INDUSTRIAL ACTION IN WESTERN AUSTRALIA'S PUBLIC SECTOR ESSENTIAL SERVICES

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DECLARATION

I declare that:

1. The contents of this thesis are my own account of the research I have conducted, inclusive of citations where necessary.
2. This thesis has not been previously submitted for a degree at any other university.
3. All opinions expressed in this paper are personal to the author.

Brodie-Ann Skalko

ABSTRACT

Workers in essential services professions protect the safety, health or welfare of a community. Any disruption to the operation of essential services can mean that communities are unable to function effectively. For this reason, additional complications arise when people working in essential fields look to take industrial action. This thesis reflects on the often-competing interests of protecting essential service workers' liberty to take industrial action (or right to strike) while upholding the life, safety, health or welfare of the community. The purpose of this thesis is to consider whether essential service workers in Western Australia's Public Sector have sufficient freedom to access their right to strike; or if legislation is overly restrictive in this regard. Secondary purposes to this thesis include consideration of whether Australia's Federal industrial relations system is more facilitative than Western Australia's industrial relations system for essential service workers taking industrial action, and, whether some essential service professions should have greater limitations than others when taking industrial action. These issues will be addressed in light of the industrial situation for professions such as policing, teaching, firefighting and nursing. A macro assessment of the historical and present approaches to industrial action taken by essential service professions in Western Australia and Australia will be presented. The macro assessment suggests that industrial actions by core essential services is rarely taken, and, when done, it is reactive and the outcome of sustained frustrations over pay and working conditions. A comparative analysis of Australia's compliance with international labour obligations on this issue highlights several shortcomings in Western Australia's labour laws. These shortcomings mean that there is a need for Western Australia to enhance its proactive dispute resolution mechanisms to facilitate better access to the right to strike, and to bring domestic laws into better compliance with international obligations.

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LIST OF ABBREVIATIONS

ACTU	Australian Council of Trade Unions
DFES	Department of Fire and Emergency Services
FWC	Fair Work Commission
ILO	International Labour Organization
NLRA	National Labour Relations Act
PSAB	Public Service Appeal Board
SSTUWA	State School Teachers' Union of Western Australia
TRANSIT	Transit Australia Pty Ltd, trading as Sunshine Coast Sunbus
USA	United States of America
WAIRC	Western Australian Industrial Relations Commission
WA Police Union	Western Australian Police Union of Workers

I CHAPTER 1: INTRODUCTION

Western Australia was colonised by the British in 1829 and prior to that it was inhabited by traditional indigenous custodians.[1] Today, Western Australia has developed into a State comprised of almost 2.7 million people of which around 100,000 identify as Aboriginal and Torres Strait Islander and around 800,000 were born overseas.[2] Western Australia's industrial relations system is unique and it is also distinct from what applies throughout the rest of Australia and other parts of the world. This is because in Western Australia both State and Federal laws apply, namely, the *Fair Work Act 2009* (Cth) and the *Industrial Relations Act 1979* (WA).[3] Prior to 1993, and before the introduction of the now repealed *Industrial Relations Reform Act (Cth)*, the Western Australian industrial relations system was reflective of the other States, which all had their own State based industrial relations commission.[4] However, with the exception of Western Australia, all States have since conferred their industrial relations powers to the Commonwealth. This transfer of a state's industrial relations power to the Commonwealth was enabled by the referral power contained in the Australian Constitution.[5] Although neither the State or Federal industrial relations system defines an essential service, both systems contain restrictions around the right to strike for employees working in core public sector professions.

This thesis seeks to consider whether Western Australia's industrial relations laws unduly restrict public sector workers in essential service professions from taking industrial action. Further, this thesis will consider whether industrial action in essential service professions is better facilitated in the Federal industrial relations system, and if some essential services should be able to take industrial action without restriction or with reduced restrictions. The primary focus of this thesis is on essential service occupations that public sector workers are engaged in, as opposed to private

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1 Nicholas Blain and Norman Dufty, 'Industrial Relations in Western Australia' (1989) 31(4) *Journal of Industrial Relations* 552, 553.

2 Australian Bureau of Statistics, *Region summary: Western Australia* (Census Data) <https://dbr.abs.gov.au/region.html?lyr=ste&rgn=5>.

3 *Fair Work Act 2009* (Cth); *Industrial Relations Act 1979* (WA); 'Key features of the WA industrial relations system', *Government of Mines, Industry Regulation and Safety* (Web Page, 24 January 2020) <https://www.commerce.wa.gov.au/labour-relations/key-features>.

4 David Plowman and Alison Preston, 'The new industrial relations: portents for the lowly paid' [2005] 56 *Journal of Australian Political Economy* 224, 227-8.

5 *Australian Constitution* s 51(xxxvii); *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas); *Fair Work (Commonwealth Powers) Act 2009* (SA).

sector workers whose employer is not a government body. The first section of this thesis will start by analysing several widely accepted essential service professions and the past actions that these workers have taken. The second section will discuss how industrial action laws have evolved over time to the present day. Finally, this thesis considers prospective future industrial relations recommendations that could be adopted in Western Australia to enhance the current industrial action legislation regulating public sector essential service professions. The outcome of this thesis is to conduct an analysis of past and present industrial actions locally and globally to determine whether law reform is needed to improve the regulation of industrial action among essential service workers in the Western Australian public sector.

A *Industrial Action and the Role of Unions*

Industrial action is any action that occurs between a worker and their employer as a result of ongoing adverse and unresolved working conditions.[6] The *Industrial Relations Act 1979* (WA) defines industrial action as 'any act, omission, or circumstance done, effected, or brought about by an organisation or employer or worker or by any other person for the purpose of compelling an employer or an employee or an organisation to accept terms or conditions of employment or to enforce compliance with any employment related demand.'[7] Industrial action includes any act done by a registered organisation that is intended to breach the employment relationship, sending a message of dissatisfaction with employment conditions to the employer.[8] These industrial related acts can include performing standard work differently, intentionally being inefficient, banning or limiting the performance of work, failures to attend work, refusals to perform role duties and employers deliberately locking out staff.[9] Industrial action can be either protected from legal prosecution, which requires specific criteria to be met, or unprotected from legal prosecution.[10]

The role that unions play is also an important consideration when discussing industrial action. Mainly because any industrial action that is taken occurs between an employer and the trade union

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6 *Fair Work Act 2009* (Cth) s 19; *Industrial Relations Act 1979* (WA) s 7 (definition of 'industrial action').
7 *Industrial Relations Act 1979* (WA) s 7 (definition of 'industrial action').
8 Ibid.
9 *Fair Work Act 2009* (Cth) s 19.
10 Ibid s 415.

or labour union who represents the workers.[11] A union consists of workers and employees who form the membership of the union, and it is the officials and delegates of the union who are the bargaining representatives for workplace matters.[12] A union's principal activities include the negotiation of rates of pay and conditions of employment for its members'.[13] The broad purpose of a union is to be accountable to its members, with a focus on protecting and regulating the labour market.[14] For example, unions advocate for members at a micro level by assisting members with personal labour disputes such as representation at court and tribunal hearings and assistance at disciplinary matters.[15] Unions also advocate for their members by representing employees at enterprise agreement negotiations, organising industrial actions, advocating to government on matters relating to employment conditions and providing industry specific benefits such as death insurance.[16] A union's purpose in regulating the labour market prevails over its focus on maximising individual worker's wages. By regulating an industry, unions are able to ensure that they have an input into the rights of those workers engaged in the sector and consequently improve the status and security of its members as a whole.[17]

As a union is recognised as an industrial representative, they can act on behalf of members in judicial settings.[18] One historically significant decision by the High Court of Australia that demonstrated the importance of a union in an industry is *R v Coldham; Ex parte Australian Social Welfare Union* ('*Coldham*').[19] The decision involved the Australian Social Welfare Union, which

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[11] 'The role of unions', Fair Work Ombudsman (Fact Sheet) <https://www.fairwork.gov.au/employee-entitlements/industrial-action-and-union-membership/the-role-of-unions>; 'What is a Union?', *The Australian Workers' Union* (Web Page) <https://www.awu.net.au/get-involved/get-informed/>.

[12] Natalie van der Waarden, *Understanding employment Law: Concepts and Cases* (LexisNexis Butterworths, 3rd ed, 2014) 217.

[13] Australian Bureau of Statistics, *Feature Article – Trade Union Membership* (Catalogue No 6105.0, 8 December 2006); 'What is a Union?', *The Australian Workers' Union* (Web Page) <https://www.awu.net.au/get-involved/get-informed/>.

