Topic 5 – Protected industrial action

The main importance of industrial action being protected is that it gives **an immunity from civil liability.**

1. What was the IA?

The action must have an industrial character = concern bargaining and dispute

- ***The Age Company***: making workers **redundant** was NOT industrial action – it was not part of bargaining, it was a process that an e'er engages in

A. Employee industrial action

Under **s 19**, the conduct was **industrial action** by employees because it included:

(a) **Performing work** in a **manner different** from how it is **customarily performed**

(b) Adopting a **practice** that **restricts, limits or delays** the performance of work

(c) A **ban, limitation or restriction** on **performing or accepting work**

(d) **Failing** or **refusing** to **attend work** or failure or **refusal to perform work**

Excluded from the definition:

- Action agreed to by employer (s 19(2)(a))
- Action based on 'reasonable concern' arising from an 'imminent risk' to his/her health and safety (s 19(2)(c)(i)): ***Offshore Marine Services***

Pattern bargaining – A BR of an employee must not engage in *pattern bargaining*

- Pattern bargaining per **s 412**:
  - If the person is a BR for 2 or more proposed EA and the conduct involves seeking common terms to be included in 2 or more of the agreements and the conduct relates to 2 or more employers: s 412(1)
  - NOT 'pattern bargaining' IF the BR is genuinely trying to reach an agreement with the employer: s 412(2)

B. Employee response action

- Before a person engages in employee response action, a BR of an employee must give written notice of the action to the employer of the employee: **s 414(4)**

C. Employer industrial action – response action

- Per **s 19(1(d)**, employer action is confined to a **lockout** of employees
    - Lockout = preventing e'ees from performing work w/o terminating K: **s 19(3)**

- **However:**
    - A pre-emptive lockout can never be protected: **s 411**
        - Employer action must be **'in response to'** industrial action by e'ee/BR

    - A lock out by the employer need not be proportionate to the employee action
        - Need a casual connection between employee claim action and employer response action (***AIPA v FWA***)
            - Employees (pilots of Qantas) wore red ties to represent membership of union and during the flights made statements about the importance of their claims against Qantas
            - Proportional bc it was 'in response to' employee's protected action (s 411(1)(a))

- **Must comply with s 413 – common requirements**
    - The BR must be genuinely trying to reach agreement
    - BR must not have breached any FWC orders

- **A notice must specify the nature of the action and the day on which it will start: s 414(6)**

- **Must comply with s 414(5):**
    - (a) Before employer engages in e'er response action, the employer must give **written notice of the action to each BR** of an employee who will be covered by the agreement; and
    - (b) Take **all reasonable steps** to notify the employees who will be covered by the agreement

Excluded from the definition: Action authorised by an employee (s 19(2)(b))

2. Initiation of protected industrial action by an EMPLOYEE

A. BR applies to FWC for a Protected Action Ballot Order (PABO) under s 437

Voting on whether employees WANT to engage in PIA

Note: an employee who is not on the voting roll cannot participate in protected IA
Note: action must be approved by more than 50% on the voting roll

An application for a ballot must:

- Be **made by one or more BRs** of an employee who will be covered by the proposed EA

- Be made **no more than 30 days** before the **nominal expiry date** of any existing agreement
    - Makes sense bc employer shouldn't have to think about a new agreement while the other agreement is on foot. Should be able to enjoy peace of existing agreement.

- If applicant wants **someone other than the Australian Electoral Commission** to conduct the ballot, must specify other person: s 437(4)
    - FWC can make that person the agent if satisfied per s 444(1)(b) that: the person is a fit and proper person to conduct the ballot any other req prescribed by the regulations are met

- **MUST SPECIFY:**
    - The **GROUP** of employees who are to be balloted: **s 437(3)(a)**

    - The **QUESTIONS** to be put to employees, including the **NATURE of the PROPOSED IA**: **s 437(3)(b)**
        - Must be **properly specified** to enable employee to under the nature of the PIA that they are authorising (***TMS* at [38]**)

        - "Unlimited action"
            - Nothing necessarily improper in asking employees to approve 'unlimited' actions or stoppages (so long as e'ees know outer limits) (***TMS***)
            - It is inevitable that the precise timing and length of the action is not determined at the stage of authorisation (***TMS* at [39])**

