Submission to the Senate Committee on Employment, Workplace Relations and Education on the Workplace Relations Amendment (WorkChoices) Bill 2005

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NOT MUCH CHOICE IF THE RIGHT TO STRIKE GOES

INTRODUCTION

1 WE WON'T remove the right to strike, Australian government newspaper advertising emphasised, (Commonwealth of Australia, 2005).

But with the *Workplace Relations Amendment (Work Choices*) Bill 2005, *WC* Bill (2005) it is arguable that the legal right to strike has almost gone. Workers and unions have limited bargaining strength by the 1993-2005 circumscribed rights of workers to lawfully strike with protected action. Unions and individuals on strike now have some protection against legal sanctions during negotiations for enterprise bargaining agreements (Creighton and Stewart 2005). Such protection is to be largely illusory.

Organising and conducting strike action legally is already most risky under the *Workplace Relations* Act (1996) (*WR* Act (1996), the *Trade Practices* Act (1974), the *Crimes Act* (1914), criminal codes and the common law of torts. It is even more so now.

1.2 I urge that in testing this proposition and the arguments for and against, to consider critical submissions with a balanced outlook. Widespread employee, union, academic and community concern exists that if this *WC* Bill (2005) is passed there would be little practical choice for the worker and union for the right to strike. The government's strategy of moving towards the legal suppression of strikes over the coming period is widely opposed.

1.3 The right to strike as a principle has a long tradition. The promise of and if required the exercise of the right to strike, without legal sanctions (except of course the loss of pay) has strong justifications. Unions advance the principle industrially.

Workers are not to be slaves or feudal serfs or servants controlled by masters. Since the development of capitalism, it is widely accepted workers should in principle have some freedom to withdraw their labour. Forced labour is not legally allowed. Strong opposition is voiced against labour law systems that legally permit orders and injunctions to compel striking workers to return to work.

Employers and their organisations accepted the principle in 1993 (ACCI 2002, BCA 1989), and in 1996, for enterprise bargaining. Although employer organisations support this Bill, the principle is maintained but with these legal restrictions.

1.4 The right to strike in principle has political support. The Minister of Workplace Relations Reith in 1996 continued the Keating government's 1993 political 'tripartite consensus' over broad principles and retained a (narrow) legal right to strike, as protected action.

> For the Coalition Parties to recognise the right to strike was a significant policy shift, but a necessary policy shift, given that we ourselves had been encouraging the system to move towards an enterprise focus. In the context of a bargaining system a right to strike in prescribed limited circumstances is both reasonable and consistent with good international practice.

Indeed the government asserts it accepts the principle of the right to strike; but limited by the *WC* Bill (2005). Opposition parties are on the record supporting the right to strike.

US Republican President Eisenhower argued:

> '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.'

1.5 Workers and unions have long supported the principles and taken industrial action to defend and advance their workplace, social and economic interests. The exercise of the right to strike has been an integral part of collective bargaining to demonstrate strength. Workers assert the principle of freedom of association, legitimate collective conduct determined autonomously without employer and state intervention.

The ACTU Your Rights at Work Worth Fighting For includes ' a campaign in opposition to the Government's plans to increase opportunities for employers to sue or fine workers who take industrial action'. www.rightsatwork.com.au

Clyde Cameron, former Labor Minister, in a pamphlet in the Parliamentary Library, is one example of the labour movement's advocacy for the right to industrially protest. Green (1990) argued for the right to strike that was introduced in a limited form in 1993 by the Keating government based on ILO principles.

Workers and their unions have further justifications for the right to strike on other than socio-economic grounds for collective bargaining. These are based on the democratic and civil rights of citizens in a free society. Depending on the circumstances as decided, such rights are expressed in forms such as the right to politically communicate in protest against workplace legislation seen as adversely affecting their interests; the right of free speech on workplace issues; freedom of assembly about industrial relations changes; the right to workplace democracy, participation in workplace decision-making; rights of conscience over such issues as against war, foreign policy and human rights abuses; and the right for responsible 'green bans' for environmental sustainability.

1.6 International labour law requires the right to strike. Novitz in her *International and European Protection of the Right to Strike* (2003) shows this, as does Creighton's analysis of Australia and International Labour Organization, ILO standards, (Creighton 1995, 1997b, 1998, 2004). International labour law protects workers using bargaining power through the promise of withdrawing labour. Novitz (2003:368) concludes that '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.'

The ILO emphasised their key position on the right to strike in 1983

> 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.

However the current *WR* Act (1996) fails to comply in important ways with Australia's obligation to uphold these minimum International Labour Organisation (ILO) standards for the protection of the right to strike, agreed to be employers, unions and governments (Ewing 1989; ICTUR 1999-2004; ILO 1994-2003; McCallum 2004; White 2004, 2005 b).

1.6 Senators should be mindful that Australia is in a low strike era, (Healy 2004, Perry 2004). Strike waves are not a public or industrial relations problem. In 2003, 88% of stoppages lasted two days or less and only 56 lasted for five days or more. In the last decade the long term downward trend of strikes continues, with less disputes and less number of days lost per thousand workers; 57 in 2003 since the peak in 1974 of 1200 per thousand employees, ABS Industrial Disputes, (Cat. No. 6321.0). The targeting of the small number of legitimate strikes with increased penalties is in stark contrast with this industrial relations reality.

