Industrial action legalities

Compiled for NTEU Fightback
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1. Monash marking ban struck down by FWC

During an enterprise bargaining dispute at Monash University in 2013, the Fair Work Commission ruled that any industrial action which results in grades being withheld, and therefore leaves students unable to re-enrol or graduate, is unlawful.

This is obviously a very serious legal blow to an industrial tactic which is commonplace in industrial disputes in the US, the UK (and, up until 2013, in Australia)

FWC made this ruling under section 424 of the Fair Work Act, which states in part:

http://classic.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s424.html

> *FWC must suspend or terminate protected industrial action--endangering life etc.*
> Suspension or termination of protected industrial action
>
> (1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
>
> (a) is being engaged in; or
>
> (b) is threatened, impending or probable;
>
> if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:
>
> (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
>
> (d) to cause significant damage to the Australian economy or an important part of it.

The Fair Work Commission's bench book on industrial action contains this useful short summary of the case.

https://www.fwc.gov.au/threats-persons-or-economy

> *Action threatening health and welfare*
>
> Monash University v National Tertiary Education Industry Union [2013] FWCFB 5982 (Hatcher VP, Catanzariti VP, Lee C, 26 August 2013).
>
> Facts
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> The NTEU had sent a 'Notice of Intention to Take Protected Industrial Action' to the University. The Notice did not identify any cessation date for any of the industrial action, meaning that it was indefinite in nature. One of the forms of industrial action was 'a ban on recording, or transmission to the employer, of assessment results, with the exception of results for which an exemption has been granted by the NTEU Exemptions Committee' (the Results Ban).
>
> Outcome
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> The Full Bench was satisfied that the Results Ban threatened to endanger student health and welfare by heightening student stress and anxiety. The Full Bench found that the indefinite nature of the Results Ban would aggravate its potential and actual effects on students. The Full Bench issued an order suspending protected industrial action in the form of the Results Ban for a period of two weeks.
>
> Relevance
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> In this case evidence was given by the University's Director of Mental Health (a psychologist) about the vulnerability of university-aged students to mental health disorders as well as the possible impact of the results ban. Her evidence was that one in four young people suffer from a diagnosable mental health disorder in any one year. The university had 13,000 students and this was considered sufficient in number to be characterised as 'part of the population'.
>
> It was admitted that there was no direct evidence of anyone actually suffering harm as a consequence of the ban, however the Full Bench stressed that the section was concerned with threatened endangerment, not actual harm.

This case has been widely cited since 2013 – here's the list of citations from Austlii

https://www.austlii.edu.au/cgi-bin/sinosrch.cgi?method=auto;query=FWCFB%205982;view=date-latest;offset=0

2. 2015 NUW strike at Woolworths Melbourne Liquor Distribution Centre

A three day unprotected strike by 600 warehouse workers had two demands – no labour hire, and no retaliation.

The industrial result was a clear win for the workers.

On “no labour hire”, Woolworths management made a joint application to FWC with the NUW for a variation in the EA which put strict conditions around labour hire. These conditions meant that labour hire was never introduced to the workplace.

On “no retaliation”, management was permitted by the terms of the deal with the NUW to investigate 3 alleged incidents on the picket line. After some further campaigning, these procedures eventually resulted in warnings or “first and final” warnings, with no dismissals.

In the aftermath, the union was ordered to pay $170,000 in fines a couple of years later.

Report of strike:

https://redflag.org.au/article/inside-melbourne-warehouse-strike

> … The Fair Work Commission issues an order banning the strike. “Great”, says one worker as a management rep puts the notice in his hand, “we need more kindling for the fire”. Dozens of the notices go up in flames.
>
> [two days later] … The union office calls a mass meeting at 9am on Thursday. A potential application for an injunction is talked up by NUW officials into seeming a near certainty of massive fines, individuals losing houses and maybe even jail. The fact that fines issued against individuals are a rarity, that in those few cases individuals have been helped out by the trade union movement and that unionists are more likely to be struck by lightning than end up jailed in this country – is all glossed over.
>
> If the aim is to change the dynamics enough to push a vote through to restart the negotiations, the meeting is a success. A vote to that effect gets up, and NUW officials and delegates go back in. But the collateral damage on the workers’ morale is immense. …

