

# FIREWALLING THE RIGHT TO STRIKE

Chris White argues for the repeal of all *WorkChoices*' restrictions on strikes

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## How long does the repression of strikes last?

Howard's neo-liberal strategy was not only to allow employers to exploit workers with AWAs, but a strategy of repressing the ability of workers to exercise bargaining power through their combined and co-ordinated withdrawal of labour.

In a collective bargaining system the strike is the necessary ultimate sanction.

*WorkChoices* attempts to legally suppress strikes. For most practical purposes, the right to strike is outlawed.

Corporations and the state apparatus have many enhanced legal powers to attack the interests of workers and their unions by using penal powers against legitimate industrial action. It is a unique model: one of the most repressive of the right to strike in the western democratic world.

State authoritarianism is a key feature of the *WorkChoices*' regime against organised labour. Howard's extreme anti-union agenda requires the state apparatus to act for corporate interests.

This includes: the Minister's unprecedented powers to politically intervene against legitimate industrial action indirectly and directly; the *Building and Construction Industry Improvement Act 2005 BCII* making legitimate industrial action 'unlawful' and the *Australian Building and Construction Commission ABCC* breaching workers' civil liberties and prosecuting workers and unions for strike action; the WorkPlace Authority, DEWR, exercising policing powers; the AIRC policing bargaining; courts reinforced with more sanctions against unions; the politics of the government's 'law and order against militant unions', with the ideology of zero tolerance against so-called 'union unlawful' strikes.

Howard's political strategy shifts more power to employers to suppress strikes not only in collective bargaining for Certified Agreements, but in more decisively subordinating their workforce to their rule. This is a 'command and control' sanctions based legal model. The many prescriptive details in *WorkChoices* are excessively legalistic and cement the juridification of industrial relations. It is not de-regulation.

Without doubt this is a frightening power for any dictatorial HRM who likes to exercise workplace rule. There is no industrial fair play.

The question is how long is *WorkChoices* to remain?

## **End the repression now**

The right to strike is a key means without which any 21<sup>st</sup> century collective bargaining system cannot exist. If workers are not able to withdraw our labour without penalty (other than losing pay), we are not free but 'wage slaves' to whatever the employer or the state wants.

The alternative workplace policy is to get the repressive state apparatus out of the workplace, off the backs of workers and employers, to support unionism and workers' rights and remove corporate law firms from industrial disputes. This alternative begins to reverse the already dominant employer power towards an industrial relations system based collective bargaining with on a form of balance of power between capital and labour.

One key reform is to 'firewall' legally the right to strike for a worker, workers collectively and their union organisation. 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 their labour.

The RG 2008 Workplace Relations Bill should simply protect any industrial action, so that 'no action lies under any law (whether written or unwritten) in force in the 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.'

PM Kevin Rudd and Deputy PM Julia Gillard (for shorthand purposes referred to as RG) will try to repeal much of the worst of the *WorkChoices* restrictions outlawing the right to strike and in 2010 the *BCII* Act. It is important to support them in this endeavour. The RG new *FairWork Australia* is to be a collective bargaining system with protected action.

But we know the RG reform is limited, retaining unfair restrictions on the right to strike. The devil is in the details. These details are fundamental to a 'firewall' protection.

*Your Rights at Work Worth Fighting For* YRAW campaigners know the right to strike is ACTU policy. The right to strike is a human right. Let's get on with this right worth fighting for.

## **Campaign on principle: no penalties for withdrawing my labour**

We start from and stick with principle. I have not found anyone who denies 'in principle' that workers should not be penalised if they withdraw their labour. No one certainly in the labour movement.

Right-wing politicians do not deny the right to strike 'in principle'. The Liberals' 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.

Employers support the principle. For example, employers agreed with Keating's 1993 reforms with the right to strike. But, the Australian Chamber of Commerce and Industry ACCI asserts limitations:

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 (matters pertaining employers and employees).

So the debate is not over the 'principle', but over the boundaries. We criticise these boundaries as not affording the firewall right to strike.

Interestingly, we see that in 2008 these employer boundaries are RG's limitations. Dare we suggest RG followed the employers' bottom line?

