Several months after his release from Robben Prison in February 1990, Nelson Mandela toured Australia. On 25 October 1990 he addressed an audience of Victorian trade unionists at the Melbourne Town Hall. Throwing away his prepared presentation, he gave a passionate and lengthy oration. That day, Mandela lavished praise on the first organisations outside South Africa to take direct action to protest against apartheid: the Seamen’s Union of Australia and the Waterside Workers’ Federation. In 1959, the Unions had imposed bans on the loading and unloading of South African ships.

Although it’s rarely celebrated, the right to strike is a fundamental human right enshrined in international law. The right to strike is closely associated with the right of employees to collectively bargain with their employer and also with the rights of freedom of association. For workers, this usually means the right to both join a trade union and to be an active participant in it. In any health check of the right to strike, invariably it is necessary to also examine the capacity of employees to collectively bargain through the unions they belong to. They are inextricably linked.

The International Labour Organisation (ILO) has stated that:

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

But when it comes to the right to strike, Australia is a backwater. The ILO has been a constant critic of Australia’s failure to comply with its international legal obligations arising from the severe restrictions it imposes on collective bargaining and the right to strike. The criticisms have gone unheeded. Industrial action, including strike action, is dying out. The number of employees whose employment is governed by collective agreements is receding at a rapid rate and the proportion of employees who are union members has collapsed to the point of existential crisis for trade unions. Union density hovers at a pitiful 14.5% of the workforce. Approximately 90% of the private sector workforce are not union members. Australian union membership has collapsed more sharply than virtually any other OECD country because our laws and policies are some of the most repressively hostile to unions in the developed world.

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Unions require fee paying members to survive and thrive. But they cannot grow or thrive under the current system because, by law, unions are required to provide their services to non-members for free. Any business seeking to prosper and grow could not do so under such a constraint.

After decades of concerted political and legislative attacks, unions have been vilified, delegitimized and weakened. They are subject to a suffocating hyper-regulation and are frequently pursued by multiple, aggressive regulators. Some recent highlights include:

- On 13 September 2017 Nigel Hadgkiss, resigned from his position as head of the regulator, the Australian Building and Construction Commission. Hadgkiss resigned shortly after admitting to the Federal Court that he breached the Fair Work Act 2009 (Cth) by directing the regulator not to publish changes to union right of entry legislation that would benefit unions. Hadgkiss failed to correct the agency’s misleading website even after staff of the regulator brought the misrepresentations to his attention. After his resignation, he was fined $8,500.00 by the federal court.

- On 25 October 2017, 32 Australian Federal Police (AFP) officers raided the offices of the Australian Workers’ Union (AWU) seeking to obtain documents in relation to political donations made in 2006 to the ALP and to GetUp! A trade union is required to hold such records for 7 years. The legality of the AFP raid and the underlying investigation of the regulator, the Registered Organisations Commission is currently being challenged in the Federal Court.

- On 15 May 2018, the prosecution of two union officials of the Victorian branch of the construction union was withdrawn after the evidence of prosecution witnesses from concrete business Boral was discredited. The prosecution for blackmail was an attempt to criminalise Union collective bargaining. Blackmail charges were originally recommended in 2014 by the Heydon Royal Commission into Trade Unions.

The last vestige of institutional respectability for the trade union movement is its role in the superannuation industry. Industry superannuation funds, jointly steered by union and employer representatives, have routinely outperformed their competition. And yet since 2015, the federal government has attempted to legislate to encourage employees to move into inferior funds and to dilute union involvement with industry funds. Industry superannuation funds are being brought before the current banking Royal Commission with the intent to try and further the government’s agenda of de-unionising them.

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**Without collective bargaining there is no bargaining**

“The right to strike is essential in any meaningful system of collective bargaining. Fair and balanced bargaining requires all parties to have a comparable measure of bargaining strength. Without at least the credible threat of industrial action, workers do not sit as equals with employers at the bargaining table. The realistic prospect of workers taking industrial action is the difference between collective bargaining and collective beseeching.”

