

This brief submission is to commend the Productivity Commission on its moderate and largely balanced draft report – which doubles as an excellent resource for students of the field. I limit my comments to two issues. By way of background I am a Professor of Law and have studied, taught and written on labour and employment regulation for two decades, although my central area in the past decade has been the law of politics and elections.

- **Industrial action & ballots.** Industrial action is subject to a bi-partisan consensus that it is to be regulated stiffly – an option of last resort. It hardly seems germane to suggest (as some have) that the very low rates of recorded action in Australia in the past decade may not capture all minor employee action or bans: the statistical measures of the past, with which we are comparing today's rates, did not either.

The chapter of the Draft Report on industrial action lists all manner of employee action, formal and informal, down to symbolic gestures such as 'taking lunch in unoccupied management offices' or systematically writing emails in capitals. Yet wrongly states that the only industrial action management takes is the occasional lockout. There is a long history recognising that employers engage in action for industrial purposes beyond formal lockouts: from unnegotiated change, through threats of redundancies, reductions in shifts and manning, even bullying. Since the aim is to describe all industrially motivated action – understood as pressure to support grievances or demands - this element of the Draft Report is remiss in being one-sided in its description of the issue.

I examined industrial action ballot law in 'Mandatory Secret Ballots before Industrial Action' (*Australian Journal of Labour Law*, 2007) with a colleague. We found it to be a hurdle whose main effect was to delay action to give employers extra notice or an opportunity to intervene legally. Its other ramifications were largely symbolic. It is a peculiar legalistic system which is not imposed on other, equally sensitive decisions within associations (such as internal board or party political meetings and decisions). This is doubly so given the many provisions protecting dissidents and non-union members from taking part in industrial action and the rules against payment for industrial action.

Accepting, as a given, the consensus in favour of keeping such regulation, our 2007 work identified the very pathologies discussed in the Draft Report – excess legalism generating cost and a reaction by unions and workers in the form of landslide majorities to ballots that kept open all options. The regime itself emblemises a 25 year drift in Australian labour regulation. From relatively brief, principles-based legislation entrusting parties, within Commission discretion, to resolve or manage issues, to thousand plus page Acts which seek to regulate in the guise of de-regulation

The entire Part 3.3 Division 8 of the Act could be replaced with a short set of sections mandating that unions consult with and survey all relevant members in an enterprise, at least a week prior to lodging such survey results with the FWC to obtain an order that protected action can occur on the basis of it having been subject to sufficient democratic consultation and survey. A fine would apply (at suitably heavy rates) if any union or official takes part in organising any action without such an order. The FWC would be left to administer this provision. Employers should have no rights to intervene, other than to seek an urgent stop order against any action that is unprotected: otherwise the question of consultation over the decision to trigger protected action is a matter between unions, workers and the industrial umpire.

- **Penalty Rates.** There is certainly room, in the 21st century, to consider harmonising weekend penalty rates into a simplified and harmonised rate or rates. Provided that base rates or transitional measures are also adjusted to minimise the impact on lower earning employees

However it is a peculiarly political – rather than economic, moral or social – rationale that led the PC to create two classes of workers (‘emergency’ and non-emergency). The idea that consumption of services is a ‘need’ on weekends is a modern invention. Emergency services have always been a 24/7 societal ‘need’. If emergency workers require special dispensation or encouragement, that should be bundled in their base rates and conditions, rather than erecting a rule that treats certain days/times as sacrosanct for one group of waged employees and not another.

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