Lockouts are included in the statistics as they are legal protected employer action under the *WR Act* (1996). Briggs (2003) shows an upsurge in employer industrial action, after O'Connor's 1999 bitter 9-month lockout of meatworkers. Employers lock out employees to lower wages when negotiating union agreements and by enforcing individual contracts, Australian Workplace Agreements (AWAs). Lockouts are half of the long disputes duration, not seen since the depression or the great lockouts of the 1890's. Furthermore, the employers' legal right to lockout employees remains with a three day notice required. There are not the same restrictions on lockouts as strikes in WC. One conclusion for the government adopting a legal strategy to suppress strikes is that their case is ideological. Another that it is to support already powerful corporate and government power in coming bargaining rounds.

1.7 One premise widely accepted in industrial relations practices is that employers, particularly large corporations and governments, have already the dominant power economically and legally to enforce their workplace interests. Consequently the purpose of labour legislation is to balance this unequal bargaining power in favour of less powerful employees. There is no balance in WC, but more power for employers.

1.8 The focus here is on union collective action. But the WC provisions also covers the right of an individual to take protected AWA industrial action when responding to all the difficulties of 'negotiating' an individual agreement (but not used). The employer retains the right to lockout the individual employee. This falls far short of the human right of the individual to strike, Ewing (2004). What is also as important is many employers and their associations will be pushing non-union collective agreements, where again these WC proposals have to be complied with by unorganised employees, no doubt with considerable difficulty.

1.9 The structure of this submission covers the following areas. Section one: Division 6 compulsory orders against industrial action; Ministerial intervention; claims banned by the Minister; the employer Greenfields agreement; compulsory secret ballots for protected action; AIRC suspension and termination of bargaining periods; prohibition of strikes during the agreement; further restrictions. Section two has some concluding remarks on removing the right to strike.

1.10 This submission argues that it is not justified for this *WC* Bill (2005) to further restrict the lawful right to strike almost to the suppression stage. Already such comments as 'Second wave laws to stymie industrial action,' are common. *Workplace Express* 3/11/2005, reports lawyer Pasfield, Slater & Gordon

> The Work Choices legislation marks the death knell for lawful industrial action by unions'. He says the new barriers to taking protected industrial action, alongside the legislation's much lower threshold for terminating bargaining periods, means that unions, no matter how strong they are, will no longer have any real bargaining muscle.
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> The legislation effectively does away with protected action by creating a large number of hoops and hurdles for unions to negotiate.
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> Under the new regime, he says, a union could take protected industrial action only if it could convince the AIRC that it could "whistle dixie while drinking a glass of water".

1.11 I recommend you study not only the current *Workplace Relations* Act (1996) *WR* Act (1996), this Bill and Memorandum, but also a copy of a standard reference to the existing law such as Creighton and Stewart (2005) *Labour Law*, together with references to AIRC, Federal Court and High Court decisions, http://www.austlii.edu.au/ and Senate Reports and submissions. But more importantly, there is much written about industrial relations practices of fair play and social justice.

Section One How The Right to Strike is (Almost) Extinguished

1 Division 6 Compulsory orders and injunctions against industrial action s111

1.1 Section 127 of the *WR* Act (1996) now gives the existing AIRC penal power to stop strikes. The AIRC has discretion on the merits of the case to be able to make an order or not to halt industrial action. If the order to return to work is not obeyed, then the

industrial action may be found by the Federal Court to be unlawful, with serious sanctions.

A decade of decisions starting with the *Coal and Allied* case (Creighton and Stewart (2005) said there was a discretion that not all industrial action not protected is automatically to become unlawful. In certain circumstances based on industrial relations fairness s127 orders are not made. S127 are not to be made against protected action, but arguably in the last decade there has been considerable over-use by some powerful employers using the s127 as a penal weapon, Maher (2002).

There is considerable complexity at law as to what is or is not protected action. But s127 is readily and speedily available to employers faced with industrial action and now to be strengthened without good reason and favouring employers.

1.2 The new s111 removes the AIRC discretion that 'may' stop industrial action and inserts 'must'. This compulsion provides little choice for the union to succeed in arguing on the merits against industrial action being stopped. Now all industrial action outside of protected action for unions 'must' be stopped by the AIRC, irrespective of the industrial relations fairness and settling of the grievances. The lack of a fair go is work is unacceptable.

1.3 The reach of s111 is to curb industrial action in the states that impacts adversely on a corporation by a 'non-federal system employee.' This is most complex as to its impact.

The s111 remedy is too widely available, ss (4) for a person 'likely to be indirectly affected' by the industrial action. Prescriptive details for the AIRC hearing s111 within 48 hours are made ss (5), and interim orders (6). There is no evidence as to AIRC delay.

Usually an AIRC order to stop industrial action is legally precise to identify the conduct, unions and workers that the order is to apply to; but not now as 111(9) allows broad orders.

The legal injunction remedy s111A is specifically available to stop pattern bargaining.

