

# BEARING THE ECONOMIC LOSS OF INDUSTRIAL ACTION: THE PAYMENT OF STRIKING EMPLOYEES UNDER THE *FAIR WORK ACT 2009* (CTH)

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*This article aims to elucidate the legal principles governing the right of striking employees in Australia to payment during periods of industrial action. It explains briefly the common law antecedents to the strike pay provisions of the Fair Work Act 2009 (Cth) and discusses in detail a number of decisions that interpret those provisions, including the recent High Court decision in CFMEU v Mannoet, which held that the prohibition on payments to employees who take protected industrial action is confined to the withholding of wages and does not permit employers to withhold other benefits, such as employer-sponsored accommodation. The article argues that, whilst the High Court decision provides a welcome clarification, there is a need for further judicial clarification of the partial work ban provisions in particular. The article discusses the assertions that the Fair Work Act provisions are overly prescriptive and the reasons for this, and suggests that they are unlikely to be relaxed in the current political climate.*

## I INTRODUCTION

The right to strike has long been recognised in international law as a fundamental right of all workers, although it is only since 1994 that Australian employees have had a statutory right to take industrial action, as part of the negotiations for enterprise agreements.<sup>1</sup> Unions and their members generally

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<sup>1</sup> See, eg, *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8.1(d). Whilst none of the conventions of the International Labour Organization ('ILO') expressly provide for the right to strike, ILO jurisprudence has established that such a right is implied in

do not take industrial action lightly, not least because employees must generally forgo their wages during periods of industrial action.<sup>2</sup> This principle that employees who take industrial action are not entitled to be paid appears to be a simple and easily justified one. The provisions of the *Fair Work Act 2009* (Cth) ('*FWA*') that deal with this issue, however, are not as straightforward in their application or, at least until very recently, as clear in their meaning as one might expect.

This article seeks to explain the development of the 'strike pay'<sup>3</sup> provisions and the common law background, to analyse the ways in which recent litigation has clarified the strike pay provisions of the *FWA*, and to draw some conclusions about the fairness of the provisions in the light of these decisions. It is argued that, whilst the provisions are unnecessarily complex and detailed, they manage to strike a reasonable balance between the interests of employees and employers, particularly given the favourable interpretation of a key provision by the High Court in *CFMEU v Mammoet Australia Pty Ltd.*<sup>4</sup> The nature and scope of the provisions do, however, reflect some of the broader concerns that have been expressed about collective regulation under the *FWA* more generally.

Part II sets out the common law principles of the work-wages bargain which are the antecedents of the statutory provisions in the federal legislation. Part III explains briefly the development of the right to strike in Australia, and of the statutory provisions and their purpose, as well as the definition of 'industrial action' in the *FWA*. Part IV considers two issues of interpretation of the *FWA* provisions: first, which 'payments to employee' are actually prohibited by the legislation, focusing on the recent decision in *Mammoet*; and, secondly, how the provisions governing payments in cases of partial work bans are being interpreted under the *FWA*.

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key conventions such as the *Right to Organise and Collective Bargaining Convention 1949* (entered into force 18 July 1951). The right to strike was introduced into federal law by the *Industrial Relations Reform Act 1993* (Cth), effective 30 March 1994. See generally Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5<sup>th</sup> ed, 2010) [22.1] and [23.03]–[23.04].

<sup>2</sup> Where part of the work is performed, employees may be entitled to part of their wages — see Part II, Section B below.

<sup>3</sup> 'Strike pay' is defined as payments by an employer to make up in whole or in part wages not earned by the employee during a period of industrial action: see *Construction, Forestry, Mining and Energy Union [CFMEU] v Mammoet Australia Pty Ltd* (2013) 300 ALR 460, [52] ('*Mammoet*'). The expression is used as a short hand reference for the prohibition in s 470(1) of the *FWA*, although as the following discussion shows, the exact meaning of s 470(1) has been unclear until very recently.

<sup>4</sup> (2013) 300 ALR 460.

## II THE COMMON LAW BACKGROUND

### A *The Work-Wages Bargain*

At common law, the work-wages bargain is at the centre of the contract of employment. The employee provides his or her personal labour under the direction of the employer in exchange for the payment of the prescribed or agreed wages or salary. It follows from this that the employer is not required to pay wages unless the employee has performed the work lawfully required by the employer under the contract — the ‘no work-no pay’ principle.<sup>5</sup> In the modern era of labour regulation, however, the no work-no pay principle is subject to numerous exceptions. For example, the National Employment Standards (NES) in the *FWA* entitle many employees to be paid their wages whilst on personal leave, compassionate leave, annual leave, or long-service leave.<sup>6</sup>

In some circumstances, the employee may fulfil his or her part of the work-wages bargain by being ‘ready and willing’ to perform work as directed, even if no work is actually done, such as by being ‘on call’.<sup>7</sup> Alternatively, employees may be ready and willing to work but the employer may have no work for them to do, for example due to a strike at the employer’s supplier. Whilst at common law the employer would be entitled not to pay in such circumstances, this principle is often overridden by stand down clauses in enterprise agreements, which may require the employer to allocate the employee other suitable duties, or to allow the employee to take paid annual leave rather than forgo wages altogether.<sup>8</sup> Employees who are locked out by their employer as part of an industrial campaign are not entitled to be paid, no matter how ready and willing they may be to perform their duties under their contracts.<sup>9</sup>

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<sup>5</sup> *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Miles v Wakefield Metropolitan District Council* [1987] AC 539.

<sup>6</sup> *FWA* pt 2-2. The NES minimum standards may be improved upon by enterprise agreements and contracts.

<sup>7</sup> However, an employee who has been dismissed by the employer, even if wrongfully, is never entitled to be paid, however ‘ready and willing’ they may be to perform the contract and even though the employee can, in theory, elect to treat the contract as being still on foot: see *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Vissher v Giudice* (2009) 239 CLR 361.

<sup>8</sup> See *FWA* pt 3-5, which applies in the absence of provisions on stand down in an employee’s contract or enterprise agreement.

<sup>9</sup> Section 418 of the *FWA* provides that an employer ‘may not’ pay employees whom the employer has locked out in response to the employees’ industrial action.