[14] N. F. Dufty, 'Collective Bargaining in the Context of Compulsory Arbitration - The Case of the Western Australian Firemen' (1978) 16(1) *British Journal of Industrial Relations* 52, 54.

[15] 'Why Join?', *The Australian Workers' Union* (Web Page) https://www.awu.net.au/wa/get-involved/why-join/; WA Police Union of Workers, 'Membership' (Web Page, 2021) <https://www.wapu.org.au/about/membership.html>.

[16] 'Why Join?', *The Australian Workers' Union* (Web Page) https://www.awu.net.au/wa/get-involved/why-join/; WA Police Union of Workers, 'Membership' (Web Page, 2021) <https://www.wapu.org.au/about/membership.html>.

[17] N. F. Dufty, 'Collective Bargaining in the Context of Compulsory Arbitration - The Case of the Western Australian Firemen' (1978) 16(1) *British Journal of Industrial Relations* 52, 54.

[18] *Industrial Relations Act 1979* (WA), s 112A(3); *Fair Work Act 2009* (Cth) s 12 (definition of 'bargaining representative').

[19] (1983) 57 ALJR 575 ('*Coldham*').

is an organisation of social workers, that sought to dispute the terms and conditions of employment of project officers that had been engaged by various Community Youth Support Scheme Committees.[20] However, the employer disputed the union's application on the basis that the project officers were not engaged in or in connection to an industry; in essence, the employer contended that its employees were not engaged in work of an industrial nature and as a consequence the eligibility rules of the organisation of social workers excluded the project officers.[21] This decision saw the union successfully apply to expand the definition of what an industrial matter is, which consequently allowed civil servants such as project officers in the Federal industrial relations system to be seen as an industry capable of taking industrial action.[22] This High Court decision opened the door for many Australian unions, such as teachers and State civil servants, to be able to make industrial applications under the Federal industrial relations system.[23] The significance of this decision was because the High Court revised the interpretation of the definition of *industrial matter* to broaden the meaning of an industry. This broadening of the scope of the term *industry* meant State civil servants were consequently included in this definition.[24] This decision has enabled judicial courts and tribunals to deal with disputes from Australian unions representing State civil servants and teachers; which were professions that had previously been excluded under the historical industrial matter interpretation.[25] It should be noted that his decision did not occur in Western Australia's industrial relations jurisdiction and further that there is no longer a requirement for an industrial matter to arise before the Fair Work Commission can hear and determine an application. Despite this, the decision is an excellent example of the power and purpose of a union that represents public service employees.

B *The Concept of Essential Services*

The International Labour Organization's Committee of Experts have acknowledged that in certain circumstances the right to strike can be restricted or removed in public service and essential service

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20 Ibid [1]-[2], [34].
21 Ibid [2].
22 Ibid.
23 Graham F Smith, 'Labour Relations Law in Australia', *Public Employment Law: the role of the contract of employment in Australia and Britain* (Butterworths, 1987) 9; *Coldham* (1983) 57 ALJR 575.
24 *Coldham* (1983) 57 ALJR 575 [30]-[40].
25 Graham F Smith, 'Labour Relations Law in Australia', *Public Employment Law: the role of the contract of employment in Australia and Britain* (Butterworths, 1987) 9; *Coldham* (1983) 57 ALJR 575, [30]-[40].

professions.[26] These circumstances require that the occurrence of a strike would result in serious hardship to the whole community, and that there be other compensatory guarantees in place in these professions to redress the imbalance of not being open to accessing the general right to strike.[27] Although there is limited research on what essential service professions actually are, and their distinction from emergency services professions, a distinction will be made for some purposes. This thesis will not endeavour to distinguish between emergency and essential services, but rather assumes that a narrow definition of an essential service would include the professions of police, teaching, firefighting and nursing by virtue of the fact that any stoppage in the provision of these services would likely cause a clear and imminent threat to the life, personal safety or health of the whole or part of the population.[28] If a service is to be categorised as essential it is most likely to be a service which is important to the public and of such great importance that the effect on the community in not having the service provided would be profound.[29] Consequently, for a service to be classified as essential, it must be in the public's best interests to have the uninterrupted provision of it.[30] Put differently, a community could not function without the service because otherwise it would threaten human life, safety or health.[31]

There is no legislated definition of an essential service that is applicable in Western Australia. However, the State Governments of Victoria and New South Wales have both enacted legislation which narrowly defines what the State regards an essential service.[32] In Victoria, an essential service is defined as 'a service such as transport, fuel, light, power, water, sewerage and any other

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[26] International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office,* 5th rev ed, 2006) 118-119.

[27] Ibid.

[28] International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office,* 5th rev ed, 2006) 119-120; Giuseppe Carabetta, 'International Labour Law Standards Concerning Collective Bargaining in Public Essential Services' (2014) 19(2) *Deakin Law Review* 275, 283; Jean-Michel Servias, 'ILO Law and the Right to Strike' [2009] 15 *Canadian Labour Law & Employment Law Journal* 147, 153-154.

[29] Andrea Sharam, 'Essential service markets: historical lessons' [2007] 60 *The Journal of Australian Political Economy* 54, 54.

[30] Giuseppe Carabetta, 'International labour law standards concerning collective bargaining in public essential services' (2014) 19(2) *Deakin Law Review* 275, 283-287; Ian Manning, 'Accessibility of essential services in urban and regional Australia' [2010] 63 *National Economic Review* 1, 1-14.

[31] Gillian S. Morris, 'The Regulation of Industrial Action in Essential Services' (1983) 12(69) *Industrial Law Journal* 69, 81; Jean-Michel Servias, 'ILO Law and the Right to Strike' [2009] 15 *Canadian Labour Law & Employment Law Journal* 147, 153-154.

[32] *Essential Services Act 1958* (VIC) s 3 (definition of 'essential service); *Essential Services Act 1988* (NSW), s 3 (definition of 'essential service').

service specified by the governor and published in the gazette.'[33] In New South Wales, an essential service is 'a service providing electricity, gas, ports, grain, rail, water, non-cash payment transaction services, commercial passenger vehicles and any other industry prescribed under the definition.'[34] The definitions in Victoria and New South Wales differ slightly and also provide scope to include other industries.[35] Additionally, the International Labour Organization ('ILO') determines what an essential service is on a case by case basis depending on "whether an interruption would of the service would endanger the life, personal safety or health of the whole or part of the population."[36] In states other than Victoria and New South Wales, the concept of an essential service is fluid and professions can become an essential service if the strike lasts beyond a certain time or to such a scope that it then causes a threat to the life, personal safety or health of the whole or part of a population.[37]

There are multiple essential service professions operating in Western Australia. Police, teachers, firefighters and nurses are notable essential service professions due to them being frequently in the public eye, and this is largely because of the role of the unions. The importance of the role of the union in industrial action is the main criteria used to identify that the professions of police, teaching, firefighting and nursing are essential and why they have been chosen to be the focus of this paper. The issue of what is an essential service is particularly relevant in the teaching sector. Aside from principals and vice-principals, teachers are not recognised as an essential service; consequently, this service has the potential to become essential depending on the nature of the industrial action.[38] Although the teaching sector has been regarded by the ILO's supervisory bodies as not an essential service, it has the capacity to become one, depending on the circumstances of the country and the impact that the strike action would have on the community.[39] This includes

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33 *Essential Services Act 1958* (VIC) s 3 (definition of 'essential service').

34 *Essential Services Act 1988* (NSW), s 3 (definition of 'essential service').

35 Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) 783.

36 Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) 783; Jean-Michel Servias, 'ILO Law and the Right to Strike' [2009] 15 *Canadian Labour Law & Employment Law Journal* 147, 153-154.

37 'International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office*, 5th rev ed, 2006) 119; Carol Fox, 'Collective Bargaining and Essential Services: The Australian Case' (1998) 40(2) *Journal of Industrial Relations* 277, 278.

38 International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office*, 5th rev ed, 2006) 119, 121.

39 *Prosecutor v Canada (Report in which the committee requests to be kept informed of development)* (the Committee on Freedom of Association, Case No 2467, 1 February 2006) [578].

situations where the scope and duration of an industrial action is so severe that it would engager life, personal safety or health of a community as discussed in chapter four. For teachers, the impact of endangering the life of a community member may occur if the care of children is compromised due to a teacher not attending work due to strike action or performing the standard of work differently resulting in the neglect of a child's needs. It is on this basis that public sector teachers have been included in this thesis as an essential service. All four of the professions of police, teaching, firefighting and nursing will be used as the focus of this thesis to show different contexts and approaches to taking industrial action and also to strengthen the thesis's argument that Western Australia's legislation regulating industrial action in these fields is restrictive.