The right of the union to apply to halt employer 'industrial action' by s 111 looks as if it has been removed, but as with other sections it is not clear.

1.4 It is arguable that the AIRC's dispute settling role is transformed with few powers to settle disputes. There are now strengthened 'policing' functions under s111 and other sections below. The 1996 protected/unprotected scheme controlling industrial action is now in 2006 a protected/unlawful scheme. There is a very limited, and in practical industrial relations terms (almost) extinguished, protection for enterprise bargaining for a workplace agreement with a single employer. All other industrial action is to be unlawful, even where it is responsible, in reaction to employer unfairness and injustice.

1.5 This makes what is legitimate union collective bargaining, with as a last resort the threat of or the taking of the right to strike most risky. If there is any retention of a

section to stop strikes, then the 'unprotected' area of stopping industrial action should be narrow, limited to serious harm to health and a limited scope of 'essential services' in the public sector and where violence or damage to person or property is the aim of the industrial action. The scope of the right to strike is not unlimited but respects other rights. Under the WC nearly all industrial action is to be made unlawful.

2 Ministerial declarations terminating bargaining periods Division 7

2.1 A new power is given to the Minister to intervene in any industrial action to declare that the bargaining period has ceased and the industrial action is to halt. This executive power is unwarranted and was formerly at least determined by the AIRC and Courts after considerable merit and legal argument. This new power is most objectionable.

2.2 It is probable that s112 (1)(c)(ii) on likely conduct that may 'cause significant damage to the Australian economy or an important part of it' will not in the Minister's opinion be limited to the necessary former narrow application to 'essential services' such as the army, police and senior public servants only.

The Division assists any employer who lobbies the Minister. One example is the Mines and Metals Association lobbying the Minister to stop any strike that hinders large corporations export to China. Any company could apply, such as car companies on component campaigns. Business affected in a power dispute can apply. Hospital strikes and other public sector workers are unjustly cited. No natural justice is afforded to the parties. The opportunity for 'political' intervention is available to the Minister.

2.3 Under s112A the Minister has power to make directions to remove or reduce the threat. The Minister may restrict initiating a new bargaining period, ss (6). Compliance sections enforce such declarations.

2.4 After the declaration, then Division 8-Workplace determinations can apply. This is a new concept, replacing MX awards (that afforded little advance for union claims). How Workplace determinations are to apply is not clear, but there are detailed prescriptions over what the Full Bench of the AIRC can and cannot do as to the content s113D of determinations. Exhaustive legal argument can be anticipated.

2.5 Whether this section is constitutional may be tested as it arguably offends the separation of powers, that the executive powers are not to have judicial affect, only the courts. Legal opinion from constitutional lawyers on this point should be sought.

3 Claims that are banned from agreements by Ministerial regulation

3.1 Section 108A determines that it is not protected action if parties support claims that include prohibited content. The Minister determines by regulation what is prohibited content, s101D. Such regulations have not yet been made. The industrial parties do not know what is banned and to be unlawful. This is unbelievable!

3.2 The regulations ban matters agreed to by employers for their industrial relations purposes that are supportive of unions and good industrial relations practices. The claims were in *Workplace Express,* 10/10/2005, 'WorkChoices makes agenda clear: Cripple awards and outlaw strikes in essential services http://www.workplaceexpress.com.au/news_selected.php?act=2&selkey=30440

'Banned clauses include those that:

- prohibit AWAs (even though AWAs will exclude both collective agreements and award
- restrict the use of independent contractors or on-hire arrangements (unions have been successful in getting these through the Commission since Electrolux);
- allow for industrial action during the term of an agreement;
- provide for trade union training leave, bargaining fees to trade unions or paid union meetings;
- provide that any future agreement must be a union collective agreement;
- mandate union involvement in dispute resolution;
- provide a remedy for unfair dismissal (see separate labour-hire" item); and
- "other matters" proscribed by regulation/legislation.

If an agreement includes prohibited content, that prohibited content will be unenforceable and the OEA will be able to remove those clauses from agreements.

Unions and employees (and employers) will not be able to take protected industrial action in support of claims for an agreement that includes prohibited content.

Extraordinary penalties of up to $33,000 will apply for seeking to include prohibited content in an agreement or lodging an agreement containing prohibited content.

This takes away the freedom of contract for employers who choose union recognition, encouragement and cooperation, Stewart (2005) 'WorkChoices shows Howard government doesn't trust employers to make right choices, *Workplace Express* 17/10/2005.)

3.3 These (unknown) prohibited provisions and penalties are most unreasonable. Thousands of employers for their own reasons with high quality human resource management currently choose to have a range of agreements with their unionised workforce that provide according to the employer and to research at least if not greater enhanced productivity. It is an extreme intervention for a government to insert their politics of workforce regulation compulsorily over that of employers and their employees. This lack of choice is not justified.