The most common reason for an employer's refusal to pay under the work-wages bargain is because the employee is 'on strike'. At common law, a refusal by employees to work for the purpose of disrupting the employer's business (as a strategy to persuade the employer to listen to the employees' industrial claims) is a repudiatory breach of contract, entitling the employer to dismiss without notice. A strike is not only a breach of the work-wages bargain, but also breaches the employee's duties of fidelity and co-operation that are implied in all contracts of employment.<sup>10</sup> Occasionally, the courts have held that legitimate industrial action merely suspends the contract of employment, rather than breaching it.<sup>11</sup>

The common law principle that a strike is a fundamental breach of contract conflicts with the right to strike recognised in international law.<sup>12</sup> Many western governments, including Australia's, have introduced legislation to provide that, in defined circumstances, strike action is lawful<sup>13</sup> and such legislation also provides protections for employees against dismissal or other adverse action by employers in response to lawful strike action.<sup>14</sup> These provisions, however, do not alter the common law rule that employees who are on strike are not entitled to be paid.<sup>15</sup>

### **B The Work-Wages Bargain and Partial Work Bans**

The common law principles are less certain in their application in cases where the industrial action consists of a refusal to perform part of the duties of the position, or where the duties are performed differently from the way they are customarily performed, for example by way of a 'go slow' or a 'work to rule'.<sup>16</sup> The starting point is that an employer does not have to accept less than the work contracted for. Provided that the employer is entitled contractually to order the employee to perform the full range of duties, then failure by the employee to perform all of those duties will disentitle the employee to be paid

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<sup>10</sup> See, eg, *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 All ER 949. The fact that in practice most employers choose not to dismiss their striking workers does not detract from the right to do so.

<sup>11</sup> *Morgan v Fry* [1968] 2 QB 710.

<sup>12</sup> Above n 1.

<sup>13</sup> See *FWA* pt 3-3 div 1.

<sup>14</sup> See in particular *FWA* ss 340–2.

<sup>15</sup> See below Part IV for a detailed discussion of the strike pay provisions of the *FWA*.

<sup>16</sup> A work to rule campaign involves carrying out the duties of the position strictly according to a detailed rule book or written policy, which usually has the effect of less work than usual being performed. For an example, see *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 All ER 949.

at all.<sup>17</sup> For example, in the *Unilever* case, employees were held not to be entitled to their wages for being ready and willing to perform their usual duties on the factory floor whilst ignoring a lawful and reasonable order to attend a supervisors' meeting.<sup>18</sup>

Since it will usually be unfair for the employer to take the benefit of part-performance whilst refusing to pay the employees any wages, the employer must make it clear to employees in advance that payment of wages depends on performance of all required duties. The Australian case law before the introduction of statutory provisions governing this issue suggests that the safest approach for employers was to refuse any performance of the contract that fell short of full performance of all duties, if they intended not to pay any wages. Employers who acquiesced in their employees' performance of only part of their duties after instructing those employees to perform all duties could still be liable to make payment, particularly where the court determined that there had been substantial performance of the contract.<sup>19</sup> However, proving substantial performance when partial work bans were in place was not always easy. Whether the banned work was insubstantial was not determined just by the amount of time usually devoted to it, but also involved consideration of the importance of the unperformed work to the employer. In *Csomore v Public Service Board (NSW)*,<sup>20</sup> the court reasoned that the unperformed work (the processing of payments received by the government) took on a significance beyond the proportion of duties that it represented in terms of time spent, because the refusal deprived the government of the revenue it needed to go about its business. This outcome reflects the reality that unions engaged in partial work bans will generally require their members to refuse such duties as will be sufficient to bring the employer to the bargaining table; otherwise, there is hardly any point to the ban.

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<sup>17</sup> *Miles v Wakefield Metropolitan District Council* [1987] AC 539, 561.

<sup>18</sup> See *Unilever Australia Ltd v Food Preservers Union* (1992) 45 IR 12. The refusal to attend supervisors' meetings was part of an industrial campaign for improved annual leave entitlements. The employer cut the power to the process line when employees refused to attend the meeting as requested.

<sup>19</sup> *Gapes v Commercial Bank of Australia Ltd* (1980) 41 FLR 27.

<sup>20</sup> (1987) 10 NSWLR 587. The employees in that case were therefore not entitled to any pay because there had been no 'substantial performance' of their duties.

### III THE DEVELOPMENT OF STATUTORY PROVISIONS ON STRIKE PAY

#### A *The Right to Strike in Australia*

The statutory provisions on strike pay need to be understood against the background of the right to strike in Australian labour law. In spite of Australia being a signatory to key international labour standards supporting workers' right to strike, there was no general right to strike in Australia until 1993. Strikes were generally illegal and the law provided significant sanctions against both striking individuals and their unions, including a wide range of tort actions.<sup>21</sup> One of the reasons why the drafters of the *Commonwealth Constitution* gave the Commonwealth Parliament the power in section 51(xxxv) to make laws to settle disputes by conciliation and arbitration was that there had been such extensive and damaging industrial disputation in the colonies during the 1890s. The availability of conciliation and arbitration to deal with industrial disputes was intended specifically to 'replace the rude and barbarous process of strike and lockout'.<sup>22</sup> Strikes were nevertheless more prevalent in Australia until the late 20<sup>th</sup> century than they were in other OECD countries.<sup>23</sup>

The 1993 reforms introduced provisions enabling employers and employees to make collective bargaining agreements (called 'certified agreements') at the federal level as an alternative to having the Australian Industrial Relations Commission ('AIRC') settle industrial disputes about terms and conditions by making industrial awards. Consistent with collective bargaining regimes in Canada and the United States ('US'), the new laws on collective agreement-making provided for recourse to industrial action without fear of legal suit (called 'protected industrial action') to advance claims when an agreement could not be reached by bargaining alone.

During the period of the Howard coalition government, the *Workplace Relations Act 1996* (Cth) ('WRA') fostered both collective and individual agreement-making at the workplace level and continued to provide for industrial action to be lawful in narrowly defined circumstances, and for 'strike pay' to be banned. The amendments introduced by the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) ('Work Choices')

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<sup>21</sup> Creighton and Stewart, above n 1, ch 22. Some state laws provided limited protection from tort action, but this was intermittent and patchy: see Shae McCrystal, *The Right to Strike in Australia* (The Federation Press, 2010) ch 3.

