

The right to politically strike?

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ABSTRACT

The right to strike on political issues is a controversial contested industrial relations and labour law issue. Governments and employers use labour law against the political protests of striking unionists. Controlling industrial action by sanctions (almost) extinguishes the right to strike. When political protest includes industrial action, such strikes are declared unlawful. When the issue of 'political' is clarified, the argument for the justification of the right to politically protest and the right to strike can be developed. International labour law principles and International Labour Organisation (ILO) jurisprudence on political strikes are adopted. Are restrictions justified against strikes on political issues or should there be greater freedoms for Australian workers and their unions to assert without risk of penal sanctions the right to politically strike? Forms of the right to political protest with industrial action could be considered for protection. The justifications may inform policy debates.

A. International protection of the right to strike

A1 ILO PRINCIPLES: Novitz (2003) analyses the strengths of the ILO and European jurisprudence and the application of the right to strike in international law. She shows the contemporary relevance of justifications to protect the right to strike. She details how the right to strike is acknowledged and upheld internationally. ILO jurisprudence has the right to strike as integral to uphold these Human Rights Conventions: The ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98). Australia is bound by these Conventions and principles, Creighton (1995, 1997, 1998); Creighton and Stewart (2000:378). Article 8, paragraph 1(d) of the ILO's International Covenant on Economic, Social and Cultural Rights of 1966, provides for: "The right to strike, provided it is exercised in conformity with the laws of the particular country."

The ILO Committee of Experts made a key statement on the right to strike on the application of Conventions and Recommendations (CEACR): ILO (1983):

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.

Novitz (2003:368) concludes 'there remains scope for the endorsement of ILO principles, based on an appreciation of the right to strike as a civil, political, and socio-economic entitlement.' Ben-Israel (1988:1) earlier argued:

The phenomenon of the strike is one of the crucial problems of contemporary industrial relations because it lies at the very core of the legal regulation of industrial conflict. The strike is basic to the distribution of power between capital and labour, and also forms part of the problem of the autonomy of groups and their relationship to the State. ... Since the late 1940's... a basic consensus emerged, albeit slowly and somewhat grudgingly. The social partners' freedom of recourse to concerted activity gained recognition as an essential element of industrial relations without which freedom of association could not exist. Freedom of association is a fundamental human right... Hence the freedom to strike has emerged as an essential tool for the implementation of such a basic freedom as freedom of association.

Understanding these modern human rights principles assists the question of political strikes.

Australian labour law is not in conformity in key respects with the ILO right to strike standards. The *Workplace Relations Act* (1996) *WR Act* (1996), the *Trade Practices Act* (1974) *TP Act*, the common law, and criminal law breach in certain respects ILO Conventions and jurisprudence; ILO (1992:435); Creighton & Stewart, (2000:378), Creighton (1988,1995,1997); Ewing (1989).

Australian unions involved in organising strikes run considerable risks at law and more so for (most) political strikes. Workers and unions raise issues of unfairness arguing an imbalance between the interests of labour and capital. Is there a basis for reformed labour laws that allow political protest strikes without the current sanctions? (other than the individual employee loses pay).

A2 Political strikes: Justification by international standards

A2 (1) PROHIBITION OF 'PURELY POLITICAL' STRIKES: The ILO, based on tripartism, has not given support to politically motivated industrial action. "The term 'political strike' is the term associated with illegality and disapprobation. The reason is that 'the political strikes' are viewed as disruptive of democratic processes" Novitz (2003:56). 'Purely political strikes' are coercive and prohibited.

Strikes protesting against government industrial, social and economic policy are nevertheless legitimate. The economic and social interests of workers encompass a wide range of legitimate issues that are interrelated to government as well as employer policies and usually enmeshed in politics. (Novitz (2003:295) considers a range of conduct where a 'political strike is that which is aimed at deposing the government, reducing its credibility, dictating the policies it should follow, or merely seeking to influence the policy formation process.')