The union and AIRC as the much complained of 'third party' is severely reduced in the workplace and the Minister is in. There are pages of penalties that are overly excessive. This Ministerial power is over-kill

3.4 This also ignores the existing legal limits on what claims can be negotiated in agreements. One key example is protected action must legally be 'about matters pertaining to the employment relationship', a complex and legally technical minefield, Creighton and Stewart (2005). It is difficult to summarise what this means. The High Court in *Electrolux* (2004) decided: (a) that the bargaining agent's fee was not legally

'about matters pertaining' to employment; (b) one such claim for a proposed agreement means the whole agreement is not legal; and (c) industrial action taken by the union in support of such a claim that is 'not pertaining' is not protected action and the union guilty of a breach.

This majority 'black letter law' High Court decision makes the practicality of taking union protected action more risky, uncertain and exposed to powerful penalties. 'Accordingly, unions in particular need to be very careful as to the basis on which they seek to take protected action. Even if all procedural requirements for taking such action are scrupulously observed, it will be open to an employer…to seek to pick apart the various claims that are being advanced to identify one that is questionable in terms of the certification requirements' Creighton and Stewart (2005:225).

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 statutory penalty and common law liability.

Kirby J in dissent said it would be 'odd in the extreme' if one clause later found technically not to be 'pertaining to the employment relationship', would invalidate the whole agreement and withdraw the union's legal protection to strike. A high degree of certainty was needed in enterprise bargaining negotiations. 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 meant 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.'

Common law rights for employers were given greater weight, e.g. against workers' right to strike. Claims of an academic, political, social nature may be rejected as 'not pertaining'. Employers argue a return to a former legal opinion that an agreement impacting on management prerogative may not involve 'matters pertaining.' The WC is not really needed for employers to be able to argue their position.

Post-*Electrolux,* there was much anxiety, with many agreements being questioned on the interpretation of 'about matters pertaining'. The contests had settled down with a Validating Act for past agreements and in recent AIRC and Federal Court decisions. These decisions (Creighton and Stewart 2005) are now effectively overruled by the Minister's intervention. It is unfair to legislatively ban matters in regulations that were to be determined by the courts.

This feature of WC that is unacceptable is where employers have not been successful in courts, so their employer legal firms drafting this WC Bill have changed the law.

4 Strikes not agreed to in Employer Greenfields agreements

Section 96D legally allows employer Greenfields agreements for new projects – employer agreements only with themselves! New Greenfields employer agreements could be made whenever so required. The headline of 'ban on strikes for 5 years', *Sydney Morning Herald* 2/11/2005 is legally possible. And not justified.

This is deep in Orwell's *1984* 'doublethink' territory, (cf Dabscheck (2003) on the building industry).

5 Compulsory secret ballots on proposed protected action Division 4

5.1 The most significant provisions severely limiting protected industrial action are new details making it compulsory for unions and workers to comply with the legal process requirements of an AIRC authorised secret ballot with a successful majority before any industrial action is protected from legal sanctions. These are most difficult new provisions to comply with. In terms of practical industrial relations realities they deny effective protected action. Such restrictions were expected given Minister Andrew's campaigning but the details are too much.

5.2 Division 4's 27 pages provisions are obsessively prescriptive and designed not to be able to be followed. I will not here recount them. The AIRC's role is the 'policing' of the secret ballot process and vote for lawful industrial action, conducted by the AEC or a privatised agency.

I cite one *Workplace Express* 3/11/2005 report:

> **Process to be more complicated**
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> Under the Work Choices legislation, once a party has initiated a bargaining period, it can apply to the AIRC for a secret ballot to authorise industrial action. The application must specify the nature of the action, and must be copied to the employer (a provision, Pasfield said, that would mean employers would effectively have a month's notice of protected action, rather than the three days that applies now).
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> Pasfield says the legislation obliges the Commission to deal with the application expeditiously (within two days), but contains no consequences if it fails to comply with the timeline.
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> Employers and disgruntled employees can make submissions about the application to the Commission, which can only grant the secret ballot if the union has been genuinely trying to reach agreement and hasn't been pattern bargaining.
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> The Commission can also refuse to order a ballot if the union has ever previously breached the provisions relating to secret ballots, Pasfield says.
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> If the Commission approves the ballot, it directs the preferred service provider, the AEC, or another provider, to conduct the ballot, which must be conducted within 10 days. Postal ballot is the preferred method, Pasfield says - which would be very difficult with large employers such as Telstra or Australia Post
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> "Attendance ballots", he says, are more difficult, because the legislation requires they be held

during breaks or outside working hours.

The ballot is approved if 50% of the workforce votes, and then 50% plus 1 of those who voted are in favour (according to Pasfield, to succeed in a workforce of 1000, some 500 need to vote, and 251 must vote in favour).

Once the ballot is declared by the AIRC, the union then has 30 days to take the protected action before the order expires (the union must still give three clear days notice of the action).

Pasfield said that unions that go through all the hoops, then notify industrial action that is going to be disruptive to a business, will run the risk of having their bargaining period terminated.'

5.3 It is difficult to see how 'rolling stoppages' democratically organised on the job would be possible. Some unions may go through the processes, and achieve success over all of the many hurdles for protected action, but likely with big stoppages and longer, (Briggs 2005; Forsyth 2005).

