Act* (2009).

They repealed some of worse features of *WorkChoices*, such as removing the ability of multi-national corporations to negotiate individual statutory employment contracts

without unions and below union industry awards wages and conditions and union collective agreements.

The *Fair Work Australia FWA* is a rebadged authority from the *Australian Industrial Relations Commission AIRC* (earlier the *Conciliation and Arbitration Commission*). Forsyth and Stewart (2009) edited essays covers these *Fair Work Act* (2009) details. McCrystal (2006, 2009) describes the consensus between Australia's right-wing political coalition and the ALP on the regulation of industrial action.

The ACTU in lobbying the new Labor government achieved advances in collective bargaining, provisions to ensure this happens if a majority of employees want it, with new good faith bargaining obligations and employment rights for individual workers, but not for the right to strike.

Powerful corporate interests successfully lobbied and PM Rudd and DPM Gillard agreed to retain most of the *WorkChoices*' restrictions on industrial action, one of the most severe repressive anti-strike regimes in the OECD world. The International Centre for Trade Union Rights (ICTUR 1999-2004) exposed that Australia's *Workplace Relations Act* (1996) failed to comply with ILO standards for the protection of the right to strike and *WorkChoices* compounded the breaches.

My earlier criticism (see papers) of the Howard restrictions now applies to the Labor government. Australian Labor has followed PM Blair's New Labour in the U.K. that retained the Thatcher-era repression of collective bargaining strikes.

Glasbeek (2009) argues in 'Rudderless in a Sea of Choices: The Defeat of Your Rights At Work—Analysis and a Possible Response' that the *Fair Work Act* (2009) is a sell-out of the *YRAW* movement. Durbridge (2009) describes the ACTU's unfinished business. Strengthening workers' rights including the right to strike is still on the unions' agenda, the ACTU 2009 Congress.

In a collective bargaining system the strike is the necessary ultimate union sanction. *WorkChoices* legally suppressed most strikes, so for most practical purposes, as we shall below, the right to strike in Australia is still (almost) outlawed.

This article is based on my paper given to the Victorian Trades Hall Council, senior union executives in the Australian State of Victoria on 14/2/2008. I have updated it to June 2009.

Section A No case for the repression of strikes

1 Global Financial Crisis: changed circumstances

ALP workplace policy in 2008 was designed with continuing economic growth and tightening labour markets. But the capitalist global financial crisis (GFC) brings the opposite – recession and unemployment.

PM Rudd in the Australian *Monthly Magazine* February 2009 is critical of ‘excessive capitalism’ and ‘greed’ and blames ‘neo-liberalism’ for the GFC. His government, like many throughout the world, changed economic policy and implemented prudent ‘Keynesian’ government demand stimulus, infrastructure development and deficit spending. Such change is necessary in response to this deeply troubling capitalist crisis that moved quickly from speculative financial markets into productive capital investment to this world recession.

I criticised the government in my Senate submission (2009) for not changing in the face of the GFC the *Fair Work* Bill as it proceeded through consultation with employers and the ACTU, the public and Parliamentary debate.

In this recession employers cut costs, wages and conditions and make workers redundant, with unemployment soaring. So with these changed economic forces, workers and their unions need to be even more able to resist, with the right to strike as a last resort weapon, difficult at any time, but more so in these crisis times.

The GFC should mean critical questioning of neo-liberal labour market policies and the capital and labour relationship that underpin *WorkChoices*. But the DPM did not change the *Fair Work* ALP policy designed for very different economic times. The previous tight labour market that enhanced unions’ negotiating position is now reversed.

The lower paid and casuals and part-timers are in an even more precarious work life facing unemployment. The ability of unionists to exercise collectively bargaining to defend their conditions of employment and organising against unjust and capricious ruling is considerably weaker with the threat of dismissal and redundancy during higher unemployment.

However, in dealing with recession and recovery, stronger collective bargaining rights are essential. Ewing (2008) observed:

‘When the world was last in a recession on this scale, the British government of the day – a Conservative government - under the influence of the Liberal economist working in the Treasury - one J M Keynes - undertook to support the rebuilding of collective bargaining, so that within a period of 12 years, 85% of British workers were covered by collective agreements.

This was presumably to create a virtuous cycle of (i) higher wages and greater spending power, (ii) to stimulate demand and production to meet the demand, (iii) to stimulate employment growth.’

Weller and Logan (2008) argue:

‘Strengthening workers’ income growth through better worker rights is an important ingredient to create strong and stable growth in the long-term. Policy makers also need

to pay attention to worker rights during a time of crisis, when profits are under pressure, which can translate into pressure to reduce worker rights. Weaker worker rights however, would make it harder for income, demand and economic growth to resume. A resolution to a major economic crisis requires a sensible policy approach to strengthening worker rights, even though private sector pressures will emerge to weaken such rights.... good worker protections limit the impact of an economic and financial crisis on people's incomes and thus on consumption and growth.

... As productivity increases, so do profits and, if worker rights are strong, so does wage growth. With stronger domestic demand, incentives for speculative investing are reduced. This results in more stable income growth over the long run and ultimately more stable and stronger economic growth – just what the financial doctor ordered for the troubled world economy. ...Labour rights have a long-term stabilising effect. They tend to reduce one of the inherent long-term economic imbalances – more people having to borrow ever larger amounts.'

Strong workers' rights means that not only do unions have the legal capacity for effective collective bargaining, but also that wages are indeed raised in much broadened bargaining rounds to boost living standards of Australian families and stimulate demand to assist economic and employment recovery. However, in this recession Labor has not achieved 'balance' but favoured the corporate interests on the right to strike.

2 State authoritarianism

PM Howard's strategy in the growing economy was not only to allow the more powerful employers to increase profits by exploiting workers with individual bargaining contracts, but also the state repressing the ability of unionists to lawfully exercise collective bargaining power through their combined withdrawal of labour power.

WorkChoices included a unique legal regime for employers to choose a range of penal powers to attack unions' legitimate industrial action and in more decisively subordinating their workforce to their rule. State authoritarianism was a key feature. This included:

1. The *Building and Construction Industry Improvement Act 2005 (BCII)* was first rushed through the Australian Parliament in 2005 when PM Howard controlled the Senate targeting most unfairly only building and construction workers and their unions. The *BCII 2005* made their legitimate industrial action 'unlawful'. Howard's politics was then to attack so-called 'unlawful union action'.

Earlier, after a dispute was settled, employers did not want to sue their workers and unions for strikes. So the Howard government established, funded with millions of dollars, a new state body 'a tough cop policing unionists' blandly called the *Australian Building and Construction Commission ABCC*. Building unionists experience this as a 'secret industrial inquisition' instilling fear on building sites against workers. This police force compels building unionists to give evidence on union meetings and any strike organisation with the threat of 6 months gaol. Workers' civil liberties, such as the right to

remain silent, are breached and they have fewer rights than criminals or suspected terrorists. The *ABCC* long after disputes are settled prosecutes workers and unions and fines have been made for so-called 'unprotected' building action.

The ILO (2005) condemned this *BCII* Act as in breach with basic minimum standards: PM Rudd says the *ABCC* will be abolished in 2010, but replaced with another body with similar powers that the ACTU and building and construction unions find unacceptable. See Roberts (2005) Ross (2005) and my papers on the *BCII* Act and the 'Perth 107' and the continuing contest *Rights On Site* campaign www.rightsonsite.org.au and www.arkstribе.org.au.