Advocates of restrictions on essential service workers acknowledge that in return for the greater regulation on these workers they should receive some form of payment guarantee, or alternative method of dispute resolution to compensate for this restriction on their right to engage in industrial action.[40] This thesis accepts that police, teaching, firefighting and nursing are essential services occupations in Western Australia because a stoppage of any of these services would likely have a significant and detrimental impact on the community. The purpose of this thesis is to consider the nature of Western Australia's essential services professions and whether the industrial laws applicable to these professions to take industrial action are overly restrictive. If Western Australia's industrial action laws are found to be overly restrictive, the thesis will consider what guarantees or other measures can be introduced to compensate for this restriction. The unique industrial relations system that applies in Western Australia means that little research has occurred in this field relative to the Federal industrial relations system. This thesis seeks to enhance knowledge of the industrial action legislation in the State and Federal systems and analyse the differences and deficiencies in each.

[40] Gillian S. Morris, 'Industrial Action in Essential Services: The New Law' (1991) 20(2) *Industrial Law Journal (London)* 89, 90.

II CHAPTER 2: ANALYSIS OF HISTORICAL INDUSTRIAL ACTION IN WESTERN AUSTRALIAN ESSENTIAL SERVICES

This chapter begins with an overview of the industrial action landscape in Western Australia and its roots in the British common law system. It will then undertake a historical analysis of industrial action which has occurred in essential service professions in Western Australia until the beginning of the 21st century. This chapter also highlights the impact that an absence or restriction on the provision of an essential service has on a community and the difficulties around balancing the rights of workers with the ongoing need for the essential service to be performed.

A *Introduction*

Before the *Industrial Relations Act 1979* (WA) was introduced, industrial actions such as strikes and work bans were illegal although still common, with legislation in this area being rarely enforced.[41] The common law system that Australia inherited from the British outlawed all forms of industrial action, as it was seen to be a breach of the contract of employment between an employer and an employee when the employee failed to perform work.[42] The introduction of the *Conciliation and Arbitration Act 1904* (Cth) outlawed industrial action and established a system of compulsory conciliation and arbitration.[43] Similarly in Western Australia, the *Industrial Conciliation and Arbitration Act 1900* (WA) prohibited industrial action after an application had been made to the Court.[44]

Multi-employer strikes, pattern bargaining, secondary boycotts, sympathy strikes, picketing and strikes during the term of the contract were still forms of illegal industrial action in Australia until the 'Work Choices' era.[45] The introduction of the *Industrial Relations Act 1979* (WA) permitted industrial action in Western Australia, but only when it is done in good faith and for the purpose

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41 *Industrial Arbitration Act 1912-1973* (WA) s 132.

42 *Industrial Conciliation and Arbitration Act 1900* (WA) s 30; Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) 781-2.

43 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) ss 6, 16; Chris Briggs, 'Strikes and lockouts in the Antipodes' in van, der Velden, Sjaak et al (eds), *Strikes around the world: Case-studies of 15 countries* (Amsterdam University Press, 2008) 173, 174.

44 *Industrial Conciliation and Arbitration Act 1900* (WA) s 30.

45 Chris Briggs, 'Strikes and lockouts in the Antipodes' in van, der Velden, Sjaak et al (eds), *Strikes around the world: Case-studies of 15 countries* (Amsterdam University Press, 2008) 173, 176.

of negotiating an industrial agreement.[46] By legalising the right to strike, this enabled a form of protection for those workers wanting to advocate for better working conditions. However, the legalisation of this right was limited in that it was only permitted if the decision to strike had been made democratically and among members of the relevant union.[47] Section 44(7)(b) of the *Industrial Relations Act 1979* (WA) can also limit industrial action by empowering the Western Australian Industrial Relations Commission ('WAIRC') to call a compulsory conference between parties when industrial action has or is likely to occur.[48]

In Western Australia, public service officers employed by the State Government (known as "State system" public service employees) such as police, teachers, firefighting and nurses can refer their industrial disputes, including protected industrial action applications, to the WAIRC or its constituent authorities.[49] The Public Service Arbitrator and the Public Service Appeal Board ('PSAB') are constituent authorities of the WAIRC that have authority to hear and determine appeals made by public servants or government officers.[50] The Public Service Arbitrator, is a WAIRC Commissioner appointed into the Arbitrator role to hear various government officers' industrial disputes.[51] Additionally, the role of the PSAB is to hear various industrial matters raised by persons employed under the *Public Sector Management Act 1994* (WA).[52] The PSAB comprises of three members of the Board, including a Public Service Arbitrator, an independent nominee appointed by the employer and an independent nominee appointed by the employee's union.[53] The purpose of these constituent authorities is to provide a forum in Western Australia for public servants and government officers to resolve industrial disputes relating to their employment relationship.

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46 *Industrial Relations Act 1979* (WA) s 42B; Chris Briggs, 'Strikes and lockouts in the Antipodes' in van, der Velden, Sjaak et al (eds), *Strikes around the world: Case-studies of 15 countries* (Amsterdam University Press, 2008) 173, 176.

47 Western Australia, *Parliamentary Debates*, Legislative Council, 15 November 1979, 4784 (Hon I. G. Medcalf, Attorney-General).

48 *Industrial Relations Act 1979* (WA) s 44(7)(b).

49 'Public Service Appeal Board', *Western Australian Industrial Relations Commission* (Web Page) <https://www.wairc.wa.gov.au/appeal-board/>.

50 *Industrial Relations Act 1979* (WA) ss 80F, 80I.

51 Ibid s 80D-E.

52 *Public Sector Management Act 1994* (WA) s 78.

53 *Industrial Relations Act 1979* (WA) s 80H.

B *Industrial Action in the Police Profession*

1 *Establishment of the Police Profession in Western Australia*

The Police Force in Western Australia was known as the Western Australian Police Department from 1861 to 1995, since then it has changed its name to the Western Australian Police Service and then to the Western Australian Police Force in 2017.[54] Western Australia did not have a formal Police Force until 1853.[55] Before this time, the means of policing included the Governor of Stirling appointing part time Constables, Mounted Police and Water Police.[56] The first formal Police Force was established in Western Australia in 1853, when an Act for the regulation of the police force was passed in parliament.[57] The *Police Force Act 1853* (WA) caused the appointment of a Superintendent of Police and the creation of a code of rules outlining administrative structure to regulate the profession.[58] An ordinance for regulating police clarified the powers and responsibilities of the police force was brought into operation in 1849 and then replaced in 1861.[59] The *Police Act 1892* (WA), which provides for the resolution of industrial disputes among police, was created and passed and much of this legislation is still largely in force today.[60] It was not until 1926 that the Western Australian Police Union of Workers ('WA Police Union') was formed and registered.[61]

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[54] State Records Office of Western Australia, 'Police Records', *Archive Records* (Web Page) <http://www.sro.wa.gov.au/archive-collection/collection/police-records>; State Records Office of Western Australia, *AU WA A 61 - Western Australia Police Department*, (Web Page) <https://archive.sro.wa.gov.au/index.php/western-australia-police-department-au-wa-a61#>; Government of Western Australia, 'WA Police Force', *Our History* (Web Page) <https://www.police.wa.gov.au/About-Us/Our-History>.

[55] State Records Office of Western Australia, 'Police Records', *Archive Records* (Web Page) <http://www.sro.wa.gov.au/archive-collection/collection/police-records>.

[56] Ibid.

[57] Western Australia Police Force, 'About Us', *Our History* (Web Page) <https://www.police.wa.gov.au/About-Us/Our-History>.

[58] State Records Office of Western Australia, 'Police Records', *Archive Records* (Web Page) <http://www.sro.wa.gov.au/archive-collection/collection/police-records>; State Records Office of Western Australia, *AU WA A 61 - Western Australia Police Department*, (Web Page) <https://archive.sro.wa.gov.au/index.php/western-australia-police-department-au-wa-a61#>; Sergeant R.K. Haldane, 'The Victoria Police Strike - 1923' (1982) 36(2) *The Australian Police Journal* 102, 102-115.

[59] State Records Office of Western Australia, 'Police Records', *Archive Records* (Web Page) <http://www.sro.wa.gov.au/archive-collection/collection/police-records>.

[60] *Police Act 1892* (WA).

[61] Robert Guthrie, 'Sick leave and workers' compensation for police officers in Australia' (2010) 17(5) *Journal of Law and Medicine* 816, 816.

