



bhpbilliton
resourcing the future

BHP Billiton Submission to the Australian Law Reform Commission

**Traditional Rights and Freedoms – Encroachment by
Commonwealth Laws**

Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

Introduction

This submission takes up the invitation to respond to the Interim Report of the Australian Law Reform Commission in its Inquiry into Traditional Rights and Freedoms—Encroachments by Commonwealth Laws published in July 2015 and in particular Chapter 5 – Freedom of Association.

BHP Billiton is a leading global resources company and a major Australian employer. Its purpose is to create long-term shareholder value through the discovery, acquisition, development and marketing of natural resources, by owning and operating large, long-life, low-cost, expandable, upstream assets diversified by commodity, geography and market. It does this with a consistent focus on protecting the health and safety of its people and the communities in which it operates.

BHP Billiton is a major direct and indirect employer in Australia.

The areas upon which BHP Billiton makes a submission are:

- protected industrial action; and
- right of entry.

Before commenting on these matters, BHP Billiton notes the observations of the ALRC in Chapter 1 of its Interim Report to the effect that there are limits on rights because they often clash with each other so that there needs to be an accommodation between them.¹

These observations are especially apt when considering the field of workplace relations. Rights of employees and trade unions operate in conjunction with of a range of other rights. Exercise of one person's right will commonly encroach upon the rights of another. An obvious example is rights of entry enjoyed by trade unions servicing the needs of members. Such rights encroach upon the co-existent rights of an occupier to have the quiet enjoyment of property free from trespass and the co-existent rights of an employer to have the benefit of an employment contract without interference. Similarly, a right of an employee under the heading of freedom of association includes a right not to be pressed into membership of a union where that is the employee's preference. So, if some employees wish to join a union that right should be respected while at the same time respecting the rights of other employees to remain outside the union. All of these rights must be respected, and none should be obliterated by a statutory right of entry enjoyed by union officials.

Protected industrial action

Enterprise bargaining context

Since 1993, Australia has had a legislated right to strike in the form of *protected industrial action*, maintained broadly in similar terms by successive Australian Governments.

This right takes the form of a statutory immunity from legal actions under the general law unless the conduct involves personal injury, wilful or reckless destruction of or damage to property, or the unlawful taking, keeping, or use of property². It operates in the context of an enterprise bargaining regime the prime focus of which is the single enterprise or a part of a single enterprise. Protected action may only be taken if detailed processes are followed under supervision of the Fair Work Commission³ and there are various points at which the Commission may intervene if needed.

1 Paragraphs 1.53 to 1.59 of the Interim Report.

2 Section 170PG of Industrial Relations Act 1988 (following the amendments of the Industrial Relations Reform Act 1993); this immunity was continued under section 170MT of the Workplace Relations Act 1996 and other provisions of that Act as amended; and continues under section 415 of the Fair Work Act 2009.

3 Initially the Australian Industrial Relations Commission and later Fair Work Australia.

A criticism has been made that Australia's laws are inconsistent with Article 8 of an ILO Covenant⁴ because industry wide or pattern bargaining strikes, secondary boycotts and sympathy strikes are unlawful.⁵

There is no legitimate criticism of the current legislation on this basis. Article 8 speaks of the right to strike "provided that it is exercised in conformity with the laws of the particular country". There is a clear right to strike available in Australia. Under Australian law, this right operates in the context of enterprise bargaining and is to be exercised in conformity with those arrangements⁶. The requirements of the Article are clearly satisfied. The Fair Work Act Review Panel Report in June 2012 entitled *Towards more productive and equitable workplaces* did not say this was a shortcoming.

Given that the framework in which strikes are permitted in Australia is one founded upon enterprise bargaining:

- a) the focus is the employees and employer within the enterprise or relevant part of the enterprise concerned; and
- b) industrial action in other contexts is generally prohibited or amenable to an order to stop.

Pattern bargaining strikes, secondary boycotts and sympathy strikes would run counter to and be destructive of the enterprise bargaining approach facilitated by the Fair Work Act and predecessor legislation.

