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Date Introduced: 26 June 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The main Schedule will commence on a day to be fixed by Proclamation or 6 months after Royal Assent

Purpose

The Bill seeks to encourage the Australian Industrial Relations Commission to hear and determine applications to stop or prevent strikes in a more timely manner.

Background

Under the current section 127 of the *Workplace Relations Act 1996* (the WRA), the Australian Industrial Relations Commission (the Commission) can issue an order to stop or prevent industrial action that is not protected action provided certain findings of fact are made. [1]

Subsection 127(1) requires that the Commission find that industrial action is 'happening, or is threatened, impending or probable' and is taken or threatened in the course of an industrial dispute.

Subsection 127(3) currently states that the Commission must hear and determine an application for an order under this section 'as quickly as practicable'.

Select definitions

'Industrial action' is generally widely interpreted and may be said to include any deliberate actions that lead to the non-performance of work. [2]

'Industrial dispute' is a dispute or a situation that could lead to a dispute about matters pertaining to the relationship between employers and employees.[3] Section 127 also covers

potential action or action taken in the course of negotiations for a certified agreement or in relation to work regulated by an award or certified agreement. [4]

A 'protected action' is an action engaged in by an eligible organisation or employee who is connected with a negotiating party 'for the purposes of advancing claims made in respect of a proposed [certified] agreement [or AWA].' The negotiation must precede industrial action and cannot be taken in concert with parties that are not undertaking a protected action. [5]

Themes from cases on the operation of section 127

The CCH Australian Labour Law Reporter (ALLR) notes some of the major themes to arise out of decisions relating to the operation of section 127, these include:

- that the power to issue an order is a discretionary one, ie. the Commission will not automatically issue an order just because the jurisdictional facts are made out [6]
- not only is the power a discretionary one, but the Commission will exercise that power cautiously
- while protected action (which is action engaged in in relation to enterprise bargaining negotiations which fulfils certain criteria) is not explicitly exempted from being the subject of a section 127 order, as a general rule the Commission will not make orders in relation to action that is probably protected action
- section 127 orders are available against anyone who engages in industrial action within the meaning of the Act, and this means employers as well as employees and unions, and [7]
- the rules of natural justice must be observed within the context of the requirement for the Commission to deal with applications for orders under section 127 as quickly as practicable. [8]

In general, the determinations in relation to section 127 applications reflect the present position of the Commission as independently exercising its discretion in the light of all of the circumstances of each application.

Short history of similar proposed amendments

A version of this amendment to introduce interim orders for subsection 127(3) was introduced in Item 7 of Schedule 11 of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. Although an amended version of the Bill passed the House on 29 September 1999, the Bill did not pass in the Senate.[9] That version of the amendment was materially different to the present proposal in two regards. The first is that it explicitly included reference to orders with regard to lockouts as well as industrial action.[10] The second is that it *required* the Commission to issue an interim order within 48 hours unless satisfied that it would be contrary to the public interest.

Another version of the amendment was introduced as item 5 of the Workplace Relations Amendment Bill 2000. Again, that Bill did not pass the Senate. That version had no explicit references to lockouts (employer actions that clearly fall within the definition of industrial action), but the requirement to issue an interim order was retained unless the Commission was satisfied that it would be contrary to the public interest. Both earlier versions did not prescribe extensive lists of factors to which the Commission must have regard.

Comments on proposals

Some objections which had been raised by Senators in the Minority Committee Reports against these earlier proposed amendments included:

- that it removed the Commission's discretion to issue orders by making them automatic
- that the Commission should not be required to issue an interim injunction in cases where it could not yet determine whether an action was protected, and therefore in some cases, potentially stop or prevent protected actions
- that there is no need to add in a time requirement because:
    - only 14.8% of applications result in orders and only 9% have been refused
    - over 50% were decided within 2 days and a further 19% within one week
    - the Commission already acts with appropriate speed and urgency in hearing applications
    - 'in only a few cases concerning unprotected action have orders been refused, and in those cases only on clear and justifiable grounds' [11]

Union submissions also argued that any imposition of time limits would direct the focus of the Commission away from resolving disputes and toward the automatic issuing of orders.[12]

Democrats' Senator Andrew Murray made the following recommendations in relation to the 2000 version of this amendment:

> It may be appropriate to give the Commission the discretion to issue interim orders if the hearing is likely to be lengthy, balancing the rights of both parties. Such an approach would seem more reasonable than a mandatory 48 hour rule… If it were to be supported, it would need to be amended… to 72 hours using the precedent in section 166A and… qualified by a note indicating that this is an exceptional power that must only be used if the Commission considers that it will likely result in the resolution of the dispute. [13]

The most important difference between the earlier proposals and the current proposed amendment is that this proposal does not *require* the Commission to issue an interim

order, ie. the earlier proposed 'must' has been changed to a 'may'. However, the new amendments introduce criteria that the Commission must have regard to in considering whether to make an interim order, and two general criteria that also cover whether a section 127 order should be issued at all.

In relation to the present proposed amendment, the Second Reading Speech notes:

> Whilst section 127 has generally proved to be an effective mechanism, delays in making or enforcing section 127 orders have sometimes extended the period during which enterprises and their workers are exposed to unprotected industrial action.