2 *The Relationship Between the Police Profession, the Judiciary and the Executive and its Impact on Industrial Action*

In 1932, the High Court of Australia made a decision that impaired the capacity of police commissioners to regulate the police force.[62] The decision of *Gibbons v Duffell* found that "a report, made in the course of an officer's duty, by an inspector of police to his superior officer, which contained defamatory references to a subordinate officer, was not the subject of absolute privilege."[63] Although not directly relating to industrial action in the police force, a consequence of this decision was that it enabled restrictions to be put on the workplace rights of police officers. These restrictions related to the arbitrary authority of a senior police officer, which made it difficult for the exchange of confidential correspondence between officers, adding to the difficulty of communicating union activities.[64]

In 1943, the Western Australian Police Force took an unusual step and directly affiliated itself politically with the Labor Party.[65] This affiliation enabled the WA Police Union to work with fellow unionists on industrial matters to advocate for a shared goal.[66] This political affiliation between the Western Australian Police Force and the State's Labor Party lasted almost 20 years.[67]

Before the 1960's, the unions representing Police Forces in all Australian states were careful to keep a politically neutral approach to industrial actions around election times.[68] Since the 1960's, police unions have continued to rely on their political connections to improve their employment rights and have engaged in political campaigns to achieve this.[69] Due to the nature of police work requiring officers to serve and protect the public, any industrial action of any kind by the police

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62 *Gibbons v Duffell* (1932) 47 CLR 520.

63 Ibid.

64 Mark Finnane. 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 13.

65 Ibid 11–12.

66 Ibid.

67 Ibid.

68 Mark Finnane. 'No longer a 'workingman's paradise'? Australian police unions and political action in a changing industrial environment' (2008) 9(2) *Police Practice and Research: An International Journal* 131, 137.

69 Mark Finnane. 'No longer a 'workingman's paradise'? Australian police unions and political action in a changing industrial environment' (2008) 9(2) *Police Practice and Research: An International Journal* 131, 137. Jenny Flemming and David Peetz. 'Essential Service Unionism and the New Police Industrial Relations' (2005) 30(4) *Journal of Collective Negotiations in the Public Sector* 283, 283.

union was banned.[70] The primary reason for the complete ban on industrial action is because the role of a police officer is to serve the public good without any personal or factional interest.[71] However, once outside of the election periods, the police union would actively use their influence to advocate for their members' interests; this served as an alternative to taking industrial action. The alternatives to industrial action taken by the union included relying on relationships to leverage the media and having informal discussions with politicians and relevant ministers.[72] Although these actions were not industrial actions, their effectiveness meant that the police union was able to introduce restrictive firearms regulations and better protections for offences against officers while at work.[73] As the amicable relationship between the union and politicians grew, this caused tension among the public as the union was increasingly able to control the operations of the Western Australian Police Department.[74]

The Western Australian Police Department underwent various public sector administrative reforms between 1980's-1990's, to change the culture of the profession. These reforms were triggered as a result of the Fitzgerald Inquiry, which was completed in 1989.[75] The Fitzgerald Inquiry highlighted that there was corruption and misconduct in the Queensland police force and its political institutions; it also included some criticism of the union's influence when acting beyond its scope.[76] The report produced following the Fitzgerald Inquiry sought to define clear boundaries for the legitimate use of union action in the industrial arena that needed to be considered Australia-wide. One of the findings of this report was that 'the [Police] Union has exercised considerable influence over the shaping of the Police Force staff and management practices over a number of years and that whilst the Police Union has a legitimate role to play in industrial matters affecting its members, it is singularly inappropriate for it to demand the right to influence the

[70] Mark Finnane. 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 8.
[71] Ibid.
[72] Jenny Flemming and David Peetz. 'Essential Service Unionism and the New Police Industrial Relations' (2005) 30(4) *Journal of Collective Negotiations in the Public Sector* 283, 283.
[73] Ibid.
[74] Mark Finnane. 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 8.
[75] Tony Fitzgerald QC, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Final Report 3 July 1989) 287.
[76] Tony Fitzgerald QC, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Final Report 3 July 1989) 287; Jenny Flemming and David Peetz. 'Essential Service Unionism and the New Police Industrial Relations' (2005) 30(4) *Journal of Collective Negotiations in the Public Sector* 283, 288.

selection of the Police Commissioner or Minister. In addition, any contact between the Police Union and Government Ministers should include the Police Commissioner and his Minister being present.'[77] These findings emphasised the need for unions and government services to be independent from each other. The role of a union is not to seek to run the day-to-day operations of a government agency, and try to replace themselves in the role of the employer, but rather to serve and advocate for the interests of employees as an organisation independent from the employer.

A Report on the Suspension and Removal of Police Officers in Western Australia by Michael Codd was produced in 1998.[78] The Codd Report saw the Western Australian Police Department go through a similar inquiry to what was done previously by Tony Fitzgerald QC to consider the employment conditions of police officers and to check the amount of influence that the WA Police Union had over the Police Force.[79] The Codd Report revealed a number of reforms needed to the administrative side of policing, such as giving police officers the subject of removal action the right to seek a review by an independent person, to ensure procedural fairness and in accordance with administrative law principles."[80] As a consequence of the Codd Report, the *Police Amendment Act 2002* (WA) was created to address issues with the former administrative process protocol which empowered the Commissioner of Police to dismiss employees without any recourse or rights of appeal.[81] The Codd Report addressed this issue of lack of appeal rights for police officers and recommended a procedurally fair way for these employees to appeal against a decision made to remove them from the force.

Throughout history, the Police Force has sought to remain politically impartial.[82] Before the *Industrial Relations Act 1979* (WA) was amended to enable some limited industrial action, police officers were banned from undertaking industrial action which led the union to forge a close relationship with the employer to achieve its industrial objectives.[83] The establishment of the

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77 Tony Fitzgerald QC, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Final Report 3 July 1989) 280.
78 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 June 1988, 4002.
79 Ibid.
80 Ibid.
81 *Police Amendment Act 2002* (WA) s 33P.
82 Mark Finnane. 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 8.
83 *Industrial Conciliation and Arbitration Act 1900* (WA) s 30.

Police Federation of Australia in 1998 has seen eight Australian State and territory police unions, including the WA Police Union that all collectively associate with a single peak body.[84] The close relationship between the Government as the employer of police officers in the State and the union is said to be the reason for why some of the worker representative organisations from each state still chose to identify as associations, rather than as industrial unions, and why the collective body representing the police industry is a federation.[85] This explains why the collective body representing the policing profession is a federation, being a group of societies or organisations which join together and who usually share the same political view or other common interest.[86] The Police Federation of Australia as a federation is thus a collective of individuals with a broader purpose than a union. [87] The purpose of Federations may not involve any industrial purpose, and could include maintaining law and order whilst keeping removed of debates raised by other unions.[88]

The WA Police Union has a strong history of representing its members, despite historical limitations on the right to strike. The WA Police Union has championed its role as a member advocate by capitalising on the community's fear of crime and its longstanding political ties, particularly to the Labor party.[89] The strong history of legislating the policing profession dates back to the introduction of the *Police Act 1892* (WA) which is an industry specific statute that also legislates industrial disputes of police matters.[90] Although the of the *Police Act 1892* (WA) has been subject to numerous amendments, it still remains in force today.

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[84] Police Federation of Australia, 'About Us' (Web Page) <https://pfa.org.au/about-us/>; Jenny Flemming, Monique Marks and Jennifer Wood. 'Standing on the Inside Looking Out: The Significance of Police Unions in Networks of Police Governance' (2006) 39(1) *The Australian and New Zealand Journal of Criminology* 71, 79.

[85] Jenny Flemming and Monique Marks. 'Reformer or resisters? The state of police unionism in Australia' (2004) 4(1) *Employment Relations Record* 1, 1-14; Mark Burgess, Jenny Flemming and Monique Marks. 'Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness' (2006) 7(5) *Police Practice and Research* 391, 395.

[86] *Collins Dictionary* (online at 14 August 2021) 'federation'.

[87] *The State School Teachers' Union of WA (Incorporated) v Principals' Federation of Western Australia* [2016] WASCA 3, [2]; *Western Australian Principals' Federation v State School Teachers' Union of Western Australia (Inc)* (2008) 88 WAIG 1812, [3]-[6]. These decisions relate to whether to register the Principal's Federation of Western Australia when members may overlap with the already registered State School Teachers' Union of Western Australia.

[88] Jenny Flemming and Monique Marks. 'Reformer or resisters? The state of police unionism in Australia' (2004) 4(1) *Employment Relations Record* 1, 1-14.