2. The Minister of Workplace Relations' unprecedented unilateral power to halt industrial action if she forms an opinion that it may be likely to cause significant damage to an important part of the Australian economy.

3. *Fair Work Australia* replacing the *Australian Industrial Relations Commission* AIRC has no discretion to settle disputes but is compelled to use penal powers against unions with automatic return to work orders, rather than conciliating and arbitrating the claims and grievances in dispute on the merits. The *Fair Work division* of the Federal Court apply sanctions against unions as do common law courts. Secondary boycotts or solidarity strikes are still unlawful, prohibited content caught by competition law, Australia's *Trade Practices Act* (1975). Other state workplace relations bodies formerly assisting workers and unions such as the *Fair Work Ombudsman* are now to control union activity.

4. The politics of the government's 'law and order against militant unions' with the ideology of penalising so-called union 'unlawful' strikes in contrast with no real strike issues as this is a period of historic low strike action in Australia.

3 The juridification of disputes

Historically, this state authoritarianism has three legal responses to industrial action: 1. total suppression, 2. some toleration or repressive tolerance and 3 some form of lawful strike. Australian labour law has had years of suppression, periods of tolerance and repressive tolerance. In 1993, the then Labor government PM Keating, introduced a (limited) legal right to strike, protected action, for enterprise bargaining. Protection was afforded for industrial action in negotiating enterprise agreements against the common law and statutes deeming strikes unlawful.

'Successive waves of reform by the Howard Government in 1996 and 2005 severely constrained the right to take industrial action. They did this by limiting the scope for protected action, imposing difficult procedural requirements on its access and ensuring that all unprotected action is regarded as unlawful and subject to an array of remedies', Romeyn (2008).

Australia moved more decisively under *WorkChoices* to suppression. This was a clear break with the century-old recognition within the Australian industrial relations system of workers' collective rights to exert economic pressure through industrial action in order to balance the unequal bargaining powers between an employer and an employee.

This is an excessively legalistic regime with many prescriptive details. It is the juridification of industrial relations where corporate lawyers dominate and courts use legal fictions to rationalise penalising unions.

Without doubt, as we shall see in the details that follow, access to corporate lawyers and penal powers by employers who choose to use them is a frightening power for any worker. Dictatorial management in the private or public sector who ruthlessly exercise workplace rule can do so against any industrial action that is not protected. There is no industrial fair play.

Although the *Fair Work Act* is simpler and easier to follow, the corporate lawyers remain dominant in industrial relations. The 'command and control' sanctions based legal regime contrasts with the (now abolished) 100-year old equity based Australian conciliation and arbitration system settling industrial action.

4 Beware collective begging

I cite the Australian Parliamentary Library Romeyn's (2008) executive summary, an argument for striking a balance relating to industrial action.

• The International labour Organisation ILO and a number of Australian academic and other commentators have criticised the *WorkChoices* reforms for tipping the balance of power too far towards employer interests—undermining the important role of the right to strike as a fundamental element of stable collective bargaining.

- despite suggestions that further reform of the right to strike will be limited, this paper argues that a thorough review of relevant legislative provisions is required.

It suggests that if such a review is undertaken it must give prime consideration to: the requirements of stable and voluntary collective bargaining; the need to strike a fair balance between the interests of workers, employers and the public; and the need to avoid unnecessary regulatory burden and complexity with its associated costs for organisations and the community. Consideration should also be given to Australia's obligations under international conventions and the guidance provided by the principles and decisions of the ILO's supervisory bodies.

- The paper notes concerns that any reduction of constraints on industrial action will see an 'explosion' of such action, but suggests that these concerns require critical consideration...

'Strikes and other forms of industrial action represent the further expression of collective voice by employees and may help to balance their bargaining power vis a vis the employer. Indeed, strike action has been recognised as playing such an indispensable role in resolving deadlocks in collective bargaining relationships as to be regarded as an essential ingredient of free collective bargaining.'

Paul Weiler 'Reconcilable differences: New directions in Canadian labour law', Carswell, 1980, p. 66 explains:

... the stoppage of work affects both sides, inflicting harm and putting pressure not only on the employer, but also on the union as a lever towards settlement. Even more important, it is the prospect of impending strike action (especially if the parties have previously had real life experience of it) which is a powerful prod to agreement as negotiations reach the critical point ...The ability to compromise simply would not be there unless the parties were both striving mightily to avoid the harmful consequences of a failure to settle. In the larger system it is the credible threat of the strike to both sides, even more than its actual occurrence, which plays the major role in our system of collective bargaining.

For these reasons, Weiler suggests that *banning strikes would effectively end collective bargaining*. Similarly, Jacobs argues that in the absence of a right to strike '*collective bargaining would amount to collective begging*'. A. Jacobs cited in T. Novitz (2003).'

These arguments were ignored by Australian Members of Parliament and ought not to be.

5 Firewall the right to strike

If workers in a democracy are not able to withdraw our labour power without being ordered back to work we are not free. Workers remain 'wage slaves' to whatever the employer or the state wants. Penal powers (other than losing pay for time lost) ought not be available to employers,

An alternative workplace policy is to get the repressive state apparatus out of the workplace, to limit corporate law firms in industrial disputes, to respect workers' rights and union freedoms and with industrial relations institutions that support unionism.

Industrial action a lawful right for an individual worker, workers collectively and their unions has to be 'firewalled'. The 'firewall' is an impenetrable barrier, a modern image more secure than that of the old 'shield'. No corporate lawyer or common law judge can get through it to penalise workers withdrawing labour.

I advocate the firewall right to strike as a key means without which any 21st century collective bargaining system and democracy cannot be fair.

Labor's *Fair Work Act* (2009) could have but did not firewall industrial action. The provision could have read: 'no legal action lies under any law whether written or

unwritten in force in the Australian Commonwealth, or any State or Territory in respect of any industrial action that is protected action; unless the industrial action has involved or is likely to involve intent to harm public health and safety.'

In any debate for a 'firewall' protection, the principle is 'no penalties for withdrawing labour power'. No one argues against 'the principle of the right to strike.' No one in the union movement. Right-wing politicians do not deny the right to strike 'in principle'. The Howard government ads said: 'We won't take away the right to strike'. Right-wing theorists such as Hayek concede that 'everybody ought to have a right to strike'. 'Libertarian' right-wingers attack the intervention of the state to dare take away the freedom of an individual to withdraw labour. But they argue for legal boundaries and in practice these can defeat the right.

Australian employers supported 'the principle' in the 1993 protected action reforms. But, the Australian Chamber of Commerce and Industry (2002) ACCI successfully asserted boundaries:

- 1. That the right to strike is only available as a last resort after there is genuine enterprise-based not industry wide bargaining;*
- 2. That the right to strike is only exercisable in the negotiation of agreements, i.e. before they were made, or after their expiry, but not during the life of agreements: and*
- 3. That the right to strike could only be taken over disputes or demands that concern industrial matters, in legal language described as 'matters pertaining employers and employees'.*

The contest is not over the 'principle', but over the boundaries. I criticise these boundaries as unfair limitations not affording the firewall right to strike.

6 Anti-strike features of *WorkChoices* remain

The ACTU (2009) Australian Senate Inquiry submission and labor law and industrial relations academics advocated unsuccessfully for these following restrictions in *WorkChoices* to be repealed.