## **Legal responses to strikes**

Historically, there have been three broad legal responses to industrial action:

1. Suppression,
2. Toleration and
3. The positive right to strike.

Australian labour law has had many years of suppression, periods of tolerance and repressive tolerance, and in 1993 a (limited) legal right to strike. We returned under *WorkChoices* again to suppression. Are we now to move to the positive right to strike?

## **RG restrictions are unfair**

'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.' How many times have we heard this refrain from the Liberals? But these are lines from RG. Key anti-strike features of *WorkChoices* are to remain: me-tooism gone too far!

But voters and *Your Rights at Work* activists were promised *WorkChoices* is to go into the bin of history. There are many detailed restrictions on the right to strike, some of which I deal with. We argue they must not remain.

RG announced, prior to the ALP Conference and during the election, key restrictions on the right to strike. I publicly criticised these unfair restrictions at the time (see my papers). They are:

1. Outlawing industry or pattern bargaining strikes retains a 'world-worst' labour law system. (The Writers' Guild strike in the USA, where workers are free to strike on an industry basis, would under the RG policy have not been possible, the writers ordered back to write by a judge and the giant Hollywood companies would have sued the Guild. But RG plan to deny such freedom of association. Julia Gillard, as acting PM, on TV 3/1/2008 and the *Australian Financial Review* 4/1/2008 'Gillard throws tonne of bricks at unions' she said in an offensive tone that the Labor government would have 'judges come down like a tonne of bricks' on unionists in an industry strike for industry collective agreements. The CFMEU was unfairly attacked: again!)
2. The 'neo-fascist' *BCII* Act and ABCC system (see my papers) is to be retained to 2010. The return of the right to strike for building and construction has to be central in our campaign. The *BCII* Act must be completely repealed and the *ABCC* dismantled, ASAP.
3. Maintaining *WorkChoices* system of compulsory secret ballots complexities for protected action in is untenable (see papers). But as we do not know the details yet, we hold back. The principle is that democracy for deciding and winning strike action is crucial. Compulsory ballots are reasonable when they comply with principles of freedom of association. The ILO supports ballots so long as they are not so difficult to implement in practice. But this is not the *WorkChoices* regime: a 'world-worst practice'. Any new system must not allow employers to take any legal points to halt the democratic ballot, and to deny protected action.
4. RG's absolutism, as in *WorkChoices*, in outlawing all strike action during the term of a collective agreement is most unfair. Unions argue at least a return to the reasonable position of the Federal Court in *Emwest* that held unions are not always prohibited from taking protected action during the agreement's life if the new claims are not in the agreement. The total prohibition is repressive of all workers' responses to unfair management decision-making. It has wider ramifications, such as prohibiting political protest stoppages and green bans etc. No right to strike outside of enterprise bargaining.
5. Under *WorkChoices* no strike pay is an obsession with excessive details. It is an offence for an employer to pay for time lost for a strike, always four hours. Workers 15 minutes late after collecting on the job for a family of a worker killed and being docked four hours pay. 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. RG should abolish this. Workers accept pay is docked for lost time, but feel aggrieved when a strike is provoked unnecessarily or any other reason on the merits for the umpire to adjudicate, as an exceptional case for strike pay.

## **These restrictions are also unfair**

These details in *WorkChoices* also have to go (see arguments in my papers):

- The Minister of Workplace Relations' unprecedented unilateral power to terminate a bargaining period to halt industrial action if an opinion is formed that it may be likely to cause significant damage to an important part of the Australian economy etc.
- Repeal all 'prohibited content' restrictions.
- Repeal the words 'matters pertaining to the employment relationship' (more later).
- No greenfields employer agreements: where there is no right to strike.
- The necessity for a right to strike is critical outside of the bargaining period in certain circumstances, such as a response to the 'murderous' Telstra HRM (see CEPU paper and the 4 Corners programme on Telstra).
- Repeal the provisions where the AIRC has to suspend the bargaining period and stop the protected action; e.g. in pattern-bargaining; where third parties have rights where they are allegedly harmed (s433); after suspension of a protected action ballot; etc (we can debate whether the AIRC power for 'cooling off' remains).
- Repeal the complex technical legalities in the process requirements for protected action (see more below), while retaining a form of good faith bargaining and notice.
- Repeal the provision whereby a strike is not protected if non-unionists are involved or with unions who are not involved in protected action.
- Repeal the right of an employer to lock out. Australia is the only OECD nation that legally discriminates in favour of employer lockouts and against workers' strikes.
- Restore the right to strike for individual bargaining, both in the RG transition AWA system and for individual bargaining for common law agreements.
- Remove all restrictions on OHS industrial action.
- Repeal the myriad of legal opportunities for employers' lawyers to apply to the AIRC to stop strikes and to the Courts for penalties.