<sup>22</sup> H B Higgins, 'A New Province of Law and Order' (1915) 29 *Harvard Law Review* 13, 14.

<sup>23</sup> Creighton and Stewart, above n 1, [22.10].

imposed new secret ballot requirements on unions before lawful strike action could be taken. Most of the *WRA* provisions remained when the Rudd Labor government replaced the *WRA* with the *FWA*, most of which commenced operation on 1 July 2009.

### **B Strike Pay and Federal Industrial Legislation**

The no work-no pay principle had no express legislative form until the *WRA* was introduced, but provisions addressing disputes over strike pay appeared from 1979. In that year, the *Conciliation and Arbitration Act 1904* (Cth) was amended to prevent the Commonwealth Conciliation and Arbitration Commission from making an award or order, or taking any other action in response to a claim for payment by employees involved in industrial action.<sup>24</sup> This provision made clear that claims for strike pay, whereby workers who lost pay due an industrial dispute, and who took further industrial action to force payment from the employer, could not be dealt with by the Commission.<sup>25</sup> A provision with similar effect appeared in the *Industrial Relations Act 1988* (Cth), which operated from 1 March 1989 until 30 December 1996.<sup>26</sup>

Since 1997, the federal legislation has had specific and very detailed provisions that make it unlawful for employees or unions to demand payment for periods when they are engaged in industrial action, and for employers to pay strike pay, irrespective of whether the industrial action is protected or not. From 1 January 1997, section 187AA(1) of the *WRA* provided that ‘an employer must not make a payment to an employee in relation to a period during which the employee engaged or engages in industrial action’. Contravention of the provision exposes employees, employers and unions to a range of penalties.

The strike pay provisions were amended in 2005 by the Work Choices legislation. From 27 March 2006 until 30 June 2009, the *WRA* required employers to deduct a minimum of four hours’ pay for any period of industrial action, even if the industrial action was for a duration of less than four hours and even if it took the form of a partial work ban under which employees performed some of their duties.<sup>27</sup> As McCrystal has observed, the effect of these provisions was to expose employers to penalties for paying

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<sup>24</sup> *Conciliation and Arbitration Act 1904* (Cth) s 25A.

<sup>25</sup> This was common in the building and construction industry: see Creighton and Stewart, above n 1, [22.66].

<sup>26</sup> *Industrial Relations Act 1988* (Cth) s 124; see *Mammoet* (2013) 300 ALR 460, [52].

<sup>27</sup> *WRA* s 507(4), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

their employees for work the employees actually performed.<sup>28</sup> This four-hour rule has been retained in the *FWA*, but applies now only to periods of unlawful industrial action. Presumably these ‘minimum deduction’ provisions seek to dissuade employees and their unions from imposing stoppages over trivial matters, although unions may be inclined to urge members to impose longer stoppages than they otherwise would if employees are to be docked a minimum of four hours’ pay.<sup>29</sup>

### 1 The Meaning of ‘Industrial Action’

The federal legislation contains a detailed definition of industrial action and the employees’ actions must fall within the definition before the strike pay provisions will apply. ‘Industrial action’ is defined extensively in section 19 of the *FWA* and the definition is largely consistent with definitions in the *WRA*. ‘Industrial action’ includes a complete withdrawal of labour,<sup>30</sup> the performance of work by an employee in a manner different from that in which it is customarily performed, or restrictions or limitations on, or a delay in, the performance of the work.<sup>31</sup> Industrial action also includes the lockout of employees from their employment by their employer.<sup>32</sup>

In *The Age Company Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services*,<sup>33</sup> the AIRC expressed the view that action is not industrial in character if it stands completely outside the area of disputation and bargaining. The AIRC considered that the definition should be read giving some weight to the word ‘industrial’, but precisely how far this qualification might extend is a question of degree: ‘An employee who does not attend for work on account of illness may not be engaging in industrial action, while an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment clearly is so engaged.’<sup>34</sup>

A good example of the need for action to be ‘industrial’ in character is provided by *CFMEU v Coal & Allied Mining Service Pty Ltd*.<sup>35</sup> In that case, the employer had required employees to submit urine samples for drug testing. The employees objected on the grounds that accurate saliva testing

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<sup>28</sup> McCrystal, above n 21, 199.

<sup>29</sup> See McCrystal, above n 21; Explanatory Memorandum, Fair Work Bill 2008 (Cth) [269].

<sup>30</sup> *FWA* s 19(1)(c).

<sup>31</sup> *FWA* s 19(1)(a).

<sup>32</sup> *FWA* s 19(1)(d).

<sup>33</sup> (2004) 133 IR 197.

<sup>34</sup> *Ibid* [44].

<sup>35</sup> (2008) 175 IR 243.



had become available and such testing was less invasive of the employees' privacy and should be implemented. The employer stood down certain employees for their refusal to take random urine tests and the union sought orders from the AIRC to stop what the union argued was unprotected industrial action, in the form of a lockout of employees by the employer. The AIRC refused to make the order because the stand down was not 'industrial action' within the meaning of the *WRA* — in its context, the action of the employer lacked the necessary industrial character to meet the definition in the Act.

The definition excludes action by employees that is authorised or agreed to by the employer and action by an employee that is based on a reasonable concern by the employee about an imminent risk to his or her health and safety.<sup>36</sup>

### **C      *The Fair Work Act Provisions in Overview***

The current provisions appear in Division 9 of Part 3-3 of the *FWA*. They are very detailed and have been labelled a 'complicated set of rules'.<sup>37</sup> On one view, they 'betoken an almost obsessive desire to ensure that employees do not receive payment in respect of periods during which they engage in (protected or unprotected) industrial action'.<sup>38</sup>

Section 470(1) provides that 'if an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day'. This general rule does not apply to a partial work ban or an overtime ban, which are subject to separate provisions.<sup>39</sup>

In the case of unprotected action, section 474 provides that no payment must be made for the entire period of the action. For unprotected action that runs for less than four hours, a minimum deduction of four hours' pay is required.

Sections 473 and 475 provide that an employee must not accept a payment from an employer if the employer would contravene section 470 or section 474 by making the payment, nor must an employee ask the employer to make such a payment. A union or any officer or member of a union must

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<sup>36</sup> *FWA* s 19(2). The occupational health and safety exception applies only where the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work that was safe and appropriate for the employee to perform.