5.4 There is no choice. Currently secret ballots are voluntary and used, but not often, and not with these over-prescriptive requirements. Under WC there is considerable scope for legal challenge. Whether the process requirements are complied with and the industrial action is legal will be a legal minefield. Senior employer Counsel now under the *WR Act* (1996) constantly legally challenge single process words e.g. 'the'. Arbitral and judicial interpretations differed on what was reasonably considered in industrial relations terms to be protected action but found after the event not to be so because of some minor technicality in 'process', over sometimes the interpretation of one word. Many process applications to ensure that there is not protected action will be made by employers.

5.5 Stewart (2004) argued that the former AIRC system was excessively legalistic. Juridification of industrial relations will be an even more determining feature. Powerful employer legal firms with strict legalism urging judicial 'black letter law' interpretations can pursue sanctions against industrial action. Their legal priority is the enforcement of employer rights over the workers' right to strike and no balance in settling grievances.

5.6 The ILO accepts balloting, but not to deny effective organisation of industrial action, Novitz (2003). These WC requirements are so complex and onerous, that in practice would deny the effectiveness of initiating the right to strike. Such frustration is arguably in breach of the ILO standards.

5.7 The object states that secret ballots have to be 'fair and democratic'. Minister Andrews says 'it was a matter of principle', 'ballots were a basic issue of workplace democracy. We think it's something that is justifiable because people ought to be able to have a say in matters about industrial action, for example. They ought to be able to have a clear say in matters that affect them as employees. But let me go a step further – we won't be stripping away the right to strike.' 'Push on compulsory secret ballots' *The Australian* 29/11/2004. Note for the 'spin' the word 'compulsory' has been removed. The ACTU replied: 'This isn't about greater democracy, it's about preventing people from taking industrial action when necessary.'

Minister Andrews does not cite any cases of abuse of existing provisions. When strikes occur with votes on the job or by whatever means the decision is representative of members' freedom of association. There is no evidence to support the assertion that union leaders force workers to strike, a conservative myth, (Hyman 1986. Kelly 1998).

Compulsory pre-strike balloting provisions as a condition of protected action follows attempts in 1999 by Minister Reith and then Minister Abbott, but rejected in the Senate. Democrat Murray said compulsory secret ballots before strikes 'would make the situation worse'. Ballots and democratic decision-making are important when organising strikes, and no evidence compels the 'lack of democracy' allegation. One conclusion is this prerequisite is ideological to weaken unions. Compulsory secret ballots for protected action are a strongly contested industrial and political public issue.

5.8 No requirement is made for employers wanting to legally lockout their workforce in bargaining for a collective or individual agreement - no balloting of management, directors or shareholders.

6 Pattern bargaining outlawed

6.1 Consistent with the government's political position, union pattern bargaining across an industry of employers is to be unlawful, with a tightening of former provisions, and for most practical purposes outlawed. Section 106 B catches claims, '(b) seeking common wages and conditions…' There are more prescriptive details in s (4) of factors satisfying the process requirements on unions whether they have been 'genuinely agreeing…' Prohibitions against pattern bargaining appear in a number of sections and their interrelationship requires closer scrutiny.

6.2 Australia is the only OECD country that makes industrial action for industry or multi-employer agreements unlawful. Pattern or industry collective bargaining was a feature of our industrial relations for over 100 years, but severely limited since 1996. In 2006, the outlawing of pattern bargaining fails to allow the industrial parties freedom of choice as to their bargaining level. For unions it fails the freedom of association and right for collective bargaining tests. Such a choice, as exercised in the past through practical industry agreements and awards, meant industry or pattern or national bargaining was voluntary and widely accepted as pragmatic and positive by industrial parties.

For national unions it is essential for workers acting in solidarity with other workers for a joint industrial agenda, one of the reasons workers establish unions. Employers in employer associations act together in their interests. Yet the law protects only enterprise bargaining. ACIRRT (2002) demonstrates that throughout the world there is some mix of industry and workplace bargaining:

> 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.

6.3 The ILO criticised *WR Act* (1996) and may do so now:

> 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.' ILO (1996). Further.'...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 and ILO (1998).
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> In 1999, the ILO 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).
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> In considering the government's response, the ILO (2001): 'With respect to the right to strike in support of a multi-employer, industry-wide agreement for all practical purposes is prohibited.'

6.4 Some unions may be able to get through s (3) that says 'The course of conduct, to the extent that it relates to a particular single business or part of a single business, is not pattern bargaining if the negotiating party is genuinely trying to reach an agreement for the business or part'. After following the strict legal tests some form of industry campaigning may be possible but extremely risky. Even then, there is a wide scope for employer legal firms to take points challenging whether every word is complied with.

Outlawing pattern bargaining is a key employer weapon aimed at making unlawful legitimate union pattern or industry bargaining coming in 2006. Employers have new easy penal weapons to undermine the industry or pattern bargaining. This is not fair.

7 AIRC policing powers to suspend or terminate protected action strengthened

7.1 Even if a union or employees get through to take protected action, there are enhanced detailed instructions to the AIRC to suspend or terminate the protected action, section 107G. These include: 'failing to genuinely try to reach agreement', 'endangering life, personal safety or health' or 'significant damage to an important part of the economy', when with 'organisations and employees who are not members' and 'demarcation disputes'.