In November 2019, the Federal Court finds NUW guilty

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1826.html

> On 9 August 2015, the Respondent contravened section 417(1) of the Fair Work Act 2009 (Cth) (FW Act) by organising the industrial action by employees of Woolstar Pty Ltd (Woolstar) at the Melbourne Liquor Distribution Centre in Laverton, Victoria (MLDC) between 10 and 11 August 2015

https://www.smh.com.au/business/workplace/union-fined-73-000-and-ordered-to-pay-woolworths-100-000-in-compensation-for-strike-20191115-p53ayy.html

> The National Union of Workers (NUW) has been fined nearly $73,000 and ordered to pay a further $100,000 in compensation to Woolworths for an unlawful strike at its liquor distribution centres in Melbourne's west.

3. MUA 2015 strike at Hutchison Ports

A week of unprotected strike action and picketing in response to workers being sacked via text message. After a week, the union won an injunction which got most of the sacked workers back in the gate. A “community protest” of some workers and other unionists continued at the docks (basically a protest presence, not a hard picket).

After months of talks and legal cases, a settlement emerged in the form of a new EA. This was reported to include no forced redundancies, more generous payouts for those who chose to leave, and priority rehiring for those who wanted to return

https://www.greenleft.org.au/content/hutchison-agreement-nears-resolution

In the aftermath of the dispute, the Fair Work Ombudsman prosecuted the MUA for unprotected action. They won a guilty verdict but only a minimal fine of $38,000.

November 2017 Federal Court judgement:

https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1363

> INDUSTRIAL LAW – whether employee organisation organised and was involved in unlawful industrial action in contravention of s 417 of the Fair Work Act 2009 …overwhelming evidence that employee organisation involved in and organised unlawful industrial action – applicant’s case proved – respondent found to have contravened s 417 of the Act – respondent liable to imposition of pecuniary penalty

In June 2018 the Federal Court rejected the Fair Work Ombudsman’s demand for the MUA to face $3.5 million in fines.

https://www.afr.com/policy/economy/fair-work-ombudsman-loses-bid-for-record-fine-against-mua-over-hutchison-strike-20180621-h11nz9

> Federal Court Justice Jayne Jagot instead imposed just $38,000 in fines against the MUA over a week of unlawful industrial action that shut down Hutchison's Sydney and Brisbane terminals in 2015 in response to its retrenchment of almost 100 workers by text message.

4. 2017 Fairfax journalist strike

Out for a week in protest at job cuts. There seem to have been zero legal repercussions, either from employer or FWO.

https://www.theguardian.com/media/2017/may/03/fairfax-journalists-go-on-strike-for-a-week-and-plan-to-miss-federal-budget

Fairfax journos struck in 2014, also with seemingly no legal repercussions.

https://thenewdaily.com.au/news/politics/2023/05/22/gambling-challenge-teal-zoe-daniel/

5. 2018 Sydney Trains RTBU strike cancelled

https://www.landers.com.au/legal-insights-news/fair-work-commission-suspends-protected-industrial-action-by-rail-workers-lessons-for-employers

This was “one of only a handful of decisions in which the Commission has made orders under section 424 suspending protected industrial action”

6. The construction industry

The CFMEU has doubtless racked up more fines for unprotected action than any other union. Often this takes the form of officials coming on to site to disrupt production. Due to frequent prosecutions and the punitive legal regime of the ABCC (now abolished), fines were very high.

2018 On the high side but not totally atypical (massively higher penalties and enforcement re CFMEU under former ABCC regime)

https://redflag.org.au/node/6178

> Last month, the Federal Court found that the CFMEU construction division had caused a work stoppage at a building site at Footscray railway station in Melbourne, which delayed a concrete pour, according to judge Richard Tracey, by “about 10 minutes”. He imposed fines totalling $242,000.
>
> Yes, you read that right: just shy of a quarter of a million dollars for a stoppage of “about” 10 minutes. Companies can kill a worker, or leave them crippled for life, and be fined much less.

Usually it was the union being prosecuted, or its officials. On some rare but high-profile occasions though, individual workers were prosecuted.