<sup>37</sup> McCrystal, above n 21, 197.

<sup>38</sup> Creighton and Stewart, above n 1, [22.77].

<sup>39</sup> See *FWA* ss 471(3)–(4), 470(4), 474(2).

not ask an employer to make a payment to an employee if the employer would contravene these sections by making the payment.

Sections 470(1), 473, 474(1) and 475 are all civil remedy provisions under Part 4-1 of the *FWA*. A contravention of any of these provisions gives rise to liability for a penalty under section 539 of the *FWA*. An employer, employee or a union may be prosecuted, and a successful prosecution exposes the defendant to a range of penalties, including fines of up to 60 penalty units (\$10 200) for an individual and or up to 300 penalty units (\$51 000) for a union or an employer that operates in corporate form.<sup>40</sup> Any pressure exerted by employees or their union on an employer to pay strike pay may also contravene section 348, which deals with behaviour that amounts to coercion.

An employer may also refuse to make payments to employees where the industrial action is ‘employer response action’, that is, a lockout by the employer in response to industrial action taken by employees.<sup>41</sup> Unlike the provisions applying to employee industrial action, there is no prohibition on payment where the employer locks out the employees, although it is hard to imagine a circumstance where an employer’s negotiating position would be advanced by paying locked out workers.

Employers and unions cannot get around the strike pay provisions by providing for strike pay in an enterprise agreement. Under the *FWA*, the Fair Work Commission (‘FWC’) cannot approve an agreement that contains prohibited content. Such content includes any ‘unlawful terms’, defined to include a term that ‘is inconsistent with a provision of Part 3-3 (which deals with industrial action)’.<sup>42</sup> By this rather roundabout mechanism, the *FWA* prohibits employers and employees from avoiding the strike pay provisions, even if they might, by agreement, wish to do so.

### **D The Purpose of the Provisions**

No statement of legislative purpose accompanies Division 9 of Part 3-3 of the *FWA* or the equivalent provisions in Part VIIIA of the *WRA*. The object of the *FWA* itself is to ‘achieve productivity and fairness ... underpinned by clear rules governing industrial action’,<sup>43</sup> although this does not take us very far in discerning the specific object of section 470.

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<sup>40</sup> See *FWA* pt 4-1. Penalty units are set under s 4AA of the *Crimes Act 1914* (Cth). One penalty unit is currently \$170 for contraventions committed after 28 December 2012.

<sup>41</sup> *FWA* s 416.

<sup>42</sup> *FWA* ss 409(3), 194(e).

<sup>43</sup> *FWA* s 3(f).

Several judicial statements about the legislative purpose of the strike pay provisions show that judges have interpreted the provisions as aiming to do more than give effect to the ‘no work-no pay’ principle. Some judges have focused on stamping out the practice of taking further industrial action to coerce employers to pay in respect of an earlier strike. Such practices occurred in the past, and were particularly common in the building and construction industry.<sup>44</sup> In *Ponzio v B & P Caelli Constructions Pty Ltd*, Lander J said (inter alia):

The policy of the Act is that if an employee engages in industrial action then it must be at the employee’s own expense [and] ... to discourage unions and their officers from making claims for a payment or engaging in or threatening to engage in or organising industrial action for the purpose of coercing the employer to make a payment to an employee during a period of industrial action. That section has as its added purpose a protection to the employer in the event that a union or its members engage in that further industrial action.<sup>45</sup>

Another purpose that has been discerned is the general discouragement of industrial action. In *Independent Education Union of Australia v Canonical Administrators*, Ryan J stated:

I consider that s 187AA in the context of Pt VIIIA of the WR Act evinces a policy that collective bargaining should occur in an environment where employer and employee are to appreciate and accept the detrimental consequences for themselves of industrial action used as part of the negotiating armoury.<sup>46</sup>

In a similar vein, Gilmour J in *Mammoet* observed that the purpose of section 470(1) ‘was to encourage employers and employees to negotiate and resolve disputes by ensuring that each bears the costs of their industrial action’.<sup>47</sup>

These varied views on purpose suggest that strike pay provisions may serve a variety of purposes. There is nonetheless room for debate about whether all of these purposes necessarily justify the highly prescriptive approach to the issue taken in Division 9 of Part 3-3: the imposition of penalties on unions, employees and employers, and the proscription on parties to enterprise agreements making their own rules about the strike pay issues.

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<sup>44</sup> See Creighton and Stewart, above n 1.

<sup>45</sup> (2007) 158 FCR 543, [83].

<sup>46</sup> (1998) 87 FCR 49, 73–4 (‘IEUA case’).

<sup>47</sup> *CFMEU v Mammoet* (2012) 206 FCR 135, 142.

There are various issues concerning the scope and interpretation of the current provisions, in particular the meaning of ‘payments to an employee’ and the interpretation of the provisions governing payments where the industrial action consists of a partial work ban. These are addressed in the next section.

## IV THE SCOPE OF THE STRIKE PAY PROVISIONS

### A *What is ‘Making a Payment to an Employee’ under Section 470?*

Although they have discerned a range of purposes in the strike pay provisions, the courts have generally agreed that the provisions prohibit the payment of wages during a strike. In the *IEUA case*, Ryan J said that the detrimental consequences for the employee were normally ‘loss of remuneration in respect of the period of the industrial action and for the employer they are the loss of production attendant on a lockout’.<sup>48</sup> This is, of course, consistent with the common law no work-no pay principle and with the Explanatory Memorandum to the Fair Work Bill,<sup>49</sup> and is supported by a plain reading of section 470.

What has been less clear until the recent decision of the High Court of Australia is whether the prohibition on ‘making a payment to an employee’ in section 470 and its predecessors in the *WRA* extends to payments *other than* the wages or salary that the employee would have earned had that employee worked during the period of the industrial action. Some courts have suggested that the prohibition might extend further than non-payment of wages. It has been said, for example, that the purpose of the provisions was to ensure ‘that employees are to bear the economic loss of their industrial action’,<sup>50</sup> or that if an employee engages in industrial action then ‘it must be at the employee’s own expense’.<sup>51</sup>

The issue of the reach of the prohibition on payments to employees in section 470 has been settled only very recently by the High Court in *Mammoet*. The decision justifies detailed consideration, given that it provides an important clarification of the reach of the provisions.

