GILSHENAN & LUTON
LEGAL PRACTICE



Protected and unprotected industrial action

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Generally speaking, “industrial action” involves conduct engaged in during the enterprise bargaining period of a bargaining dispute. Industrial action can be either *protected* or *unprotected* – these are legal terms with specific meanings and are discussed further below.

The law in this area is complex, and it is therefore important for everyone involved in such disputes - employees, unions and employers – to understand what constitutes industrial action and what they can and cannot lawfully do in undertaking such action in the course of a bargaining dispute.

Types of industrial action

The *Fair Work Act 2009* (Cth) regulates industrial action in Australia. Industrial action can be engaged in by either party.

Common examples of industrial action include:

- employees refusing to take phone calls or responding to emails;
- employees refusing to work overtime;
- employees stopping work for periods of time; and
- an employer locking out employees by preventing them from working.

What is not industrial action?

An action will generally not be classed as industrial action where:

- the action has been approved or agreed by the opposing party in the dispute; or
- an employee took a particular action, or omitted to do something, due to a reasonable and imminent concern for the health or safety of the employee *and* the employee did not unreasonably fail to comply with a direction of their employer to perform other suitable and available work.

When can industrial action be taken?

Generally, industrial action is considered when employers and employees (and/or their representatives) cannot come to an agreement whilst negotiating for a new enterprise agreement. This is usually in relation to matters concerning the relationship between an employer and the employees and/or employee unions, wages, or the operation of a proposed new enterprise agreement.

Industrial action is then taken to advance the employees' and/or employers' interests during the bargaining process.

It is important to note that an application for protected industrial action by way of a "secret ballot" or "protected action ballot" cannot be made earlier than 30 days prior to the nominal expiry of an enterprise agreement.

Example:

- The current enterprise agreement is due to expire on 1 January 2024;
- The employees and employer have been in negotiation since 1 February 2023 to agree on terms for the new enterprise agreement post-January 2024;
- Negotiations are at a stalemate;
- The employees cannot make an application for protected industrial action until 2 December 2023 – 30 days prior to the current agreement expires.

What is the difference between protected and unprotected industrial action?

Protected industrial action

Protected industrial action is that which has been approved by the Fair Work Commission after a successful "secret ballot".

Generally, industrial action that has been 'protected' limits the liability of parties engaging in action that may otherwise result in a claim for damages or adverse action. For example, an employee cannot be terminated because they participated in industrial action.

Although the *Fair Work Act* protects a person from liability, if a person engages in protected industrial action (such as going on strike for a day), the Act generally provides that the employer

must not pay the employee for the duration of the period that the employee engaged in industrial action. Penalties can apply to employers who pay employees for industrial action and employees who ask their employers for payment.

Where an employee engages in industrial action that is not a failure or refusal to attend or perform work, this is referred to as a "partial work ban". In other words, a partial work ban is industrial action that is not an absolute stoppage of work. Where an employee engages in industrial action that is a partial work ban, the employer may reduce the employee's pay by a proportion and give the employee notice of the reduction in pay because of the ban.

There are of course some limitations as to what is 'protected' under the *Fair Work Act*. Usually, acts that result in, or are likely to involve in injury, damage or defamation are not protected.

Unprotected industrial action

Unprotected industrial action is any form of action that has not been approved by the Fair Work Commission.

Similar to protected industrial action, the *Fair Work Act* provides that an employer must not pay an employee for the duration of time that the employee engaged in the unprotected action. However, if an employee engages in unprotected industrial action for less than 4 hours, the employer is required to withhold a minimum of 4 hours pay. An employee must also not ask an employer for such payment.

In *Hillsbus Co. Pty Ltd v Bajwa* [2018] FWC 6861 the Fair Work Commission found that unprotected industrial action had occurred in circumstances where 128 employees took personal leave on a single day.

This leave was organised as part of the bargaining process for a new enterprise agreement but was not approved through a secret ballot. The FWC held that this was a *"covert campaign which encouraged others to participate in a coordinated manner"* which was capable of falling within the definition of industrial action.

What is a "secret ballot"?

A "secret ballot" or "protected action ballot" is an approved vote by which employees can decide whether they want to engage in a particular form of industrial action to support their enterprise bargaining negotiations.

In order to have a valid ballot, a bargaining representative (for example, a union) may apply to the Fair Work Commission for an order allowing the ballot. There are strict requirements under the *Fair Work Regulations 2009* (Cth) that must be followed for a valid application.

It is important to ensure that any proposed protected action ballot is clear when describing the potential industrial action. If the description is vague or uncertain, there is a possibility that it will become unprotected industrial action.

Once an application has been made, the Fair Work Commission must make a decision on whether to grant the protected action ballot within 2 working days.

Who can take part in a secret ballot?

A protected action ballot is required to specify the group or groups of employees who are to be balloted. Once an order for a protected action ballot has been made, a roll of voters listing all employees is compiled. The ballot will only cover those employees who will fall under the proposed enterprise agreement.

A secret ballot requires more than 50% of affirmative votes to be successful.

What does the Fair Work Commission consider when determining a protected ballot application?

When considering a protected ballot application, the Fair Work Commission must be satisfied that:

1. the application has been made pursuant to the *Fair Work Act*; and
2. the applicant/s have been genuinely trying to reach an agreement.

If the Fair Work Commission decides to make a protected action ballot, it must also make an order directing the relevant bargaining representatives to attend a conference before the closing date for the ballot, to attempt to resolve or partially resolve the issues before the industrial action commences.

What happens if I engage in unprotected industrial action?

Any person who intends to engage in industrial action must make sure that they fall within the group of employees under the protected action ballot.

If a person engages in industrial action that is not protected, or in which they are not protected, they could be subjected to disciplinary or other proceedings by their employer.

What can I do if I suspect my employees are engaging in unprotected industrial action?

If it is suspected that employees are purposely engaging in action, such as refusing to undertake work in an attempt to influence a new enterprise agreement (and in circumstances where there was no protected industrial action organised), an employer may make an application to stop the employees from undertaking that action.

An employer may make an application to stop unprotected industrial action whether that action is already happening or is in the process of being organised. Contravening a stop order can result in significant penalties.

It is important for employers to understand whether the relevant action is a form of protected or unprotected action. If an employer takes adverse action (such as terminating the employment relationship, other disciplinary action or conducting an investigation) against an employee for protected industrial action, they may be in breach the general protections provisions of the *Fair Work Act*.

Get help from an employment lawyer

If an employee or employer requires advice or assistance with regard to industrial action (protected or unprotected), our team of employment lawyers are highly skilled in all areas of workplace law. We can advise you on the legality of any action being taken (or considered) and represent you if you are found in breach of employment laws.

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