



INDUSTRIAL ACTION BEST PRACTICE GUIDE

Australia



The *Fair Work Act 2009* (Cth) (FW Act) sets out the requirements of lawful industrial action. Industrial action continues to be a significant feature of the industrial landscape.

OVERVIEW

The FW Act contains a central distinction between “protected” industrial action (that is, lawful action) and “unprotected” industrial action (unlawful action). However, a designated “bargaining period” during which industrial action is protected no longer exists, as was the case previously under the former legislative regime.

Industrial action is permitted for the purpose of supporting or advancing claims in relation to an enterprise agreement that are about, or are reasonably believed to be about, “permitted matters”. Permitted matters are essentially matters pertaining to the relationship between an employer and employee, although the definition has expanded to also include matters pertaining to the relationship between the employer and the union.

One significant feature is that employers do not have the ability to pre-emptively lock out employees. A lock out is available only as a response to planned employee industrial action.

KEY FEATURES OF THE FW ACT

- Protected action can only take place once the nominal expiry date of a Single Enterprise Agreement (SEA) has passed.
- The previous requirement for an employee to prove that industrial action is based on an alleged “imminent risk” to health or safety no longer applies.
- Lockouts by employers are only available as a response to employee industrial action.
- Secret ballots are required and applications can be made in the 30 days prior to the nominal expiry date of an agreement.
- All employees can take industrial action, not just union members, subject to certain conditions.
- Industrial action cannot relate to a proposed greenfields agreement or multi-enterprise agreement.
- The rules for suspension and termination of industrial action remain largely unchanged.
- Strike pay is unlawful. But, where industrial action is protected, any pay deduction must be commensurate with the period of action.

WHAT IS “INDUSTRIAL ACTION”?

Industrial action means:

- The performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work
- A ban, limitation or restriction on the performance of work by an employee or on the acceptance of, or offering for, work by an employee
- A failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work.

Picketing generally does not constitute industrial action, although it will often constitute a legally actionable tort. Picketing commonly involves workers not only publicising their demands at the entrance to their workplace, but also attempting to block access to the workplace by other employees or contractors. Employers targeted by a picket have recourse to injunctions and damages by way of common law, or possibly trade practices remedies.

REQUIREMENTS FOR PROTECTED INDUSTRIAL ACTION

Protected industrial action is lawful industrial action that is immune to legal remedies that would otherwise apply, unless it falls outside the exemption discussed below.

Secret ballots are a requirement before any protected employee industrial action. Before a protected action ballot can be conducted, an application must first be made to Fair Work Australia (FWA) seeking an order directing that the ballot occur. FWA must be satisfied that the applicant has been, and is genuinely trying to reach an agreement with the employer.

Under the FW Act, industrial action will be protected only when:

- It occurs after the expiry of an existing enterprise agreement
- It occurs in relation to a proposed SEA
- Persons organising or engaging in the industrial action are genuinely trying to reach an agreement
- A ballot has approved the industrial action
- Notice requirements for the action have been met
- It can be categorised as an “employee claim action”, “employee response action” or “employer response action” (see below)
- It is consistent with the terms of the protected action (secret) ballot and the notice

- It occurs within 30 days of the declaration of the results of the successful ballot.

An “**employee claim action**” is industrial action organised or engaged in to support or advance permitted claims made in relation to an agreement. The participants in the action are limited to an employee(s) who is entitled to vote in the protected action ballot, or a bargaining agent of an employee who will be covered by the agreement, against an employer who will be covered by the agreement.

An “**employee response action**” is industrial action engaged in by an employee(s) who will be covered by the proposed agreement in response to industrial action taken by an employer who will be covered by the agreement.

An “**employer response action**” is industrial action engaged in by an employer who will be covered by the proposed agreement in response to industrial action taken by an employee who will be covered by the agreement.

Important Note – An employer cannot pre-emptively lock out employees but can do so only in response to receiving notice of planned industrial action.

WHAT ARE THE NOTICE REQUIREMENTS FOR INDUSTRIAL ACTION?

Employee claim action

For an employee claim action, bargaining representatives must provide written notice of the intended industrial action to the employer. That notice must be given at least three working days prior to any industrial action, unless FWA has specified a longer period (of up to seven working days) in a protected action ballot order. In addition, the notice must not be given until the results of the required ballot have been declared.

The industrial action must also be consistent with that authorised by the protected action ballot.

Employee and employer response action

A bargaining representative of an employee must provide written notice of the intended industrial action to the employer of the employee. For an employer response action, the employer need only provide notice to all employees who may be affected as to the nature of the industrial action and the day the employer action will commence.