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<sup>48</sup> *Mammoet* (2013) 300 ALR 460, [58], quoting the *IEUA case* (1998) 87 FCR 49 (Ryan J).

<sup>49</sup> Explanatory Memorandum, Fair Work Bill 2008, [259].

<sup>50</sup> *O’Shea v Heinemann Electric Pty Ltd* (2008) 172 FCR 475, 487.

<sup>51</sup> *Ponzo v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, [83].

## 1 *The Mammoet Litigation in the Federal Circuit Court and Federal Court*

The issue of the reach of section 470 of the *FWA* arose from the taking of protected industrial action by employees of Mammoet Australia Pty Ltd in pursuit of a new enterprise agreement governing their employment. The employees worked in gas production on the Burrup Peninsula, a remote area of Western Australia. Because of the remoteness of the region, the employees worked on a fly in/fly out basis. Under the enterprise agreement applying to their employment,<sup>52</sup> the employees were provided with accommodation paid for by Mammoet whilst on site, or were entitled to an allowance if accommodation was not provided, given that their 'work was at such a distance that they could not return to their usual place of residence each night'.<sup>53</sup>

In April 2010, the CFMEU, as the employees' bargaining agent, gave notice that the employees would take protected industrial action for a period of 28 days from 28 April. Mammoet required the employees to vacate their accommodation for the duration of the strike, asserting that the provision of the accommodation at its expense constituted a 'payment' to the employees and was therefore prohibited by section 470.

The union commenced litigation, claiming that the refusal to provide the accommodation was 'adverse action' taken because the employees were exercising a 'workplace right' (being the right to take protected industrial action in pursuit of a new enterprise agreement).<sup>54</sup> Lucev FM rejected the union's case, upholding a submission by Mammoet that there was no case to answer because the employer-provided accommodation was a 'payment' prohibited by section 470(1) and requiring the employees to vacate it could therefore not be adverse action. In making his ruling, Lucev FM accepted that the purpose of section 470 was to require employees to 'bear the economic loss of their industrial action', and that the continued provision by the employer of paid accommodation would defeat that purpose.<sup>55</sup> The Federal Magistrate took the view that it was consistent with Parliament's intention that the employees 'should bear, not only the loss of remuneration for the

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<sup>52</sup> This agreement had expired and the parties were negotiating a new agreement. Under the *FWA*, an expired agreement continues to operate until replaced by a new agreement.

<sup>53</sup> This was the definition of 'distance worker' in cl 42 of the *Mammoet Australia Pty Ltd Pluto Project Greenfields Agreement 2008*.

<sup>54</sup> The workplace rights provisions are in *FWA* pt 3-1. The adverse action was the alteration of the employees' position to their detriment because they had exercised a 'workplace right', being the right to take protected industrial action: see *FWA* ss 340-2.

<sup>55</sup> *CFMEU v Mammoet Australia Pty Ltd* (2011) 254 FLR 59, [111].

period of protected industrial action, but also the burden of all financial consequences of that action'.<sup>56</sup>

The union appealed unsuccessfully to the Federal Court on the question of the meaning of 'payment to an employee' in section 470(1). Gilmour J took the view that the expression should not be interpreted narrowly and that if Parliament had intended section 470 to prohibit only the payment of wages, then 'it could have employed that language or language to that effect'.<sup>57</sup>

The decisions were handed down during the period of the government's review of the first three years of operation of the *FWA*. Several submissions to the review expressed concern about the implications of the decisions in *Mammoet* and the need for amendment to section 470 to overturn the decision.<sup>58</sup> The Review Panel was sympathetic to those submissions and wrote in its final report:

The interpretation of the court potentially presents a problem for any employee engaging in protected industrial action where provision of accommodation forms part of their overall remuneration. It also presents a problem for all employers of those employees, as making payment for periods of industrial action in contravention of this requirement is a civil remedy provision. Accordingly, the interpretation of the court is likely to result in substantial disruptions to employees and employers, as the practical effect is to require an employer to cease providing accommodation to employees for the duration of protected industrial action.<sup>59</sup>

The Report stated that the requirement to remove an employee from the accommodation as a consequence of that employee taking industrial action had a demonstrably harsh impact on employees in the *Mammoet* case. It agreed that the interpretation of section 470 undermined the capacity for employees, who live away from home in accommodation provided by their employer, to take protected industrial action. The Report recommended that section 470 be amended to make clear that 'payment' did not extend to the provision by employers of accommodation to employees working in remote areas.

The recommendation was strongly supported by the Australian Council of Trade Unions ('ACTU'), which was concerned that the outcome of the litigation 'undermines the ability of thousands of employees engaged in

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<sup>56</sup> *Mammoet* (2013) 300 ALR 460, [30].

<sup>57</sup> *CFMEU v Mammoet Australia Pty Ltd* (2012) 206 FCR 135, [43].

<sup>58</sup> Submissions were made by the ACTU, the CFMEU, the Electrical Trade Union and the Australian Workers Union.

<sup>59</sup> Commonwealth of Australia, *Report of the Review of the Fair Work Act* (2012) 185.

remote areas to take protected industrial action by imposing a significant financial burden on workers'.<sup>60</sup>

The recommendation was not taken up by the government in its amending Bill<sup>61</sup> in response to the Review Panel's report. However, the decisions in the Federal Circuit Court and the Federal Court were overturned by the High Court.

### **B The High Court Decision**

On 12 April 2013, the High Court gave the CFMEU leave to appeal the Federal Court's decision in *Mammoet*. In a unanimous judgment, the High Court allowed the appeal in its decision handed down on 14 August 2013. The focus of the decision was the meaning of section 470.