(i) Unlawful industry strikes

Australia outlawing industry or pattern bargaining strikes retains a 'world-worst' labour law system for workers. Pattern bargaining is when there are common claims for wages and conditions on two or more employers for proposed collective agreements. But this prohibition is wrongly based and anti-union.

All effective industrial relations systems have elements of pattern or industry bargaining. Research by the Australian Centre for Industrial Relations Research and Training ACIRRT (2002) shows:

'there is no sector in the Australian labour market or bargaining system in the OECD which fits the fictitious model of 'genuine' enterprise bargaining – all bargaining systems contain elements of pattern-setting and workplace bargaining.'

Earlier, industry bargaining was not prohibited, but in many cases the standard with industry awards.

The ILO (1996) criticised the Howard government's *Workplace Relations Act* (1996):

'Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike.'

The ILO Committee of Experts was concerned the Industrial Commission can determine the appropriate level of bargaining:

'The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining. ...the choice of bargaining level should normally be made by the parties themselves, and the parties 'are in the best position to decide the most appropriate bargaining level' (General Survey on Freedom of Association and Collective Bargaining, 1994, paragraph 249).

In March 1999, the Committee found, in relation to multi-employer agreements:

'The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.' ILO (1999).

In considering the Howard government's response, the ILO said (2001): *'With respect to the right to strike in support of a multi-employer, industry-wide agreement for all practical purposes is prohibited.'*

The *Fair Work Act* 2009 still denies this ILO collective bargaining right at the industry level or in pattern bargaining. DPM Gillard has sternly maintained her stance against pattern bargaining and industry industrial action. This comment is familiar in the contest with unionists. On TV 3/1/2008 and in the *Australian Financial Review* 4/1/2008 she said in an offensive tone that the Labor government would have 'judges come down like a tonne of bricks' on unionists in any pattern bargaining strike for collective agreements.

But powerful employers engage in industry and pattern bargaining. They seek common claims with employers in their industry. They support the 'level playing field' not wanting to be in competition on the price of labour, whether through forcing it down as

low as possible, or in leapfrogging either to attract and retain labour or in response to union claims.

Employer industry associations campaign with common strategies to oppose union claims that is pattern bargaining. Industry and national bargaining throughout the world is not inconsistent with enterprise bargaining. The bargaining practice has to be determined by the parties, without unwanted legal state restrictions. Industry bargaining agreements with multi-industry employers does mean productivity advances. Peetz (2005) 152 IR and Labour Law academics in their Senate critique of the *WorkChoices* Bill argued making legitimate industry and pattern bargaining industrial action unlawful was unfair and continue to do so.

A reform is in the *Fair Work* Act for multi-employer bargaining should employers and unions genuinely wish to do so. But again most unfairly, protected action and good faith bargaining orders are not available, giving the upper-hand to employers. Furthermore, it is unlawful to coerce an employer to make a multi-employer agreement or to discriminate against the employer if they have not entered into a multi-employer agreement.

(ii) Employers frustrating compulsory secret ballots

WorkChoices mandated complex compulsory secret ballots for protected action. Formerly the union organised member approval in a democratic vote. No abuses were cited, nor was there a demand for change from union members. State controlled compulsory secret ballots were asserted as right-wing political ideology. Secrecy was from other fellow workers. Howard government Ministers' used political spin that union leaders force workers to strike, but this is unfounded, see Hyman (1989) on understanding strikes and Waters (1982) sociological analysis of industrial conflict and strikes in Australia.

In Howard's *Workplace Relations* Act (1996) three days notice of protected action gave some scope for unions to exert economic pressure within enterprise bargaining. A postal ballot was voluntary and in practice not often used. Under *WorkChoices* (2006) it was compulsory for unions to comply with 45 sections of complex process requirements for a protected action ballot (PAB). The AIRC polices the process and determines submissions. The Australian Electoral Commission conducts the ballot.

Rather than negotiating, employers as parties to the ballot process were able to pursue any number of baseless technical reasons why a protected action ballot not proceed, Bukarica (2007). This included objecting to the questions that the union puts to its members on 'the nature of the industrial action' on the ballot paper or on the details on the electoral roll or that the union is pursuing 'prohibited' claims or on the manner of the union tactics or pattern bargaining or technicalities after the ballot - all able to frustrate the process. The employer focus was mostly that the union 'was not genuinely trying to reach agreement', again in many instances scope for the AIRC to police bargaining behaviour and the reasonableness of the claims. Corporate lawyers in numerous cases on the relatively small number of protected action ballots strikes challenged, made the process more costly and delayed lawful action, McCrystal (2009).

For the PAB, unions have to ensure a quorum of at least 50 per cent of eligible voters who must cast a vote, of which more than 50 per cent must approve the action. Only a simple majority of valid votes cast is warranted and indeed the quorum rule may hide the true level of support for the strike. For example, looking at votes in two workplaces of 100 employees, where in the first 49 employees in the ballot vote, all in favour of strike action and in the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was greater active support for the strike in the first workplace. A simple majority of people who vote is not enough continuing the perverse tradition of *WorkChoices* where employees can vote to bind themselves to the terms and conditions by a simple majority of voters but in order to authorise industrial action a higher standard is in place. The ILO has held that while: ‘the obligation to observe a certain quorum...may be acceptable...The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises.’ Novitz (2003).

This is all designed to assist employers to frustrate the economic bargaining power of the strike weapon and to restrict traditional short ‘rolling stoppages’ tactically organised on the job that are more risky. But unions do manage to get through the 45 sections for positive votes for lawful industrial action and with successful outcomes.

Under the *Fair Work Act* (2009) the process for a compulsory secret ballot has been refined, somewhat easier (yet to be tested) and still complex and an employer can take technical objections and challenge union bargaining behaviour. An individual worker still cannot be compelled to take protected action even with a clear majority in favour.

The contrast in *WorkChoices* with employer lockouts is significant Briggs, (2004). There is no ballot requirement for employers legally locking out their workforce in bargaining for collective or individual agreements - no balloting of management, directors or shareholders.

The principle of freedom of association is still breached. Workers and their unions have to be legally able to administer their democratic strike vote of members without interference from the employer and/or the state.

(iii) Industrial action ‘not protected’ still banned

The Labor government’s absolutism, the same as *WorkChoices*, in prohibiting all strike action during the term of a collective agreement is most unmerited. Earlier, unprotected action was not always unequivocally illegitimate and liable to be made unlawful and penalised. One example is it is reasonable that unions are not always prohibited from taking protected action during the agreement’s life if the new claims are not in the agreement. But this is banned.

Most significantly, the *AIRC* and now *Fair Work Australia* is compelled to automatically make orders to stop unprotected action threatened, organised or undertaken. This is irrespective of the merits, that workers' grievances may be just, or that it may be better to conciliate rather than make the order. Politicians attack so-called 'wild-cat' strikes. Action in defiance is legally coercion and attracts automatic fines or imprisonment. Common law tort actions for damages are available.

This total prohibition is repressive of all workers' responses to harsh and unfair management decision-making. Giant corporations in mining, banking, communications and manufacturing, as well as governments as employers, are ruthlessly able to oppose any collective resistance of their workforce over grievances and deny the right to strike.

Outlawing all unprotected action has wider serious ramifications undermining democratic freedoms, as it prohibits legitimate social and political protest stoppages and over issues such as the environmental crisis.