[89] Mark Finnane. 'No longer a 'workingman's paradise'? Australian police unions and political action in a changing industrial environment' (2008) 9(2) *Police Practice and Research: An International Journal* 131, 134.

[90] Nicholas Blain and Norman Dufty, 'Industrial Relations in Western Australia' (1989) 31(4) *Journal of Industrial Relations* 552, 562.

C *Industrial Action in the Teaching Profession*

1 *Development of the Teaching Profession in Western Australia*

Before 1893, convicts who were deemed 'of good character' were appointed by the Board of Education to be schoolmasters.[91] The first formal Education Department was established in 1893 and covered teaching of school aged children and students in the Technical Education Division.[92] Shortly thereafter in September 1896, the first teachers' union in Western Australia was established and named the Public School Teachers' Association of Western Australia.[93] Membership to the Public School Teachers' Association of Western Australia was based on the employer, as opposed to industry type, and the member being employed as a teacher, rather than as an administrative staff.[94] In 1899, the name of the Association was changed to the State School Teachers' Union of Western Australia ('SSTUWA').[95] In 1920, the SSTUWA amalgamated with the Country Teachers' Association and as a result saw an increase in membership until 1917, when tensions arose over the appointment of a full time union secretary.[96] However, at its roots the teacher's union remained a small lobbyist group that was yet to be well recognised by the government.[97]

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[91] Shirley M. Leahy, *Convict Teachers and the Children of Western Australia* (Honours Thesis, Edith Cowan University, 1993) 2-3.

[92] Naomi Segal, 'The 1981 'Education Cuts' Dispute in Western Australia' (Papers In Labour History No. 2, Perth Branch Australian Society for the Study of Labour History, October 1988) 1, 1.

[93] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 58; Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 3.

[94] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 58; Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 3.

[95] Bruce Mitchell, *A History of Public School Teachers' Organisations in New South Wales, 1855 to 1945* (PhD Thesis, Australian National University, 1969) 66; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 58; E.A. Thieberg, *Industrial Relations in the State School Teaching Service in Western Australia* (Masters Thesis, The University of Western Australia, 1961) 4; Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 9-10.

[96] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 59.

[97] Ibid 57.

2 *The Growth of the Teachers' Union in Western Australia*

In 1910 to 1920, Western Australia was experiencing significant and long standing financial difficulties which were exacerbated by World War I.[98] One policy that the then government introduced to reduce the State's budget deficit, was to suspend the annual automatic pay increases for public servants.[99] The government then sought to reduce costs by introducing a special reduction in pay of around 7.89%, by cutting Saturday morning work and reducing salaries in accordance with this for all public servants.[100] Tensions arose again between teachers and the government when the Government appeared to be dragging their feet in replying to discontent and suggestions by the delegations of teachers. These delays included a 20 week prolonged response from the then Premier, Sir James Mitchell, in response to the creation of a proposed Public Service Board with independent authority to set pay rates.[101] Also in contention was the lack of engagement with a suggestion by the teachers, civil service and railway officers delegations to establish a body that was impartial and independent of the government to set pay rates and hear appeals.[102] The teacher's union sought a change in the way that grievances were resolved, as the right of appeal for decisions affecting teachers rested with the Minister who was also the person that made the regulations.[103] As a result of these tensions, the teacher's union and Civil Service Association united to try and resolve the disputes by forming an emergency council.[104] The various attempts to informally and amicably resolve the issues by the emergency council however continued to build. Eventually in 1920, SSTUWA, which had built up a strong membership base of 76% of public sector teachers, identified that the issues in dispute had grown to the extent that informal

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98 Ibid.

99 This policy was implemented as part of the 1912 classification plan, Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 282; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 59.

100 Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 282; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 61.

101 Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 283; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 59, 61.

102 Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 283.

103 I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 59.

104 Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 285; Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 58.

and amicable resolution was no longer possible.[105] By the start of the 1920's, the culmination of these issues saw the union organise industrial action in the form of a three week strike which remains the longest strike of school teachers to have ever occurred in Australia's history.[106]

3 *The Role of Unions in Western Australia's 1920's Strike*

By 1920, in the period after World War I, teachers participated in a three week strike in order to improve working conditions in Western Australia, which involved other members of the Grand Council.[107] The Grand Council represented civil servants as a whole and its composition included executives of the SSTUWA, Civil Service Association and the Railway Officers' Association.[108] Although the railway officers were initially party to the Grand Council they later withdrew and reached a separate agreement on pay in the Arbitration Court.[109] In collaboration with the Civil Service Association, the teacher's union also independently continued to pursue its objectives and had a very small success in increasing the work allowance for male and female teacher uniforms.[110] In December of 1919, the teacher's union and Civil Service Association executives held meetings, conducted ballots which supported a strike and endorsed the suggestion to establish a *fighting fund*.[111] Then, in June of 1920, money was collected to fund the strike.[112] Several weeks prior to the strike taking place, the teacher's union and Civil Service Association heard news that their request for an independent authority to set wages, also known as the appeal board, was

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[105] E.A. Thieberg, *Industrial Relations in the State School Teaching Service in Western Australia* (Masters Thesis, The University of Western Australia, 1961) 5.

[106] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 57.

[107] Bruce Mitchell, *A History of Public School Teachers' Organisations in New South Wales, 1855 to 1945* (PhD Thesis, Australian National University, 1969) 176; Keith Moore, 'Disobedient Citizens: Press Depictions of Striking School Teachers in NSW and Anti-Vietnam War Demonstrators in NSW and Victoria in 1968' in Elder, C., Moore. K. (ed), *Newvoices, new visions: Challenging australian identities and legacies* (Cambridge Scholars, 2012) 249-250.

[108] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 62.

[109] Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 285.

[110] Ibid 286.

[111] Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 287; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 66.

[112] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 66.

granted by the Government.[113] However, at the meeting, Cabinet still refused to negotiate a pay increase.[114] As a result, and despite union rules and legislation restricting industrial action, the Disputes Committee moved a motion that teachers and civil servants *cease work forthwith*, this motion was resoundingly carried with only around a handful of members dissenting.[115] Although section 104 of the *Industrial Arbitration Act 1912* (WA) expressly prohibited strikes and lockouts, all State Government offices and schools were then closed and picketing occurred out the front of workplaces.[116] Although the strike resulted in some small changes, the teacher's union and Civil Service Association maintained that these concessions were not enough, because the pay increases were only offered to permanent and low paid male employees and therefore were inadequate and not fairly applied.[117] The Premier on the other hand maintained his position that the government had granted increases to all low paid civil servants and teachers and further had promised that an appellate board be established to determine appeals and the salaries of teachers.[118] At a final mass meeting of the SSTUWA and Civil Service Association, the Premier's offer to settle the matter without proceeding to the Court of Arbitration was approved by the members, the key terms of the agreement included:

- officers must return to work as soon as an agreement was made;
- an appeal board would then be immediately appointed;
- this board would be empowered to hear and determine matters relating to officers over a certain classification;
- the board could hear matters from officers earning below £252 immediately, and those positions that earnt below this classification would be published in the gazette immediately; and

[113] Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 288.
[114] Ibid 288-90.
[115] *Industrial Arbitration Act 1912* (WA) s 7(4); Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 288-90.
[116] *Industrial Arbitration Act 1912* (WA) s 104; Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 288-90.
[117] Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 289.
[118] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 70.

- the terms would be applied equally to teaching staff under the Education Department, as with permanent officers under the *Public Service Act 1904* (WA).[119]

Following the end of this 1920 strike, the then Premier, Hon. J. Mitchell, introduced to parliament the PSAB Bill for the purpose of preventing unauthorised cessation of work on the part of public servants.[120] The jurisdiction of the independent board of appeal, known as the PSAB Board, included:

- establishing a system of compulsory arbitration which would ensure that appeals were heard and determined on matters relating to classifications and reclassifications, salary or allowances of public servants;
- to correct anomalies in treatment in respect of reclassification, salary or position;
- to determine whether any immediate relief was available to officers earning a salary above £252; and
- to consider complaints of alleged victimisation following the strike.[121]

The PSAB Bill was assented to on 3 December 1920 and the *Public Service Appeal Board Act 1920* (WA) came into force.[122] One notable inclusion in the *Public Service Appeal Board Act 1920* (WA) that caused debate but remained in the Act was section 15, which prohibited strike action. The *Public Service Appeal Board Act 1920* (WA) section 15 stated that 'it is an offence for any public servant to take part in any act, matter, or thing in the nature of a strike, and on conviction shall forfeit the privileges which otherwise might have been enjoyed under any Act or regulation relating to his service and be liable to a penalty not exceeding ten pounds.'[123] The 1920 strike resulted in the establishment of the PSAB which consists of one representative from the

[119] Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 291-2; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57-73.

