Australia high court ruling imposes greater restrictions on industrial action

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A majority ruling by Australia's High Court this month places even more onerous conditions on workers taking industrial action and is another means for employers to sue workers for profit losses during enterprise agreement disputes.

Under Australia's Fair Work's anti-strike provisions, industrial action can only be taken during bargaining periods for new enterprise work agreements (EBAs). All other action is illegal. In order to take EBA "protected" action, workers are required to go through lengthy procedures, including holding a secret ballot.

Even if the ballot endorses industrial action, the specific forms must be submitted in advance to the Fair Work Commission (FWC), the government's industrial tribunal, for approval. The FWC, however, can terminate the "protected" action on a whole range of pretexts, including if the action threatens "to cause significant economic harm."

On December 6, the High Court ruled that workers cannot take "protected" action for the remainder of any enterprise bargaining period if they, or their union, breaches an FWC order related to the dispute. The ban would remain in place even if the "breach" was quickly corrected or related to minor procedural matters.

Delivering its majority decision, the court said that the Fair Work Act was intended "to deny the immunity of protected industrial action" to all those who had "demonstrated they were not prepared, or prepared to take sufficient care, to play by the rules." A dissenting judgement from Justice Stephen Gageler admitted that the ruling was a "sweeping denial of a union's capacity to take protected industrial action."

The High Court determination was in response to an application by Esso—the Australian arm of ExxonMobil—over its long-running EBA dispute with the Australian Workers Union (AWU) at its Longford oil and gas operations in Victoria. The dispute involved 600 workers who rejected a company EBA which imposed a 14-day on, 14 day-off roster and abolished mandated pay levels, with current take home wages slashed by up to 50 percent.

In March 2015, the FWC ordered the Australian Workers Union (AWU) to lift bans on "de-isolating" or testing equipment at Longford. The bans had already been specified in the AWU's previous applications for "protected" action.

The FWC, however, ordered the AWU to lift the bans after Esso successfully argued that AWU's definition did not apply to equipment for testing "air freeing" and "leak testing."

When the union did not immediately comply, Esso took legal action the Federal Court of Australia. The company claimed that the union's "breach" of the FWC directive "rendered all industrial action organised by the AWU after the breach to be unprotected." It called on the Federal Court to ban the AWU "from organising any further protected action" during the dispute.

While the Federal Court denied the company's application this was overturned on December 6 by the High Court. The matter has now been remitted to the Federal Court for the determination of the penalties on the union

The High Court ruling establishes a precedent with far-reaching implications. It opens up the AWU to possible legal action by Esso for damages claims and court fines for so-called illegal industrial action. This will now be used by other companies to seek damages if FWC orders have been breached during past EBA disputes.

It will also fan greater corporate agitation for an even-more stringent industrial relations regime despite the

fact that the unions operate as an industrial police force, consistently isolating all industrial disputes and negotiated agreements in line with employers' demands.

The unions not only enforce FWC rules but also seek the industrial court's interventions and then impose the "arbitrated" and regressive outcomes. This is the case with the AWU's dispute with Esso where the arbitration process has been underway for over a year after the union called off indefinite strike action in late 2016 following an FWC order (see: "Australia: State Labor government moves to ban Esso strike").

Employer groups welcomed the High Court decision. Australian Mines and Metals Association director of workplace relations Amanda Mansini hailed the decision as a "test case" and gloated: "If unions want protection of our laws to organise a strike in support of bargaining claims then the unions must comply with Australia's laws until an agreement is struck, not just when it suits them."

Former federal Liberal government employment minister Eric Abetz declared: "This decision will clarify the operation of the law and ensure further consequences for law-breaking and defiance."

Australian Council of Trade Unions (ACTU) secretary Sally McManus said the court ruling made it "even harder and more unpredictable for workers to take protected action."

McManus called for "detailed discussion" with the Labor Party but made clear that the ACTU was not calling for the total abolition of the anti-strike laws or an "unmitigated" right to strike but only "a fair one."

This year McManus launched an ACTU campaign "to rewrite the [Fair Work] rules and bring fairness back." The campaign is a total fraud.

The "rules," which were introduced by the Rudd Labor government in 2009 with the enthusiastic backing of the unions, were never about "fairness" or protecting workers' rights but to assist employers' demands for increased productivity and other cost-cutting measures to bolster profits.

The ACTU campaign and McManus's posturing is another cynical attempt to cover over this history and promote the return of a Labor government, which the unions hope will allow them to deepen their role as the principal industrial police force in the escalating assault on jobs, wages and working conditions.