(iv) The right to strike over the environmental crisis risky

There are great challenges for employers and workers to combat global warming, to respond to the environmental crisis and for industry to invest in 'green jobs'. Effective workers' rights can assist change. The lawful ability for workers and their unions to negotiate and take industrial action over environmental issues ought not be risky or unlawful. Protected action on the environment may be questioned as legally 'not pertaining to employment' (see below).

Union 'green bans' are historically a key environmental activity pioneered in Australia. With community support, they are for the protection of the environment or conserving built heritage against the short-term profit making of developers. Novitz (2003) argued:

'...that green bans allow the values of the 'life world' Habermas (1997) to permeate the capitalist system. The Sydney green bans, were where constitutional democratic procedures have not decided how to develop Sydney before the labourers stepped in; profit making builders had. The green bans may be understood as taking onestep further a union goal traditionally applied to setting wages and conditions of employment; substituting a conscious group decision for a market determination.'

WorkChoices and the *Building and Construction Industry Act* (2005) outlaws green bans. The *Australian Building and Construction Commission, the ABCC* can interrogate and prosecute workers and unions for legitimate industrial action on the environmental crisis.

'Green Bans are going to become increasingly important as we head into an era of climate change over the next 10 years . . . and the Greens policy is to allow workers to make climate change not just a household issue, which they already are, but a workplace issue. The Greens have a very clear policy on this that allows workers to have the internationally recognised right to strike for whatever matter they choose, if that's an environment matter, so be it.' Senator Bob Brown, leader of the Greens' party.

The *Fair Work Act* (2009) should have ensured a lawful green ban.

(v) No strike pay

Under *WorkChoices* no strike pay was an obsession, with strict prohibitions. It was an offence for an employer to pay for time lost for a strike and always four hours. Workers 15 minutes late after collecting on the job for a family of a worker killed were docked four hours pay. PM Howard supported a company that docked a full week's pay from workers because they had a ban on overtime in support of a collective agreement. The *Fair Work Act* abolished this, except for unreasonably keeping it for unprotected action. But for protected action, employer deducts pay for the actual period of time the workers stopped work. If partial work bans are implemented employers will be able to issue a notice and deduct a portion of pay, with disputes resolved by *Fair Work Australia FWA*.

Keeping 4 hours deducted for action unprotected is a disincentive to return to work. There are examples of half hour stop-work meetings where workers would return to work and then be docked a further three and a half-hours. There ought to be paid meetings for employees to meet collectively to hear report backs without any deduction at all.

There should be scope for *Fair Work Australia* to determine on the merits, e.g. where there is unnecessary employer provocation that strike pay is warranted. Workers accept pay is docked for lost strike time, but feel aggrieved when a strike is provoked unnecessarily.

7 Further restrictions on the right to strike remain unfair

The *Fair Work Act 2009* retains most of these (see my Evatt papers in the references):

- The issue of the legally restrictive and narrow ‘matters pertaining to the employment relationship’ doctrine. I discuss this below as it is retained in the *Fair Work Act*.
- *Fair Work Australia* has to stop the protected action in circumstances that can be a denial of that right. This occurs where third parties suffer significant harm they have rights to seek stop the protected action orders and is far too wide as by definition third parties can normally be adversely affected; after suspension of a protected action ballot; and power for ‘cooling off’ periods stopping protected action. The right to strike is diminished when such provisions can be used to stop lawful strikes.
- Not all of the complex technical legalities in the process requirements for protected action are repealed (see more below). The *Fair Work Act 2009* has a form of good faith bargaining, retains process provisions and that the union must be genuinely bargaining before seeking a protected action ballot – a recipe for juridification.
- The right to strike for individual bargaining is not in the new system for the many higher paid common law individual agreements. Under the *Fair Work Act 2009* protected action only applies to collective bargaining in the enterprise.
- Occupational health and safety action was legally made more difficult with a subtle legal change putting the onus on the worker to prove the health and safety risk. All the restrictions on OHS industrial action are supposed to be removed. The details of this OHS right to strike are still contested.

A new power for *Fair Work Australia* includes a deadlock procedure for protracted protected action causing significant harm to the bargaining parties themselves. Protected action terminated can lead to a limited form of arbitration – potential for juridification.

Labor repealed some restrictions.

- Labor did repeal the ‘prohibited content’ restrictions that made certain union claims for recognition, for union training leave, for union deductions etc unable to be lawfully in a collective employment agreement. This was a most severe restriction on the freedom of collective bargaining in breach of International Labour Organisation ILO practices for employers and employees to determine freely the content of what they negotiate over without state interference. PM Howard did not trust employers who wanted to agree to work with and respect employee rights in their union organisation.
- Labor repealed the provision whereby a strike is not protected if non-unionists are involved or with unions who are not involved in protected action.

- Labor repealed ‘greenfields employer agreements’ where the employers in planning for new projects could make employment agreements with themselves! They were without a workforce or without the unions and then these greenfields employment conditions were enforced on the new employees in the greenfields’ project without a right to strike. In the *Fair Work Act* (2009) greenfields’ agreements are with unions.
- The right of an employer to mount an offensive lockout is removed. But the lawful lockout is allowed in response to workers’ protected action. This in itself is a weapon that arguably the more powerful employer ought not to have, Briggs (2004, 2005). Also, anything short of a lockout by an employer is not unprotected industrial action. A unilateral change in the usual performance of work can be unprotected industrial action for an employee but not an employer. So an employer is free to cancel all overtime during bargaining and it is not unprotected industrial action. But an overtime ban by employees would be unless authorised by a protected action ballot.

8 What the firewall right to strike would involve

We accept that when it is proved that there is intent to damage the health and safety of the community such a strike is not to be protected. This is a reasonable boundary, as is protection for the rights of persons and property in certain circumstances.

When enacted the right to strike means there is a positive benefit for all parties in industrial relations and in the public interest. As the union threat in bargaining is legal, as a last resort, agreement may be made without strike dislocation and with fair play.

Despite what right wing politicians believe, the firewall right to strike and its industrial relations practice is a factor for industrial peace and the prevention of strikes.

The firewall strike involves the following features.

- Worker and union collective bargaining industrial action for collective agreements is fully protected. Workers and unions are free at law to collectively bargain with the right to strike not only on wages and conditions but also over management prerogative decisions, industry development decisions etc. There are no sanctions for collective bargaining strikes that protect and advance the occupational, social and economic interests of workers.
- Whatever claims are decided on democratically by workers to bargain over be allowed. Freedom of association and collective bargaining with the right to withdraw labour power in any way determined is paramount.
- ILO standards for the protection of the right to strike apply. In 1983, the ILO emphasised their principles.

‘The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social

interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.'

Novitz (2003:368) concluded:

'...there remains scope for the endorsement of ILO principles, based on an appreciation of the right to strike as a civil, political, and socio-economic entitlement.'

ALP MPs have supported this ILO principle. Kevin Rudd in 2005 criticising the *WorkChoices* Bill supported the ILO citing my 2005 paper 'Inside the ILO Tent' Evatt Foundation and in 'John Howard's Radical Industrial Relations Regime and its Incompatibility with ILO Standards' 25/11/2005. But his government in 2009 ignores ILO standards.