But it is different with strikes on ideological grounds, less directly connected to workers' self interest. Here the right to strike is linked to contemporary understandings of democracy, human rights of political participation as citizens, and the right to politically protest as an exercise of civil liberties. Such argued for political freedoms are increasingly under threat. After the new Senate in July 2005, the Howard government should almost extinguish the right to strike. Should unions have the political right to protest and strike against such workplace laws? Novitz (2003: 56) begins her analysis:

My contention is that it is inappropriate to speak of political strikes as if they constituted an amorphous mass of iniquity, for strikes may be capable, not only of undermining, but also facilitating democratic participation. First, a strike can be said to be 'political' insofar as it challenges the traditional balance of power between capital and labour in any particular enterprise or industry. (With) industrial action that challenges traditional powers of managerial prerogative...there may be an argument for protection of the right to strike as aspect of 'industrial democracy'. Secondly, the adjective 'political' can be used to describe actions taken by reasons of ideological convictions relating to the achievement of social justice. Strikes which challenge an employer's environmental practices or trading partners could come within this category. Here, workers are not acting in their own direct interests, but in line with what they considered to be fundamental ethical beliefs. By taking an extended view of workers' legitimate interests or by mounting an argument based on 'freedom of speech', it may be possible to provide a democratic justification for protection of a right to strike in these circumstances. Finally, the term 'political' is most commonly applied to those actions which are designed to affect the operation of government. Strikes which have such aims are generally regarded as the most alarming. Nevertheless, I shall examine the controversial argument that the ability to take such industrial action can sometimes be justified in democratic terms both in the context of 'protest strikes' against totalitarian regimes and even, potentially, against Western European 'democratic' government.

A2 (2) STRIKES THAT CHALLENGE GOVERNMENT POLICY: So-called 'political' strikes by public sector unions are legally protected when during enterprise bargaining on wages and conditions. Public servants, teachers, university workers, nurses and those not in essential services (narrowly interpreted) striking as a last resort are justified; so long as public health and welfare is not adversely affected.

Macfarlane (1981:158) argues that, 'if one is dealing with a highly repressive autocratic regime, it is not difficult, in terms of democratic theory, to justify the use of the strike weapon to secure the overthrow of the Government or major changes in the Constitution.' Trade unions in the past have played a crucial role in the fight for democracy. Should in Australia industrial bans defending democracy be unlawful and unions subject to penalties?

Novitz (2003: 62) argues for the right to strike to influence government:

Pluralist theorists who advocate 'participatory democracy' consider that centralised political power is neither a reality nor desirable. ...employers and workers can be regarded as two interest groups, which can and should have input into government policy. ...If there is to be some balance between the relative political influence of capital and labour, there may be a case for legal recognition of strikes which seek to influence government policy.

Transnational corporations threaten government with moving capital overseas. Should workers have the parallel freedom to strike to influence government policies?

A2 (3) POLITICAL PROTEST STRIKES LEGITIMATE: But what about more general political strikes against government policies? The ILO concludes that 'protest strikes' aimed at influencing government policy do merit legal protection without sanctions. In the Argentina case, the Congress of Argentine Workers organised a strike that included national employment policy, job stability, free education and a public health system. The government declared the strike illegal and said that the strike was 'clearly of a political nature, since it did not involve the defence of particular or specific interests of workers in a given activity, but was the expression of pure and simple opposition to the social policy of the Government'. The ILO Governing Body Committee on Freedom of Association (CFA) reminded the government that 'trade union organisations should have the opportunity to call for *protest strikes* particularly with a view to exercising criticism of the social and economic policy of the governments,' Novitz (2003: 293). Clearly such a form of political 'protest strikes' are not to be declared unlawful on ILO principles. Macfarlane (1981) explores this distinction between 'coercive' and 'protest' strikes. Political 'protest strikes' are strikes designed merely to draw attention to the extent or depth of feeling against particular government law or policy while 'coercive strikes' are 'designed to force the government to change that policy.' 'Protest strikes' at least, but not 'coercive strikes', should be permissible in a democratic society.

