

Protected Industrial Action Ballot Order Applications

Professor Breen Creighton

RMIT Graduate School of Business and Law

Associate Professor Shae McCrystal

Sydney Law School

Professor Richard Johnstone

QUT School of Law

Submission to the Productivity Commission Inquiry into the Workplace Relations Framework

March 2015

This submission has been prepared by Professor Breen Creighton, Professor Richard Johnstone and Associate Professor Shae McCrystal, who are the co-chief investigators on a three year Australian Research Council funded project examining protected industrial action ballot order applications made to the Fair Work Commission.

The submission is made in response to questions raised by the Productivity Commission in Issues Paper 3, *Workplace Relations Framework: The Bargaining Framework* relating to the protected industrial action ballot order application requirement under the *Fair Work Act 2009* (Cth) (FW Act), and will inform the Productivity Commission about work we are undertaking empirically to answer those questions. The questions are: ‘Some commentators argue that the secret ballot requirements are too prescriptive. The Commission seeks participants views’ (p 13); and ‘any need to change the protected action ballot process’ (p 14). The research project may also provide empirical information with respect to the related question about aborted strikes – ‘the prevalence of ‘aborted strikes’ ... as a negotiating tool’.

The FW Act provides that protected industrial action by employees and their bargaining representatives is restricted to support for negotiations for a single-enterprise agreement, subject to the Fair Work Commission (‘FWC’) authorising an independent secret ballot of employees to approve the taking of protected industrial action through a protected action ballot order. Any industrial action taken without a protected industrial action ballot order may give rise to common law or statutory liability. This means that protected industrial action ballot orders are the ‘access gate’ to lawful industrial action and that FWC authorisation of protected action ballot applications plays a crucial role in mediating access to such action.

Because the threat of industrial action is an important bargaining lever in negotiations, the protected action ballot order process impacts on bargaining conduct, including the timing of protected action, and the conduct of bargaining representatives. In practice, applications for protected action ballot orders may be made for a variety of reasons:

- because the bargaining representative is ready and prepared to take protected industrial action;
- because the bargaining representative is contemplating the possibility of taking protected industrial action and wishes to be able to access that option at relatively short notice; or

- because the bargaining representative wishes to obtain leverage in enterprise bargaining negotiations without necessarily having an intention actually to take such action.

A review of the literature on the protected action ballot process shows that there are no empirical data with respect to its impact in practice. A study by Orr and Murugesan examined compulsory ballots through the lens of theories of freedom of association and democracy, questioning whether protected industrial action ballots are necessary from the perspective of facilitating democracy.¹ Other scholars have explored the complex law that has developed with respect to the requirement that an applicant for a ballot ‘genuinely try to reach agreement’;² and the extent to which the FW Act implements international labour standards concerning the right to strike.³ There are also three text books and a monograph which describe and analyse the PABO provisions.⁴

The protected industrial action provisions were also considered by the FW Act Review Panel which expressly noted the lack of empirical data concerning the incidence, timing and nature of ballot orders.⁵ On the basis of submissions by stakeholders and a small sample of the results of protected action ballots, the panel suggested that the PABO provisions ‘have a significant impact on employees and their union representatives’.⁶

The available literature suggests that PABO applications hinder employee and employee representative access to protected industrial action, but no empirical evidence supports or refutes this proposition, or empirically describes the ballot application process.

United Kingdom legislation has required secret ballots of union members as a prerequisite to protection against civil liability for industrial action since 1984.⁷ A long term empirical study undertaken by Undy et al examined the effects of the UK legislation on trade union

¹ Orr, G, and Murugesan, S (2007). ‘Mandatory Secret Ballots Before Employee Industrial Action’ 20 *Australian Journal of Labour Law* 272.

² Naughton, R (2008). ‘Just What Does “Genuinely Try to Reach Agreement” Mean?’, Australian Labour Law Association, Fourth Biennial Conference, Melbourne, November.

³ McCrystal, S (2010) ‘The FW Act and the Right to Strike’ 23 *Australian Journal of Labour Law* 3.

⁴ Creighton, B and Stewart, A (2010). *Labour Law*, 5th ed, Federation Press, Sydney; Owens, R, Riley, J and Murray, J (2010). *The Law of Work*, 2nd Ed, Oxford University Press, Melbourne; Pittard, M and Naughton, R (2010). *Australian Labour Law: Text, Cases & Commentary*, 5th Ed, LexisNexis, Sydney; McCrystal, S (2010a). *The Right to Strike in Australia*, Federation Press, Sydney.

⁵ Australian Government (2012). *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Commonwealth of Australia, 180.

⁶ Ibid.

⁷ See McCrystal, S and Novitz, T (2012). ‘“Democratic” Pre-conditions for Strike Action: A Comparative Study of Australian and UK Labour Legislation’ 28 *The International Journal of Comparative Labour Law and Industrial Relations* 115.

decision-making, finding that the UK ballot requirement had a differential effect on large and small unions, posing more problems for smaller unions; offered a ‘credible way of demonstrating the resolve of union members before strike action was taken’; and encouraged union moderation as to the forms of action proposed in ballot papers.⁸ These findings are not directly applicable to Australia due to significant differences in the legal regimes and patterns of industrial action in the two countries, but they do offer some insight into the impact that ballot provisions can impact upon industrial decision making.

The research project will address the gaps in our understanding of the protected industrial action ballot order process through empirically describing ballot applications, and qualitatively analysing the extent to which the statutory regime impacts upon industrial behaviour in practice. The aims of the research project are to understand the manner in which the protected industrial action ballot process impacts upon enterprise bargaining behaviour and decision-making by bargaining representatives. In particular the project aims:

1. empirically to describe the protected action ballot order process in practice and the subsequent use of protected industrial action by industrial actors;
2. to explore the effect of the protected industrial action ballot order requirements on the enterprise bargaining behaviour of ballot applicants and employers; and
3. to determine the extent to which the provisions place restraints upon taking of protected industrial action.

The first component of the research project will statistically examine all ballot applications made to the FWC over a 12 month period ($\approx 1,000$; based on 1011 for 2011-12). The data will analyse patterns of relationships between a number of variables including: the number of ballot applications made; who actually made the application; the proportion of successful, unsuccessful and withdrawn applications; the proportion of ballots opposed by employers; the ballot methods (postal, attendance, electronic or a mix) used by the Australian Electoral Commission or independent ballot agent (if one was used); the range of questions asked in the ballot; the range of questions approved or disapproved by ballot; the size of the bargaining groups balloted; and the proportion of ballots endorsing or rejecting protected industrial action. It will also provide statistical information about the average timeframes involved in ballot applications.

⁸ Undy, R, Fosh, P, Morris, H, Smith, P and Martin, R (1996). *Managing the Unions: The Impact of Legislation on Trade Union Behaviour*, Clarendon Press, Oxford, 229-230.

The second component of the research project will examine a smaller sample of ballot applications in order to explore the factors that influence balloting decisions by bargaining representatives, and bargaining representative and employer perceptions of the impact of the ballot process on enterprise bargaining behaviour. For each application in the sample, there will be an interview with the bargaining representative and employer and tracking of progress from the point of application to the FWC through to the resolution of the bargaining process relevant to the dispute. This will provide qualitative data with respect to the *decision-making processes* of bargaining representatives, and stakeholders' perceptions of the impact of the legislative regime on bargaining behaviour. It will also enable analysis of patterns of industrial action use in practice.

Planning for the project is currently underway, and findings will be reported in late 2016.