- Industry and pattern bargaining industrial action is lawful as the industrial parties have freedom to determine at what level they bargain.
- The individual worker is protected under all circumstances: no dismissal or victimisation: no loss of social security.
- The right to strike on occupational health and safety is absolute and not conditional.
- The right to strike is not more restricted in specific industry settings: i.e. the Building and Construction regime is abolished; restrictions in trade-related industries, such as the waterfront are repealed; in 'essential services' the right to strike is restored.
- The ancient British common law master and servant doctrines of tort and breach of contract do not apply. Workers exercising and the union officials organising the strike have complete legal protection against common law actions in tort, contract and in equity. There is no possibility of crippling damages. Industrial disputes are settled by the parties or in the industrial relations commission system and not in the common law courts.
- Peaceful picketing is protected industrial action and is not subject to common law injunctions.
- An employer cannot employ 'replacement' labour to break a strike, but is required to negotiate. The ILO policy is that the hiring of workers to break a legitimate strike is a serious violation of freedom of association.
- Competition law outlawing solidarity strikes and secondary boycotts is removed by the repeal of the *Trade Practices Act* (1975) provisions.

- The right to strike extends internationally. As unions organise globally in response to powerful multi-national corporate interests, the collective bargaining system protects the right to strike across countries. European labour laws and rights for workers extend across countries based on the limited European protection for the right to strike, Novitz (2003). Australia requires similar rights based on ILO minimum standards so Australian workers can combine with other workers to bargain with the power of corporations.
- The right to politically protest by withdrawing labour is lawful. This right to strike exists as a last resort in response to government public policy. Workers and their unions have as citizens in a democracy legal protection for short political protest strikes, such as attending rallies and assemblies against *WorkChoices* and any issue that impact on workers social and economic interests.
- For more ‘political’ grievances, this right in a democracy exists: such as attending protest ‘No War’ rallies; on vital foreign affairs issues such as protesting against dictatorships and fascist acts and supporting international human rights struggle. Scope for political communication and freedom of speech as determined by the workers and their union is protected. This democratic right implements the ILO right to have political protest strikes. (See Novitz 2003 and my papers). The *Fair Work Act* (2009) still denies such a right. Obviously, the ILO does not support any ‘purely political’ strikes to bring down a government.
- Fines against strikes are at a minimum, as the principle of restorative justice applies.
- Provisions in the *Crimes Act* and in Australia’s anti-terror laws that makes certain strikers criminal are repealed.

Section B Specific issues on the right to strike

1 Remove the protected action/unprotected action dichotomy

One historical problem is the structure of the industrial relations regime, here the ‘protected/unprotected action’ dichotomy. Industrial relations participants and unions have been forced to accept the structure of the labour law responding to industrial action to be within the legal framework of ‘industrial action that is protected and industrial action that is not protected’ - or ‘lawful/unlawful’ boundaries. Policies on industrial action are framed within this dichotomy.

Earlier, industrial action ‘not protected’ was at times legitimate and not necessarily to be made ‘unlawful’, depending on the circumstances and merits. But under Howard’s 1996 *Workplace Relations* regime, the protected/unprotected dichotomy changed for the worse. Over a decade, powerful corporate lawyers were used to press their technicalities about what was within the scope of protected/unprotected. After decisions by the Federal Court, the AIRC and at times decisively by the High Court such as the *Electrolux* (2004) decision, the boundary of the lawful strike shifted against unions. Protected action was

narrowed and the scope of unprotected action was widened and found to be unlawful and strikes penalised. Australia's 'protected/unprotected' regime was criticised by the ILO. Then with *WorkChoices*, the protected/unprotected dichotomy again further moved against unions. The AIRC was compelled to halt industrial action not protected. Legal processes for protected action were more risky.

Labor's *Fair Work Act* has a widened scope for protected action and a narrower scope of unprotected action, but backed retains much of *WorkChoices*. This problem is there should not be this dichotomy.

What Australia's modern collective bargaining system requires is a new paradigm - the firewall right to strike. Here lawful industrial action is not confined to enterprise bargaining, but as a principle is central to all bargaining and a democratic right and political freedom to defend and extend workers social and economic interests.

2 No common law sanctions against strikes

The right to strike requires total protection from the British colonial doctrines of the common law of tort that declares a strike a civil wrong, where damages are liable. The strength of protected action is to forbid employers suing unions in tort at common law.

This 'employer common law right' against unprotected action today contrasts with the immunity from the tort law for industrial action gained by UK unions in 1906. Employers took no common law actions against union strikes from 1920's to the 1970's. The industrial relations practice was to settle strikes in the conciliation and arbitration commission. Although strikes give rise to civil liability, employers were reluctant to sue when the strike was over, as it gives rise to bitterness in the future employment relationship. But right-wing politicians and employer associations campaigned tirelessly for the return of the common law against strikes. There has been a resurgence of corporate lawyers advising this tort process.

The common law doctrine that a strike breaches the employment contract is a legal fiction, as workers want to return to work under new conditions. Judges still hold strikes intrinsically cause economic harm and are tortious. Unions risk the interlocutory injunction that halts the industrial action and the employer wins. Behind judges' legal reasoning is the policy for free market competition that is hostile to employment law and to union combination. Of course, there is much free competition amongst capitalists in economic rivalry that causes harm and damage to competitors: but rarely a civil wrong.

The ILO holds that the common law breaches the right to strike. An example in 1991 in Australia was the Pilots' strike. The ILO criticised the then Labor PM Hawke government and the company's use of the tort law with damages of \$6.5 million against the Pilots engaged in a controversial enterprise bargaining dispute for higher wages (but outside of the Accord). Although the ILO did not uphold the Federation's complaint, it did state that it could not view with equanimity a set of legal rules which:

'1. appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein;
2. makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequences of their actions; The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action too promote and defend their economic and social interests.'

Also, the common law makes much union picketing tortious. The common law injunction stops picketing. This unduly restricts the freedom for unions to freely organise community assemblies.

The history of 'strikebreaking' by the route of the common law involves:

- the Australian legal anomaly of industrial action being a civil wrong at common law after 300 years, i.e. tort of interference with contractual relationships and inducing breach of contract; the tort of intimidation; the tort of conspiracy by unlawful means; and the tort causing loss by unlawful means;
- the ancient torts of 'watching and besetting' and 'nuisance' are still used today;
- how the defence of justification that the union was legitimately advancing and defending workers employment interests does not apply;
- why all of these common law doctrines should not be used in a modern IR system.

The *Fair Work Act* (2009) retains this masters' weapon against any unprotected strike.

3 Process requirements and technicalities

I examined the case law on the union process compliance requirements under Howard's 1996 *Workplace Relations Act* for protected action. On the face of it and as initially interpreted by the AIRC it was a straight forward notice requirement to the employer of 'at least 3 working days' written notice of the intention to take the action', together with the requirement that the notice state 'the nature of the industrial action.' But over the decade, senior employer counsel successfully argued a restrictive meaning of 'the' and 'the nature' in numerous cases. Courts held unless strictly complied with. The strike was not protected action and was unlawful and penalties applied, defeating the strike. Other technical process requirements were similarly enforced.

These requirements reappeared in *WorkChoices*, as well are in the compulsory ballot rules and remain in the *Fair Work Act* (2009). The hegemony of legal technicalities about the protected action process ought to be removed and fair play, merit arguments without regard to legal technicalities apply.

4 Delete 'about matters pertaining to the employment relationship'

The words of the legal doctrine 'about matters pertaining to the employment relationship' remain in the *Fair Work Act* (2009). This means continuing legal confusion and

uncertainty about what matters do pertain to the employer and employee relationship. Corporate lawyers can argue and judges rule that union claims are once more deemed as outside of 'matters pertaining' and that protected action cannot be taken.