The Court accepted that the purpose of section 470(1) is to allocate the economic loss attributable to industrial action as between employers and employees.<sup>62</sup> The Court considered it 'quite plain', however, that 'the provision does not comprehensively address the allocation of all the costs of [the] industrial action'.<sup>63</sup> Nor does the provision 'prohibit the performance of the entirety of the obligations of an employer to its employees for the duration of the industrial action'.<sup>64</sup>

The enterprise agreement required the employer to provide accommodation at its expense to its employees that were 'distance workers' as defined by the agreement. The Court took the view that the provision of such accommodation may involve the transfer from the employer to the employee of an economic benefit. This benefit may be capable of being expressed in terms of monetary value, but that of itself did not mean there had been a 'payment' by the employer to the employee of that sum.<sup>65</sup>

The Court looked to other provisions of the *FWA* where the term 'payment' was used to ascertain the meaning of 'payment' in section 470 and concluded that when the *FWA* speaks of 'payment' it means payment of money.<sup>66</sup> The true construction of section 470 was also to be ascertained by the nature of

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<sup>60</sup> ACTU, Response to *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, 21 August 2012, 28.

<sup>61</sup> Fair Work Amendment Bill 2013 (Cth).

<sup>62</sup> *Mammoet* (2013) 300 ALR 460, [42].

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* [46].

<sup>66</sup> *Ibid* [47].

section 470 as a civil remedy provision. Like criminal penalties, a civil penalty ‘should be “certain and its reach ascertainable by those who are subject to it”’.<sup>67</sup> This requirement of certainty would not be satisfied if an employer could be subject to a penalty not only by taking some positive action (paying wages to striking employees), but by doing no more than maintaining the status quo (such as permitting employees to continue to use accommodation paid for by the employer). The Court pointed also to the legislative history of the strike pay provisions to show that it is the non-performance of work by the employee that is the occasion of the proscribed payment.<sup>68</sup>

Having observed that the *FWA* in fact contemplates the continued subsistence of the employment relationship during and after industrial action,<sup>69</sup> the Court turned to consider the means by which the employees came to receive the accommodation at the work site. The benefit of the accommodation was established by the enterprise agreement binding the parties. On a plain reading, the accommodation was a benefit to which the employees were entitled upon attending at the work site, unless and until they were directed to return to their usual place of residence. The provision of the accommodation was therefore ‘neither a payment of money, nor provided in relation to the non-performance of work during the period of industrial action’.<sup>70</sup>

Finally, the Court considered an allied argument that because the employees were not ready, willing and able to work, they were not entitled to the provision of accommodation for the period when no work was performed. The Court impliedly rejected the application of this common law principle and focused instead on the terms of the enterprise agreement as defining when the entitlement to accommodation arose. The Court reasoned that:

The effect of the Agreement is that, while the employment relationship subsists, accommodation is to be provided by the respondent to its employees who have acted upon its instruction to travel to the location of the Project. It is the continuation of the employment relationship and the employee’s entitlements under it which is the condition on which the provision of accommodation depends.<sup>71</sup>

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<sup>67</sup> *Ibid* [48], citing with approval *DPP (Cth) v Keating* (2013) 87 ALJR 657, [48]. See also *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1, 47–8.

<sup>68</sup> *Mammoet* (2013) 300 ALR 460 [52]–[59].

<sup>69</sup> *Ibid* [59].

<sup>70</sup> *Ibid* [61].

<sup>71</sup> *Ibid* [72].



Finally, the High Court made it clear that, in the light of the meaning of section 470, the denial of accommodation to the employees in all the circumstances would constitute adverse action under section 342 of the *FWA*:

[T]he respondent's denial of accommodation would be an alteration of the position of the relevant employees to their prejudice so as to constitute adverse action within the meaning of s 342 of the Act. Even though the refusal of accommodation would ... not be a denial of a legally enforceable entitlement, it would effect a deterioration in the advantage enjoyed by the relevant employees had the refusal of accommodation not occurred.<sup>72</sup>

For all these reasons, the High Court allowed the appeal by the CFMEU and remitted the matter to the Federal Circuit Court to be heard and determined according to law.

The decision gives welcome clarification of the scope of the prohibition in section 470 and has important implications for employees wishing to exercise their right to engage in protected industrial action. Employees must forgo their wages, but are not required to forgo other non-wage benefits under their contracts or enterprise agreements. Thus, such employees are not to be made to suffer additional economic loss that may have the practical effect of discouraging them from exercising an important industrial right.

### **C      *Payments for Partial Work Bans under Division 9***

As discussed in Part III, the strike pay provisions apply not only to situations involving a complete stoppage of work, but also to partial work bans. Section 471(3) defines a partial work ban as industrial action that is *not* a failure or refusal by an employee to attend for work, or a failure or refusal by an employee who attends for work to perform any work at all, but excludes a ban on overtime, which is subject to its own provisions. In the case of a partial work ban that is protected industrial action, section 471 allows the employer to elect to pay nothing, or to pay a proportion of the employees' wages, provided that the employer gives written notice in advance of what it intends to do.<sup>73</sup> These provisions reflect the common law principles on part performance and reflect the employer's right to demand performance of all duties before any wages are paid. The right is, however, subject to the

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<sup>72</sup> Ibid [73]. Section 342(1) of the *FWA* defines 'adverse action' to include action that 'alters the position of the employee to the employee's prejudice'. In its earlier decision in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, [4], the Court made it clear that these words were not confined to the alteration of a legal right.

<sup>73</sup> *FWA* s 471(4).

employer giving formal written notice of the intention not to pay. The provisions are an innovation introduced by the *FWA*, the purpose of which is to provide employers with flexibility and discretion in managing partial work bans that constitute protected action.<sup>74</sup>

Under section 471, the employer is required to give notice to employees in advance of an intention not to pay at all, or stating what proportion of the employees' wages will be paid; otherwise full payment must be made. The regulations prescribe requirements relating to the form of notice given and the content of such notice.<sup>75</sup> The employer is taken to have given notice to the employee in accordance with that paragraph if the employer has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any), receives the notice and has complied with any requirements prescribed by the regulations. Where the legislative requirement to give notice relates to substantive rights, the federal tribunal has generally required substantial compliance with the notice provisions.<sup>76</sup>

### 1 *Determining Part Payment*

Although under section 471(4) the employer may pay nothing during a partial work ban, an employer may consider it politic to pay some wages, not least because a failure to pay at all may prompt a full strike.<sup>77</sup> The payment for a partial work ban is worked out according to the regulations, which require a three-step process: first, the employer must determine the 'work' that is the subject of the ban; next, the employer needs to calculate the proportion of time the employee would have spent on performing that work; and finally the employer reduces the employee's total pay by that proportion.<sup>78</sup> The amount to be deducted is not intended to represent damages suffered by a business, but to relate to the proportion of the employee's work not performed, calculated according to his or her normal wages.<sup>79</sup>

This proportion of total wages that the employer elects to pay may be challenged by employees in the FWC, which has the power on application to make an order substituting its own calculation for the employer's.<sup>80</sup> In doing

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<sup>74</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [301].