## **What the firewall right to strike looks like**

- 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 (rudely violated by *WorkChoices*) is paramount.
- Industry and pattern bargaining industry action is lawful as the industrial parties have freedom to determine at what level they bargain.
- ILO standards for the protection of the right to strike apply. Australia abides by minimum international labour standards. In 1983, the ILO emphasised their key position. '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.'

(Kevin Rudd in 2005 in two excellent speeches attacked 'John Howard's Radical Industrial Relations Regime and its Incompatibility with ILO Standards' and in Parliament on the *WorkChoices Bill* referenced one of my papers on the ILO right to strike. ALP MPs, Greens and Democrats support ILO minimums. Yet RG policies are to be in breach of the ILO standards).

- 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 restricted in specific industry settings: i.e. the Building and Construction regime is abolished; restrictions in trade-related industries, such as the waterfront, go; in 'essential services' the right to strike is restored: (but let us debate a few exceptions).
- The ancient British common law master and servant doctrines of tort (a civil wrong) and breach of contract do not play any part in strike breaking. Workers in a union 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 in the industrial relations commission system and not in the common law courts.
- Picketing (despite prior AIRC decisions) is protected industrial action. Picketing is not subject to common law interim injunctions.
- An employer cannot employ 'replacement' labour to break a strike. The ILO policy says 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 politically protest by withdrawing labour is lawful. This right to strike exists in response to public policy issues. Workers and their unions have as citizens in a democracy legal protection for short political protest strikes e.g. in defence of workplace rights such as attending rallies against *WorkChoices* and any issue that impacts on workers social and economic interests. (RG denies such a right). 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 the fascist Indonesian occupation of East Timor; 'green bans' for the protection of the environment and indeed scope for political communication and freedom of speech as determined by the workers and their union. This democratic right implements the ILO right to have political protest strikes. (See papers). But such protection falls short of 'purely political' strikes to bring down a government.
- Fines do not exist, as the principle of restorative justice applies; or at least, fines are a minimum.
- The State's 'essential services' restrictions meet ILO standards.
- Provisions in the *Crimes Act* that makes certain strikers criminal are repealed.
- Provisions in anti-terror laws that could be used to criminalise strikes are removed.
- The positive right to strike covers the lawful strike exercised internationally. One of the key issues as unions organise globally in response to the giant corporations is to ensure Australia's collective bargaining system is designed to allow the right to strike across countries. For example, in Europe labour laws and rights for workers extend across countries based on the European protection for the right to strike. Australia requires similar rights based on ILO minimum standards so our workers can combine with other workers to stand up to the power of corporations.

What are the boundaries?

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 are at times, protection for the rights of persons and property in certain circumstances.

When enacted the right to strike means not only would Australian comply with international obligations protecting workers' rights, but also there is a positive benefit for all in industrial relations. Where the union threat in bargaining is legal, as a last resort, agreement may be made without strike dislocation and with fair play.

The firewall right to strike and its industrial relations practice is an important factor for industrial peace and the prevention of strikes.

## **More on the RG unfair restrictions**

I now develop key issues.

### **1. Remove the protected action/unprotected action dichotomy**

An important historical issue facing us is the protected/unprotected dichotomy. Employers, governments, industrial relations specialists, labour lawyers and union leaders have accepted the structure of the labour law responding to industrial action to be placed within the legal framework of 'industrial action that is protected/industrial action that is not protected.' Or 'lawful/unlawful' boundaries. Arguments are framed within this dichotomy.