7.2 Section 107H compels the AIRC to halt pattern bargaining with many detailed instructions of what to do.

7.3 Section 107I gives more power to the AIRC for 'cooling off' orders; again only to support the employer's negotiating tactics.

7.4 Particularly objectionable is section 107J. This says the AIRC 'must, by order, suspend a bargaining period' and protected industrial action, when there is significant harm to any third person (not the employees and employer negotiating the dispute) and where 'the Commission considers that the action is adversely affecting the employer or employees of the employer'. Prescriptive provisions detail where the action 'may be threatening to cause significant harm', where persons are 'particularly vulnerable', 'threatens to damage the viability of a business', 'disrupt the supply of goods or services to a business', 'reduce the person's capacity to fulfil a contractual obligation' 'cause other economic loss' and 'any other matters that the Commission considers relevant.'

Industrial relations and labour law accepts by definition that a strike does affect other businesses and persons. But the settlement of the dispute is paramount. The recognition of union collective rights with as a last resort the right to exercise economic strength through industrial action is supported as legitimate, even though some harm may occur.

The new 2006 regime means anyone really affected by industrial action can apply to have it stopped. This supports the employers bargaining position. Minister Andrews hails the rights of patients in hospitals, students in schools and universities, persons affected by public sector bargaining. The ACTU responded that this was 'a spiteful proposal of the Government's repression of industrial action for the caring professions, nurses, teachers and others that portrays them as wanting to hurt students and patients.' There is the availability in the private sector for any business affected to halt strikes. Minister Andrews cites the corporate car companies wanting to stop lawful strikes in component suppliers. Similar provisions in a so-called *Better Bargaining* Bill were defeated on their merits by the former opposition Senate (Senate Report and submissions, (White 2004, 2005).

O'Neil (2004) concluded on the earlier Bill: 'It is difficult to imagine that protected industrial action will not result in some economic damage to third parties and there is at the least the potential for the scope of the immunity offered under protected action to be narrowed by the Bill.'

7.5 Just in case it is not clear that protected action is difficult, Division 3 subdivision B lists the exclusions from protected action. They are:

- 108A Exclusion – claims in support of inclusion of prohibited content;
- s108B Exclusion-industrial action while bargaining period suspended;
- s108C Exclusion-industrial action must not involve persons who are not protected for that industrial action;
- s108D Exclusion-industrial action must not be in support of pattern bargaining claims;
- s108E Exclusion – industrial action must not be taken until after nominal expiry date of workplace agreements or workplace determinations;
- s108F-notice of action to be given;
- s108G Employee may appoint agent to give notice under s 108F;
- s108H Exclusion-requirement that employee organisation or employee comply with Commission orders and directions;
- s108I Exclusion-requirement that employer genuinely try to reach agreement;

- s108J Exclusion-employee and employee organisation action to be authorised by secret ballot or be in response to employer action;
- s108K-employee organisation action must be duly authorised.

All of these provisions are complex and linked to other sections.

8 Prohibition of all strikes during the term of an agreement

The *WC* Bill (2005) prohibits industrial action for all reasons during the term of the agreement that can now be five years. Minister Andrews responded to lobbying by employers, the AIG, to reverse the *Emwest* (2002, 2003) decisions.

Kenny J of the Federal Court said the *WR Act* (1996) does not always prevent a union from taking protected action during the life of a Certified Agreement. It is legally permissible when a claim is for new matter not dealt with in the agreement. The Federal Full Court on appeal agreed that protected action is important for enterprise bargaining. They decided it is inconsistent not to allow a union to negotiate a matter not in the existing agreement, particularly when awards are limited to allowable matters leaving other issues to be negotiated at the enterprise level. This is pragmatic industrial relations. Here in *Emwest* protected action for a new redundancy claim over a new restructuring was valid. Unions should have the right to bargain in the changed circumstances and be able to take protected industrial action over a new claim.

O'Neil (2004:7) argued earlier: 'the notion that industrial issues are closed for the life of a particular agreement is at odds with the fact that businesses are at liberty to significantly restructure the business during the course of the agreement, which will be responded to by claims from employees and their organisations.'

This ban is questionable applying international labour law jurisprudence, Novitz (2003:272, 283). Ewing (2004) argues, as a human right the right to strike should not be taken away during the agreement. ILO principles allow a right to strike in political protest during the life of the agreement.

The *WC* Bill (2005) with this blanket proscription against any strike during the life of a workplace agreement or AWA goes too far as *Emwest* was fair.

9 Industrial action involving non-protected workers is not protected

The *WR Act* (1996) does not allow protected action involving secondary boycott or with other unions that are not protected. The WC (2005) tighten this to make organising industrial action subject to further risks. It becomes unprotected if taken in concert with employees of different employers. Protected action is only legally allowed to be taken by workers and unions to whom the proposed agreement will apply. As O'Neil (2004) understatedly argues: 'it is possible in multiple enterprise bargaining rounds (for collective agreements) that all protected action may be lost for legitimate participants where a few, presumably employees, partake or are otherwise caught up in the 'wrong' industrial action.'