Without collective bargaining, there is no bargaining at work. Although they are agreements with individuals, there is nothing individual about an employment contract. Employment contracts are routinely pro forma documents. Invariably, they are prepared by company lawyers, presented by the company and then executed by employees unchanged. There are terms about confidentiality, restraints of trade, termination of employment, company policies and so on. Individual employment contracts are all in remarkably similar terms, reflecting the trends in thinking of human resources managers and employment lawyers. Frequently, the font of the law firm that prepared an employee’s contract can be discerned by experienced employment lawyers.

During the Howard Government’s infamous WorkChoices era, a statutory individual employment agreement known as an Australian Workplace Agreement (AWA) was introduced. In promoting AWAs, the government stated that “AWAs offer an employer and employees the opportunity to make an agreement that best suits the specific needs of individual employee.” That opportunity was a mirage. In practise, AWAs were identical documents imposed on thousands of employees, many of which reduced remuneration and other benefits. Telstra successfully imposed many thousands of identical AWAs on its workforce.

In contrast, the terms of an enterprise agreement made by an employer and a trade union vary widely, reflecting genuine negotiation and collective bargaining. In some cases, they are concluded after strike action has been taken. Some collective agreements may contain a detailed disciplinary process, affording employees the right to natural justice. Others may have no such protection. The point is that their terms differ, reflecting the fact that they are only concluded after bargaining has taken place. There is no one-size-fits-all imposition on the employees. In larger workplaces, employees have tended to enjoy greater bargaining power, reflected in the terms that they are able to negotiate.
The right to strike in international law

The right of workers to band together and bargain for better conditions with representatives they choose is enshrined in two ILO conventions which were both ratified by Australia in 1973, namely:

- Article 10 of the ILO’s Freedom of Association and Protection of the Right to Organise Convention, 1948 (ratified by Australia in 1973); and

Article 10 of the Freedom of Association and Protection of the Right to Organise (1948) provides protection for furthering the interests of the members of an association, and article 4 of the Right to Organise and Collective Bargaining Convention (1949) requires measures to be implemented to ‘encourage and promote’ voluntary collective agreements between employees and employers. ILO jurisprudence interprets the freedom of association and the right to bargain collectively as being inclusive of the right to strike to achieve those aims.

The right to freedom of association has been further recognised through the following additional conventions:

- Article 20 of the Universal Declaration of Human Rights;
- Article 8(d) of the International Covenant on Economic, Social and Cultural Rights;
- Article 11 of the European Convention on Human Rights; and

The right to strike is expressly conferred by Article 8(d) of the International Covenant on Economic, Social and Cultural Rights, which was ratified by Australia in 1975.

History of the right to strike in Australia

For most of Australia’s legal history, a right to strike has not been recognised.

The Conciliation and Arbitration Act 1904 (Cth) prohibited all strikes and other industrial action. The statute imposed a penalty of up to 1000 pounds for any person who engaged in strike action. Strike action was outlawed in favour of vesting a national tribunal with the power to settle industrial disputes through the use of conciliation and arbitration processes. Unions and employers were required to refer unresolved industrial disputes to the tribunal. If the dispute could not be resolved by conciliation, the tribunal could make a binding arbitration known as an award.

All strikes remained unlawful. All strike action could be pursued by recourse to the common law and the industrial torts. Injunctions and damages were pursued against unions and employees. The model of a national umpire settling industrial disputes without a legislated right to strike prevailed for most of the 20th century.

In 1993, a limited right to strike was first enshrined in legislation in Australia. Even then, it’s not entirely accurate to describe the changes in the statute as conferring a right to strike. Rather, the Industrial Relations Reform Act 1993 (Cth) (IRR Act) provided an immunity from liability from legal action for employees and unions taking strike action in limited circumstances. Such strike activity came to be known as “protected action”. This change reflected an intention to deregulate the industrial relations system and move away from centralised wage fixing. Instead, the new system gave primacy to collective bargaining at the enterprise level – that is permitted employees and their union to collectively bargain with an employer and in certain circumstances take industrial action without liability for loss. Employers were permitted to take lockout action against striking workers.

Since that time, industrial relations policy has continued to be fiercely contested at each federal election and the laws have been frequently altered. Business lobbyists have consistently campaigned for reform of the IR system, a campaign which continues to this day. Over time, the capacity to effectively collectively bargain has been constrained by legislative change.

