117.\_org\_ organisation New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

This submission is on behalf of an organisation

Name of organisation: New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

Ch 1. The Inquiry in Context

Ch 2. Scrutiny Mechanisms

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**Background**

The New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union (**“the United Services Union”**) is the largest branch of the Australian Services Union with over 35,000 members in New South Wales.

The United Services Union represents the industrial interests of its members across a range of industries including local government, clerical, administrative, energy, airlines and utilities. Membership coverage extends to employees in wages, salaries and professional classifications, with members working for a large variety of employers throughout New South Wales. Members are derived from local government, electricity, and clerical and administrative employees in the airlines, retail, food manufacturing, road transport, and totalisator industries.

**Introduction**

As identified in the Australian Law Reform Commission (**“ALRC”**) Interim Report, ‘workplace relation laws in Australia have been subject to extensive local and overseas criticism on the basis of the lack of compliance with ILO Conventions concerning freedom of association and the right to organise.’[[1]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn1%22%20%5Co%20%22) In examining this criticism within the context of a domestic ‘right’ to strike this submission will adopt the following structure:

1. Australia’s international legal obligations in respect of the right to strike;
2. Australia’s federal strike provisions as found in the Fair Work Act 2009 (Cth) (**“the Act**”);
3. The conflict (if any) between the international and domestic right to strike.

After addressing each of the above limbs what becomes apparent is that employees, and by extension employee organisations, are at a fundamental bargaining/negotiation and dispute resolution disadvantage. This disadvantage arises from fundamental inequalities within the broader federal workplace relations framework, but can ultimately be traced back to the limited, and heavily regulated, right to strike under the Act. While strikes, and industrial unrest more broadly, can result in economic damage and uncertainty for both employers and employees, the right to strike by withdrawing labour, is one of the only methods by which employees may attempt to equalise the bargaining position between themselves and their employer.

**Australia’s international obligations**

Australia is a party to a number of international instruments dealing with an employee’s right to organise. The International Covenant on Civil and Political Rights (**“ICCPR”**) states that:

‘1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of the right other than those which are prescribed by law, and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedom of others.’***[[2]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn2%22%20%5Co%20%22)***

The International Covenant on Economic, Social and Cultural Rights (**“ICESCR”**) also states that:

            ‘1. The State Parties to the present Covenant undertake to ensure”

…

(c) The right of trade unions to function freely subject to no limitation other than those prescribed by law and which are necessary in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others.

(d) The right to strike, provided it is exercised in conformity with the laws of the particular country.’***[[3]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn3%22%20%5Co%20%22)***

Similar sentiments appear in the Freedom of Association and Protection of the Right to Organize Convention 1948 (no. 87),***[[4]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn4%22%20%5Co%20%22)*** with the right to strike also being expressly recognised as forming part of Australia’s international legal obligations in the explanatory memorandum to the Fair Work Amendment Bill 2013.[[5]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn5%22%20%5Co%20%22) Moreover, the objects of the Act provide as a central framework the requirement to ‘take into account Australia’s international labour obligations.’[[6]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn6%22%20%5Co%20%22)

**The position domestically**

The provisions regulating strike action in the federal workplace relations system can be found in Part 3-3 of the Act. The terminology used in this part is ‘industrial action’, which can be understood to cover a myriad of actions involving the withdrawal, reduction, and amendment of labour conditions at a worksite, including the complete withdrawal of labour by way of strike.

The Act provides for a number of conditions/restrictions to be placed on an employee’s[[7]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn7%22%20%5Co%20%22) capacity to take industrial action, including requirements:

1. to provide notice to an employer of proposed industrial action;[[8]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn8%22%20%5Co%20%22)
2. ensuring that parties are genuinely trying to reach an agreement;[[9]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn9%22%20%5Co%20%22)
3. that industrial action must not take place until after the nominal expiry date of an enterprise agreement or workplace determination;[[10]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn10%22%20%5Co%20%22)
4. that fifty (50) percent of eligible employees vote in a protected action ballot, and fifty (50) percent of those voters approve a proposed industrial action.[[11]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn11%22%20%5Co%20%22)

Provided that these conditions (and others) are met, an industrial action will be a ‘protected industrial action’, meaning that ‘no action lies under and law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action.’[[12]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn12%22%20%5Co%20%22)

Despite the above, the Fair Work Commission (**“FWC”**) may make an order suspending or terminating an employee protected industrial action if ‘the action is causing, or is threatening to cause, significant economic harm.’[[13]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn13%22%20%5Co%20%22) To a certain extent this, in and of itself, unreasonably encroaches upon an employee’s right to strike, as the underlying tactical advantage gained by a strike is as a result of economic pressure placed on the employer.