The industrial relations strategy of the government is to undermine the ability of unions to organise workers across employers with concerted industrial action, notwithstanding that this has always been a feature of union organising and not unlawful, but tolerated.

10 More restrictions on the right to strike

'Green bans' supporting environmental action are outlawed as a result of the combined impact of WC. This is despite that there is, as in the original green bans, considerable support from environmental and community groups.

Legitimate political protest action as a civil liberty in a democracy is outlawed (Novitz 2004; White 2005 a).

The section 90 guillotine for terminating new agreements (that is most objectionable) has the following impact here. If that notice is given before the end of the current agreement, the employer can avoid industrial action at all, unless employees are prepared to fall back on the Fair Pay Commission Standards, much lower than the minimum awards, and then take protected action after the agreement expires. It is far more likely they will concede and agree to a lesser collective outcome or individual AWAs. So employers effectively control whether protected action can occur, long before workers get to the ballot process.

A small but important restriction is that the burden of proof of the legality of OHS industrial action is reversed with 106A (4) making it harder for unions to take lawful OHS action.

106A (1) definition of industrial action is changed but consistent with not having the current 'industrial dispute' available. Section 106A (2) details are wide just in case the scope is not wide enough.

An indication of the penal crackdown in imprisonment for 6 months by s107B for disclosing the identity of certain persons engaging in industrial action with an agent. Similar secrecy compliance sanctions occur throughout the *WC* Act. Penalties for unions of $33,000 are common.

The section 166A *WR* Act (1996) limited immunity for unions from common law tort for 72 hours is repealed. Common law sanctions based on ancient master and servant doctrines that as such strikes are unlawful are now immediately available. The employer has a further powerful weapon to stop strikes and penalise the unions. For over 70 years the public policy was to settle the claims and grievances by conciliation and if no agreement by arbitration if necessary and not in the common law courts. Costello (1986) introduced torts in the (in) famous *Dollar Sweets* case. In the *Airline Pilots* case $4.5 million in damages were awarded in the tort action against the Pilots Federation. Common law judges are even more to be controlling strikes.

In complying with the many process requirements for in industrial action to be protected, S107C (e) may be a difficulty where the Minister determines what else are to be 'particulars' of the industrial action to be notified to the employer. Again there is no indication of the regulations that the Minister may make. There will be more room for legal technicalities to be taken to declare the industrial action unlawful.

With a limited multi-business agreement allowed, these are defined to operate as though multi-business agreement is an agreement with a single business. To make a multi employer agreement the employer must apply to the Office of Employment Advocate, OEA to make/vary a multi business agreement, that is to be granted only in the public interest and only after OEA issues a certificate can agreement be made. This is most complex, makes protected action difficult and changes the existing provisions.

I do not go into other details for more policing powers for the AIRC to control strikes, such as prescriptions to restrict the initiation of new bargaining periods, 107F and after a secret ballot and protected action is suspended, any new protected action has to go through the whole procedures again; most unreasonable.

Division 9-Payments are not to be made in relation to periods of industrial action has considerable detail that is obsessively prescriptive. Workers on strike lose pay full stop.

I have not gone into the penalties sections to see how they all apply, but on the face of them many have fines of $33,000 against unions in breach and this is excessive. The rationale of industrial disputes is supposed to be to settle them, not to punish those organising against perceived injustices.

Section Two Concluding on the removal of the right to strike

Overall, the existing limited right to strike is extinguished. Whereas employees rights at work should be strengthened including a firewall protection for the human right strike.

Legitimate union collective bargaining and industrial action defending and promoting the workplace, economic and social interests of employees will be unjustifiably made unlawful, with higher penalties available. Millions already who have little power or are denied or can't strike because of the changed labour market have no choice. All workers should have the right to strike without penalties.

This increase of penal sanctions as weapons for employers and a strategy for suppression of the right to strike moves away from the former tolerance of strikes that did not use the penalties available to repressive tolerance periods with some use of the penal powers, to now a strategy attempting legal suppression of strikes. Management who love power and authority benefit.

The government has already outlawed the right to strike for building and construction unions in legislation slammed through in August and applying retrospectively to catch unions' campaigns. The new building industry Australian Building and Construction

Commission 'police force' is operating with wide-ranging powers to 'investigate' building workers involved in so-called 'unlawful industrial action'. Building workers' basic civil rights to silence and not to incriminate themselves have been removed with threat of jail! (Roberts 2005).

'Blueing' is to become even more risky. Will the Australian 'blue' with the boss be an endangered species? Workers and their unions in dispute, those 'blueing', will be liable to be ordered back to work, fined, sued and even criminalised, with increased penalties.

Stewart (2004) has characterised the former system as excessively legalistic and the 2006 system as more so. The juridification of industrial relations will now be a more determining feature. Powerful employer legal firms applying strict legalism urging judicial 'black letter law' interpretations will vigorously pursue the sanctions against industrial action. The enforcement of employer rights prevails over the workers' right to strike.

Howe (2005) argues that the Building and Construction Act (2005) was not modelled on de-regulation, but a state 'command and control' model that was not fair and may be ineffective regulation. WC is the same.