When elected in 1996, the Howard government legislated to enhance the powers of the national tribunal to stop or prevent industrial action that was occurring outside of the permitted framework and to restore an earlier prohibition on secondary boycotts.

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5 Giudice, G. The Right to Strike in Australia, 2.
The Workplace Relations (Work Choices) Act 2005 (Cth) (the infamously coined WorkChoices) put in place an elaborate and highly technical regime of requirements that had to be followed in order for strike action to be ‘protected’. It reduced the range of matters that could be pursued in bargaining. It also increased the powers of the Commission to suspend or terminate industrial action. A failure to comply with the highly prescriptive and technical requirements of WorkChoices meant that the industrial action was ‘unprotected’ and opened organising unions to penalties and compensation.

Upon its election in 2007, the Rudd government announced a review of Australia’s workplace laws, and eventually introduced the Fair Work Act 2009 (Cth) (FW Act). The scheme overwhelmingly left in place the limitations upon the right to strike prescribed by WorkChoices.

Over recent decades, restrictions on the activities of unions, severe restrictions on industrial action and the substantial penalties for contravening those restrictions have seen strike action collapse to record low levels. Unions, their officers and individual employees can now be pursued not only by employers but by aggressive regulators seeking substantial fines well after any industrial dispute has been resolved. Trade unions are not regulated like banks and other companies. There are no cosy arrangements. No joint press releases. No staff secondments. Unions are hamstrung by excessive regulation and impaired by frequent prosecution by the regulators – the Fair Work Ombudsman, the Registered Organisations Commission and the ABC.

The state of the nation’s right to strike – on life support

Although employees and their unions notionally enjoy an ability to engage in strike action, it is severely restricted. As work is fractured, fragmented and restructured, the right to strike is becoming increasingly irrelevant to many workers. For example, employees working in 7 Eleven stores cannot bargain with franchisors like 7 Eleven, whose non-negotiable contracts with franchisees severely impact their remuneration, because franchisors are not the employers of the employees.

Strike action during the life of a collective agreement is prohibited. This means that where, for example, an employer reneges on crucial terms of the agreement or sacks all union delegates during the life of an enterprise agreement, strike action is illegal.

Overwhelmingly, the right to strike only exists in the window after the expiry of the term of an enterprise agreement with an employer and only where workers are seeking a further agreement.

Sympathy strike action and strikes in support of political objectives are also unlawful. Should the federal government move to legislate the privatisation of the ABC today, employees could not lawfully strike.

Employees are not free to bargain or take strike action in support of all claims. There is no freedom of contract for collective agreements. Pursuing claims that enhance employment security or seek bargaining agents’ fees are impermissible.

Employees cannot bargain for industry wide outcomes or pattern bargain in respect of a multitude of employers.

To initiate strike action in support of a new enterprise agreement within a designated bargaining period, workers must comply with the following requirements:

1. The bargaining representative must attempt good-faith bargaining with the employer.
2. Once this ‘fails’ then the bargaining representative must apply to the Fair Work Commission, demonstrate that the bargaining has failed, and seek an order to conduct a postal ballot to vote on proposed industrial action.
3. If the application is successful, a secret ballot referendum must be held for all members covered by the agreement that is the subject of proposed industrial action.

a. The ballot must outline the exact form of proposed industrial action, and must then be approved by the members. For example, the ballot must specify the date/s, the duration, the time of commencement, and the restrictions that will occur as part of the proposed strike action.

b. If industrial action occurs outside of the specifications of the ballot then industrial action may be challenged by the employer and be suspended or terminated by application to the Fair Work Commission.

4. A majority of members must return their votes by post.
5. A majority of those returned ballot papers must be in favour of the proposed strike action.

12. Fair Work Act 2009 (Cth) s 459 (1) (c).
Despite the fact that this ballot process can often take weeks, the union only has 30 days to initiate the industrial action from the date at which the ballot results are declared.\(^{13}\) If the 30 days lapses, then the action becomes illegal and may be subject to penalties as well as suspension and/or termination orders.\(^{14}\)

The union must provide detailed notice and disclosure of the nature of the industrial action including the timing of the action at least three days prior to the action occurring.

