**Justifying Tort Immunities for Industrial Action**

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Submission to ALRC Inquiry into Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

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1. **Introduction**
	1. This submission has been prepared by five senior academics with extensive experience in the regulation and practice of workplace relations.[[1]](#footnote-1) It responds to the questions posed in Chapter 9 of the Australian Law Reform Commission’s Issues Paper 46, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (December 2014). It anticipates, and seeks to counter, submissions that may be made to the Commission opposing or seeking to diminish the immunity against tort liability conferred by the ‘protected industrial action’ provisions in the *Fair Work Act 2009* (Cth).
	2. While the submission is concerned specifically with the history and justification of immunities in relation to the taking or organisation of industrial action, some of the points we make about the need for the law to recognise and balance competing interests in the field of workplace relations may have broader significance for the Commission’s task in this inquiry.
	3. In particular, we note that the loaded language adopted in the terms of reference, which speak of federal laws ‘encroaching’ upon what are characterised as ‘traditional’ common law principles, may serve to obscure four crucial aspects of judge-made law and its interaction with statutory regulation.
	4. The first stems from the fact that the common law is a dynamic body of law that not only can evolve, but may often do so in response to legislative initiatives.[[2]](#footnote-2) What may be regarded as an established or even ‘fundamental’ rule or principle in one era may be overturned, contradicted or at least significantly refined in a later era. To call something ‘traditional’ then may indicate no more than that it has survived for a period of time without challenge – it does not guarantee that it will survive indefinitely.[[3]](#footnote-3)
	5. A second and related point concerns the length of time that a common law rule is recognised. It may be true, for instance, that ‘torts mostly have a long history, some dating as far back as the 13th century’.[[4]](#footnote-4) But this is not true of all torts. The forms of liability that, as we explain later in this submission, make the organisation of virtually all forms of industrial action unlawful at common law were largely created (or at least crystallised into something like their modern form) in the late 19th century, not the 13th. Furthermore, the idea of a statutory immunity from liability for the torts in question dates back (at least in the United Kingdom, where the torts originated) to 1906. Hence in a British sense at least, it is the immunity, not the liability, that has arguably attained ‘traditional’ status.
	6. The third point concerns the tendency, which again we see as implicit in the terms of reference, to treat the common law as part of the ‘natural order of things’, with legislation operating to create ‘exceptions’ or ‘encroachments’. Yet as Johnstone and Mitchell note, ‘instrumental state regulation’ of the labour market dates back to at least the 14th century, operating alongside and largely separate from the common law for much of the intervening period.[[5]](#footnote-5)
	7. A fourth point relates to another common assumption, which is that the ‘values’ that underpin the common law are somehow universal and inherently worthy of recognition. We would not quarrel with the suggestion that some parts of the common law – including some of the principles outlined in Issues Paper 46 – reflect what have come to be seen as fundamental freedoms or universal standards of justice. But other parts are simply a reflection of the values that predominated amongst the judiciary at key periods of the common law’s development. Those values do not now, and perhaps did not even then, *necessarily* reflect prevailing community standards.
	8. Much of the common law of employment, as it emerged in the 19th century, was (and arguably remains) ‘dominated by the idea of property, a very wide view of managerial prerogatives and a pervading belief in the illegitimacy of collective action when undertaken by workers’.[[6]](#footnote-6) For at least the last century or more, that view has been displaced by statutory regulation that has sought in varying degrees to protect workers by (among other things):
* imposing obligations on employers (in relation to matters such as wages, working hours, leave and workplace safety) that go beyond those that they would have voluntarily accepted by contract;
* recognising the legitimate role of trade unions in representing the interests of workers; and
* allowing workers to challenge adverse managerial decisions through laws relating to matters such as discrimination or unfair dismissal.
	1. In each of these respects, and many more, modern statutory labour law has reflected and imposed a set of values in relation to workplace relations that are at variance to those of the common law. There is nothing about the nature, origins or administration of the common law that should be seen as privileging its values, over those that have come to inform statutory regulation of employment and workplace relations.
1. **British Origins**
	1. In a series of decisions between 1880 and 1901 the English courts identified a range of tort liabilities, which cumulatively had the effect of fixing any worker who engaged in industrial action, or any union official who organised such action, with responsibility for any losses that the action inflicted upon another party (most obviously, the employer).[[7]](#footnote-7) This meant that they were exposed to the award of damages (which they were unlikely to be able to pay), and to the issue of injunctions to stop or prevent their action.[[8]](#footnote-8)