The Government has stated that its primary objective is to strengthen the operation of section 127 by allowing applications for the prevention or stopping of industrial action to be heard and determined in a more timely manner. [14]

Main Provisions

Item 1 repeals subsection 127(3) of the WRA and replaces it with **proposed subsections 127(3)-(3D).**

Proposed subsection 127(3) states that the Commission must, as far as practicable, hear and determine an application for an order to stop or prevent industrial action within 48 hours. The existing subsection does not specify a time period. It states that the Commission must hear an application 'as quickly as practicable.'

Under **proposed subsection 127(3A)**, the Commission *may* make an interim order directing that industrial action stop or not occur if:

- an application for an order to stop or prevent industrial action has been made, and
- the Commission is satisfied that, or has not formed a view as to whether, the industrial action is not, or would not be, protected action, and
- the Commission is satisfied that it will not be able to determine the application either within 48 hours of the making of the application or before likely industrial action commences within 48 hours.

Proposed subsection 127(3B) states that an interim order ceases to have effect if the application is determined.

Proposed subsection 127(3C) sets out a non-exclusive list of factors that the Commission must have regard to in considering whether to make an *interim* order:

- the damage to industry that will be caused by the industrial action
- the time that will be needed to determine the application

- whether the industrial action has escalated since the application was made
- whether the industrial action forms part of a sequence of related industrial action that the Commission is satisfied is not or may not be protected action
- the likely commencement of industrial action, and
- whether notice of the industrial action required to be given under the WRA has been given.

The proposed subsection states that the Commission must have regard to, but is not limited by, these factors.

Proposed subsection 127(3D) sets out the following additional factors that the Commission must have regard to in making an order to stop or prevent industrial action under existing subsection 127(1) or an interim order under new subsection 127(3A):

- whether a person or organisation engaging in the industrial action is a person whose employment is subject to, or is an organisation that is bound by, a certified agreement that has not yet reached its nominal expiry date, and
- the undesirability of the occurrence of industrial action that is not protected action.

This proposed subsection does not spell out that the Commission is not limited by these factors, but general administrative law principles would suggest that the list should not be taken to be exclusive.

Note 1 is a reminder of section 170MN of the WRA which states that any action will not be protected action if the industrial action occurs whilst parties are bound by a current certified agreement. However, the Federal Court has recently interpreted the operation of section 170MN narrowly. The full wording of section 170MN states that a person must not engage in industrial action "…for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement."[15] In short, the Court held that these words still allow for the possibility of an industrial action while a certified agreement is on foot if the matter for which the action was taken or is proposed to be taken is not actually covered by the certified agreement.

Concluding Comments

The proposed amendments give the Commission a specific power to make interim orders to direct industrial action to stop or not occur. However, unlike earlier incarnations of the amendment, there is no *requirement* upon the Commission to issue an order within 48 hours subject to the public interest. Although the proposed provisions set out factors that the Commission must consider, there is nothing that formally reduces the Commission's

discretion to consider other matters to ensure an appropriate balance among the timely issuance of section 127 orders, procedural fairness, and the public interest.

The factors to be considered in the issuing of interim orders are extracted from case law to highlight potential problems with the operation of section 127 (**proposed paragraphs 127(3C)(a-f)**).[16] The inclusion of the factors is an attempt to guide the Commission toward the intended outcome of achieving speedier orders.

The Commission is guided by the common law to make decisions. It has expressly acknowledged the balance that must be struck between procedural fairness and the timely operation of section 127 to stop industrial action.[17] The Full Bench has also emphasised that the requirement that the rules of natural justice be observed be balanced with the requirement that the Commission deal with applications for orders as quickly as possible. The reasons for the action will be particularly significant if the cause of the action is in dispute.[18] De Felice notes that 'even where action is not protected under the WRA, the granting of relief in the form of a section 127 order or an injunction is not automatic.'[19] There are circumstances in which actions that do not meet the criteria for protected action could nevertheless be considered legitimate.[20]

Currently, the case law would suggest that relevant factors in determining whether to issue an order *also* include:

- the substantial merits of the case, especially the purpose and intended effect of the industrial action [21]
- the conduct of the parties
- whether conciliation has been exhausted, and
- whether a section 127 order would assist in the settlement of a dispute, or exacerbate it. [22]

Overall, the Commission will consider each case on its merits taking into consideration all of the relevant factors. The proposed amendments do not reflect this approach. Instead, the proposed amendments only formally prescribe a consideration of whether persons engaged in a current industrial dispute are subject to a certified agreement. They then expressly prescribe the 'undesirability of the occurrence of industrial action that is not protected action' as the other general factor that must be considered in deciding whether to issue an order (**new paragraphs 127(3D)(a-b)**). It is questionable whether the prescription of these factors will substantially alter the current consideration of whether section 127 orders are issued.

It is worth noting that where a law prescribes matters to which the decision-maker must have regard, the decision-maker is bound to give those matters weight as fundamental elements in making the decision.[23] In the light of this, the 'non-prescription' of other

factors might prove significant because the proposed list of factors chosen for the face of the legislation may:

- give an applicant more concrete grounds for arguing in favour of an order, and
- become a formal basis on which to appeal determinations about the issuing of orders (eg. on the basis that a particular factor had not been considered).