The Committee of Experts on the Application of Conventions and Recommendations said:

Organisations responsible for defending workers' socio-economic and occupational interests should... be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living (ILO CEACR 2002, cited Novitz 2003: 293).

But is there a point to the argument that coercive political strikes against governments should be unlawful? Obviously so. However, the political right wing and corporate leaders support certain political strikes, on occasions. There are protest strikes against governments that are not democratic e.g. strikes in Zimbabwe; that are white racist (South Africa); fascist, communist (Poland and the Solidarity strikes) or that are authoritarian Nigerian or left wing, Venezuela. All over the world at any one time governments implement their reactionary economic and social politics and workers and unions use the political strike in opposition to the policies and the repression of political protests (see www.labourstart.org/).

A2 (4) INDUSTRIAL DEMOCRACY RIGHT TO STRIKE: Democratic participation at the workplace and in political policy making is important justifications, e.g. the October 16th National strike on University and Government decision making, White (2004). 'It has become increasingly common for workers to claim, in their work situations, some version of the rights they now enjoy in the political field' Novitz (2003:57). The scope of the right strike is broader when based on employees having a voice, not only over their own working conditions, but when they are opposed to the way an enterprise is being run or government policy impacting on the enterprise decision making.

A 2 (5) RIGHT TO STRIKE AS A CIVIL LIBERTY: Ignatieff (2001:165) demonstrates that the right to politically protest is broadly accepted throughout the liberal democratic world recognised as an important civil and human right. Political protests historically have been evolving as a civil and political right and linked to freedom of speech, freedom of association and the right to free assembly. (Novitz 2003: 65):

To view the right to strike is an aspect of 'free speech', 'freedom of association', or even 'freedom from forced labor' is to give it the status of a fundamental civil liberty. This suggests that it could be exercised whenever the worker so chose the *prima facie* personal freedom. The entitlement to take industrial action could not be limited in terms of subject matter, such as collective bargaining or workplace governance, except where it infringed some other right or vital aspect of the public good

Hunt (2001) argues that legal reasoning to legitimise restricting strikes in Australia is not ethically based. Workers have a moral right to wage justice and to strike as a civil liberty outweighing other rights, such as employer's property rights. Moral rights reasoning and ethical arguments based on these principles may be applied to political strikes.

A2 (6) IDEOLOGICAL STRIKES AGAINST EMPLOYER POLICIES: Novitz (2003: 59) continues:

Workers have been willing to engage in industrial action for reasons unconnected with their own immediate concerns or financial interests. The motivation for their action often has an ideological basis and broad social implications. While the ILO sees the right strike as a fundamental right of workers and of their organisations, it has regarded it only as a means for the promotion and defence of workers' direct economic and social interests.

Novitz (2003: 296) indicates that the CFA may intervene to protect participants in ideologically motivated strikes aimed at changing an employer's policies. The CFA found that a strike called by university teachers to protest against acts of repression against students came within the framework of legitimate trade union activities. The university teachers were not taking industrial action in respect of their own conditions of employment, but to express their abhorrence at how their employer, the government, had treated students. This strike was taken for the benefit of others, on ideological or humanitarian grounds. Nevertheless, the CFA found the strike to be legitimate. Similarly, a British ban held legitimate was the threat made by members of the BBC staff that union members would take whatever industrial action necessary to prevent the 1977 FA cup final being relayed via satellite to South Africa in protest against apartheid.