In practise, the technical requirements are a lawyers’ picnic, enabling employers to frustrate and delay strike action. Even where there is complete compliance, the limited right to strike is all too easily removed because the Fair Work Commission (FWC) is vested with considerable power to suspend or terminate protected industrial action.\(^{15}\) It must suspend or terminate protected industrial action if satisfied that the action is “…causing or threatening to cause, significant economic harm to the employer, or any of the employees, that will be covered by the agreement.”\(^{16}\) Or, if it may cause “significant damage to the Australian economy or an important part of it”.\(^{17}\)

In other words, the FWC is required to suspend or terminate all industrial action against an employer other than action which threatens or causes insignificant economic harm to the employer. Similarly, industrial action in a large range of industries can be characterised as causing significant damage to an important part of the economy.

There is also a blanket power to prohibit industrial action affecting public services and a power vested in the tribunal to order a “cooling off period”. The federal government is able to terminate a dispute by Ministerial declaration.

When on 29 January 2018, the Rail Tram and Bus Union’s (RTBU) sought to engage in protected industrial action, including overtime restrictions and a 24 hour rail strike, the action was pre-emptively suspended by the Fair Work Commission.\(^{18}\) SDP Hamberger accepted that the application made by the NSW government on the grounds that the proposed strike was “threatening to endanger the welfare of part of the population” and “threatening to cause significant damage to the Australian economy or an important part of it”.

The contrast with the current long-running dispute in the French railway sector could not be more stark. Since March 2018, railway workers have been engaged in repeated and protracted industrial action after the French government announced a major restructure of the system including plans to reduce employee benefits. There have been more than 18 individual 48 hour strikes so far.

### ILO criticism of Australia's restrictions on the right to strike

The ILO has consistently observed that Australia is not complying with its legal obligations concerning collective bargaining and the right to strike. It has repeatedly requested that Australia’s legislature remove various restrictions on the right to strike. The criticism has predominantly come from the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts), a body within the ILO which reviews the application and promotion of ILO standards.

In 1999, the ILO criticised the Workplace Relations Act 1996 (Cth) for limiting the right to strike to single businesses, stating:

> The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.\(^{19}\)

In 2007, the Committee of Experts noted that WorkChoices contained several aspects that were not in keeping with Australia’s commitment to the Freedom of Association and Protection of the Right to Organise Convention, and that the new law had “…introduced additional prohibitions on industrial action”.\(^{20}\) The Committee of Experts emphasised that the law:

> …prevents the taking of lawful industrial action relative to “pattern bargaining”, that is, negotiations seeking common wages or conditions of employment for two or more proposed collective agreements with different employers or even with different subsidiaries of the same employer-parent company.”

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15. Fair Work Act 2009 (Cth) s 418, s423, s424.
• “...narrows the range of matters which can be the subject of industrial action by providing that such action is not protected if it is taken in support of claims which include “prohibited content”. The latter is defined in the Workplace Relations Regulations, 2006, as including a wide range of subjects that, to a large extent, constitute collective bargaining topics.”

• “...tightens the prohibition of industrial action taken in concert with other parties who are not protected (i.e. sympathy strikes) in that it is now mandatory for the AIRC to order that such action stop or if it has not yet occurred, that it not occur.”

• “...removes the discretion formerly held by the AIRC in respect of suspending or terminating a bargaining period in case of danger to the economy, and makes it mandatory to do so.”

• “...allows the Minister to unilaterally issue a declaration terminating a bargaining period in circumstances including threatened economic damage, thereby preventing the taking of protected industrial action.”

The Committee of Experts concluded its report as follows:

The Committee once again requests the Government to indicate in its next report the measures taken or contemplated so as to amend the following provisions of the WR Act – as amended by the Work Choices Act – so as to bring them into conformity with the Convention.

The features of Work Choices that were the subject of this criticism in 2007 remain intact today. The ILO continues to voice its criticisms of the situation in Australia. In 2017, the ILO again requested:

...the Government to review the abovementioned sections of the FWA [the Fair Work Act] in consultation with the social partners, so as to bring them into accordance with the Convention and requests the Government to provide information on the measures taken or envisaged in this regard.