As the Interim Report notes, the grant of the current statutory right to take protected industrial action involves, from another perspective, a substantial encroachment on the legal, economic and societal rights of others⁷. Encroachment on those other rights should not be facilitated by legislation except as reasonable and proportionate. This must take account of wider societal circumstances including the workplace relations framework. In Australia, that framework is based on a system of regulated enterprise bargaining. There is no requirement, and neither would it be in any way proportionate or reasonable, to expand industrial action rights beyond what is reasonable and appropriate within an accepted enterprise bargaining framework.

Pattern bargaining

Pattern bargaining is an expression drawn from North American labour practices. It involves an agreement reached in one enterprise being forced upon other employers with like businesses. It is a type of industry wide bargaining antithetical to enterprise bargaining as understood in Australia⁸.

Pattern agreements are not necessarily objectionable. Rather, it is industrial action taken in support of claims for pattern agreements which is rightly prohibited. While participants within an industry may adopt a common approach to employment terms, forcing a pattern bargain upon an employer through industrial action is contrary to the enterprise level focus of the Fair Work Act. For the reasons explained above, the workplace relations framework in Australia positively requires that protected action not be available to pursue such claims and there is no general criticism of this available based on the ILO Convention.

Another criticism made to the ALRC is that pattern bargaining is only prohibited in the case of employees or unions, and not employers⁹. This criticism is a furphy and indicates a misunderstanding of the legislation. It would not be lawful for an employer to take protected industrial action (ie, a lockout) in pursuit of pattern bargaining claims.

The right of an employer to take protected industrial action is very limited in its scope.¹⁰ It does not give a right to pursue pattern bargaining claims. The employer's right to take protected industrial action arises only *in response to employee claim action*¹¹ which itself must not be to pursue pattern bargaining claims¹². The suggestion, therefore, of an imbalance between employer and employee rights in this area is misconceived.

In fact, the problem in this area is that the definition of pattern bargaining under the Fair Work Act is so narrow, or has been so narrowly interpreted¹³, that protected industrial action in support of pattern bargaining

4 *The United Nations International Covenant on Economic, Social and Cultural Rights.*

5 *Paragraph 5.69 to 5.71 of the Interim Report.*

6 *As the submissions of BHP Billiton and others to the current Productivity Commission Inquiry into Australia's workplace relations framework show, some tightening of the limits and processes associated with protected industrial action is warranted. This submission concentrates, however, on the illegitimacy of the criticisms urged on the ALRC as summarised in its Interim Report.*

7 *See, for example, paragraphs 17.63 to 17.67 of the Interim Report.*

8 *It is defined in section 412 of the Fair Work Act 2009.*

9 *Paragraph 5.71 of the Interim Report.*

10 *Sections 408 and 411.*

11 *Section 409(1).*

12 *Section 409 (4).*

13 *Trinity Garden Aged Care and Another (Full Bench of the AIRC) 21 August 2006, PR973718 upholding a first instance decision of VP Lawler. See also National Tertiary Education Industry Union v University of Queensland [2009] FWA 90, Richards SDP and Farstad Shipping v Maritime Union of Australia [2014] FWC 8130, Johns C.*

claims by unions can easily go unchecked. However, that is a matter related to the effectiveness of Fair Work Act processes and is likely to be beyond the concerns of the ALRC. It is a matter to which the Productivity Commission's attention is being drawn.

Secondary boycotts

Secondary boycotts occur when two or more people (such as union officials and/or employees) hinder or prevent a third party from supplying goods or services to a business, acquiring goods or services from a business, or engaging in interstate or overseas trade or commerce where, in any such case, the target business is not the employer of those people imposing the boycott. A secondary boycott can be contrasted with a primary boycott such as a strike where there is a refusal by a group of employees to perform work for their own employer with whom they are in dispute. By contrast, secondary boycotts target third parties not directly involved in the dispute. By involving third parties, the harmful effects of a dispute are magnified across the community, to serve the interests of a single party¹⁴.