A2 (7) GREEN BANS AND CONSCIENCE STRIKES: In the 1970s, the NSW Builders Labourers Federation embarked upon 'Green bans' industrial action to protect the environment by refusing to take jobs constructing a luxury complex on undeveloped bushland, on the Greenbelt Sydney, respecting community opposition to this project, Thomas (1973). These bans for environmental and community protection were justified politically by the militant Communist union leadership, Silverman (1966, 1971). Novitz (2003: 61) argues this form of industrial action could be seen as a means by which to:

allow the values of the 'life world' Habermas (1997) to permeate the capitalist system. The Sydney 'green bans', were where constitutional democratic procedures have not decided how to develop Sydney before the labourers stepped in; profit making builders had. The green bans may be understood as taking one step further a union goal traditionally applied to setting wages and conditions of employment; substituting a conscious group decision for a market determination.

Australia has a history of political struggles and strikes on environmental issues and social issues. Novitz (2003:60) argues:

...that considerations of a social character should be permitted to influence the market-led considerations often taken by employers... to extend the concept of 'workers' 'self-interest', so to accommodate industrial action taken on a principled stance. This is an attempt to relate the right strike back to the socio-economic interests of workers. Such strikes could be considered justifiable on the grounds of individual conscience and

moral autonomy or as an extension of free speech. Indeed a strike may be viewed as an aspect of acting as a responsible citizen, a role which cannot simply be suspended during working hours.

Political strikes were taken for reasons of conscience. Hay (1978: 37) cites the (in)famous Waterside Workers Federation 1938 ban on the shipment of pig-iron to Japan in protest against war preparations, where the Communist waterfront union leader Healy asserted 'the right of the individual to refuse to participate in any action towards which he (sic) may have conscientious objection.' Silverman (1966, 1971) assesses the arguments of militant unionists for political strikes and the responses. Waterfront unionists 'refusal to participate in the business of munitions manufacturing was similar to their later refusal to assist the Dutch to reassert control in the East Indies. They claimed that they retained their personal rights and prerogatives, one of which was to aid persons in a struggle for freedom.'

Hay (1978) makes a case for political strikes in a liberal democracy on grounds of republican democratic theory. Union bans on foreign policy issues for human rights are justified in terms of conscience and free speech. They are promoted as legitimate civil disobedience; Silverman (1966, 1971). Should political rights of workers to decline to carry out work that violates their sense of social justice and conscience be allowed? Should workers have protection when attending mass citizen Peace Rallies such as in the 'Not in My Name' 2003 anti-Iraq war protests?

A3 The right to strike as a human right

The right to strike is seen as a human right, Creighton (1995, 1997), although justified on socio-economic grounds. Ewing (2004) sees a convergence of the justifications for the right to strike: the traditional socio-economic arguments and the civil and political justification for the right to strike are joined by a human rights justification. There is a renewed advocacy for the right to strike as a human right. International labour law is joined by human rights law.

History demonstrates the need for human rights, Ignatieff (2000). Workers assert their human rights have been abused by suppression, here of the right to strike. Workers and unions uphold today as in the past the right to strike. Legitimate positions are strongly held such as the 'dignity of labour', that 'labour is not a commodity', is 'not forced labour', and workers are 'free and not slaves'. As a human right not to be abused and punished for going on strike, it is put forward to protect the individual employee's dignity.

Ewing (2004) shows the right to strike as a human right has interesting features. A human right is inalienable in that it cannot be abrogated by the State or by individuals. Human rights are indivisible and often unequivocal. The exercise of human rights has to in practice be made possible by the State. What would this mean for the political strike?

Although an individual right, the right to strike is exercised in combination. Individuals organising collectively especially in unions are fully protected. For the right to strike generally including on political issues to be effective then the union organisers and the union organisation are not subject to penalties. The individual on strike has a 'firewall protection'. Apart from losing wages, no other penalties can be imposed. You cannot be dismissed or discriminated against for going on a protest strike to express your political view.