        - **Using the words of the Act – not properly specified** per ***Telstra***:
            - Performing work in a manner different from how it is customarily performed
            - Adopting a practice that restricts, limits or delays the performance of work
            - **A ban, limitation or restriction on performing or accepting work**
            - Failing or refusing to attend work or failure or refusal to perform work

B. Notice of application must be given to employer of employees who are to be balloted: s 440

- Must be given within 24 hours of making application
- The FWC must not determine the application unless each applicant gives notice of application to employer: s 441(2)

C. When the FWC can make the order: s 443

Per **s 443(1)** the FWC ***must*** make the PABO if:

a) Application has been made under **s 437** and complies; and

b) The FWC is satisfied that each applicant **has been** (consider prior conduct), and **is**, ***genuinely trying to reach an agreement*** with the **employer** and **employees** who are to be balloted

Valid for 30 days

(i) Has there been genuine attempt to reach an agreement:

- No genuine attempt to reach an agreement where negotiations are in **very preliminary stages**, merely **preparatory steps** (***Total Marine Services***) – ie: can't get PIA if haven't tried to agree
    - Negotiations involved limited face to face meeting
    - Many items only set out in headings
    - No wage claim was specified with detail
    - Limited meetings and limited articulation of claims

- **Per *Esso*, relevant factors are:**
    - The *subject* matter of the claim
    - The *timing* of the advancement of the claim
    - The *basis* upon which the claim is advanced
    - The *significance of the claim* in the course of the negotiations
    - The claimant's belief as to whether the *claim is about a non-permitted matter* or not
    - Where there is legal *clarity* about the permitted status of the claim
    - Whether the other party has placed in contest whether the claim is about a permitted matter
    - And whether such a claim has been withdrawn and, if so, when and in what circumstances

- **Trying to include a term that is NOT permitted to be included the EA ('content of agreements') may not be 'genuinely trying to agree'**
    - Eg: bc outside of what is allowed (see p. 46)
    - ***Esso***:
        - Held that the use of a contractors clause (non-permitted matter bc didn't relate to employment relationship) did NOT breach 443(1) and union was genuinely trying to reach agreement
        - Factors:
            - Did X adopt a *rigid* approach and said the clause must be included?
            - Did the clause feature prominently in bargaining?
            - Did X withdrew the clause after being told it was not permitted?
            - Was the course only advanced in response to a question for more detail on X's claim?
            - Was the clause only a draft proposal?

- **Holistic approach** per ***Esso***: "The diversity of the factual circumstances and nuances which will be found in different cases means that it is not possible to say that any particular factor or consideration will always be determinative of the result."

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(ii) S 443(1)(b) does NOT require bargaining to have commenced

Flick J at [58] in *JJ Richards*: the terms of s 443(1)(b) do NOT require bargaining to have commenced

- NOT REQUIRED to go through the process first of obtaining a **MSD** (determination that e'ees want to bargain the employer/s)
- This may be unsatisfactory but it is the law. Unsatisfactory bc genuinely trying to agree requires more than like preparatory steps to be taken but then this says that bargaining does not have to be commenced

BUT **Flick J** said that genuinely trying to agree requires:

- That the applicant to have told the employer of the general ambit...for which agreement is sought AND;
    - Eg: log of claims

- That the employer has foreshadowed...its attitude to the proposed agreement

D. <u>FWC must, as far as practicable, determine the application within 2 working days: s 441(1)</u>

- Then AEC conducts secret ballot of e'es represented by the BR: **s 449**
    - Action must be approved by more than 50% on voting roll
- Any action taken must ordinarily commence within 30 days of the ballot result being declared: **s 459**

Variation of a protected ballot order: s 447

- (1) An applicant for a PABO may apply to the FWC to vary the order
- (2) May apply to change the date by which voting closes
- (3) An application can be made at any time before the date by which voting in the protected action ballot closes OR if the ballot has not been held before that date and the FWC consents--after that time.
- (4) FWC may vary the PABO

Revocation of a PABO: s 448

- (1) An applicant for a PABO may apply to the FWC, at any time before voting closes, to revoke the order
- (2) The FWC MUST revoke the order