The current provisions of the *Competition and Consumer Act 2010* prohibiting secondary boycotts¹⁵ were introduced in 1977. They first appeared in the *Trade Practices Act 1974* because such boycott conduct was then a significant problem within Australia. They were expanded in 1980 to prohibit such conduct in concert with an employer¹⁶. The secondary boycott laws have stood the test of time and have been instrumental in greatly reducing the incidence of the unlawful conduct they identify. The Competition Policy Review Final Report of March 2015 commented as follows about secondary boycotts in the workplace relations context:

Secondary boycotts are harmful to trading freedom and therefore harmful to competition. Where accompanied by effective enforcement, secondary boycott prohibitions have been shown to have a significant deterrent effect on behaviour that would otherwise compromise consumers' ability to access goods and services in a competitive market.

The Swanson Committee observed:

... no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the person engaged in the dispute.

The Panel considers this policy rationale, including its application to employee organisations, to be as relevant today as it was when first formulated. The Panel sees a strong case for effective secondary boycott provisions. The existence of such prohibitions and their enforcement by the ACCC or parties harmed by the conduct serve the public interest.

The Panel's view is confirmed by the findings of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) concerning the Construction, Forestry, Mining and Energy Union (CFMEU) and Boral, published in Volume 2, Part 8.2 of the Royal Commission's Interim Report.

The Competition Policy Review therefore recommended that the prohibitions on secondary boycotts in the Competition and Consumer Act should be maintained and enforced. It suggested that the ACCC should pursue secondary boycott cases with increased vigour¹⁷.

The Draft Report of the Productivity Commission's inquiry into the Australian workplace relations framework examines the issue again without any suggestion that prohibitions on secondary boycotts should be watered down. In fact, it seeks further information about enforcement matters¹⁸. The Draft Report also observes that being a signatory to an ILO convention is not, on its own, a sufficient justification for changes to laws prohibiting secondary boycotts, and that such conventions are not legally binding unless Parliament chooses to enact domestic laws to bring them into effect. It observes that there is little evidence to suggest that organised labour in Australia is unable to find alternative ways to express its support for causes wider than the workplace relationship¹⁹.

In the light of these authoritative inquiries which have looked and are looking into the operation of secondary boycotts as part of the workplace relations framework, it is important that the ALRC keep firmly in mind the

14 See section 24.1 of the Draft Report of the Productivity Commission's inquiry into the Australian workplace relations framework.

15 Sections 45Dff.

16 The provision which is now section 45E of the Competition and Consumer Act 2010 had its genesis in conduct considered by the Federal Court of Australia in *Leon Laidely Pty Ltd v Transport Workers' Union of Australia* (1980)42 FLR 352.

17 Recommendation 36.

18 Section 24.4.

19 *Ibid*, section 24.4, page 780.

necessity to balance competing rights. There is an overwhelming case against permitting secondary boycotts which interfere with the free rights of others for the reasons identified in the Competition Policy Review as set out above.

In summary, there should be no diminution of the current secondary boycott laws as they presently operate in Australia.

Sympathy strikes

A *sympathy strike* is a strike by employees not directly concerned in the issue but wishing to associate themselves with that issue. Depending on the circumstances, a sympathy strike may also be a secondary boycott. There has never been a recognition under Australian law of a right to engage in sympathy strikes.

A characteristic of sympathy strikes, like political strikes and secondary boycotts, is that the issue in dispute is not able to be resolved by any concession or agreement reached with the employer of the employees engaged in the strike.

A sympathy strike is fundamentally antithetical to the enterprise bargaining approach underpinning the Fair Work Act. The observations by the Productivity Commission about the relationship between Australian law prohibitions and relevant ILO covenants in the context of secondary boycotts are apposite also in the case of sympathy strikes.

There is no basis upon which such an unrestrained encroachment upon the legal, economic and societal rights of others should be recognised under Australian law.