However, general administrative law principles suggest that for the decision to be considered ultra vires because of a failure to consider an obligatory criterion, 'the criterion must be significant for the decision in that it materially affects the decision.' [24] Moreover, demonstrating that a matter has not been considered is difficult because there is a general presumption that officials read and take into account all material before them.[25]

Overall then, as a result of the proposed amendments, the Commission will not be required to issue the interim order and is not limited to consideration of the prescribed factors. Therefore, consistent with its past exercise of discretion, the Commission could continue to exercise its discretion in relation to this new power to issue interim orders only in circumstances where it considers that such an action is justified.

Endnotes

1 So far, these orders have not applied to protected industrial action. In *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors* (1997) 42 AILR, 3-582, the Full Bench of the Commission formulated a general rule that in the exercise of the discretion under section 127, "an order should not be made in relation to industrial action that is considered to be protected or plainly likely to be protected action." As it is a matter for the Commission's discretion, it is possible, but unlikely, that section 127 orders are made in relation to protected actions.

2 This includes actions by employers, see the themes from cases section below. To be more specific, the definition of industrial action in section 4 of the WRA covers:

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work . . .

(b) a ban, limitation or restriction on the performance of work . . . in accordance with the terms and conditions prescribed by an award or an order of the Commission, by a certified agreement or an [Australian Workplace Agreement] . . .

(c) a ban, limitation or restriction on the performance of work . . . that is adopted in connection with an industrial dispute

(d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work . . .

but does not include:

(e-f) an action authorised or agreed to by both employers and employees

(g) an action based on health and safety concerns.

3 WRA, subsection 4(1).

4 WRA, paras. 127(1)(b-c).

5 *Coal and Allied,* op. cit. 1., para 4.1. Further information about the operation of section 127 orders to prevent or stop industrial action is available in Victor De Felice, 'Preventing or Stopping Industrial Action' *Melbourne University Law Review*, 2000, Vol. 24, pp. 310-348.

6 These factors are taken from the CCH ALLR at 45-660. The submission of the ACTU to the inquiry into the Workplace Relations Amendment Bill 2000 (Submission no. 18) stated that the Commission has only refused applications where the action is protected, or in exceptional circumstances such as where the action is related to health and safety. p. 16.

7 *Australian Meat Industry Employees Union v G & K O'Connor Pty Ltd* (2000) 47 AILR, p. 4.

8 See further comment with regard to natural justice in Concluding Comments section.

9 I refer to the version of the Bill as passed by the House of Representatives.

10 However, there was a defence provided for employers if their conduct was based on the belief that the locked out employees' employment had been terminated.

11 These comments are drawn from the Minority/Democrats Report into the Workplace Relations Amendment (More Jobs Better Pay Bill) Bill 1999. Ch. 6, pp. 16-18. It should be remembered that these objections were raised against the Commission requirement to issue orders rather than the discretion to issue orders. The figures are from the then DEWRSB submission on the Bill. Further figures on the number of section 127 applications are available from the Workplace Relations Monitor at the DEWR website.

12 See for example the CPSU submission on the WRAB 2000, p. 5.

13 Senator Andrew Murray, Minority Report to the WRAB 2000 inquiry, p.15.

14 Explanatory Memorandum to the Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002, p. 2.

15 *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61 (6 Feb 2002).

16 The Explanatory Memorandum states that some of the factors are similar to factors identified by Munro J in *Transfield Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2001) 50 AILR, 4-503. That case is primarily about whether the claims were matters 'pertaining to the relations of employers and employees'. However, Munro J, in granting the order, mentions the prospect of escalation and the seriousness of the industrial action at para. 43.

17 *Appeal by AWU, CEPU & Ors (1999)* 46 AILR, 4-104.

18 ibid., and see also CCH ALLR, at 45-665.

19 De Felice, op.cit. 2., p. 348.

20 The Full Bench in Coal & Allied, op. cit. 1. states '[the Commission] will usually need to be satisfied that the industrial action to be made subject to the order is illegitimate in a sense warranting that it should attract appropriately a direction by the Commission that it cease or not occur.' p. 3433.

21 In *Emwest*, op. cit., 15., the Federal Court specifically states that the purpose of the industrial action should be considered as well as the fact of whether a certified agreement is current. In other words, it is not automatic that the existence of a current certified agreement prevents industrial action.

22 These factors are taken from Lewin C in Application under sec 127 by Southcorp Australia Pty Ltd *(1997)* 42 AILR, 3-561.

23 *Queensland Medical Laboratory* v *Blewett* (1988) 84 ALR 615 at 623.

24 Enright, *Federal Administrative Law* , The Federation Press, 2001, p. 394

25 *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162. The discussion of general principles is intended as an indicator of relevant considerations that the Federal Court may consider. It should be noted that decisions under made under the WRA are expressly excluded from the operation of the *Administrative Decisions (Judicial Review) Act 1977* at section 3(a) of Schedule 1.