<sup>75</sup> *Fair Work Regulations 2009* (Cth) regs 3.22–3.24.

<sup>76</sup> See, eg, *Capricornia Pty Ltd t/a Quality Hotel Batman's Hill on Collins* [2011] FWA 727.

<sup>77</sup> The option of a full strike must have been included on the ballot paper when the union balloted its members about their preparedness to take protected industrial action as part of the bargaining for a new enterprise agreement.

<sup>78</sup> *Fair Work Regulations 2009* (Cth) reg 3.21.

<sup>79</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) [309].

<sup>80</sup> *FWA* s 472.

so, the FWC must take into account whether the proportion specified in the employer's notice was reasonable having regard to the nature and extent of the partial work ban and to fairness between the parties, taking into consideration all the circumstances of the case.<sup>81</sup>

Two recent cases on payment for partial work bans have exemplified the sorts of considerations that the FWC regards as relevant in determining part-payment in the case of partial work bans. Clearly section 472 arms the Commission with the discretion to consider factors other than those that the employer is expressly required to consider under Regulation 3.21. This poses some difficulties for employers wishing to exercise their statutory right to pay only a proportion of wages because they clearly need to consider a wider range of factors than the proportion of total time that the banned work represents if they want their calculation of reduced wages to survive a potential challenge.

In *Transport Workers Union v Department of Territory and Municipal Services (ACTION)*,<sup>82</sup> the ACTION bus company in the Australian Capital Territory (ACT) gave notice that it would dock bus drivers' wages by two-thirds in respect of a one-week work ban during which the drivers continued to drive the buses but refused to accept cash fares. The partial work ban was lifted whilst the drivers' union challenged the notice.

Commissioner Deegan considered that the 'proper application' of Regulation 3.21 required a careful consideration of what was 'work' for the purposes of the required calculation. She held that 'work' in this context is capable of meaning more than just the physical task that is banned and that the question of what 'work' is includes consideration of the overall impact of the banned task on the work.<sup>83</sup> Whilst taking cash fares might occupy only a small amount of time during each shift, the impact of the ban went further than loss of cash fare revenue alone. She considered that a failure by the drivers to collect cash fares would result in a large proportion of passengers, who would normally use other ticketing methods, instead proffering cash, confident that it would not be accepted.<sup>84</sup> A ban on the collection of fares would also impact on the entire community as ACTION was taxpayer-funded

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<sup>81</sup> FWA s 472(3).

<sup>82</sup> (2010) 197 IR 1.

<sup>83</sup> Ibid [34]. This interpretation is consistent with common law principles for determining part-payment.

<sup>84</sup> Ibid [46].

and the lost revenue was likely to result in an additional government subsidy being required.<sup>85</sup>

Whilst acknowledging that fairness as between the parties was a difficult concept to apply in this context, Commissioner Deegan said that it was relevant to consider that the ban was designed to have maximum impact on the employer whilst having the least possible impact on drivers' wages. It was also relevant to take into account (in the employees' favour) that a bus service was still being provided and that the impact on revenue of non-collection of fares was not severe for the company, given that the service was heavily subsidised by government. The Commissioner calculated a pay deduction of 20.1 per cent, being the percentage that fare collection contributed to the overall cost of providing the bus service.

In *AIMPE v Port of Brisbane Pty Ltd*,<sup>86</sup> the union challenged the reduction in pay by the Port of Brisbane for a partial ban on the maintenance of a dredging vessel. The employer's reduction of the engineers' pay of 35 per cent was calculated by reference to the maintenance activity on the vessel over the previous 12 months.<sup>87</sup> The union argued that the reduction was unfair, given the actual work done during the industrial action.

Commissioner Harrison accepted that the assessment of whether the proportionate reduction was reasonable — having regard to the nature and extent of the partial work ban — is an assessment which is undertaken prospectively at the time of issuing the notice rather than retrospectively after the partial work ban ceases.<sup>88</sup> He considered that the holistic approach adopted by the employer (looking at an average over 12 months) was sensible in light of the evidence about the inherent lack of predictability regarding the nature and extent of the work that would have been required to be performed if not for the partial work ban during the industrial action period. Whilst he was willing to give consideration to the union's reasons for disputing the employer's calculations, the Commissioner concluded that the union had failed to provide sufficient evidence to satisfy him that he should disturb the 35 per cent proportionate reduction assessed by the employer when the notice was given.<sup>89</sup>

An interesting aspect of this decision was the Commissioner's view that the fairness criterion in section 472(3)(b) supported a retrospective assessment of

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<sup>85</sup> *Ibid* [41].

<sup>86</sup> [2011] FWA 4653.

<sup>87</sup> *Ibid* [30].

<sup>88</sup> *Ibid* [67].

<sup>89</sup> *Ibid* [71]–[74].

the impact of the partial work ban. Under this criterion, Commissioner Harrison was influenced in his decision not to vary the employer's deduction by the fact that it had incurred costs as a result of the TSHD Brisbane having to move from Hay Point to Cairns. The partial work ban was the reason for the dredge having to relocate as it did, and this was the direct cause of significant costs to the employer as it was required to pay compensation to North Queensland Bulk Ports.<sup>90</sup>

With respect, this approach appears contrary to the intent of the provisions as set out in the Explanatory Memorandum to the Fair Work Bill, which stated that the reduction in pay for a partial work ban is not intended to serve as damages for losses suffered by the employer (given that this is protected industrial action) but only to represent the wages value of the unperformed work. The issue may need to be resolved by a Full Bench at a future time.