**The conflict of rights**

What is readily apparent from an examination of the provisions of the Act, but in particular s 413 and s 417, is that any right to strike as expressed in the Act is directed towards assisting the parties to reach enterprise agreements. This is reinforced in the objects of the Act where it states:

‘The object of this Act is to provide a fair and balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

…

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.’ [[14]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn14%22%20%5Co%20%22) [emphasis added]

This means that the domestic right to strike is drawn significantly more narrowly than the right to strike at international law where ‘the right to strike [is] not limited solely to industrial disputes that are likely to be resolved through signing a collective agreement.’[[15]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn15%22%20%5Co%20%22)

It is however important to recognise that the vast majority of international instruments that protect employee rights to organise, including the right to strike, may be regulated by a competent authority provided that such regulation is necessary to protect public order, public health or public safety.[[16]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn16%22%20%5Co%20%22) It then becomes a question of whether the restrictions imposed by Australia’s legislative framework are necessary when considering the very fundamental role the right to strike plays in protecting and empowering employees.

One of the primary objectives of any system of labour law is to be ‘a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in employment relations.’[[17]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn17%22%20%5Co%20%22) If this were not the case, then there would be great merit in the suggestion that labour relations should be unregulated. However, there is undoubtedly a power imbalance between employees and employers, and the right to strike is one of the most essential equalising forces ‘through which workers and their organisations may promote and defend their economic and social interests.’[[18]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn18%22%20%5Co%20%22)

It is against this backdrop that the restrictions within the Act become problematic. Protected industrial action cannot be taken whilst there is an enterprise agreement still within its nominal term of operation,[[19]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn19%22%20%5Co%20%22) and such industrial action must be taken ‘for the purpose of supporting or advancing claims in relation to the agreement.’[[20]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn20%22%20%5Co%20%22) By necessity this restricts the use of industrial action for any matter not within the ambit of an enterprise agreement,[[21]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn21%22%20%5Co%20%22) or for that matter, concerning issues relating to the proper implementation or interpretation of a valid enterprise agreement. While it is still possible, in these circumstances, to access the jurisdiction of the FWC to deal with issues of interpretation, given the proposed changes to the composition and operating methodology of the FWC,[[22]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn22%22%20%5Co%20%22) it is doubtful whether the FWC will continue to provide an ‘impartial and rapid mechanism’[[23]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn23%22%20%5Co%20%22) in which employees will feel confident that their rights will be protected.

Moreover, given the recent decision handed down in Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd (**“Aurizon”**),***[[24]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn24%22%20%5Co%20%22)*** the precarious position faced by employees in enterprise agreement negotiations is reinforced. Aurizon saw the Full Bench of the Federal Court uphold an employer’s decision to cancel a number of enterprise agreements which had just passed their nominal expiry dates pursuant to s 226 of the Act. This had the disastrous consequence (from the employee’s perspective) of shifting employees onto a modern award with significantly worse wages and conditions than they experienced under the newly terminated enterprise agreements. This severely undercut the employee’s negotiating position, as they were now required to negotiate up from the lower floor of the award, rather than negotiating changes to the enterprise agreements.

Given this relatively new development in the Court’s interpretation of s 226 of the Act, employees are now faced with an almost impossible choice. Should employees allow enterprise agreements to pass their nominal expiry date in order to gain access to the one industrial mechanism that allows employees ‘to sit as equals at the bargaining table’,[[25]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn25%22%20%5Co%20%22) or will the threat of a terminated enterprise agreement which completely undermines the employee’s bargaining position provide incentive for  employees to concede on reductions to wages and conditions that they otherwise would not have in order to ensure that a new enterprise agreement is in place when the previous enterprise agreement passes its nominal expiry date. If Aurizon has the latter effect, this will further neuter the right to strike as an effective tool of collective bargaining for employees.

Even where the temporal requirement of an enterprise agreement being past its nominal expiry date is met, the requirement that a protected action ballot be passed authorising the protected industrial action[[26]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn26%22%20%5Co%20%22) is an excessive requirement unjustly infringing on an employee’s right to strike. As was identified by the Canadian Supreme Court:

‘The right to strike is an essential part of meaningful collective bargaining in our system of labour relations. The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals.’***[[27]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn27%22%20%5Co%20%22)***

Given that the majority of enterprise agreements are negotiated by, or with the heavy involvement of, employee organisations, it will be incumbent upon the employee organisation to advise members as to an appropriate time, within the context of the negotiations, for industrial action to be taken. The requirement that this tactical consideration be approved by a majority of voters, with a further requirement that fifty (50) percent of all eligible voters cast a vote,[[28]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn28%22%20%5Co%20%22) is unnecessarily restrictive. Not only does this requirement expressly regulate the internal operations of trade unions, but it also places an unnecessarily high bar on a successful protected action ballot. In contrast, an enterprise agreement only needs to be approved by a majority of votes cast[[29]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftn29%22%20%5Co%20%22) and does not require a particular quorum of voters to be successful. Given the significant restrictions placed on protected industrial action, and the conversely wide-reaching impact of enterprise agreements on the workplace landscape, it is peculiar that enterprise agreements are able to be approved with less scrutiny than a protected action ballot.