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It’s all about power

For economic policy wonks, these are perplexing times. Ordinarily when unemployment is low and job creation is robust, the demand for workers intensifies and wages increase. Similarly when productivity increases, so too do wages. But these laws of economics are no longer working. Wages are stagnating across many developed economies. Many economists, bureaucrats and even politicians are shifting to a new consensus about a key cause of wage stagnation - a loss of employee bargaining power.

Conservative economic institutions including the IMF and OECD have also sounded unprecedented warnings about growing income inequality in developed nations. Recently the OECD published research which supported industry-wide collective bargaining, finding that “flexible” systems were associated with greater wage inequality and higher unemployment. In June 2017, the Governor of the Reserve Bank of Australia, Glenn Stevens, declared a low wage crisis that threatened the economy and suggested that employees should ask their boss for a pay rise. A year later, Stevens’ thinking had evolved. He now argued that a loss of employee bargaining power was contributing to the crisis.

The policy response from Canberra to the declaration of a low wage crisis? Silence.

Recently, The Economist joined the fray, proclaiming that employees had lost too much bargaining power in the labour market and called for programs and policies to support the re-unionisation of the workforce.

The loss of employee bargaining power is reflected in a range of data, set out below. It includes data about the terminal decline of strike action.
Figure 1  Days of Industrial Dispute Each Year

Figure 1 shows that since the 1970s each decade has delivered less industrial disputes than the previous. The number of working days lost to industrial disputes per 1,000 people has declined in accordance with the drop in the occurrence of industrial disputes. In the 1970s, there was an average of over 500 days lost per year per 1,000 workers, peaking in 1974 with over 1,000 days lost to disputes per 1,000 people. The last decade since 2007 has seen an average of less than 15 working days per year lost to industrial disputes per 1,000 people.

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22 Stanford J, Historical Data on the Decline in Australian Industrial Disputes. Centre for Future Work, 2018

23 Stanford J, Historical Data on the Decline in Australian Industrial Disputes. Centre for Future Work, 2018
Figure 2  Labour Compensation as Percentage of GDP

Figure 2 details the proportion of GDP that is made up from employee wages, salaries and super contributions. A comparison of Figure 2 with Figure 1 shows a similar trend and correlation between the proportion of GDP distributed to workers and the frequency of strike action. This is further reflected in statistics relating to the trend relationship between the ‘average annual increase in average weekly earnings’ and the ‘days lost to industrial disputes per 1000 workers’ detailed in Figure 3 below.

Figure 3  Trend Between Increase in Wages and Frequency of Industrial Action

The incidence of industrial action appears to bear a strong correlation with wage growth. Figure 3 shows that the periods in which more industrial action occurs corresponds with periods of faster wage growth, and vice-versa.


Figures 4 and 5 show the extent of the dramatic collapse in union density in recent decades. Figure 5 compares union density in Australia to a range of comparable countries.

26 Stanford J, Centre for Future Work. <www.futurework.org.au>
27 Stanford J, Centre for Future Work. <www.futurework.org.au>
Conclusion

If the right to strike is critical to effective collective bargaining by employees and their trade unions, its imminent death signifies that Australia is moving towards a labour market in which bargaining over terms and conditions of employment does not occur; a labour market in which the power to determine workplace conditions is largely concentrated in business. This has implications for union members but also all other employees because gains made by union campaigns tend to flow on throughout the workforce.

Unions are a critical institution that moderate inequality, provide a check and balance to unfettered managerial power and a voice for a significant part of the population. That voice has been severely diminished. Australian unions would not impose a ban on shipping to protest at egregious human rights abuses as they did during the era of apartheid in South Africa. To do would almost certainly entail being sued by shipping companies, prosecuted by the Fair Work Ombudsman seeking the imposition of substantial fines and might even see union official hauled before a Royal Commission headed by a notoriously conservative jurist.

Unions have been diminished by sustained and relentless attacks. Having extracted the teeth of labour, many of the same forces are now turning their attention to other important institutions. Look no further than the fate of Universities, the Australian Human Rights and Equal Opportunity Commission, the ABC, community legal centres and the charities and civil society sectors.