Historically, the legal response to strikes can be placed on a continuum of repression, tolerance and a right to strike. In Australia, with arbitration, 'repressive tolerance' prevailed. With the 1993 reforms for 'protected action' for enterprise bargaining as the boundary, outside of this, so the employers pressed, strikes were to be unlawful. Now at the time (and I was involved from SA) this was not the ACTU position. This was enterprise bargaining protection, but outside of this protection, it was not necessarily 'unlawful.' Legitimate industrial action was not automatically to be made 'unlawful', depending on the circumstances and merits. ILO Conventions applied. (Although the 1993 Act was not strictly drafted like this).

But moving to Howard's 1996 Workplace Relations regime, the protected/unprotected dichotomy changed for the worse. Reith's section 127 was the legal weapon of employer choice to have the AIRC stop strikes (except those that were clearly protected action). The AIRC had discretion on the merits to recognise the strike as legitimate. The Federal Court did not hold all industrial action unlawful.

As the years progressed, powerful corporate lawyers were used to press their technicalities about what was within the scope of protected/unprotected. After many decisions by the Federal Court, the AIRC and at times decisively by the High Court such as the (in)famous *Electrolux* (2004) decision, the boundary of the lawful strike shifted. 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 rightly criticised by the ILO.

Then with *WorkChoices*, the protected/unprotected dichotomy changed again for the worse. The AIRC had no discretion to hear the merits of a strike case, but was compelled to halt industrial action not protected through section 496. Industrial action was even more risky. *WorkChoices* inserted more detailed legal process requirements for protected action so that it's scope was narrowed almost to the point of non-existence. Even where there was protected action after a legal ballot, the *WorkChoices* system had many mechanisms to halt the lawful strike.

The RG proposals (and we do not know the details) are for a widened scope of protected action and a narrowed scope of unprotected action (but backed by automatic penalties retaining the *WorkChoices* feature). Australia may be back to a form of repressive tolerance.

What Australia's modern collective bargaining system requires is a new paradigm - the positive 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 return to the common law sanctions against strikes, ever**

Our campaign for the right to strike has to insist on the need for total protection from the doctrines of the common law of tort that declare all strikes unlawful.

The strength of protected action is to stop unions being sued in tort at common law, but limited to enterprise bargaining. There has been a resurgence of corporate lawyers advising this tort process. This 'employer common law right' today contrasts with the immunity from the tort law for industrial action gained by UK unions in 1906!

Why is my focus on this point? RG plans to retain this ancient masters' weapon for any strike outside of the bargaining period.

My first union employment was in the SA AWU, just after Secretary Jim Dunford, for threatening to black-ban a Kangaroo Island farmer's wool shorn by non-union labour, was held to have committed a tort by the Supreme Court. The AWU was subject to damages. Then Jack Nyland SA TWU Secretary was held to be committing a tort for a ban against a non-unionist. I was involved in lobbying the SA Parliament for immunity against this tort law. After knock-backs in the SA Upper House, in 1983 a form of immunity against the tort law was passed. The principle was to settle the dispute in the IRC. Other States introduced similar immunities.

At the Federal government level, after attempts by Whitlam in 1972 and then Hawke 1983 was stopped by the senate, some procedural immunity was introduced in 1988, and then later some immunity for a strike outside of protected action was enacted in the *WR Act* (1996), as section 166A. The policy acknowledged that the AIRC is to settle disputes in a 72-hour period before an employer application to common law civil courts was available. *WorkChoices* abolished this limited immunity.

Employers took no common law actions against union strikes from 1920's to the 1970's. The industrial relations consensus was that 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 a young lawyer Peter Costello successfully revived the tort law in *Dollar Sweets* in 1986 and trumpeted his win politically against unions with Ray Evans, the

corporate zealot who ran the H. R. Nichols Society and who campaigned tirelessly for the return of the common law against strikes.

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 hold strikes intrinsically cause economic harm and are tortious. They do not support a right to strike to prevail over employers' interests. 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. A (in)famous example in 1991 was the Pilots' strike. The ILO criticised the Hawke government and Ansett'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 to promote and defend their economic and social interests.'

The common law makes much union picketing unlawful. The common law injunction stops picketing. This unduly restricts the freedom for unions to organise and strike effectively. Community assemblies in the Waterfront dispute were held to be tortious, by Beach J of the Victorian Supreme Court injuncting (unsuccessfully) everyone involved.