MacCallum (2005) warned that the government's reliance on the Constitution's Corporations power (rather than the 100 year old reliance on the Constitution's industrial power to prevent and settle industrial disputes) would inevitably lead to a corporatisation of labour law where the interests of corporations dominate over those of working families.

> If corporate power is further unleashed owing to the reshaping of our labour laws into the image of corporate economic productivity, the corporate sector will obtain a huge increase in power and influence to the great detriment of the Australian nation and especially to the long term disadvantage of working women and men.

Many in the labour movement such as Sutton (2005) see the *WC* Bill as intensifying class warfare in key areas, as powerful corporate forces striving for profits continue restructuring and their anti-union campaign using all of the new provisions and organised labour resists against lack of fair play.

The PM in the election did not raise these further restrictions on the right to strike so there is little legitimacy. Corporate associations lobbied Minister Andrews to take away the protections necessary for the effective right to strike, under the massive advertising 'spin' promising that 'We won't take away the right to strike'.

The *WR Act* (1996) is in a number of ways in breach of ILO obligations to protect the right to strike, (ICTUR 1989) and the *WC* Act is most likely to be further criticised by international labour law jurists as falling short of human rights.

Hunt (2001) argues that the current restrictions are not morally based. WC fails the ethics test.

The Parliament runs the risk of the WC not having democratic legitimacy. Workers, their unions and the concerned public ought to be able to analyse, debate and criticise WC with time and not ramming it through the Senate before Christmas. This WC Bill has many legally complex details. The failure to hold a comprehensive democratic Senate Inquiry process, means there will be no legitimacy to the these labour laws.

The only labour laws that can claim legitimacy are those to which all workers, not just employers, could assent to as participants in rational discourses.

The government's political strategy at work includes a 'law and order' campaign to provoke unions and strongly support companies against so-perceived 'militants.' Combet's speech at the Press Club 3/11/2005 said at the end that the unions were not going to pay the fines and some union leaders would go to gaol. Both union resistance to unjust WC outcomes and collective bargaining for new agreements will see unionists penalised. The employers' bargaining power over employees backed by the state is increased in an unwarranted degree, dangerous for a democracy.

'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.' Clyde Cameron, former Labor Minister (1972).

From penal colony to 2006 penal powers indeed.

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APPENDIX ILO OBLIGATIONS

Ben-Israel (1988:1-2) explains this fundamental freedom to strike highlighting the industrial and political consensus of our modern times.

> The phenomenon of the strike is one of the crucial problems of contemporary industrial relations because it lies at the very core of the legal regulation of industrial conflict. The strike is basic to the distribution of power between capital and labour, and also forms part of the problem of the autonomy of groups and their relationship to the State. The concept of the strike relates to issues, which lie at the heart of the ideological conflicts of industrial relations. …Since the late 1940's…a basic consensus emerged, albeit slowly and somewhat grudgingly. The social partners' freedom of recourse to concerted activity gained recognition as an essential element of industrial relations without which freedom of association could not exist. Freedom of association is a fundamental human right…Hence the freedom to strike has emerged as an essential tool for the implementation of such a basic freedom as freedom of association.'

The ILO with Australia as a founding member since 1919 is uniquely based on a tripartite structure. The ILO consensus is that 'labour is not a commodity.' 'Social justice' in the workplace and recognition of worker interests is to be taken into account

with other economic goals. There is to be 'freedom from forced labour'. Workers should not be compelled to return to work by employer and state sanctions. Union 'freedom of association' is a basic human right.

The importance for employers of the ILO remains agreement for 'fair competition' by companies abiding by minimum labour standards to prevent countries from gaining economic advantage in the labour market by the exploitation of their workforce.

The main justification of the right to strike is socio-economic, being essential to a union's freedom of association and as a collective bargaining power counter-balancing corporate power in a global capitalist market economy. This broad scope is to defend and extend not only workers' occupational interests but also social and economic interests. The principles support Convention No 87 *Freedom of Association and the Right to Organise Convention 1948*, and Convention No 98, *Right to Organise and Collective Bargaining Convention 1949.* These were highlighted by the *ILO Declaration on the Fundamental Principles and Rights at Work 1998*, agreed to by Minister Reith.

Article 8, paragraph 1(d) of the ILO's *International Covenant on Economic, Social and Cultural Rights (ICESCR)* of 1966, (agreed to by Australia in 1975) provides for

'The right to strike, provided it is exercised in conformity with the laws of the particular country.'

The ILO emphasised their key position on the right to strike in 1983

> 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.

Justification at other levels promotes the right to strike as a civil right based on citizenship principles, as a 'human right' and 'freedom of association'. Novitz (2003:65): 'To view the right to strike is an aspect of 'free speech', 'freedom of association', or even 'freedom from forced labour' is to give it the status of a fundamental civil liberty. This suggests that it could be exercised whenever the worker so chose the prima facie personal freedom. The entitlement to take industrial action could not be limited in terms of subject matter, such as collective bargaining or workplace governance, except where it infringed some other right or vital aspect of the public good.' Ewing (2004) makes a strong case for the right to strike as a human right.

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