Perth 2006 – strike on Mandurah rail link project was the subject of one of the most famous and large scale prosecutions of individuals by the ABCC. Eventually about 90 workers were fined between $6,000 and $10,000. The CFMEU fundraised to pay the fines.

https://www.smh.com.au/national/workers-aware-strike-was-unlawful-court-20071105-18b9.html

https://www.theage.com.au/national/worker-fury-as-strike-case-opens-20060830-ge30xj.html

Union campaigns over this and similar cases made a public issue of the repressive ABCC. The ABCC was wound back but not abolished under the Rudd/ Gillard/ Rudd government of 2007-2013, and abolished by the Albanese government in 2023.

7. Qantas v TWU

In March 2009 TWU members held union meetings at Qantas as part of a campaign against outsourcing. When workers were told by management that these meetings constituted unprotected industrial action and that their wage would be docked four hours pay, some stopped work for that amount of time.

Qantas management pursued the TWU for damages, ultimately winning close to $750,000 in damages and fines. Though the March 2009 stopworks happened under the WorkChoices legal regime, this case is still relevant because “unprotected” industrial action still means that workers and their union can potentially be found liable for damages caused by their industrial action.

Judgement May 2011:
https://jade.io/article/216903

TWU directed to pay damages Qantas of $707,000; fines on union of $20,000; fines on officials of $18,000.
https://www.lexology.com/library/detail.aspx?g=154a7db5-795b-4c93-8a2b-21fec51e234c

8.FWC bench book on unprotected action

https://www.fwc.gov.au/unprotected-industrial-action

Fair Work Commission “bench books” are useful sources on how clauses of the Fair Work Act play out in practice. The FWC bench book on unprotected industrial action highlights three cases:

- 2015 MV Portland – MUA members refused to sail their ship to Singapore after being told the ship was being taken out of service. Justice Bromberg in Fed Court found that the MUA members had not been in employment from the time the ship was taken off the coastal trade, and therefore had not been taking part in industrial action by refusing to sail the ship.
- 2009 Shell refinery – stopping work due to health and safety concerns (asbestos) was legitimate. However once alternative work was offered and refused, this was unprotected industrial action – the result was, workers not being paid for that period
- 2018 Q catering – workers took strike action and picketed in protest at Qantas outsourcing its catering arm. One worker was sacked for her role in organising and promoting this industrial action. The worker ran a case for unfair dismissal, but this sacking was found to be lawful.

9. Esso v AWU

Another complication – *any* violation of *any* order given by FWC at *any* time during a bargaining process has the potential to jeopardise the legally protected status of any subsequent industrial action.

This is based on an ambiguously worded clause of the Fair Work Act

https://www.aigroupworkplacelawyers.com.au/high-court-esso-v-awu-decision-implications-for-protected-industrial-action/

> On 6 December 2017 the High Court's decision in Esso Australia Pty Ltd v Australian Workers' Union; Australian Workers' Union v Esso Australia Pty Ltd [2017] HCA 54 clarifies that employees and unions cannot take or organise protected industrial action if they have failed to comply with any relevant order of the FWC at any time during the bargaining process for an enterprise agreement.

High Court summary Dec 2017

https://www.hcourt.gov.au/assets/publications/judgment-summaries/2017/hca-54-2017-12-06.pdf

Melb Uni law school summary:

> …Esso claimed some forms of purportedly protected action — relating to bans on equipment performance testing, air freeing and leak testing (which the AWU claimed was 'de-isolation of equipment') — were not protected. The Fair Work Commission granted Esso's application for an order requiring the AWU to stop the organisation of bans on equipment testing, air freeing and leak testing, and in contravention of that order the AWU continued to organise that action. Section 413(5) provides that employees and

> bargaining representatives must not contravene any orders that apply to them and 'relate to, or relate to industrial action relating to' an agreement or a matter that arose during bargaining. …
>
> Because s 413(5) is 'poorly drafted', especially the ambiguity in its shifting tenses, it is necessary to look to the legislative history and context of the provision as indicators of its purpose (at [29]). That history suggested that the section was now aimed at applying to past contraventions of earlier orders (at [35], and see at [30]ff and at [41]). Similarly, the structure of the rest of s 413, and the tense changes throughout it, reinforce that s 413(5) is directed 'to non-contravention of an order that was required to be complied with before the time of inquiry and mandates that there have been no past contraventions of any such order'
>
> The majority made the declaration that the AWU had contravened the original order, and that, due to the operation of s 413(5), industrial action that followed that contravention was not protected…

There's a minority opinion that goes the other way, but it's a minority of one.