In our globalised network economies, individual protection is arguably still important in workplace relations. This human right to be effective requires immunity from common law sanctions. The strike on political issues would not constitute a breach of the individual's contract. Nor would torts law and injunctions be available to employers. The right to strike as a human right means that certain solidarity strikes are protected, including political protest strikes. As a human right, the scope is wider than bargaining on socio-economic issues. It can be used to respond to political attacks on workers industrial rights. Individuals should have the freedom to determine how the right to politically protest with industrial action should be exercised and for what purposes. The right to strike can be used to politically promote other human rights and to oppose exploitation and oppression and for human rights. Ewing (2004) argues:

If the right to strike is a human right workers must be free to determine the causes they will promote by using it, just in the same way that we do not censor the purposes that may be promoted by the exercise of the right to freedom of assembly. People are free to exercise their human right to peacefully assemble by marching through the streets to demonstrate their opposition to the invasion of another country or anti trade union legislation. Why should they not also be free to exercise their human right to strike to promote the same ends by staying at home, or in order to reinforce the protest? It is not for the State to determine the causes which may be promoted in this way.

Green (1990) recommended the policy approach taken by ILO jurisprudence that the workers determine the purpose of the strike, here political. It is the conduct that the right protects, not the purpose. Unions have freedom over the purpose.

The right to strike as a human right, Ewing (2003) explains does not mean that there are not nor ought not to be reasonable limitations and respect for the rights of others, with the doctrine of proportionality. As we shall see, Australian labour law allows sanctions political strikes. This leads to reform debates for some protection of political strikes.

B. Australian laws against political strikes

B1 AUSTRALIAN CONSTITUTIONAL FREEDOM OF COMMUNICATION? One line of inquiry is in Constitutional law. The High Court has determined that as citizens Australians have an implied constitutional freedom of political expression; the right of freedom of communication on political matters. The High Court's constitutional principle of freedom to communicate political views is functional, 'is necessary for and a corollary of' Australia's system of liberal representative democracy. This is a negative freedom limiting a government's legislative and executive powers rather than a positive right, Williams (1998).

Doyle (1995) is critical of the High Court's narrow characterisation of political communication that is protected but limited to speech. The reasoning of the speech/action distinction that political speech is protected but not action is not valid. Doyle (1995) argues that 'the High Court may be faced to abandon this untenable distinction between speech and conduct, as it denies Constitutional protection to many forms of communication employed by citizens – especially workers.' Doyle (1995) argues that 'peaceful picketing' and 'industrial action is also expressive conduct worthy of constitutional protection.' She was dealing with industrial action broadly. But arguably protection should be secure when the purpose of the strike is political protest.

From this, there are arguments that unionists on strike peacefully picketing and leafleting to communicate political views with mass media present could be constitutionally protected, against any legislative restriction. Doyle (1995) gives the illustration of workers attending mass union political protests marches against the Liberal Kennett Victorian State government as coming within consideration of the implied freedom of political communication. This reasoning could apply to protect workers leaving work to attend protest marches e.g. against industrial law amendments deregulating the industrial relations system and adversely affecting their workplace and economic interests by the Minister for Workplace Relations Andrews that will be passed by the Senate after July 2005.; or the building workers protesting the Cole Royal Commission.

Doyle shows a union 'to avoid sanctions attaching to industrial action, it must bring its activities within the implied freedom of communication.' But this may not help. Unions have had to put up with the schizophrenic industrial/political distinction. Doyle's argues that this industrial/political dichotomy is arbitrary, confusing and untenable. Her description of the arbitrary distinction of union conduct as industrial or political can be applied today to the *WR Act* (1996) distinction between industrial action that is protected or not protected. Past judicial interpretation has given judicial recognition of political strikes, which are not industrial. As such, unions could not invoke the jurisdiction of the Conciliation and Arbitration system. However, when it comes to employers stopping strikes, then so-called political strikes, that are not industrial as they are not 'matters pertaining to the relationship between employers and employees', become so when the industry is disrupted. The act of taking the industrial action is then sufficient so that orders against such strikes going ahead or continuing can be made.