**Conclusion**

It is apparent that there is some divergence between Australia’s obligations at international law and the system in place domestically when it comes to the right to strike. While there is scope for the Australian domestic legislative regime to diverge from the international law position where it is ‘necessary’, the restrictions currently placed upon employees is excessive and unnecessarily restrictive.

While the legislative regime would benefit from a fundamental overhaul in respect of this issue, some immediate short term measures may assist in addressing the legislative encroachment on the fundamental right to strike, these include:

1. Allowing protected industrial action to be taken at any time, regardless of whether an enterprise agreement has passed its nominal expiry date; and
2. Allowing a protected industrial action ballot to be passed by a majority of votes cast, eliminating the requirement for a majority of eligible voters to cast a vote.

Should the ALRC wish to discuss these recommendations, or any other matter raised herein please do not hesitate to contact Ms Casey Young, Director Legal and Industrial on (02) 9265 8237.

[[1]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref1%22%20%5Co%20%22) Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachment by Commonwealth Laws, No IP 46 (2015), 146 [5.131].

[[2]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref2%22%20%5Co%20%22) International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 22.

[[3]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref3%22%20%5Co%20%22) International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 8.

[[4]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref4%22%20%5Co%20%22) Freedom of Association and Protection of the Right to Organize Convention (No. 87), opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950), art 8.

[[5]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref5%22%20%5Co%20%22) Explanatory Memorandum, Fair Work Amendment Bill 2013, p. 7.

[[6]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref6%22%20%5Co%20%22) Fair Work Act 2009 (Cth), s 3(a).

[[7]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref7%22%20%5Co%20%22) The Part also deals with employer initiated industrial action

[[8]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref8%22%20%5Co%20%22) Fair Work Act 2009 (Cth), s 414

[[9]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref9%22%20%5Co%20%22) ibid, s 413

[[10]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref10%22%20%5Co%20%22)ibid, s 417(1)

[[11]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref11%22%20%5Co%20%22) ibid, s 459(1)

[[12]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref12%22%20%5Co%20%22) ibid, s 415(1)

[[13]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref13%22%20%5Co%20%22) ibid, s 423(2)

[[14]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref14%22%20%5Co%20%22) ibid, s 3 Act

[[15]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref15%22%20%5Co%20%22) International Labour Organisation, Freedom of Association Digest of Decisions & Principles of Freedom of Association Committee of the Governing Body of the ILO (International Labour Office Geneva, 5th (revised) ed, 2006), [531].

[[16]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref16%22%20%5Co%20%22) see International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 8(c) & International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 22(2).

[[17]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref17%22%20%5Co%20%22) P. Davies & M. Freedland, Kahn-Freund’s Labour and the Law (Law Book Company, 3rd ed 1983),  p.6

[[18]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref18%22%20%5Co%20%22) International Labour Organisation, Freedom of Association Digest of Decisions & Principles of Freedom of Association Committee of the Governing Body of the ILO (International Labour Office Geneva, 5th (revised) ed, 2006), [522]

[[19]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref19%22%20%5Co%20%22) Fair Work Act 2009 (Cth), s 417(1).

[[20]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref20%22%20%5Co%20%22) ibid, s 409(1)(a)

[[21]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref21%22%20%5Co%20%22) see ‘permitted matters’ in Fair Work Act 2009 (Cth), s 172(1).

[[22]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref22%22%20%5Co%20%22)  Australian Government Productivity Commission, Workplace Relations Framework: Draft Report, August 2015.

[[23]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref23%22%20%5Co%20%22) [23] International Labour Organisation, Freedom of Association Digest of Decisions & Principles of Freedom of Association Committee of the Governing Body of the ILO (International Labour Office Geneva, 5th (revised) ed, 2006), [533]

[[24]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref24%22%20%5Co%20%22)  [2015] FCAFC 126

[[25]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref25%22%20%5Co%20%22) R. McCallum, D. Chin, A. Gooley, Fairness and Balance in Industrial Bargaining, (In Mordy Bromberg and Mark Irving eds, 2007 pp 90-103).

[[26]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref26%22%20%5Co%20%22) Fair Work Act 2009 (Cth), s 409(2)

[[27]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref27%22%20%5Co%20%22) Saskatchewan Federation of Labour v Saskatchewan [2015] I SCR 245

[[28]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref28%22%20%5Co%20%22) Fair Work Act 2009 (Cth), s 459(1)

[[29]](https://www.alrc.gov.au/%22%20%5Cl%20%22_ftnref29%22%20%5Co%20%22) Fair Work Act 2009 (Cth), s 182(1)

Ch 6. Freedom of Movement

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Ch 12. Privilege Against Self-incrimination

Ch 13. Client Legal Privilege

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General feedback

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