In 2004, I researched why the common law should not control strikes at all and has to be abolished. I ended up writing a paper of 34,000 words! If you want to hear about 'strike breaking' by the route of the common law, contact me for:

- the history of industrial action still being unlawful at common law after 300 years;
- how the interlocutory injunction is a great weapon for employers to stop strikes;
- the fiction of the 'breach of the contract of employment' by a strike is still upheld;
- the history of the master and servant status norms and how they have been inserted into the law of contracting, the 'freedom of contract' myth;
- the case law on 'industrial or economic' torts: i.e. 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;
- how precedent applies these doctrines;
- why the UK Parliament in 1906 introduced the immunity from the common law, but Australia introduced the arbitration system and did not pass a law for immunity until 1993;
- how the common law against strikes breaches ILO principles;
- how labour law academics criticised the common law as there is no right to strike; (but every law student still learns the torts law against strikes).
- why it was not used by employers until the New Right became active;
- and the case law and
- why all of these common law doctrines should not be used in a modern IR system.

### **3. Process requirements: beware corporate lawyers and technicalities.**

I examined the case law on the process requirements under Howard's 1996 *WR Act* that allow protected action when followed strictly by unions. I started with what was on the face of it (and initially interpreted by the AIRC) 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.' Senior employer counsel successfully argued the meaning of '**the**' and '**the nature**' in a number of cases. Courts held unless strictly complied with the strike were not protected action and was unlawful and penalties applied. Other technical process requirements were similarly enforced.

These requirements reappeared in *WorkChoices*, but as well are in the compulsory ballot rules and again the technical points were taken. The hegemony of legal technicalities about the protected action process has to be removed and fair play, merit arguments without regard to legal technicalities must predominate. After 35,000 words I concluded we have to these *WR Act* words. So in the drafting of the 'firewall' right to strike, fair process requirements are critical.

### **4. Delete 'about matters pertaining'.**

We are assuming that one of the 'world-worst' features of *WorkChoices*, namely 'prohibited content' is to be abolished (see paper).

My argument here goes the next step to argue that historically the new RG system should not have the words 'about matters pertaining to employment', otherwise labour law reverts to the 2004 *Electrolux* law. This means (apart from continuing legal confusion) the return of corporate lawyers to argue and judges to rule that union claims are once more deemed as not capable of being in a Certified Agreement. Workers and unions want a collective bargaining system that allows the freedom to associate and to determine claims and to bargain with the right to strike on those claims and when agreed, then the content is in the Certified Agreement.

To remind us about *Electrolux* 2004. The High Court held that protected action is only for claims legally 'about matters pertaining to the employment relationship' and legally capable of being

certified. This limits the right to strike scope and practical operation by holding workers cannot make certain claims.

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 even more uncertain. The Full Federal Court argued for a pragmatic industrial relations response in a system where enterprise bargaining claims backed with protected industrial 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 lawfully capable of being certified as 'pertaining to the employment relationship.' The High Court held the claim for the bargaining agent fee BAF did not 'pertain to the employment relationship' and that protected action could not be taken in support of 'non-pertaining' claims. Unions 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.'

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 logs of 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 invalidate the whole agreement and 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 meant, said Kirby J, 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 (disguised in 'black letter' logic) reduced the scope of union protected action by making it more vulnerable to the common law weapon.

Howard in response passed legislation to validate thousands of past Certified Agreements. But we were still uncertain not knowing what are 'matters pertaining' and the legal status of protected action in the future. 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 we know *WorkChoices* compounded the peril, added 'matters pertaining' to 'prohibited content' so as to overrule reasonable AIRC decisions. The point of this is we do not want to return to this the 1996 regime.

Finally, I argue 'matters pertaining' is an old judicial reasoning device arising out of Master and Servant Status law. Common law judges assigned legal rights by status (not 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. To any normal person a union bargaining fee is about employment. Let us move on, remove the notion that collective bargaining is restricted to 'matters pertaining', otherwise we are left again with 300 years of fictional doctrine!

## **5. What about the wildcat strike?**

Most protection is afforded to organised industrial action by the union. Should the issue of the wildcat strike, with no notice, no union leadership involvement, and unprotected action, be allowed? Arguably as a human right, in some circumstances, yes.