Industrial Courts exercise power to stop the industrial action, using section 127 of the *WR Act* (1996) and injunctions. There are differing Commission opinions of whether a worker has a right to strike to attend a political protest. Whether a discretion is exercised by the AIRC that the conduct is such it should be declared unlawful depends on the circumstances. There is one line of argument that a political strike may be unprotected, but depending on the circumstances not sufficiently illegitimate as to be made unlawful and be penalised by the Federal Court enforcing the *WR Act* (1996).

It could be argued Australia's Constitutional freedom of communication should protect, for example political protest by University staff and their unions, as universities have to uphold free speech in inquiry and debate. The October 16th strike was to communicate staff concern in defence of higher education and the independence of universities. White (2004) concludes that such protest strikes as on University independence and workplace rights were both industrial and political, with justifications for protection against any possible sanctions.

Political picketing is precarious. In *CEPU v Laing* (1998) 159 ALR 73 the Federal Court upheld the s127 order to cease the peaceful picketing against the WA Court government's repressive industrial laws. The Federal Court did not extend Constitutional protection to industrial action as political communication.

The common law injunction can stop picketing. Protection is not afforded to effective picketing, such as acts of physical blocking. Disorderly conduct, trespass, and the ancient common law of 'watching and besetting' are weapons against the picketers by the employer. Picketing may be held to be a civil wrong and tortious or run foul of secondary boycotts law. Picketing action is subject to traffic law, criminal and property law. Industrial and community protests as picketing particularly enmeshed in political issues such as in the Waterfront dispute were held to be unlawful, with Justice Beach of the Victorian Supreme Court injunctioning (unsuccessfully) nearly everyone on the peaceful Waterfront assemblies.

Silverman (1966) and Hay (1978) describe political protest strikes that did not see sanctions used by employers. This was for tactical reasons, or it was a one day stoppage over or the damage was limited. Employers and governments respond robustly at the workplace and in the political arena, in the media and at negotiating conferences but not necessarily in the courts. Silverman (1966, 1971) describes recognition of some political strikes. This is an industrial relations practice that means sanctions against short political strikes, one day protest stoppages are not used. With de facto acceptance, should it be legal?

Responses to industrial action as political protests cover a range of accommodation and tolerance to repression. But Collins (2003: 248) warns 'we can detect a reluctance of modern states ever to take the idea of the social right to strike so seriously that they relinquish the power, should governments so wish, to take decisive action through force to break a strike. The right to strike is always contingent on the state's ultimate monopoly of force.'

B2 AUSTRALIAN LAWS AGAINST POLITICAL STRIKES: HISTORICAL CONTEXT: Unions in Australia have a long history of political action through the ALP: but not using industrial action for political purposes. After the defeat of the 1890's strikes, a lesson for unions was not to use the strike weapon as a political strike, but election to parliament. Hyman (1989: 171): 'Every important trade union struggle over wages and conditions has today a political dimension, since it impinges directly on government economic strategy.'

Political strikes in the 1960's and 1970's invoked public controversy. Government and employers used political invective against militant union leaders with accusations of politically motivated threats to the community. This is despite the small number of political strikes. Hay (1978) shows that they have been relatively insignificant in number. Strikes on political issues have been short protests or bans with minimal economic disruption. Political strikes show strongly held criticisms of government policies and significant grievances by workers and their unions that are debated in the political arena.

The ACTU historically organised social campaigns, but rarely used the political strike. Strikes are justified industrially to protect workers social interests, e.g. the 1977 Medibank national protest strike was for the social wage. Union leaders do assert that workers should not be forced into master and servant relationships by employers or governments. Strongly held views justify a strike over political issues. Employers supported the principle of the right to strike for enterprise bargaining but based on the prohibition on industrial action during the currency of the agreement and was applied only on industrial matters, ‘pertaining to the employer and employee relationship’ and not political issues. This employer view was reinforced by the High Court (2004) in *Electrolux*¹.