[120] *Public Service Appeal Board Act 1920* (WA); Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 1920, 2095.

[121] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 77; Public Service Appeal Board Bill 1920 (WA); E.A. Thieberg, *Industrial Relations in the State School Teaching Service in Western Australia* (Masters Thesis, The University of Western Australia, 1961) 50-52.

[122] *Public Service Appeal Board Act 1920* (WA).

[123] *Public Service Appeal Board Act 1920* (WA) s 15; Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 129.

employees, one representative of the government and one independent chairman.[124] Although the structure and purpose of the PSAB largely remains in place today, it's undergone several amendments and is now contained within the *Industrial Relations Act 1979* (WA).[125]

4 *The Right for Teachers to be Heard*

The significance of the role of a teacher was regulated through state and federal legislation. Towards the end of the 1920's, the High Court of Australia made a determination on a dispute between the Federated State School Teachers' Association of Australia and the State of Victoria.*[126]* The outcome of this dispute considered whether the occupation of teaching was of an industrial nature and concluded that teachers were regarded as a public service rather than an *industry* within the meaning of section 4 of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth).[127] This decision ultimately found that State school teachers were not engaged in *industry* and therefore not deemed to be employees with any right of appeal from arbitrary decisions that affected them.[128] Consequently, the disputes which arose between teachers and the State were not *industrial disputes* within the meaning of section 51 of the Commonwealth Constitution.[129] The test used in this decision has been considered as divisive with criticisms of it including the subjective nature of what an industrial dispute is defined as and also that industries do change from being publicly run to privately run such as in the telecommunications and postal service industries.[130] This decision was made after the PSAB was formed in Western Australia and meant that State school teachers in Western Australia had a limited right of appeal, whereas teachers in other states went without. This limited right of appeal to the PSAB in 1920, then Government School Teachers Tribunal in 1961-1985, made it difficult for teachers to raise a dispute over anything other than salary and promotions.[131]

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[124] I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57, 68.
[125] *Industrial Relations Act 1979* (WA) s 80H-K.
[126] *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569, 569.
[127] Ibid 575.
[128] *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569, 569; *Coldham* (1983) 153 CLR 297, [22].
[129] *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569, 569.
[130] Warwick Rothnie, 'Restoring the Frontiers of an Unruly Province: Inter-governmental Immunities and Industrial Disputes' (1985) 11(3) *Monash University Law Review* 120, 144-5.
[131] Rod Chadbourne, 'The new industrial relations, teacher unions and educational reform' (2000) 3.2 *Change: Transformations in Education* 19, 27-9.

5 *The Frequency and History of Teacher Strikes and the Impact this has had on Industrial Action in the Sector*

Up until the 1930's, the teaching profession was predominantly male and the government had proactively sought to promote this by offering better pay and conditions to male workers.[132] In 1934, despite the *Industrial Arbitration Act 1912* (WA) still prohibiting industrial action, a *regulation strike* was taken by teachers which was powered by a profession where 98% of its employees were union members.[133] The regulation strike lasted for an entire year and was initiated following wide discontent by teachers with their service conditions.[134] After a number of failed protests organised by the SSTUWA, the various conditions teachers disputed in the regulation strike were compiled into a manifesto, highlighting the disabilities faced by teachers and school children. The manifesto raised the unfair conditions placed on teachers such as, shortages in school stock, out of date equipment, employment of monitors as teachers and the closure of the Teachers' Training College.[135] Following this strike, the Government made some concessions for teachers including reopening the Teachers' Training College, restoring allowances, removing some emergency deductions, creating an all girls school and restoring long service leave.[136]

Between 1950 to 1969, teachers did not take industrial action. This was due to the transition from the end of world war 2 which caused a decrease in membership.[137] Although industrial action was not taken, the teaching profession was still party to disputes with the government. These disputes

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[132] Sally Kennedy, 'Useful and Expendable: Women Teachers in Western Australia in the 1920s and 1930s' (1983) 44(1) *Labour History* 18, 18-20.

[133] Naomi Segal, 'The 1981 'Education Cuts' Dispute in Western Australia' (Papers In Labour History No. 2, Perth Branch Australian Society for the Study of Labour History, October 1988) 1, 1; E.A. Thieberg, *Industrial Relations in the State School Teaching Service in Western Australia* (Masters Thesis, The University of Western Australia, 1961).

[134] E.A. Thieberg, *Industrial Relations in the State School Teaching Service in Western Australia* (Masters Thesis, The University of Western Australia, 1961) 5-6; Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 124-6.

[135] Vincent Horner, *The Influence of the State School Teachers' Union of Western Australia on the Policies of the State Education Department of Western Australia* (Masters Thesis, The University of Western Australia, 1961) 129, 131.

[136] Ibid.

[137] Naomi Segal, 'The 1981 'Education Cuts' Dispute in Western Australia' (Papers In Labour History No. 2, Perth Branch Australian Society for the Study of Labour History, October 1988) 1, 1; E.A. Thieberg, *Industrial Relations in the State School Teaching Service in Western Australia* (Masters Thesis, The University of Western Australia, 1961) 6.

did not proceed to the Western Australian Industrial Commission but included a salary dispute in the late 1950's and a teacher housing issue in the late 1960's.[138]

Towards the end of the 1970's, the SSTUWA again tried to undertake a series of rolling one day strikes. This was a result of a change to the holiday leave arrangements of its members without consultation from the SSTUWA.[139] This industrial action did not progress due to the lack of engagement from teachers and no clear direction being given from the union.[140]

In the early 1980's, tension grew among teachers over the earlier arbitrary change in holiday leave entitlements, resulting in an Industrial Action Fund being established by the SSTUWA. As a result of unsuccessful negotiations, in May of 1981, the SSTUWA decided to abandon the holiday pay issue and instead change its primary focus towards increasing salaries in the profession.[141] A campaign was conducted by the SSTUWA but this failed.[142] Shortly thereafter, the New South Wales Teachers' Federation, whose members had historically shared the same salaries, conducted a salary campaign and achieved a 10% salary increase.[143] Because of the historical similarities in salaries between Western Australia and New South Wales, the flow on from the New South Wales teachers' salary increase was that the SSTUWA used this outcome in negotiations to achieve a 4.3% rise in their salary followed by a further 5.9% rise soon after. [144]

During the 1980's, teachers raised a dispute with the Government School Teachers' Tribunal about the provision of more time for non-teaching duties and the need for more time to undertake administrative duties.[145] The Government School Teachers' Tribunal conceded that teachers did require additional non-contact time but that School's existing resources did not allow for this.[146] Following this decision, the teaching profession undertook a series of strikes in response to

[138] Naomi Segal, 'The 1981 'Education Cuts' Dispute in Western Australia' (Papers In Labour History No. 2, Perth Branch Australian Society for the Study of Labour History, October 1988) 1, 1.
[139] Ibid 2.
[140] Ibid.
[141] Ibid.
[142] Ibid 3.
[143] Western Australia, *Government Gazette*, No 30, 8 May 1981, 1401, 1465.
[144] Western Australia, *Government Gazette*, No 55, 9 July 1982, 2471, 2541.
[145] Western Australia, *Government Gazette*, No 53, 25 July 1980, 2481, 2509.
[146] Ibid.

government imposed funding cuts for education supplies in schools.[147] In this case, the SSTUWA and its members took strike action individually in some high schools to protest these education cuts, and were supported by parents in their campaign to lift spending cuts.[148] The budget cuts in the 1980's also saw individual schools take industrial action. This industrial action included a work-to-rule campaign, student and parent short strikes, protests, a suspension on teaching for a whole week as a result of one of its teachers being redeployed to Lynwood Primary School and ongoing strikes in three schools refusing the acceptance of replacement teachers.[149] Following negotiations with the Government, with the support of the then President of the Western Australian Council of State School Organisations, an agreement was made whereby a moratorium on industrial action was agreed and a 5.9% increase to teacher's salaries was implemented.[150]

Commencing in 1995, public school teachers in Western Australia participated in a ban on voluntary labour in response to a change in government and a proposed new industrial relations regulatory framework.[151] The new framework proposed that teachers' salaries would be stagnated and they were to be expected to manage more students with less resources.[152] The ban involved teachers complying strictly with the Department of Education's regulations and not taking on additional tasks generally completed by them.[153] This industrial action resulted in a small pay rise for teachers and the adoption of a new regulatory framework which provided for more flexible work hours, career structure and meetings to be held outside of school hours.[154]