### **Argue the right to strike as a human right.**

Workers assert morally that their human rights have been abused by suppression, here of the right to strike. Legitimate positions are strongly held such as the 'dignity of labour', that 'labour is not a commodity', is 'not forced labour', and workers are 'free and not slaves'. As a human right not to be abused and punished for going on strike, it is put forward to protect the individual worker's dignity.

Although unions assert the right to strike is a human right, this is a moral right, as really it is not a legal right. In other systems, such as Europe, there are entrenched Human Rights laws. At least countries enact labour laws based on UN Human Rights. Australia is yet to have strong Human Rights laws.

I adopt Professor Ewing's arguments. 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 penalties and the common law of

tort. The right to strike as a human right means that solidarity strikes are protected. The human right 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.

### **Democracy as the basis of the right to strike.**

Many arguments are based on principles of a fair and free collective bargaining system where the strike is as an economic weapon in industrial relations, an industrial sanction, as a means of enforcing a right or a demand for an improved employment right.

But what of the right to strike outside of this dominant paradigm? We argue that unless we widen the principles of our argument beyond that of the collective bargaining means, we will not afford the firewall protection to legitimate strikes e.g. for short political protests, environmental action etc.

I favour a combination of arguments. (See papers on the political strike). It is sound to base the right to strike on principles of democracy and democratic rights, theories justifying civil liberties, freedom of speech and assembly and democratic rights to express and communicate political opinion. The right to strike is a democratic right.

### **Finally, campaign to win**

We have *WorkChoices* until repealed. Enterprise bargaining will still be difficult. Strikes may occur. Many will be settled. Where there are penalties, then unions must expose the injustices, to educate workers and the community so that the political campaign can develop. Since 1996, there have been hundreds of sanctions and fines imposed and this continues (witness the \$10,000 each for the CFMEU Perth workers striking over the dismissal of their shop steward). We can learn from the lessons of struggle. We are now at a historical juncture.

We campaign to win a fairer Australia.

## **Addendum one: How to get there**

Unions put as a priority the discussion of a strategy of how we organise to convince RG and the Australian Parliament to entirely dismantle *WorkChoices* and enact what workers and unions need for the right to strike. This is our urgent collective task. It's still all about political power.

Although we think pessimistically about our chances, we can act optimistically. Let us not now retreat from what will be known by labour historians as Australia's 'orange revolution', the YRAW campaign. YRAW convinced voters to democratically dispatch the Howard government into history's bin – Australia has just avoided going down the neo-fascist corporate road!

We know that one right, the lawful strike, is a critical means to defend and advance the rights and interests of working class families. The right to strike is an issue of human dignity. Social unionism has the ability to politically mobilise union and community activists. We are a powerful political lobby group. Strikes are at low rate, so politically now is the time to push for the right to strike. We can forge a 2008 'right to strike coalition', and to integrate it into YRAW and community campaigns and the ACTU's 2008 industry organising.

## **The movement underway**

We explain to our members when they are in collective bargaining negotiations in 2008-2010, they are still stuck with *WorkChoices* until repealed. Industrial pressure, as a last resort, threatened or used is legally still very risky. Members have to know the details why the right to strike is important and to lobby the RG government.

When labour movement activists are armed with the 'right to strike' arguments and:

- The ACTU lobbies to put in place policy in the National campaign;
- ALP MPs are lobbied and 'on message'; the Greens are campaigning;
- A 'right to strike' website is up and running and YRAW activists receive campaign emails;
- Any strike subject to unfair penal sanctions is exposed;
- Union media is savvy with pamphlets and radio ads and *Get Up* is on side;
- IR academics are public about the unfairness of *WorkChoices* restrictions;
- The churches and the community groups understand the issues and go public;
- Labour lawyers are drafting the 'firewall' right to strike details;
- Many in Human Resource (HR) management are comfortable with the 'firewall';
- Seminars are being held about how unions defeated the penal powers in the 70s;
- Public debates are held;
- We can mobilise mass community assemblies if needed, then we are well on the way!
-

- The ACTU knows how to campaign in the community, and the VTHC has a proud history of just doing it!