But workers and unions deserve a collective bargaining system that allows the freedom to associate and to determine any claims and to bargain with the right to strike on those claims and to reach agreement.

The Australian High Court in the *Electrolux* (2004) case held that protected action is only for claims legally 'about matters pertaining to the employment relationship'. This limited the right to strike scope by holding workers cannot make certain claims and made difficult the practical organisation of industrial action. The legal issue of what claim 'pertains to an employment relationship' is complex, technical, and uncertain and with differing AIRC and judicial opinions as to what is covered. Predicting what strikes are protected is most uncertain.

The Full Federal Court argued for a pragmatic industrial relations response in a system where enterprise bargaining claims backed with protected action required a high degree of certainty. The High Court, with a 'black-letter law' interpretation disregarding any realistic industrial relations outcomes, reversed the Federal Court and held that industrial action is not protected because the union genuinely believes the claim is lawful. It must only be a claim that a Court says is 'pertaining to the employment relationship.' The High Court held the claim for the 'bargaining agent fee' for collective bargaining from non-unionists did not 'pertain to the employment relationship' and that protected action could not be taken in support of such a 'non-pertaining' claim.

Unionists support a BAF as fair contribution to collective bargaining expenses and about employment it is available in other countries. To prohibit such claims is simply to frustrate unions who have to be very careful as to the basis on which they seek to take protected action. Even if all procedural requirements for taking are rigorously observed, an employer's lawyer can pick apart the claims to identify one that is questionable in terms 'of matters pertaining.'

High Court justice Kirby J in dissent started from the position that the capacity of the parties to freely negotiate employment conditions was the purpose of the 1996 enterprise bargaining regime where union protected action could be taken without common law liability. Calling for realism, Kirby J argued that all manner of workers' claims were the industrial relations realities. He argued:

... it would be 'odd in the extreme' if one clause later found technically not to be 'pertaining to the employment relationship' and to be unlawful, would withdraw the protection. A technical legal matter that may take years, as in this case, to resolve through the courts should not remove the immunity for industrial action. The threat of the common law of torts means a 'grave, even crippling, civil liability for industrial action, determined years later to have been unprotected, is to introduce a serious chilling effect

into the negotiations that such organisations can undertake on behalf of their members. It would be a chilling effect inimical to the process of collective bargaining.’ (43-68).

In effect the policy of the majority of the High Court reduced the scope of union protected action by making it more vulnerable to the common law weapon. As the Federal Court said:

‘If the parties are to make rational and confident decisions about the courses of conduct, they need to know where they stand. It would be inimical to the intended operation of the WR Act (1996) to interpret it in such a way as to make the question whether particular industrial action is ‘protected action’, and therefore immune from legal liability, depend upon a conclusion concerning a technical matter of law...As this case demonstrates, that may be a matter about which well-informed people have different views.’

As these ‘matters pertaining’ terms remain in the *Fair Work Act 2009* the legal status of protected action is most risky, Irving (2008). This is another form of juridification. I add that one reform is that claims can now be made that pertain to the relationship between a union and an employer covered by the proposed agreement.

Finally, I argue ‘matters pertaining’ is an old judicial reasoning device arising out of British Master and Servant status law. Common law judges assigned legal rights by status, and ignored social or workplace justice: so the masters’ status at law is to be dominant and the servants’ status is to obey. Any hint of conflict, let alone withdrawing labour by a servant, was automatically criminal. Over many years, this status doctrine was imported in capitalisms’ freedom of contract law. Today this status reasoning is still applied as ‘matters pertaining’, here the status of the employer and the status of the employee. The judiciary can use the status device to declare what is white is black, i.e. not about employment. The doctrine that collective bargaining is restricted to ‘matters pertaining’ ought to have been removed.

5 Freedom to bargain?

Despite the ALP promise to ‘remove the Howard Government’s onerous, complex and legalistic restrictions on agreement content’ and that bargaining participants should be ‘free to reach agreement on whatever matters suit them’, subject only to the requirement that the terms be ‘lawful’, the *Fair Work Act* does not deliver on this promise. This is an undeniable breach by the ALP. In an unnecessary complex legality, the *Fair Work Act* (2009) makes a distinction between ‘unlawful’ and ‘non-permitted’ terms. It is still prohibited to strike for a claim for a ‘bargaining service fee’.

The *Fair Work Act*’s ‘non-permitted’ terms in relation to unfair dismissal, right of entry and reserving subject matters in future agreements re-introduces ‘prohibited content’ matters. This denies the parties rights to bargain fairly on any matter they like. It breaches ILO rights to collectively bargain and undermines reasonable industrial relations. That which later is held by a judge to be ‘not permitted’ is most risky for organising protected industrial action.

There is not any justification for the notion of ‘non-permitted’ content in agreements. Parties should be free to negotiate their own agreements. Employers and employees should not be told that, even if they freely agree on a matter that they regard as important to their relationship e.g. a commitment to address environmental issues, they cannot include it in their agreement, despite what they have agreed is in no way illegal.

Most unreasonably, like *WorkChoices*, the inclusion of ‘non-permitted’ content in a proposed agreement means any industrial action taken is unlawful: but we have a rider, unless those concerned reasonably but mistakenly think the content is permitted. Now that is an improvement, but will surely be legally contested.

6 Orwellian 1984 labour laws

I add an observation on the political debate. Many unionists regarded labour law under *WorkChoices* was an Orwellian **1984** workplace world, where opposites of what politicians said apply. ‘Doublethink’ was one **1984** device. ‘Doublethink’ is the power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them. ‘Doublethink’ involves the forgetting of any fact that has become inconvenient, and then, when it becomes necessary again, drawing it back from oblivion for just so long as it is needed. This denies the existence of objective reality and all the while taking account of that reality which one denies. Politicians will be familiar with this experience.

One use of ‘doublethink’ is to label justifiable union organising which is not unlawful, or to be more specific, which is lawful, to be deemed by political opponents as ‘inappropriate’. Legislative changes are pushed (here by PM Howard and maintained by Rudd) which transforms that which is ‘inappropriate’ into that which is ‘unlawful’. Through the interplay of ‘unlawful’ and ‘inappropriate’ the vice of doublethink is played out. That which is lawful is unlawful. Or at other times the interplay of ‘permissible and not permissible’ and applies to ‘protected/unprotected’ action and so on applied to all legitimate industrial action.

I contend this ‘doublethink’ applies again with the *Fair Work Act* (2009) – albeit in a different form. A new ‘*1984 doublethink political spin*’ that ‘*WorkChoices is dead*’ and the *Fair Work Act* (2009) establishes ‘*the right to strike*’ and ‘*fair rights for workers*’ and a ‘*fair balance for all*’.

Section C The right to strike as a human right and a democratic right

Unions assert morally that government and employer suppression of the right to strike has abused human rights. As a human right not to be abused and punished for going on strike, it is argued to protect the individual worker’s dignity. Legitimate positions are promoted for justification, such as the ‘dignity of labour’, that ‘labour is not a commodity’, workers are ‘not to be forced labour’ but are ‘free and not slaves’.