	2. The key liabilities were for inducing a breach of contract and for conspiring to inflict economic loss. Industrial action by employees almost invariably involves a breach of their employment contracts, while it may also interfere with the performance of contracts that their employer has with customers or suppliers. Any organised (or even spontaneous) industrial action will also by definition involve a ‘combination’ of individuals to achieve certain aims, at the immediate expense of their employer’s business or enterprise.
	3. In *Taff Vale Railway Co v Amalgamated Society of Railway Servants*[[9]](#footnote-9)the House of Lords also determined that a trade union which was registered under the *Trade Union Act 1871* (UK) was answerable in law for the tortious acts of its members or officials.
	4. The combined effect of these decisions was that it was impossible for workers and their unions lawfully to take any form of industrial action to protect and to promote their interests. Public disquiet, fuelled by vigorous union agitation in the run up to the 1906 general election, in due course led to the enactment of the *Trade Disputes Act 1906* (UK).
	5. Essentially that Act did two things:
* it provided trade unions with a blanket immunity against all forms of tort liability, whether in an industrial context or otherwise; and
* it provided individuals with protection against certain specified forms of tort liability, provided the actions in question were taken ‘in contemplation or furtherance of an industrial dispute’.[[10]](#footnote-10)
	1. The passing of the 1906 Act heralded a long period in the United Kingdom where the law played a relatively marginal role in the day to day conduct of industrial relations. That changed in the 1960s, when the courts evinced a preparedness to recognise the existence of new forms of tort liability which fell outside the scope of the protections afforded to individuals under the 1906 Act. In 1964, the House of Lords in *Rookes v Barnard*[[11]](#footnote-11)found that a threat to breach a contract constituted an ‘unlawful act’, sufficient to ground liability under the tort of intimidation, liability for which had until then been limited to threats of physical violence. The House of Lords effectively side-stepped the 1906 Act, which did not protect against ‘unlawful means’ conspiracy or the tort of intimidation. New and increasingly sophisticated heads of tort liability followed as the British courts sought to avoid the effect of the statutory immunities.[[12]](#footnote-12)
	2. These developments in turn led to extension of the statutory protections. For example, the *Trade Disputes Act 1965* (UK) was introduced, in part to reverse the effect of the decision in *Rookes v Barnard*. Such legislation was not interfering with centuries old common law freedoms. It was redressing the ‘onslaught of *new* common law’, restoring ‘the status quo’.[[13]](#footnote-13)
	3. Starting with the *Industrial Relations Act 1971* (UK),the protections were significantly recast. They have, however, been retained, and in modified form are now to be found in the *Trade Union and Labour Relations Consolidation Act 1992* (UK).
1. **The Position in Australia**
	1. By the early 20th century, the Australian courts had made it clear that they regarded the English torts as part of the common law of Australia.[[14]](#footnote-14) This included those tort liabilities predating the 1906 Act. Later on, the judges here were also willing to adopt most (if not quite all) of the heads of tortious liability that developed after the passage of the statutory immunities in the UK.[[15]](#footnote-15) As the Victorian Court of Appeal has recently reaffirmed,[[16]](#footnote-16) this includes the tort of intimidation, though not (or at least not yet) a further and more general tort of unlawful interference with business that has come to be recognised in Britain.[[17]](#footnote-17)
	2. For the greater part of the 20th century, Australian courts were prepared to adopt developments in the British common law without any equivalent statutory context operating to mitigate the effects of the increasingly complex heads of liability. In fact, it was not until 1993, as described below, that the Commonwealth enacted any provision equivalent to the British Act of 1906.[[18]](#footnote-18)
	3. It follows that throughout most of the 20th century Australian unions and their members were in an extremely vulnerable position in circumstances where they organised or engaged in industrial action. Not only were they exposed to actions in damages and the issue of injunctions, taking industrial action would almost invariably constitute a repudiatory breach of an employee’s contract of employment, thereby rendering the employee liable to summary dismissal.
	4. Significantly, however, there were very few common law actions by employers against unions and their members and officials between 1904 and the early 1970s. Where tort actions were initiated, they generally involved former union members or officials who had been subjected to detrimental treatment in consequence of having fallen out of favour with their former colleagues.[[19]](#footnote-19)
	5. From the early 1970s onwards, however, there was a steady trickle of cases where employers did seek relief in tort against unions and/or their members and officials. Such actions never became commonplace, but it is significant that they did become more common after 1970.[[20]](#footnote-20)
	6. The most likely explanation for the dearth of common law claims against unions and their members and officials in the period prior to 1971 resides in the fact that in 1904 the Commonwealth Parliament passed the *Conciliation and Arbitration Act 1904*. This measure was extremely intolerant of industrial action. Indeed in its earliest incarnation it entirely proscribed both strikes and lockouts on pain of significant criminal sanctions.[[21]](#footnote-21) This was fully consistent with the perception that the adoption of the conciliation and arbitration system marked the introduction of a ‘new province for law and order’ where:

*[T]he process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public*.[[22]](#footnote-22)

* 1. In fact the system never succeeded in its stated objective. Indeed, the blanket proscription of strikes and lockouts was repealed in 1930, but it remains the case that throughout its 84 years of existence the 1904 Act contained a broad range of provisions which were directed to the prevention of, and punishment for, industrial action. Despite this, industrial action was a commonplace throughout the entire life of the conciliation and arbitration system.[[23]](#footnote-23) That said, the rhetoric of the ‘new province’ was important. From beginning to end, the underlying logic of the system was that curtailment of the capacity to take industrial action was part of the ‘price’ that workers and unions had to pay for the benefits (notably organisational security and protected terms and conditions of employment) conferred by the conciliation and arbitration system. This had the consequence that for those employers and employer organisations who looked to the law to prevent or to punish or prevent industrial action, the first port of call was the *Conciliation and Arbitration Act*, rather than the common law.
	2. Throughout the 1950s and ‘60s the principal sanction under the 1904 Act was the ‘bans clause’ procedure, whereby awards contained prohibitions on imposing bans on working in accordance with the award. Breach of such a term could lead to the imposition of fines, and the issue of injunctions. Breach of such injunctions could then be punished as a contempt of court. These provisions were extensively relied upon throughout the 1960s, although in many instances fines remained unpaid.
	3. Union resistance to the use of bans clauses came to a head in 1969 when an official of the Victorian Branch of the Tramways Union, Clarrie O’Shea, was imprisoned for contempt of court because of his refusal to cooperate in the collection of fines which had been imposed on his union. There was a real threat of widespread industrial and civil disruption. The fines were paid by an anonymous donor, and O’Shea was released from prison without ever having purged his contempt. Thereafter, although the bans clause provisions (in modified form), and other penal provisions, remained in the 1904 Act until its repeal in 1988, the enforcement provisions of the Act were regarded as dead letters in practice. It is surely no coincidence that in the period after the O’Shea incident, employers began to use the common law to prevent or sanction industrial action for the first time since the early part of the 20th century.
	4. In the early 1990s the focus of the federal system of industrial regulation began to shift away from conciliation and arbitration in favour of formalised enterprise bargaining. In other words, Australia moved towards a system of collective bargaining rather than state regulation through ‘compulsory’ conciliation and arbitration.[[24]](#footnote-24) The promotion of ‘enterprise-level collective bargaining’ is now formally enshrined as an object of the *Fair Work Act 2009* (Cth), in ss 3(f) and 171.
	5. An essential element of any system of collective bargaining is the capacity of the participants in the process to elect to take industrial action in order to exert pressure upon the other parties to the negotiations. Without this capacity, as Kahn-Freund and Hepple explained, bargaining is largely devoid of meaning:

*[T]he imperative need for a social power countervailing that of property overshadows everything else. If the workers are not free by concerted action to withdraw their labour, their organisations do not wield a credible social force. The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places.* ***A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers****. That – in all its simplicity – is the essence of the matter*.[[25]](#footnote-25)

Absent legislative intervention, the common law does precisely what Kahn-Freund and Hepple warned that it must not do.

* 1. The proposition that for collective bargaining to be meaningful workers needed to have legislative protection against common law liability found legislative expression for the first time in the *Industrial Relations Reform Act 1993* (Cth). That measure introduced an attenuated form of protection against common law liability for parties who were engaged in certain forms of enterprise bargaining – provided they complied with certain prescribed conditions.
	2. The protected industrial action provisions have remained in place in largely unaltered form since 1993 – with the significant addition in 2006 of a requirement that any proposed industrial action by employees first be approved, by secret ballot. The provisions are now found in Part 3-3 of the *Fair Work Act 2009*.[[26]](#footnote-26)
	3. The immunity conferred by s 415 of that Act against common law (or other) liability applies only in relation to those taking or organising industrial action in relation to a new single-enterprise agreement. It is also not in any sense a ‘blanket’ immunity, even in that limited scenario. It does not, for example, preclude tortious (or criminal) liability for any personal injury, wilful or reckless property damage, unlawful dealing with property or defamation that may occur in connection with industrial action that is otherwise protected.
	4. In summary, the introduction and retention of protection against common law liability for industrial action is an essential element of any system of collective bargaining. The right to engage in such bargaining is, in turn, an essential element of respect for the principle of freedom of association. And that in turn is an essential precondition for the establishment and maintenance of a liberal democracy governed by the rule of law. These precepts, including the need for respect for the right to strike, find recognition in the Constitutions of many industrialised democracies.[[27]](#footnote-27) They are also embodied in international law, to which we now turn.
1. **International Law**
	1. Article 8.1 of the International Covenant on Economic, Social and Cultural Rights 1966, to which Australia is a party, states that:

*The States Parties to the present Covenant undertake to ensure: …*

*(d) The right to strike, provided it is exercised in conformity with the laws of the particular country*.[[28]](#footnote-28)

* 1. The Committee on Freedom of Association of the Governing Body of the International Labour Organisation (ILO) has consistently taken the view that respect for the principle of freedom of association, which is a necessary incident of membership of the Organisation, carries with it an obligation to respect the right to strike:

*The Committee has always recognized the right to strike by workers and labour organisations as a legitimate means of defending their economic and social interests.*

*The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests.*

*The right to strike is an intrinsic corollary of the right to organise protected by Convention No 87*.*[[29]](#footnote-29)*

* 1. The ILO’s Committee of Experts on the Application of Conventions and Recommendations has also consistently taken the view that respect for the right to strike is an essential element of the guarantees of organisational autonomy which are set out in Article 3 of the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87):

*The Committee considers that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.*[[30]](#footnote-30)

* 1. Australia has been a member of the ILO since its inception in 1919. It is clearly, therefore, subject to the Constitutional obligation to respect the principles of freedom of association, including the right to strike. It has also ratified Convention No 87.
	2. In February 1991 the Governing Body’s Committee on Freedom of Association handed down its decision in a complaint against the Government of Australia by the International Federation of Air Line Pilots Association arising out of the airlines dispute of 1989.[[31]](#footnote-31) The complaint was rejected, but in the course of its decision the Committee observed:

*The Committee cannot view with equanimity a set of legal rules which: (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein; (ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and (iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests*.[[32]](#footnote-32)

* 1. On close analysis, the protections set out in Part 3-3 of the *Fair Work Act 2009* fall some considerable way short of the ILO standards as outlined above, and those which flow from ratification of the International Covenant on Economic, Social and Cultural Rights.[[33]](#footnote-33) Nevertheless, they do at least go some way towards meeting Australia’s international obligations in relation to freedom of association in general, and the right to strike in particular.
1. **Conclusion**

5.1 It is clear from the foregoing that providing protection against common law liability for industrial action is not a ‘privilege’ conferred by law upon unions and their members. Instead it is:

* a recognition of a critical element in the logic of collective bargaining;
* a necessary incident of proper respect for a fundamental human right; and
* necessary to ensure and maintain compliance with Australia’s obligations in international law.
1. Our scholarly contributions in this field include: B Creighton and A Stewart, *Labour Law*, 5th ed, 2010; R Owens, J Riley and J Murray, The Law of Work, 2nd ed, 2011; B Creighton and A Forsyth (eds), Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective, 2012; S McCrystal, The Right to Strike in Australia, 2010. [↑](#footnote-ref-1)
2. See eg M Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36 *University of NSW Law Journal* 1002. [↑](#footnote-ref-2)
3. See eg *PGA v R* (2012) 245 CLR 355, where the High Court retrospectively disavowed any common law presumption of an irrevocable marital consent to sexual intercourse, not least because of the evolution of statutory regulation of the crime of rape. [↑](#footnote-ref-3)
4. Issues Paper 46, para 16.4. [↑](#footnote-ref-4)
5. R Johnstone and R Mitchell, ‘Regulating Work’ in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law*, 2004, ch 5. [↑](#footnote-ref-5)
6. L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, 1994, p 248. [↑](#footnote-ref-6)
7. See, eg, *Bowen v Hall* (1881) 6 QBD 333; *Temperton v Russell* [1893] 1 QB 715; *Quinn v Leathem* [1901] AC 495. For a history of the evolution of tort liability for industrial action in these and other cases, see W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, 2nd ed, 1992, ch 34. [↑](#footnote-ref-7)
8. *Springhead Spinning Co v Riley* [1868] LR 6 Eq 551. [↑](#footnote-ref-8)
9. [1901] AC 426. [↑](#footnote-ref-9)
10. This was the so-called ‘golden formula’ of British labour law: see K W Wedderburn, *The Worker and the Law*, 1965, p 236. [↑](#footnote-ref-10)
11. [1964] AC 1129. [↑](#footnote-ref-11)
12. See, eg, *Stratford v Lindley* [1965] AC 269; *Torquay Hotel Co v Cousins* [1969] Ch 106; Creighton, Ford and Mitchell, above, p 1165. [↑](#footnote-ref-12)
13. Lord Wedderburn, *The Worker and the Law*, 3rd ed, 1986, p 47 (emphasis in original). [↑](#footnote-ref-13)
14. See, eg, *Martell v Victorian Coal Miners Association* (1903) 9 ALR 231*; Slattery v Keirs* (1903) 20 WN (NSW) 45; *Brisbane Shipwrights’ Provident Union v Heggie* (1906) 3 CLR 686; *Southan v Grounds* (1916) 16 SR (NSW) 274; *Coffey v Geraldton Lumpers’ Union* (1928) 31 WALR 33. [↑](#footnote-ref-14)
15. See Creighton, Ford and Mitchell, above, p 1165. [↑](#footnote-ref-15)
16. *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2014] VSCA 348. It should be noted that special leave to appeal this decision is being sought from the High Court. [↑](#footnote-ref-16)
17. See, eg, *OBG Ltd v Allan* [2008] 1 AC 1. [↑](#footnote-ref-17)