## **Historical contradictions**

I raise three major contradictions for the labour movement to debate:

1. We know there is a reluctance of modern states ever to take the right to strike so seriously that they relinquish the power to take decisive action through force to break a strike. The right to strike is always contingent on the state's ultimate monopoly of force.
2. That when the world capitalist crisis develops, deepens and there is an economic downturn, corporate power turning against working families is even fiercer. Unemployment deters workers' struggle and strikes; and
3. A major historical contradiction of the 20<sup>th</sup> century is that left parties when in government (whether reformist, labour, social democratic or Stalinist) often failed the working class.

Resolving these contradictions are our tasks for this century!

## **Addendum two: What line of argument comes from those who challenge the right to strike? Is the right to strike an historical anachronism or has it contemporary relevance?**

### **1. 'This firewall protection of the right to strike is all too much' line.**

In industrial relations practice, normal employers and HR managers do not resort to legal penal sanctions. Collective bargaining and workplace disputes are settled by negotiation and agreement by skilled industrial relations advocates.

In reality, most HR managers are not afraid of the firewall right to strike. For example, many HR managers accept the Australian Institute of Employment Rights 2007 AIER book *Australian Charter of Employment Rights* (pages 97-100). They have no issue e.g. with statements, such as by (former Judge) 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.'

The firewall protection is not at all too much for employers (unless they are Liberals).

## **2. 'Strikes will erupt everywhere' line.**

This is again just not reality.

Liberals argue it is good public policy to repress strikes. But paradoxically, a key factor in producing strikes is the belief 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?

'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.' USA Republican President Eisenhower.

'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's argument (Labor Minister in the Whitlam government,) applies to the Howard government. We ought not have to cite it against RG.

Countries that have an industrial relations system that 'guarantees' the right to strike and a system of preventing and settling disputes often have fewer strikes.

## **3. 'The hurt to everyone' line**

For hundreds of years workers have heard the refrain that a strike causes hurt to employers and the economy, so there ought to be no right to strike. The strike hurts other workers and the unemployed. The strike harms consumers. The strike hurts families and communities and on and on. I leave you to develop the responses.

The contradiction now is such 'hurt' is legally permissible by protected action, i.e. the right to strike prevails. The workers' freedom is more important than the alleged hurt. So what we are arguing about is the industrial action that is unprotected.

#### **4. The 'corporate and union conflict does not exist now' line**

There is no shortage of commentators who assert that the capital/labour conflict is anachronistic and thus the right to strike. Our reply shows the conflict between capital and labour, between corporations, management and organised labour still exists and the right to strike relevant. History demonstrates that forms of conflict do occur due to the differing collective interests of the workforce and the owners of capital in a capitalist economy. And similarly, industrial conflict exists with the employer as the state (witness State ALP governments).

Employment contracts are based on management authority structures. Inevitably, grievances and conflict at work do arise at a number of different levels responding to 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.

We are not be fooled. All throughout history there have been periods of union quiescence where capital rules and the workforce subservient, and periods of greater struggle and back again.

The end of 'class warfare' line is similar, promoted by right-wing 'think tanks' and some MPs. But if *WorkChoices* was not a class attack by capital and the state on the working class, then we do not know what it was. *YRAW* was a working class political response in a democratic election. This is a debate that I do not pursue here, but is important

Another dominant line is that the industrial parties are in a system of 'partnership'. Strikes are of the past it is said in favour of corporate social responsibility and cooperative partnership at work because the labour market is different. Many academics and politicians express this view.

I do not know of anyone who is opposed to an industrial relations system where the strike weapon is not needed, where there is real workplace democracy, where grievances are peacefully solved by 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 as a last resort.

#### **5 'In the modern workplace employers and employees are all equal' line**

This is the major spin put about by Howard and still Nelson and Bishop, the rich and powerful, corporations like BHP Biliton, the political leadership of business associations such as the Business Council of Australia BCA, the Australian Mines and Metals Association AMMA, the Australian Chamber of Commerce and Industry ACCI, their ideologues in the H. R. Nichols Society, the Murdoch press and right wing writers. They deliberately distort and invert the workplace reality of employer dominance and worker submission. If 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. We have to refute it. I repeat some of the arguments.