#### **D Overtime Bans**

Overtime bans are not partial work bans for the purposes of Division 9 and have their own rules. Under sections 470(4) and 474(2), the requirement on the employer not to make payment applies only if the employee was specifically requested or required to work a period of overtime, the employee refused to work that period of overtime, and the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement, or the employee's contract of employment.<sup>91</sup>

These specific provisions were designed to address the situation that arose in *O'Shea v Heinemann Electric Pty Ltd*,<sup>92</sup> a decision made under the provisions of the WRA, which did not make specific provision for overtime bans. A dispute had arisen about the employer's obligation to pay in a case where a number of employees worked their normal day of 7.45 am to 4.30 pm, but refused to work overtime shifts that ran between 4.40 pm and 6.30 pm. The employer argued that the employees were engaged in one continuous period of industrial action from the first day of the overtime ban until the last day of that ban; the ban was clearly in place and was not lifted and re-applied on a daily basis and, for this reason, it constituted ongoing industrial action. Therefore, the employer was correct in withholding all payments whilst the industrial action was on foot.

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<sup>90</sup> Ibid [57]–[58].

<sup>91</sup> For a fuller discussion, see McCrystal, above n 21, 203–5.

<sup>92</sup> (2008) 172 FCR 475.

The Federal Court rejected the employer's arguments, finding that industrial action is not necessarily considered a continuing period of industrial action if it is broken by a period of ordinary work. Accordingly, the industrial action occurred only for the duration of the overtime shift, being two hours each day. The employer could therefore refuse pay for those two hours.<sup>93</sup> The court observed that '[i]n a case where the employees have contributed the benefit of a full day's work to their employer, it seems contrary to the intention of the provision to punish employees beyond the calculation allowed for in the provision'.<sup>94</sup> The provision was not meant to be punitive.

## V CONCLUSIONS

The principle that employees who fail to work because they are engaged in industrial action should not be paid is far from new. The no work-no pay principle has long been a part of the common law of employment.

The *FWA* provisions regulating strike pay have been largely uncontroversial, if submissions to the Fair Work Act Review are any indication. This can probably be explained by the advantages the current provisions have over the *WRA* provisions they replaced, particularly with respect to the abolition of the minimum four-hour pay deduction (for protected industrial action at least) and the treatment of pay for partial work bans. The common law rules on the payment of wages in circumstances of part performance have lacked clarity, and the *WRA* did not deal with this form of industrial action at all. The strength of the current provisions is that they recognise that employees who actually do some productive work can be paid something for that work and that employees are also entitled to know in advance by how much the employer proposes to reduce their pay. The requirement reflects a principle of fairness — that employers should pay for the labour from which they benefit. Employers must give notice in writing if they plan to refuse all payment in cases where not all duties are performed. On the 'nuts and bolts' issue of how much the employer determines should be paid there are few tribunal decisions. Those there are suggest that there is a mismatch between the method set out in the regulations for how employers are to calculate reduced payments made to employees engaged in partial work bans, and the considerations applied by the FWC should the employer's pay notice be challenged. If considerations of fairness and the impact of the omitted work (rather than the proportion of time the duties take) are relevant, as the decisions suggest, it would be better specifically to require employers to turn

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<sup>93</sup> However, the employer was also entitled to not pay two hours of ordinary working time due to the four-hour minimum deduction rule that applied at that time.

<sup>94</sup> *O'Shea v Heinemann Electric Pty Ltd* (2008) 172 FCR 475 [32].

their minds to them when they make their calculations. It is also important that the Commission does not endorse the use of pay reductions as a de facto mechanism for compensating the employer for economic loss, as was hinted at in the *Brisbane Ports* decision. To do so has the potential to undermine the protection given by the *FWA* to lawful industrial action.

As far as the scope of the prohibition on strike pay is concerned, the *Mammoet* decision in the High Court has brought welcome clarification to the question of what constitutes ‘payments to an employee’ in section 470(1). Payments are confined to the wages the employees would have earned during the period of industrial action and do not include accommodation to which an employee is entitled under his or her enterprise agreement. The principle established in the decision probably extends to the provision of other benefits that the employee is entitled to under the instruments that cover his or her employment. If the decision had been different, employees working away from home would have found themselves less able than other employees to exercise the rights under the *FWA* to take protected industrial action because of the serious financial implications for them of exercising those rights. The rights of employees to take protected industrial action are already heavily circumscribed; any further limits on such a right should not be able to be achieved indirectly via the strike pay provisions.

It must be acknowledged, however, that there is some truth in the observation that the strike pay provisions of the *FWA* reflect an ‘almost obsessive desire’ to ensure that employees do not receive payment for those times in which they engage in industrial action, whether that action is protected or unprotected. This is reinforced by the provisions of the *FWA* that make it impossible to get an enterprise agreement approved by the FWC if it contains provisions that deal with strike pay, even if the parties have negotiated their own terms dealing with the issue.

There may be a number of reasons for the extremely detailed regulation of this relatively straightforward issue. The detailed provisions on strike pay are a legacy of the Howard government’s workplace laws, which in many respects exemplified ‘command and control’ regulation, focusing on detailed government regulation of major facets of collective employment relationships, rather than letting the parties reach their own agreements on matters that affected them, underpinned by a floor of minimum rights and requirements.<sup>95</sup> It also reflects a preoccupation of the Howard government with curbing the power of the more militant unions in Australia, particularly those representing

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<sup>95</sup> See Sean Cooney, Jill Murray and John Howe, ‘Time and Money under Work Choices: Understanding the New Workplace Relations Act as a Scheme of Regulation’ (2006) 29 *University of New South Wales Law Review* 215.

building and construction workers. It was these unions that most often used industrial power to persuade employers to pay their members for time spent on strike.

As Stewart has observed, the *FWA* retained many features of the *WRA* and indeed the Work Choices laws. The detailed strike pay provisions, albeit in an expanded form, are part of this retention. As Stewart points out, this can be explained by, amongst other things, a desire by the Rudd Labor government to placate business interests, distance itself from the union movement and also to retain a 'balance' in the *FWA* between the interests of business on the one hand and employees and their unions on the other.<sup>96</sup> Now that a Coalition government is in power, it would seem unlikely that the prescriptive rules about strike pay will be relaxed, but at the same time there is no indication that the government is interested in overturning the interpretation given to 'payments to an employee' in the *Mammoet* decision, which is favourable to employees. Those interested in the area will continue to watch the interpretation of the provisions by the courts and the FWC and wait to see if the forthcoming Productivity Review of the *FWA* has anything to say about these important provisions and other related facets of Australian workplace legislation.

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<sup>96</sup> Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 45–7.