It is not often that a Republican President of the United States can be cited, in this case Eisenhower:

'The right of workers to leave their jobs is a test of freedom. Hitler suppressed strikes. Stalin suppressed strikes. But each also suppressed freedom. There are some things worse than strikes, much worse than strikes — one of them is the loss of freedom.'

In 1970, Clyde Cameron (who became the Labour Minister under the Labor PM Whitlam government) commented:

'Eisenhower was correct in pointing out that the hallmark of the Police State is the loss of the right to strike. A worker's right to strike is surely a basic human right. The right to withdraw labour is the one thing that distinguishes a free worker from the slave. This is a fundamental freedom.'

Although unions assert the right to strike is a human right, in Australia this is a moral right, not a legal right. In other systems, such as Europe, there are entrenched Human Rights laws. At least these countries enact labour laws based Human Rights, including a form of the right to strike, Novitz (2003). Australia is yet to have strong human rights laws or a Bill of Rights.

I adopt Ewing's (2004) arguments where human rights law joins international labour law. The right to strike as a human right has interesting features. A human right is inalienable in that it cannot be abrogated by the state or by individuals. Human rights are indivisible and often unequivocal. The state has to support the exercise of human rights. Although an individual human right, the right to strike is exercised in combination. Individuals organising collectively are fully protected. Apart from losing wages, no other penalties can be imposed. No strike is a breach of the individual's contract. As a human right to be effective, the union organisers and the union organisation are not subject to fines and the common law of tort.

As a human right solidarity strikes are protected as human rights law overrides competition law. As a human right, the scope is wider than collective bargaining on work issues. Workers determine the purpose of the strike. It is the conduct that the right protects and the purpose is not restricted. You cannot be dismissed on a protest strike to express your political view. It can be used to respond to political attacks on workers' industrial rights and be used to politically promote other human rights and to oppose exploitation and oppression.

'If the right to strike is a human right workers must be free to determine the causes they will promote by using it, just in the same way that we do not censor the purposes that may be promoted by the exercise of the right to freedom of assembly. People are free to exercise their human right to peacefully assemble by marching through the streets to demonstrate their opposition to the invasion of another country or anti trade union legislation. Why should they not also be free to exercise their human right to strike to

promote the same ends by staying at home, or in order to reinforce the protest? It is not for the State to determine the causes which may be promoted in this way.' Ewing (2004).

Justifications on human rights underpin but are deeper than on principles of a collective bargaining system where the strike is as an economic weapon, an industrial sanction, as a means of enforcing a right or a demand for an improved employment right.

We deepen the justification for the right to strike beyond the collective bargaining means to that based on democracy. The right to strike is strengthened when based on principles of democratic rights, freedom of speech and assembly, freedom to express and communicate political opinion and civil liberties' theories. The democratic principles afford the firewall protection to legitimate strikes e.g. for short political protests, environmental action etc. See my arguments in my papers on the right for the political protest strike.

Section D Is the right to strike an historical anachronism or has it contemporary relevance? Dealing with lines of argument from those opposed to the right to strike.

1 'Firewalling the right to strike is too much' employer line

Skilled industrial relations advocates settle collective bargaining and workplace disputes by fair negotiation and agreement without any recourse to industrial action. So most HR managers are not afraid of the firewall right to strike. For example, many employers accept the Australian Institute of Employment Rights AIER book *Australian Charter of Employment Rights 2007* (pages 97-100). They have no issue e.g. with statements, such as by former Justice Munro:

'[9] Union membership: Every worker has the right to form and join a trade union for the protection of his or her occupational, social and economic interests. The worker has the right to require the relevant union to uphold its Constitution and Rules, to spend union funds and conduct activities, including affiliations, participation in community wide engagement and lawful industrial action in support of its interests, in accordance with the union's rules free from employer and governmental interference.'

'[11] Collective bargaining and industrial action: Every worker has the right to bargain collectively in pursuit of an individual or collective agreement about the work relationship and, without being in breach of contract, and without threat of dismissal or discrimination, to take industrial action to protect their occupational or economic interests to secure agreement about matters that are or are reasonably related to work. Such industrial action should be taken in accordance with legislated procedures enabling exercise of the right in a manner consistent with the ILO standards to which Australia is bound.'

In industrial relations practice, most HR managers do not resort to penal sanctions. The firewall protection is not too much for reasonable employers.

2 ‘Strikes will erupt everywhere’ line

This is again just not reality. Strikes do not simply erupt if they become legal. Countries that have a collective bargaining system that has an effective right to strike and a system of preventing and settling disputes often have fewer strikes.

Right-wing politicians assert policy to repress strikes, but Romeyn (2008) argues it is not a power balance. Waters (1982) shows there are deeper and more significant economic and workplace issues contributing to strikes. Paradoxically, a key factor in producing strikes is the belief by right-wing politicians that they can be eliminated.

History shows that under repressive anti-strike regimes, workers still struggle and take industrial action to defend their interests. The issue for unionists is: are we slaves or are we to be free?

3 ‘The hurt to everyone’ line

‘This country cannot afford to see increases in industrial disputes which put at risk Australia’s global reputation’; ‘there can be no going back to the industrial culture of an earlier age’ and ‘We require these clear, tough rules to make the point that industrial disputes are serious. They hurt workers, they hurt businesses, they can hurt families and communities, and they certainly hurt the economy’ and ‘industrial action comes at a cost to the economy. It therefore should not be without cost to those engaged in it ‘ and ‘We want people abiding by the rule of law.’

For hundreds of years workers have heard this refrain that a strike causes hurt. But these are from Kevin Rudd during the election campaign to appease the corporate employers.

The contradiction is such ‘hurt’ is legally permissible by protected action, i.e. the right to strike prevails. So as we have seen it is the industrial action that is unprotected. The workers’ freedom we have argued is more important than the alleged hurt.

4. The ‘capital/labour conflict does not exist now’ line

The line that the capital/labour conflict is anachronistic and thus the right to strike anachronistic flies in the face of the real (albeit lessened) contest between capital and labour, between corporate management and organised labour over major employment issues. Such contests have and can involve organising industrial action and for such workers’ interests protected industrial action is critical.

Indeed, history demonstrates in a capitalist economy forms of conflict occur due to the differing collective interests of the workforce and the owners of capital. Also, industrial conflict exists with the government/state as the employer.

As well, employment contracts are based on hierarchical management authority structures. Inevitably, grievances and conflict at work do arise responding to harsh and

unfair management. The authority structure provides a focus point for the tension between employment as a market transaction and the need to respect the humanity and dignity of workers. At times, the resolution of such tension requires strike action to resolve grievances. There have been periods of union quiescence where capital rules and the workforce are subservient, and periods of greater struggle and back again.

Powerful corporate associations, right-wing ‘think tanks’, media and right-wing MPs promote this end of ‘class warfare’ line. But *WorkChoices* was a class attack by the interests of capital and the state on the working class. *YRAW* was a working class political response in a democratic election campaign.

Another line is that employers and employees are in a ‘partnership’ so strikes are of the past. But we are not opposed to an industrial relations system where the strike weapon is rarely needed, where there is workplace democracy, where workers’ grievances are peacefully solved by negotiation and consensus, where collective bargaining is fair and where union rights are upheld by management. But such partnership and industrial relations system is no reason not to have the firewall strike. It is only a means, a reserve power, not necessarily used.