18. At State level, Queensland adopted a modified version of the 1906 Act in 1915. This was repealed at the initiative of the Bjelke-Petersen Government in 1976. South Australia adopted an extremely limited measure of protection in 1984, which remains in force as s 138 of the *Fair Work Act 1994* (SA). That apart, none of the other jurisdictions had adopted any form of statutory protection prior to 1993. [↑](#footnote-ref-18)
19. See, eg, *McKernan v Fraser* (1931) 46 CLR 343; *Williams v Hursey* (1959) 103 CLR 30; *Coalminers Industrial Union of Western Australia, Collie v True* (1959) 33 ALJR 224. [↑](#footnote-ref-19)
20. See further the table of common law actions by employers in the period 1971–92 in Creighton, Ford and Mitchell, above, pp 1166–71. [↑](#footnote-ref-20)
21. *Conciliation and Arbitration Act 1904* s 6. For a rare reported case of a prosecution under this provision, see *Stemp v Australian Glass Manufacturers* (1917) 23 CLR 226. [↑](#footnote-ref-21)
22. H B Higgins, ‘A New Province for Law and Order’ (1915) 29 *Harvard Law Review* 13 at 13–14. [↑](#footnote-ref-22)
23. See W B Creighton, ‘Enforcement in the Federal Industrial Relations System: An Australian Paradox’ (1991) 4 *Australian Journal of Labour Law* 197. [↑](#footnote-ref-23)
24. See Creighton and Stewart, above, pp 38–42. The system of regulation established by the 1904 Act was commonly described as being ‘compulsory’ in character. It should be noted, however, that it was never ‘compulsory’ to bring a ‘dispute’ before the tribunal. It is true, however, that once that occurred the operation of the system was indeed ‘compulsory’ in character. [↑](#footnote-ref-24)
25. Otto Kahn-Freund and Bob Hepple, *Laws against Strikes*, 1972, p 8 (emphasis added). [↑](#footnote-ref-25)
26. For description and analysis of these provisions, see Creighton and Stewart, above, ch 23; McCrystal, above, ch 7. [↑](#footnote-ref-26)
27. For example France, Germany, Italy and South Africa. [↑](#footnote-ref-27)
28. Those laws themselves must not be such as to interfere with the protections provided by the Covenant. See also Article 8.3 of the Covenant, and Article 8 of the International Labour Organisation’s Convention No 87 concerning Freedom of Association and Protection of the Right to Organise (1948). [↑](#footnote-ref-28)
29. *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*,5th e), 2006, paras 521–523. [↑](#footnote-ref-29)
30. *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 69th Session, 1983, Report III (Part 4B), para 200. See also *Giving Globalization a Human Face*, International Labour Conference, 101st session, 2012, Report III (Part 1B), para 117. It should be noted that both the findings of the two ILO Committees, and the International Covenant on Economic, Social and Cultural Rights, are based on the premise that the right to strike is a worker right: that is, they do not treat the employer’s capacity to lockout as a corollary of the right to strike. However, that does not mean that it is inconsistent with respect for the right to strike for national law and practice to recognise an employer’s right to lockout: the point is that it is not impelled by respect for the worker’s right to strike. [↑](#footnote-ref-30)
31. As to that dispute, see K McEvoy and R Owens, ‘On a Wing and a Prayer: The Pilots’ Dispute in the International Context’ (1993) 6 Australian Journal of Labour Law 1. [↑](#footnote-ref-31)
32. 277th Report of the Committee on Freedom of Association, para 236. See also *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, 2006, para 664. [↑](#footnote-ref-32)
33. See McCrystal, above, ch 10; B Creighton, ‘International Labour Standards and Collective Bargaining under the *Fair Work Act 2009*’ in Creighton and Forsyth, above, ch 3. [↑](#footnote-ref-33)