In summary, since Western Australia's foundation teachers have taken industrial action on several occasions which has resulted in lasting and impactful outcomes. For instance, in the case of the 1920 and 1934 strikes, despite section 104 of the *Industrial Arbitration Act 1912* (WA) prohibiting strikes and lockouts, teachers took industrial action which resulted in rectifying significant pay

[147] Naomi Segal, 'The 1981 'Education Cuts' Dispute in Western Australia' (Papers In Labour History No. 2, Perth Branch Australian Society for the Study of Labour History, October 1988) 1, 1.
[148] Ibid.
[149] Ibid 7-8.
[150] Ibid 17.
[151] 'WA Teachers need your help', (1995) 17(16) *Education: journal of the N.S.W. Public School Teacher Federation* 1, 8.
[152] Government of Western Australia, 'No talks with union unless teacher work bans are lifted' (Media Statement, 24 February 1995) <https://www.mediastatements.wa.gov.au/>.
[153] Susan Robertson and Rod Chadbourne, 'Banning Voluntary Labour: a study of teachers' work in the context of changing industrial regimes (1998) 19(1) *Discourse: Studies in the Cultural Politics of Education* 19, 27.
[154] Ibid 32.

and employment condition deficiencies in the profession. Also, there appears to be no information available to suggest that the Government took any legal action against the SSTUWA for breaching section 104 of the *Industrial Arbitration Act 1912* (WA) in relation to either of the 1920 and 1932 strikes. Also, in the instance of the 1980's industrial action, the strikes taken by the SSTUWA that resulted in a 10.2% profession wide pay rise occurred despite being prohibited under section 97 of the *Industrial Relations Act 1979* (WA). Although historically there were total prohibitions on the right to strike, the teaching profession has demonstrated that industrial action is still a necessary means to achieve employee industrial objectives.

D *Industrial Action in the Firefighting Profession*

1 *The Creation of Western Australia's Firefighting Industry*

Prior to the 1880's, and out of necessity, there existed several informal volunteer fire brigades located at various suburbs in the Perth Metropolitan area, namely, Fremantle, the Eastern Goldfields, Albany, Bunbury and Geraldton.[155] The first official fire brigade was the Fremantle Volunteer Fire Brigade and it was established in 1885 as part of a community effort to protect persons and property.[156] Shortly thereafter, the *Fire Brigades Act 1898* (WA) was created and a Commission was charged with establishing formal fire-fighting arrangements which led to the WA Fire Brigade being formed.[157] The formal fire brigades located in Perth had oversight by the WA Fire Brigades Board, although initially this oversight did not extend to cover the outer suburban and country fire brigades.[158] The Western Australian Volunteer Fire Brigades Association was formed in 1904 and its purpose was to support both career and volunteer fire brigades in Western Australia.[159] The employment conditions of firefighters during this time were fairly poor, as firemen were required to work twenty-four hours a day, seven days a week with leave being

[155] Department of Fire & Emergency Services, 'Heritage', *If Somebody Yelled Fire!* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>.
[156] N.F. Dufty, *Industrial relations in the public sector: the firemen* (University of Queensland Press, 1979) 41.
[157] *Fire Brigades Act 1898* (WA); N.F. Dufty, *Industrial relations in the public sector: the firemen* (University of Queensland Press, 1979) 41.
[158] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.
[159] Department of Fire & Emergency Services, 'Heritage', *If Somebody Yelled Fire!* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>.

granted only when it was necessary.[160] Firefighters in the early 1900's were expected to remain available at all times, formally attend to work from 8am to after 6pm and attend additional training following that until 10pm.[161] Outside of the attendance of work hours, firemen would follow a set eating schedule and complete drills and parades in addition to fighting fires at any stage of the night.[162] Unsurprisingly these conditions of employment resulted in a high staff turnover which led to industrial action.[163] On 10 January 1901, a group of firefighters took industrial action by threatening a coordinated mass resignation.[164] Negotiations then occurred to resolve disputes about hours and leave which resulted in the grant of 12 hours of leave every eight days.[165] This arrangement remained in place until 1920 when the formal hours of station work reduced to 7am to 4pm daily, however after hours work and constant availability was still mandated, and 14 days annual leave per annum was granted.[166]

On 1 January 1910, the *District Fire Brigades Act 1909* (WA) came into force which brought all Western Australian fire brigades under the jurisdiction of the Fire Brigades Board.[167] As a result, a Chief Officer's position was created and all existing and volunteer brigades came under the control of the WA Fire Brigade.[168] During the World War I era, the use of volunteer firefighters was substantially increased and threatened the work of the permanent staff. Along with the improvement of poor working conditions, these factors contributed significantly to why firemen wanted to form a union.[169] The Western Australian Fire Brigades Employees Union was formed and registered before the State's Industrial Commission on 11 September 1916.[170]

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[160] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[161] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] Ibid.

[166] *Fire Brigade Employees Agreement* (1920) 1 WAIG 17 cls 8, 13.

[167] N.F. Dufty, *Industrial relations in the public sector: the firemen* (University of Queensland Press, 1979) 41.

[168] Department of Fire & Emergency Services, 'Heritage', *If Somebody Yelled Fire!* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>; *District Fire Brigades Act 1909* (WA) s 35(1).

[169] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[170] Department of Fire & Emergency Services, 'Heritage', *If Somebody Yelled Fire!* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>.

2 *The Tensions Between Volunteer and Career Firefighters*

In 1922, the WA Fire Brigades Board transferred the ambulance service it provided to the St John Ambulance Association.[171] In 1923, another dispute arose where the firemen working under the supervision of the Fire Station Keeper in Kalgoorlie planned to go on strike due to ongoing poor leadership.[172] In this dispute, the WA Fire Brigades Board had to step in and were able to transfer the supervisor to another station, which averted the proposed industrial action.[173] Also, in the late 1920's, an expansion of the volunteer brigades over that of permanent firemen caused the Western Australian Fire Brigades Employees Union to take industrial action in the form of a *go slow* order, which is a direction to perform work slower than usual.[174] This industrial action was taken because the permanent firefighters felt that the growth in volunteer firefighters was causing issues in service delivery; for example, volunteers were not reliable and were replacing properly trained permanent firemen. The go slow order saw the permanent firemen reinstated to their former roles. This temporarily placated the dispute but caused a lasting point of tension between volunteer and permanent firefighters.[175] Another key feature of the 1920's was that it saw firefighters working week reduced to 84 hours per week on a rotating morning and night shift roster and annual leave increased to 21 days per annum.[176] Although these disputes did not immediately result in any material changes, they demonstrate the traditionally conservative nature of the Union in avoiding to use the powerful leverage of industrial action to resolve disputes; further, the tension between the working hours and role of volunteer versus career firefighters are still live issues in the profession.

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[171] Department of Fire & Emergency Services, 'Heritage', *Technology, Training and Turnout* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>.

[172] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[173] Ibid.

[174] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) https://www.ufuofwa.net.au/vault/union-history/; Natalie van der Waarden, *Understanding Employment Law: Concepts and Cases* (LexisNexis Butterworths, 3rd ed, 2014) 218.

[175] United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[176] *Fire Brigade Employees – State of Western Australia Agreement* (1925) 5 WAIG 55, cls 6, 13.

3 *The Role of the Federal Firefighting Union*

The 1940's saw the introduction of a new Act, the *Fire Brigades Act 1942* (WA) to regulate the firefighting industry in the State.[177] Also, the first informal discussions around the formation of a Federal union being created was raised by Melbourne's fire union in 1942, with the justification being that it would assist in information sharing within the industry.[178] An informal Federal United Firefighters' Union of Australia was established which saw a greater degree of relevant information about awards and agreements being shared with state branches, along with more dialogue around supporting workers' safety and facilitation of political advocacy.[179] The work week was reduced from 84 hours to 56 hours per week in 1945, which was likely a result of communications arising from within the informal Federal union and the introduction of a third platoon that increased the career-firefighter numbers.[180]

In 1965, a dispute regarding the service pay of firemen and officers arose.[181] The dispute resulted in a union motion in favour of commencing a restrictive duty strike to be taken on 1 November of that year.[182] Although negotiations occurred between the union and the Fire Brigade Board that saw the strike being prevented, tensions between the parties still remained.[183] These tensions saw the union leverage the Fire Brigade Board's need to appoint more officers following the reduced working week hours by banning its members from sitting the necessary examinations or accepting promotions.[184]

The decision in *Pitfield v Franki* provides a High Court decision of how the United Firefighters' Union sought, and was denied, Federal registration.[185] The Western Australian Fire Brigades Employees Union were impacted by this decision because they not only supported, but also

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[177] Fire Brigades Act 1942 (WA); United Firefighter's Union of Western Australia, 'Union History', *History of the WA Fire Brigade's firemen and their Union* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[178] N. F. Dufty, 'The firemen's union*'* (Working Paper No 20, The Flinders University of South Australia Institute of Labour Studies, February 1977) 1.