Workers experience that employer's 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 'collectivity' of capital. Historically, the main object of labour law has always been, and will always be, a countervailing force to counteract the 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 in the 21<sup>st</sup> century. Even more so tomorrow, 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**

Just because the strike level is at record lows does not mean that in the future, depending on economic and social forces, that strikes will not again increase and the right to strike important.

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 industrially and politically class conscious blue-collar militant unionists organising with strikes contrasted, with the new division of labour, with the new individualism of the professional, mobile and white collar career employee. The strike weapon, says this line, is from the old working class and no longer relevant. But such arguments are flawed by industrial relations reality. Blue-collar workers still exist.

In the last decade, significant white-collar sectors in education, the public sector, the finance sector, the universities, nursing staff and professionals had to resort to industrial action in bargaining with the more powerful state employer. We have now a white-collar working class just as militant and just as capable of using the strike weapon. White-collar collective responses to employer caused grievances still require a right to strike. It is not an historical anachronism.

What explains lower strikes can be debated. But that is for another paper. The repression of strikes in the last decade has made organising strikes most difficult. So overall this has had some deterrent impact. Now, the Liberals trumpet this result. We say workers do not want to be slaves; that the freedom to strike is overriding.

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. Repressive sanctions have had impact on union thinking.

But a contrary point can be made. 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 contemporary relevance for conflict in large private workplaces and in the public sector, should the significant number of workers in the precarious labour market who can't or don't strike, be the subject of the priority right to strike campaign? Unions quite rightly 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 AWAs, youth, women, the work/life collision, gender issues etc.

Casuals have such precarious positions that their subjective ability to confidently engage in industrial action is low. But a difficulty in participation does not mean that worker' rights do not apply to casuals. 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.

It is simply wrong that the greater workforce female participation means less ability for strikes; increasingly, women workers strike to rectify grievances.

## **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 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. When in the union and in the collective bargaining system, the right to strike is essential.

## **9. 'Contractors are not employees and cannot strike' line**

One reason for the decline of strike action may be the making by employers of workers into contractors so as to define them as not being entitled to work rights, including the right to strike. Again, there are strikes against employers forcing workers into being contractors.

Where these contractors are employees, devices to avoid their exercise of their rights have to be overturned. 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. Then again this in itself is no reason to deny the right to strike.

## **10. 'Individual knowledge based workers can't strike' line.**

In the 'post-Fordist', high skilled knowledge economy, the high paid knowledge worker is an individual who does not take collective action goes the line, so does not need the right to strike and won't strike. Again this is not an IR reality. We know high paid computer experts do take collective action, e.g. in 2007 IBM workers conducted a successful international threatened strike using the 'virtual strike' to negotiate gains. However, even if more individualised, professional workers should not be denied the right to strike.

The 'individualisation' of industrial relations does not eliminate the capacity to organise collectively. Another reality is the individual exercising his or her human right to strike with others still requires the protection of the lawful strike. Furthermore, the right to strike has relevance for the individual who in individual common law contract negotiations may be victimised, dismissed etc and requires protection.

## **11. Who's afraid of the strike? The 'we always went on strike irrespective of the law so we don't need a right to strike' line.**

'What's wrong with a good bloody strike. That's what I say. 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. Shock horror. I can see the headlines now militant union official calls for strike action. The parliamentary debates will have me down as a threat to the economy. I'm costing jobs the Minister will say. Strike, how dare I speak that word. Haven't we become a bunch of wowsers? 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 can reasonable hold these views. It is a reality that unions settle disputes and negotiate by agreement for penalties to be dropped. But many unions are forced to the Courts and to pay the fines.

*WorkChoices* and the *BCII* Act had no democratic legitimacy. They are bad laws. There are strong arguments to defy bad laws, and some workers and unions will.

Unions are not going to launch (like the 1970s) mass strikes to defeat these penal powers. 2008 is a campaign for political lobbying.

In the past, many of us organised strikes knowing that the penal powers would not be used. These days, we know it is far more risky that the employer will use penal sanctions. I accept you settle and you win the dispute. But unionists should not have to organise under penal sanctions.

Workers and unions have always developed from isolated struggles to general struggles and then to lobby politically to implement labour laws favorable to the interests of the working class.

My argument is that to achieve the firewall right to strike is a measure of the labour movement's maturity and strength. The challenge to have your rights at work implemented is ahead of us.

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