Important Note – Industrial action will not lose its protected status if employees who are not members of a union negotiating party engage in the industrial action (provided that the employees’ actions otherwise fit within the concept of an employee claim action).



Immunity provisions – protected industrial action

The immunity provisions for protected industrial action provide that no legal cause of action lies under any law (whether written or unwritten) in force in a state or territory in respect of any protected industrial action. Exceptions to this rule include where the industrial action has involved or is likely to involve:

- Personal injury
- Wilful or reckless destruction of or damage to property
- The unlawful taking, keeping or use of property.

This immunity does not prevent defamation actions for anything that may have occurred in the course of protected industrial action. Employees are subject to workplace behaviour obligations owed to their employer.

CAN AN EMPLOYER SEEK TO SUSPEND OR TERMINATE PROTECTED INDUSTRIAL ACTION?

The FW Act allows for suspension or termination of protected industrial action.

New “significant economic harm” provisions

A new category of suspension or termination has been added, which relates to “significant economic harm” to the employer or to any of the employees who will be covered by the agreement. The economic harm at issue must be ‘imminent’.

FWA has set the bar very high for affected parties to have protected (lawful) industrial action suspended under this provision. Industrial action by its very nature involves the infliction of economic harm. Factors relevant to determining whether protected industrial action is causing, or threatening to cause, significant economic harm include the degree of harm, the capacity of an employer to bear the harm and whether the good faith bargaining requirements have been met.

Third parties may also seek to use this provision if their business operations are significantly harmed as a result of protected (lawful) industrial action taken by an employer or employees in dispute.

Other grounds for suspending or terminating protected action

The other grounds for suspending or terminating protected industrial action continue where life or personal health or safety is or will be endangered; or there is or will be significant damage to the Australian economy.

The Workplace Relations Minister may make a declaration stopping industrial action, with the exception that the Minister cannot make a declaration on the grounds of the adverse effect of the industrial action on the employer.

COOLING OFF

Suspending industrial action to allow a period of cooling off is available. FWA must make an order suspending protected industrial action if it is satisfied it is appropriate, having considered the duration of the action, whether suspension would be contrary to the public interest and whether suspension would be beneficial to the bargaining representatives because it would assist resolution.

WHAT RESPONSES CAN EMPLOYERS MAKE TO UNLAWFUL INDUSTRIAL ACTION?

The table below sets out where employers can seek orders to stop unlawful industrial action.

RESPONSE	TYPE OF INDUSTRIAL ACTION BEING ADDRESSED	WHO CAN BRING AN APPLICATION	RANGE OF ORDERS
Fair Work Australia	Unprotected industrial action that is happening, impending, probable or being organised either before or after the nominal expiry date	Employer Person affected by the industrial action	Stop order from FWA that the industrial action stop or not occur
Fair Work Australia	Protected industrial action causing significant harm, endangering life or significant hardship to a third party	Initiative of FWA A Bargaining Representative for the Agreement Affected third party A Federal Minister A Minister of a referring state or territory	Order suspending or terminating protected industrial action for a proposed enterprise agreement
Federal Court or Federal Magistrates Court	Pattern bargaining (section 422) Industrial action during the nominal term of an enterprise agreement or transitional instrument (an agreement made under the WR Act) under section 417 Enforcement of an order made by FWA under section 418 (section 421) Secondary boycotts under the <i>Competition and Consumer Act 2010</i> (the former <i>Trade Practices Act 1974</i> (Cth))	Initiative of FWA Application by person affected by industrial action Employer affected	Order that industrial action stop, not occur or not be organised Injunction Damages
Supreme Court	Action that involves wrongful conduct known as industrial torts, being: <ul style="list-style-type: none"> ■ intimidation (eg conduct to threaten, abuse employees entering and leaving work) ■ trespass (eg picketing on an employer's land) ■ interference with contractual relations (eg preventing an employer fulfilling a supply contract or employment contract) ■ conspiracy to injure by unlawful means 	Person affected	Injunction and damages

FWA will have jurisdiction over both national and non-national system employers and employees in respect of its powers to stop industrial action.

Q & A – SUSPENSION OF PROTECTED INDUSTRIAL ACTION

Does suspension or termination of protected industrial action end the right to take protected industrial action at a later stage?

Not necessarily. Protected industrial action may be resumed after any period of suspension but will be subject to any requirements for the giving of notice before any further industrial action occurs.

An employer faced with industrial action will need to make decisions quickly, often under pressure. Managing industrial action that interferes with your business is stressful. In the event of industrial action it helps if you have prepared first for the prospect of industrial action and thought about your options. Experience suggests that early engagement of senior management regarding the choices available to your organisation is a hallmark of a well-handled dispute. Factors relevant to the choice of whether to go to FWA or to court will be the degree of harm, the nature of the action and the duration of the action, as well as the critical need to protect the organisation and other employees continuing to work.