> Gageler J rejected this reading as a 'harsh and rigid form of industrial discipline' which encourages strict compliance with any FWC order and makes the representative into 'an industrial cripple and an industrial outlaw' (at [103]), and this 'sweeping denial' of capacity runs against the scheme's purpose of creating an environment for bargaining that is 'fair and flexible and efficient' (at [104]). While this arbitrariness might be alleviated by a representative's ability to seek a revocation or variation from the FWC, relying on that mechanism would undermine the taking of protected industrial action (at [105]).

10. "There's no such thing as an illegal strike – just an unsuccessful one"

Strikes being illegal certainly raises the stakes. But it's possible to wage such strikes, and to win them. The bigger and more impactful the strike, the lower the chance of legal retaliation.

Teachers in Massachusetts, US, 2022:

https://labornotes.org/2022/07/how-educators-brookline-massachusetts-won-illegal-strike

> Striking has been illegal for public employees in Massachusetts since 1919. But in Brookline, a small suburb of Boston, we did it anyway.
>
> Out of a membership of 1,100, more than 900 signed in on the picket lines May 16. The strike culminated with a thousand educators descending on town hall for a rally with allies from around the state.

> …In short, we won all our demands with minimal compromise. Perhaps more important, we ended a cycle of disrespect and showed that we are willing to take collective action.

US teachers strikes, 2018:

https://labornotes.org/blogs/2018/10/lessons-teachers-how-strike-and-win

> The West Virginia teachers strike was unlawful. Legally, teachers could have been fined or outright replaced for walking out. That didn't happen—but it could have if they hadn't built broad public support. The organization shut down not just a few schools or districts, but all schools across the state. Most of the states where teachers have struck or walked out are "right-to-work" states—but an anti-union law is no match for strength in numbers.

Ontario, Canada, 2022:

https://labornotes.org/2022/11/general-strike-threat-beats-ontario-anti-worker-law

> Ontario workers delivered a spectacular blow to Premier Doug Ford's government this week. Just four days after ramming through unprecedented anti-worker legislation, Bill 28, Ford appeared in a hastily called press conference on Monday morning to announce its full repeal.
>
> Ford claimed this was a good-faith gesture to kickstart negotiations with Ontario's 55,000 education workers, who had entered their second day of an "illegal" strike.

Australia 2017 – the best interview Sally McManus has ever done

https://www.abc.net.au/news/2017-03-15/actu-boss-happy-for-workers-to-break-unjust-laws/8357698

> I believe in the rule of law when the law is fair and the law is right. But when it's unjust I don't think there's a problem with breaking it.
>
> It shouldn't be so hard for workers in our country to be able to take industrial action when they need to.

University of California Santa Cruz 2020

https://newrepublic.com/article/156591/wildcat-strike-grows-housing-crisis

> Wildcat strikes like the one in which Arjona is now participating come with particular risks: Employers can refuse to meet with strikers to renegotiate a settled contract—currently the official tack of the University of California. Wildcat strikers are also exposed to potential termination, and the union itself could face consequences for

> sanctioning or appearing to support a work stoppage that violates a no-strike clause, undermining its ability to assist, even if union leadership is sympathetic to the grievances of the rank and file (as it appears, in this case, to be).
> …
> Ultimately, as with so much else, who wins out will likely hinge less on legality than on power. “There’s a saying in the labor movement,” said Barry Eidlin, who studies labor at McGill University in Montreal. “There’s no such thing as an illegal strike—only an unsuccessful one.”

The UC Santa Cruz strike was long, messy, and partly successful – winning a $2,500 housing stipend and reinstatement of all victimised strikers.

https://www.santacruzsentinel.com/2020/08/13/ucsc-agrees-to-reinstate-41-grad-students-fired-during-wildcat-strike/

Even more important, this strike popularised what was to become the key demand of the 48,000-strong University of California strike in 2022 – a minimum wage of $54,000 per year, enough to lift all workers out of rental stress no matter where they lived.

https://payusmoreucsc.com/why-1412/