

Fair Work | Fact Sheet



Industrial Action

The information in this sheet only concerns national system employers and Victorian employers.

The information concerns the industrial action provisions in the Fair Work Act 2009 (Cth) (FW Act), which will commence operation on 1 July 2009.

The key differences between the FW Act industrial action provisions and those in the Workplace Relations Act 1996 (Cth) (WR Act) are:

- The concept of a bargaining period is removed.
- It will be easier to comply with the secret ballot requirements.
- A precondition for taking protected industrial action will be that participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place.
- Protection for industrial action will not be lost to protected participants because unprotected persons join the action.
- The prohibition against strike pay for protected industrial action will be lessened in scope.

Protected industrial action

The rules for protected action under the FW Act remain largely the same as those in the WR Act. Protection from penalties for industrial action remains available if industrial action is undertaken during negotiations for an enterprise agreement on the condition that the parties have been genuinely trying to reach agreement and comply with any good faith bargaining orders made by Fair Work Australia (FWA). However, under the FW Act protection for industrial action will not be lost to protected participants if unprotected persons join the action (although those unprotected persons will be exposed to orders and penalties).

Industrial action will also not be protected if:

- the industrial action relates to a proposed Greenfield's agreement or multi-enterprise agreement;
- the notice requirements set out in section 414 have not been met; or



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- an order suspending or terminating industrial action is in operation

The Occupational Health & Safety exemption remains under the FWA such that employees can claim that their conduct was not industrial action but rather related to a “reasonable” concern about their health and safety. The FWA has removed the requirement that the employee bears the onus of proof for this exemption which may have the effect of making it easier to establish.

Protected action ballot orders

Employee industrial action will only be protected if there is a valid protection action ballot order and only if the action takes place in accordance with the terms of and within the 30 day period specified in the protected action ballot order.

The Commonwealth will now bear the full cost of ballots conducted by the Australian Electoral Commission (AEC) whereas under the WR Act the Commonwealth only bore 80% of those costs. The effect of this change may be to increase the number of ballots undertaken. An applicant can still elect to use an approved ballot agent other than the AEC in which case the applicant will need to bear the full cost of that ballot. The FWA can issue directions to ensure that any non-AEC approved ballot agent remains accountable.

The FW Act removes the ability of FWA to stay a protected action ballot order if it is challenged by an employer. This will have the effect of allowing industrial action to continue even though a challenge to the validity of the ballot order has been made by an employer. Similarly, employees can now unilaterally seek an extension of the 30 day period for industrial action without needing to obtain the employers consent first.

An application can be made for a protected action ballot order up to 30 days before the nominal expire date (NED) of an agreement rather than once the NED has passed. Any protected action still cannot commence until after the NED.

Employer industrial action

The ability to lock out employees remains available for employers under the FW Act but lock outs will now only be protected if they are taken in response to industrial action initiated by employees.

Strike pay

It is still unlawful to pay, receive or demand “strike pay” other than in accordance with the terms of the FW Act. The prohibition against strike pay for protected industrial action will now only apply to the actual period of industrial action. In the case of protected overtime bans, employees will not be paid for overtime hours not worked, but they will not lose their right to payment for ordinary hours. In the case of partial work bans, employers

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can elect to accept the work and pay full wages, lockout the employees, or refuse to accept the work and (if permitted) stand employees down until the employees agree to work full duties.

Where there is unprotected industrial action, employers must withhold at least 4 hours pay for an incident or, if longer than 4 hours, for the whole duration of the industrial action. This reflects the WR Act rules regarding strike pay.

Termination of industrial action

Under the FW Act, FWA will be required to end industrial action if it causes or may cause significant harm to the economy or safety or welfare of the community. FWA will have the discretion to end industrial action and determine a settlement where the industrial action is protracted and significant economic harm is being caused, or is imminent for, both of the bargaining parties.



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