Is pattern bargaining allowed?

Under the FW Act, pattern bargaining is prohibited except where a negotiating party is genuinely trying to reach an agreement. Pattern bargaining occurs where:

- A person is a bargaining representative for two or more proposed enterprise agreements
- The course of conduct involves seeking common terms for two or more agreements
- The course of conduct relates to two or more employers.

CASE STUDY - PATTERN BARGAINING

A union provides a pattern agreement to a number of major employers in the retail industry. The union meets with each of the employers separately.

The union makes changes to the agreement for each employer, taking into account the individual circumstances of each employer. The union reaches a stalemate with one of the employers and proceeds to take protected industrial action. The affected employer attempts to stop the industrial action by seeking a court injunction. The court injunction fails as the court agrees with the union's argument that it had engaged in pattern bargaining in a genuine attempt to reach an agreement.

WHAT ARE THE RULES FOR PROTECTED ACTION BALLOTS?

The protected action ballot (secret ballot) requirements continue on essentially the same terms as existed under the former legislative regime. However under the FW Act, there is a minor lessening of the participation requirements for a protected action ballot. There is no requirement that an employee be a member of any union that had applied for the ballot order, but merely that the employee be represented by a union applicant.

As a formal bargaining period no longer exists, an application for a protected action ballot can be made, at the earliest, 30 days before the nominal expiry date of an enterprise agreement that applies to the employees who would be covered by the proposed agreement. This means that unions will have a chance to organise industrial action to commence as soon as the last applicable agreement passes its nominal expiry date.

There is also provision for extending the period of operation for the protected action ballots.

The critical issue is whether the applicant for a protected action ballot has been genuinely trying to reach agreement. Relevant to this determination is whether the applicant is pursuing matters that pertain and whether the applicant has, and is, bargaining in good faith under the FW Act.

The taking of protected (lawful) industrial action does not end the bargaining representative's obligation to adhere to the good faith bargaining requirements.

NO PAYMENT FOR INDUSTRIAL ACTION?

The prohibition on payment to employees during the taking of protected industrial action has been made more flexible than under the WR Act. This new flexible approach may have the effect of lessening the disincentive to take industrial action.

Payment for unprotected industrial action

Under the FW Act, an employer cannot pay the employee(s) who take unprotected industrial action for the total period of time during a day in which unprotected action is taken (with a minimum deduction of four hours).

Payment for protected industrial action

In general, payment for any period where an employee has failed or refused to attend work, or attended but failed or refused to perform any work at all (ie strike) is prohibited only for the total duration of the protected industrial action taken by an employee on a day. Special rules apply for partial work bans and overtime bans. Where an employee participates in a partial work ban only, the employee will be entitled to full pay for the period of the work ban, unless the employer either:

- Gives a notice to the employee refusing to accept partial performance; or
- Gives a notice stating that the employee's pay will be reduced in proportion to the work not performed.

Any employee who receives a notice in relation to a deduction of wages is entitled to approach FWA to vary the proportion by which the payment has been reduced.

Important Note – FWA may review the amount of a pay deduction but cannot rule on an employer's decision not to accept partial performance and to withhold all payments for the period of a partial work ban.

The notice to employees needs to be provided before the industrial action begins.

In many businesses, the loss of one or two day's production can have serious effects on the bottom line. We strongly recommend employers put in place an industrial action contingency plan to enable a prompt response to prevent significant loss. In our experience, being prepared can save lost production time and put you in control.

HOW CAN DLA PIPER ASSIST?

We have many expert lawyers who can help you to deal with industrial action. We have extensive experience in preparing bargaining strategies, managing responses to unlawful industrial action and ensuring compliance with secret ballots for protected industrial action and appearing in the tribunals and courts.

In some industries, the loss of a day or two of production to industrial action can cost a business millions of dollars. In the new industrial environment, employers need to be prepared to obtain court and/or FWA orders to stop industrial action, should it occur. We have expert lawyers who are experienced in obtaining relief at short notice.

We also provide industrial action training seminars for our clients and have updated this training so that it covers the new laws.

INDUSTRIAL ACTION CHECKLIST

- Does your organisation have an industrial action contingency plan to stop or prevent industrial action and minimise the effects of industrial action?
 - Have you considered whether your organisation needs training on how to deal with industrial action?
 - Have you considered whether the risk of industrial action is low, medium or high and what countermeasures should be put in place to deal with industrial action?
 - What is the best structure for your operations to avoid future industrial action that may severely damage your business?
 - What planning do you have in place to avoid industrial action based on safety issues?
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