B3 (1) POLITICAL STRIKES: UNLAWFUL: In Australia, nearly all political strikes are unlawful. The *WR Act* (1996) says only strikes in enterprise bargaining at a single business have protections against statutory and common law penalties, Creighton & Stewart (2000:148; 155; 378). Employers litigate on any breaches of the details of the legislative processes that make the strike unprotected (Noyen 2003). Legal boundaries are complex and risky, even more so with *Electrolux* (2004) making more uncertain what is protected action. Sanctions apply to political strikes under the *WR Act* (1996), the *TP Act* (1974) section 45D and at common law. The Waterfront (1998) and Pilots (89-90) industrial disputes are characterised as political by the power of governments and courts. Both governments condemned the disputes as political, although they were industrial issues, enmeshed in politics. Hyman (1989:171) argues: ‘...the increasing intervention of the state on the side of the employers in industrial relations means that the traditional trade union segregation of industrial from political activities has become largely meaningless.’

B3 (2) INDUSTRY BARGAINING UNLAWFUL: The *WR Act* (1996) protects strikes during the bargaining period only at the single workplace. National, industry or multi-employer strikes for agreements run the risk of being declared unprotected. Any national strike, let alone a national strike on political issues, may not be protected. Australia is the only country in the Western world that bans national strikes. Collective bargaining industrial action at the industry level is accepted by the ILO. The ILO has cited Australia’s restriction against collective bargaining at the industry level or multi-employer level, against pattern bargaining, as being in breach of ILO principles. Should national protest political strikes not be subject to penalties?

B4 SOLIDARITY STRIKES UNLAWFUL: An effective penal power outlawing strikes characterised as solidarity, sympathy, third party or boycott strikes is Section 45D of the *TP Act* (1974). Section 45D deters solidarity strikes and is a hotly contested politically. Australian trade law treats union solidarity as though it were an oppressive restraint of trade, Hunt (2001). The *TP Act* amendment 2002 makes strikes against overseas trade unlawful. Union solidarity action with political bans risk breaching s 45D. Creighton & Stewart (2000:380) cite the ILO Committee of Experts ‘that sympathy action (which could include much, if not all, secondary action) should be lawful so long as the action in support of which it is taken is itself lawful.’

B5 POLITICAL STRIKES UNLAWFUL AT COMMON LAW: Unions organising strikes over political issues are most vulnerable to common law liability, Ewing (1993:18-39); Creighton & Stewart (2000:395-416). The common law of contract and tort applies where strikes as such are unlawful regardless of the circumstances of the strike. Consequently, interlocutory injunctions in the civil courts can stop strikes, particularly on political issues. Ancient British common law master and servant law, tort and contract law survive with common law judges making industrial action unlawful irrespective of the merits, Conlon (1992). These common law rights available to employers are the industrial torts: inducing breach of contract; interference with contractual relations; intimidation; civil conspiracy; and causing economic loss by unlawful means. The common law of contract based on master and servant status makes unlawful the withdrawal of labour. However remarkable, the strike is at common law a breach of the individual’s contract of employment. Increasingly, employer tactics use interlocutory injunctions to stop strikes (Noyen 2003). Australia’s failure to provide protection against common law liability is in breach of our international obligations. Should there be firewall protection for unions and individuals in political strikes against these common law weapons?

Conclusion

Is it arguable that Australia's restrictions on the right to strike on political issues are unfair? Should workers be able to exercise protest power with industrial action in a democracy? The right to politically protest by strike action could be re-evaluated: 1. in a democracy, political strikes do occur and the State's legal responses should not be to suppress; 2 overcomes unfairness between the interests of labour and capital, rebalanced to meet international obligations; and 3 engages in a reform debate for the protection of the right to politically protest and the right to strike of benefit to industrial relations and the community.

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¹ *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40 (2 September 2004)