Right of entry

The principal *rights of entry* of union officials facilitated by the Fair Work Act are:

- a) for the purpose of investigating a suspected contravention of the Act or a term of an industrial instrument applicable to members of the union official's organisation²⁰; or
- b) for the purpose of holding discussions with one or more employees who perform work on the premises, whose interests the union official's organisation is entitled to represent, and who wish to participate in those discussions.²¹

The first of these is a measure to help underpin the workplace relations system by allowing an opportunity for a relevant union official, representing actual members, to investigate on their behalf apprehended breaches relating to those members. The second is a measure to enable employees to have their attention drawn to the opportunity for industrial representation by an eligible union.

It is important to note that these rights are correctly understood as substantive *rights of the employees*. They are not substantive rights of the union or the union officer.

Another substantive right to be taken into account is the right of the employer or occupier to decide who may enter premises under its ownership or control and for which it has responsibility. It is also appropriate to consider the right of an employee not to join a union or be pressed into union activity. This is an aspect of the freedom of association.

Moreover, an employee has a legitimate expectation that he or she may quietly go about the day and enjoy a meal break without being subjected to uninvited visits, at worst pressure, to join a union or union activity. This everyday entitlement is presently unreasonably fettered by the Fair Work Act through its grant to a union official to have access to employees in meal or crib rooms²².

These other rights must be kept in mind when considering the suggestion advanced to the ALRC for relaxation of the requirement that a person who seeks to exercise a right of entry be a *fit and proper person* to hold an entry permit. There have been numerous cases in the Fair Work Commission and Federal Court illustrating why this requirement must not be weakened²³.

For example, a Vice President of the Fair Work Commission recently ruled against the issue of a permit to a CFMEU Construction and General Division official in view of his proven track record of bad behaviour when entering building sites. The Vice President said:

20 Section 481.

21 Section 484.

22 Section 492. *The present imbalance will be restored, in part, if the Fair Work Amendment Bill 2014 presently before Parliament is enacted.*

23 See, for example, *Re Maritime Union of Australia* [2014] FWCFB 1973 (26 March 2014); *Re Construction, Forestry, Mining and Energy Union – Construction and General Division, Queensland Northern Territory Divisional Branch* [2015] FWC 4544 (20 July 2015), and the various judgments referred to in paragraph [27] of that latter decision.

The evidence discloses a record of disrespect and disregard for the rights of occupiers of building sites and the legislative scheme regarding right of entry. On numerous occasions Mr Myles has shown a complete lack of preparedness to comply with the rights and obligations of permit holders. To the extent that the behaviour is sanctioned or encouraged by the union, Mr Myles has demonstrated a preparedness to follow the approach sanctioned rather than comply with the law. The unions have not demonstrated any real preparedness to take action to avoid similar behaviour in the future. No real attempt has been made to justify his behaviour and no such justification would seem to be available. There is no basis to find that similar conduct will not occur in the future.

...

The scheme of the Right of Entry provisions of the Act is to strike a balance between competing interests of occupiers and union officials. Mr Myles appears to lack any desire to comply with the legislative balance. ...²⁴.

In the face of such conduct by some officials and such failures of corporate responsibility by some unions in relation to their officials, it is astonishing that the ALRC could be urged to support a lessening of the fit and proper person test in the context of issuing right of entry permits. The suggestion pays no regard to the rights of others needing to be balanced with the union right of entry.

In fact, consideration should be given to permitting interested persons beyond a Fair Work Inspector to challenge the issue of a permit to a person on the basis that he is not a fit and proper person to hold a right of entry permit. Employers and occupiers bear the brunt of what can be very inappropriate behaviour by permit holders. However, standing to contest these matters is essentially confined to a Fair Work Inspector or, in unusual circumstances, the Fair Work Commission acting on its own initiative.²⁵

In conclusion, there is no legal or other proper principle under which statutory rights of entry for union officials should be expanded or restrictions protecting the encroached rights of others should be lessened.

²⁴ Vice President Watson in *Re Construction, Forestry, Mining and Energy Union – Construction and General Division, Queensland Northern Territory Divisional Branch* [2015] FWC 4544 (20 July 2015), at [42] and [45].

²⁵ See sections 507(1) and 508(3) of the *Fair Work Act*.