5 ‘In the modern workplace employers and employees are all equal’ line

As we are all equal in the workplace, so the line goes, there is no need for the right to strike to balance the power relationship. This is ‘spin’ put about by the rich and powerful, by giant corporations like BHP Biliton and Rio Tinto ceaselessly striving for capital accumulation and profits, the business associations the Business Council of Australia BCA, the Australian Mines and Metals Association AMMA, the Australian Chamber of Commerce and Industry ACCI, the Australian Industry Group AIG and their ideologues in the Murdoch press. They deliberately distort and invert the workplace reality of employer dominance and employee submission.

But workers experience is that when it comes to a power contest, employers rule in the workplace. Workers through the employment contract are subordinate socially, subject to the division of labour in industry and subordinate occupationally in their workplace position. The employment contract legally enforces this position for the individual. The very essence of the employment problem is subordination, the very weakness of the worker. The industrial reality behind the ‘equality of contracting’ is an act of submission; in its operation a condition of subordination. Workers are in a weaker bargaining position, vulnerable to the specific and collective power of capital.

Historically, the object of labour law has been, and will always be, a countervailing force to counteract this inequality of bargaining power that is inherent in the employment relationship. Even with the right to strike, corporations still rule, but hopefully more fairly. Such inequalities of power are central to a market economy with giant transnational companies. Even more, workers need the right to strike.

6 ‘Declining strike numbers and the decline of blue collar militant means the right to strike is irrelevant’ line

In an era of the lowest working days lost for 45 years, strikes are not a public or industrial relations problem in stark contrast with the strike waves of 1973-4. With strikes so low, it is an appropriate period to have reforms. Of course, this has not stopped right-wing politicians creating fear about strikes. Such political ideology has to be challenged.

Just because the strike level is at record lows and recessionary forces make industrial action more difficult does not mean that the right to strike does not need to apply, but the reverse. For workers in these most difficult times of insecurity, a lawful strike is warranted.

The ‘declining strike numbers’ line ignores the reality of protected action in the last decade between large corporations and unions in mining, coal, building, transport, and manufacturing. There has been a decline in the numbers of the politically class conscious blue-collar militant unionists organising with strikes contrasted with white-collar employees. But blue-collar workers still exist and struggle.

Significantly, white-collar sectors in education, the public sector, the finance sector, the universities, nurses and professionals had to resort to protected industrial action in bargaining with the more powerful government employers. A white-collar working class requires a right to strike to respond to employer caused grievances.

The repression of strikes in the last decade has made organising strikes most difficult. The Australian union leadership has responsibly advised that industrial action is often too risky. We have a generation of union growth organisers who have never led a strike for fear of it being unlawful.

But a contrary point can be made for the right to strike. Where unions are able to promise and pursue protected action, this promise, as a last resort, but not exercised, contributed to agreements being reached without resort to any strike action. The right to strike is downward pressure on strikes.

7 ‘The precarious workforce cannot strike’ line

With a significant number of Australian workers in the precarious labour market who do not strike, the right to strike is less relevant is the line. Unions respond to the fragmentation of the workforce: casualisation, dependent contractors, long hours, deepening inequality of work for those at the lower end of the labour market, those exploited on individual contracts, youth, women, the work/life collision, gender issues etc. Casuals have such precarious positions whose subjective ability to strike is low.

It is simply not the case that the greater workforce female participation means less ability for strikes as increasingly women workers withdraw their labour power to rectify grievances.

But a difficulty in participation or organisation is not a reason to deny rights. The stronger argument is that we should ensure all precarious workers are able to exercise the right to strike, even more so because they are in a poor bargaining position.

8 ‘The majority of workers are non-unionists who cannot strike’ line

The majority of workers are not in unions, so the right to strike is not relevant is the line. But now and in the future non-unionists are legally able to have collective non-union agreements. These non-unionised workers are not denied the legal protection to strike, however difficult it is for them. Unions are in decline so the line is there is no need for the traditional union right to strike. However, the inevitability of permanent union decline is not certain. The union organising strategies for renewal amongst non-unionists are gradually succeeding.

9 ‘Contractors are not employees and cannot strike’ line

One reason for the strike decline is employers make employees into contractors, so they not denied work rights, including the right to strike. But first there are strikes against employers forcing workers into being contractors. Where they are employees, devices to avoid rights have to be resisted. The difficult position of such employees is an argument that the right to strike should be available. The larger numbers of dependent contractors means they are less likely to be in a position collectively to exercise their rights to strike: but not entirely, as it is a question of organising.

10 ‘Knowledge workers and professionals do not strike’ line

In the ‘post-Fordist’, high skilled knowledge economy, the high paid knowledge professional is an individual who does not take collective action goes the line, so does not need the right to strike. Again this is not an IR reality. At times high paid computer professionals do take collective action, e.g. in 2007 IBM workers conducted an international threatened ‘virtual strike’ to negotiate gains. Professional workers should not be denied the right to strike. The ‘individualisation’ of the workplace does not eliminate the capacity to organise collectively. Furthermore, the right to strike has relevance for the individual in common law contract negotiations who may be victimised, dismissed etc and requires protection.

11 The ‘we went on strike defying the law so we do not need a right to strike’ line.

‘What’s wrong with a good bloody strike. When the boss plays up, give ‘em a good 24 to left off steam. If the boss doesn’t agree to a decent pay rise give ‘em 48. Protected, unprotected just give it to ‘em. I’m sorely tempted on behalf of some of the most militant unionists in the country to simply say well you can all get knotted, we’re workers and we have a right to strike, without any new laws. You can all catch us if you can. If the law is bad, then strike against it.’

Many unionists reasonable hold these views. *WorkChoices* and the *BCII Act* had no democratic legitimacy. They are unjust laws. There are strong arguments to defy bad laws. Some workers and unions have and will.

It is pertinent to recall that in different times the 1969 mass strikes unions defeated the then penal powers with national strike protest actions after the jailing of union leader Clarrie O'Shea for not paying strike fines, Hutson (1983). After this there was recognition that penal sanctions were 'dead letters' and not justified. Unionists organised strikes knowing that the penal powers would not be used.

But in recent decades, employers do institute legal proceedings and unions have to add to the settling of the dispute by agreement for those proceedings to be dropped. Some unions are forced to the Courts and to pay the fines. These days organising industrial action is far more hazardous. But unionists should not have to organise under the threat of penal sanctions for a human right.

Future lobbying

YRAW convinced voters to democratically dispatch the Howard government into history's bin, but not yet all of *WorkChoices*. The lawful strike is a critical means to defend and advance the interests of working class families in this recession and any recovery. Social unionism has the ability to mobilise. Although unionists may think pessimistically about reforms when the Labor government says the *Fair Work Act* (2009) will not be changed, the ACTU can still organise optimistically and the VTHC has a proud history of just doing it!

The firewall right to strike is a measure of any labour movement's strength. The challenge is ahead of us to have rights at work implemented.

I end by raising for debate historical contradictions and challenges.

1. Modern states are more and more authoritarian, employing many forms of penal powers against its citizens, often for political power. Governments never take the right to strike so seriously that they relinquish the power to take decisive state action through force to break a strike. The right to strike is always contingent on the state's ultimate monopoly of force.
2. That as the world capitalist crisis develops in this severe world recession, corporate interests use state power even fiercer against workers' interests and to disorganise the collective strength of unions.
3. A major historical contradiction of the 20th century has arguably been that left political parties when in government - whether reformist, labour, social democratic or Stalinist - often fail their working class supporters and instead support capitalist interests.

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