[179] Ibid.

[180] Department of Fire & Emergency Services, 'Heritage', *If Somebody Yelled Fire!* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>.

[181] N.F. Dufty, *Industrial relations in the public sector: the firemen* (University of Queensland Press, 1979) 205.

[182] Ibid.

[183] Ibid.

[184] N.F. Dufty, *Industrial relations in the public sector: the firemen* (University of Queensland Press, 1979) 205; *Fire Brigade Officers' Union v Fire Brigades' Board* (1966) 45 WAIG 1204.

[185] *Pitfield v Franki* [1970] HCA 37.

financially backed, the registration of a Federal union. The registration of a Federal union would have enabled Western Australian firefighters access to benefits such as a greater degree of relevant information about awards and agreements being shared, interstate support when undertaking industrial action and assistance with facilitating political advocacy.[186] These benefits caused the Western Australian Fire Brigades Employees Union to support the Federal union's appeal to the High Court of Australia for registration.[187]

In an unsuccessful attempt to the High Court of Australia to formally register the United Firefighters Union, the High Court upheld an application which sought an order for the registration of the United Firefighter's Union to be quashed.[188] The High Court quashed the decision on the basis that it found there was 'a lack of authority to register the Union as an organisation of employees because the Union was not at any material time an association of not less than 100 employees in or in connection with any industry' or that firemen were not 'engaged in any industrial pursuit within the meaning of section 132 of the Act.'[189] In short, section 132 of the *Commonwealth Conciliation and Arbitration Act 1904-1969* (Cth) provides for the circumstances that must be met before an association or person is registered as an organisation.[190]

In this decision where the United Firefighters Union first sought registration, Chief Justice Barwick formed the opinion that firefighting authorities 'did not carry on' and 'were not engaged in' any industry and as such persons employed by firefighting authorities were not employees.[191] Further, Barwick CJ found that the 'performance of the duties of the fire officer did not comprise of manual labour nor produce or distribute commodities, as such this work could not be seen as industrial and was not an industrial pursuit.'[192] Barwick CJ, Mctiernan J and Menzies J all decided to quash the union's registration.[193] The sole dissenting judge was Justice Walsh who took a broad view and considered that the work that the fire fighting authorities engaged in was manual work

[186] N. F. Dufty, 'The firemen's union' (Working Paper No 20, The Flinders University of South Australia Institute of Labour Studies, February 1977) 1.
[187] *Pitfield v Franki* [1970] HCA 37.
[188] Ibid.
[189] Ibid [3].
[190] *Commonwealth Conciliation and Arbitration Act 1904-1969* (Cth) s 132.
[191] *Pitfield v Franki* [1970] HCA 37 (Barwick CJ, McTiernan and Menzies JJ).
[192] Ibid (Barwick CJ).
[193] Ibid (Barwick CJ, McTiernan and Menzies JJ).

and was industrial in nature such that the employees should be regarded as being engaged in an industrial pursuit.[194] By not being classified as an industry, firefighters in the Federal industrial relations system were unable to obtain registration and provide industrial supports such as knowledge sharing about conducting industrial actions to the firefighters unions in each state.[195]

Despite the High Court initially rejecting its registration, on 14 June 1974 the Federal United Professional Firefighter's Union was formally established to replace the union that was deregistered four years prior.[196] In 1983, a further High Court decision reversed the decision in *Pitfeild v Franki*[197] by redefining an industry and the meaning of an industrial dispute. The Federal union now has branches in each state, including Western Australia.[198] The United Professional Firefighter's Union's Western Australian Branch represents the 'industrial interests of career public sector and private industry firefighters, communications officer and fire safety officers.'[199]

4 *How the United Firefighter's Union of Western Australia has Used Real and Threatened Industrial Action*

In Western Australia during the 1970's there were two unions operating within the Fire Brigade, one for officers and another for firefighters; this caused tension in the industry as both unions separately competed for better terms and conditions of employment for its members.[200] Membership to either union was a compulsory requirement of the profession.[201] In 1970, firefighters were also granted a 40 hour work week.[202] Additionally, two major wage agreements were negotiated for firefighters, the first in 1971 and the second in 1975.[203]

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[194] Ibid (Walsh J).

[195] N. F. Dufty, 'The firemen's union*'* (Working Paper No 20, The Flinders University of South Australia Institute of Labour Studies, February 1977) 1.

[196] 'United Firefighters' Union of Australia', *Registered Organisations Commission* (Web Page) <*https://www.roc.gov.au/find-a-registered-organisation/*>; 'Union History', *United Firefighter's Union of Western Australia* (Web Page) <https://www.ufuofwa.net.au/vault/union-history/>.

[197] [1970] HCA 37.

[198] *Coldham* (1983) 153 CLR 297, [29]-[40].

[199] 'Your Union', *United Firefighter's Union of Western Australia* (Web Page) <https://www.ufuofwa.net.au/>.

[200] N. F. Dufty, 'Work and its correlates - the case of the firemen*'* (Working Paper No 10, The Flinders University of South Australia Institute of Labour Studies, June 1974) 15.

[201] Ibid.

[202] Fire Brigades Employees' Award 1967 (1970) 50 WAIG 850.

[203] N. F. Dufty, 'Collective Bargaining in the Context of Compulsory Arbitration - The Case of the Western Australian Firemen' (1978) 16(1) *British Journal of Industrial Relations* 52, 53; *Western Australian Fire Brigades Board - General Officers Salaries Allowances and Conditions Agreement 1971* (1971) 51 WAIG 1027*; Western Australian*

In the case of the 1971 wage agreement negotiations, there was a significant difference in the positions of the parties requiring the WAIRC to become involved to resolve the pay scale issue and work week.[204] The introduction of the 40 hour work week initially caused a dispute over weekend hours between the Fire Brigade Board and the union.[205] However, a resolution was made in the WAIRC whereby it was agreed by the parties that "work should not be completed for its own sake" and that an eight week trial period would enable officers in charge to stand down staff at midday on weekends, provided that all necessary work or drills were satisfactorily completed.[206] The tactics used by the union in this instance involved them targeting management through the use of some limited industrial action such as the refusal to undertake various duties, the threat of a passive strike and the threat by the union that they would take the issue directly to the relevant Minister.[207] Ultimately this matter was heard and determined by the WAIRC and an order was made to raise the wage bill for firemen.[208]

In the case of the 1975 wage agreement negotiations, neither party undertook or threatened industrial action although some passive strikes may have occurred.[209] In preparation for the 1975 pay claim negotiations, the union ran a large scale empirical survey of 168 firemen and 48 officers in Western Australia that were randomly selected from the unions' membership list.[210] The study found that over a third of the sample workers came from a skilled workers background, a quarter from a semi-skilled background, one in six being a white collar worker, and a further one in six

Fire Brigades Board Administrative, Clerical and General Officers Salaries, Allowances and Conditions Agreement, 1975 (1975) 55 WAIG 1485.

[204] *Fire Brigade Employees' Industrial Union of Workers (Coastal Districts) of Western Australia v Western Australian Fire Brigades Board* (1970) 51 WAIG 97, 96-7.

[205] Ibid.

[206] *W.A. Fire Brigades Board v the Fire Brigade Employees' Industrial Union of Workers (Coastal Districts) of Western Australia* (1971) 51 WAIG 204.

[207] N. F. Dufty, 'Collective Bargaining in the Context of Compulsory Arbitration - The Case of the Western Australian Firemen' (1978) 16(1) *British Journal of Industrial Relations* 52, 53.

[208] *Fire Brigade Employees' Industrial Union of Workers (Coastal Districts) of Western Australia v Western Australian Fire Brigades Board* (1970) 51 WAIG 97, 96-7.

[209] N. F. Dufty, 'Collective Bargaining in the Context of Compulsory Arbitration - The Case of the Western Australian Firemen' (1978) 16(1) *British Journal of Industrial Relations* 52, 53; N.F. Dufty, *Industrial relations in the public sector: the firemen* (University of Queensland Press, 1979) 275.

[210] N. F. Dufty, 'Work and its correlates - the case of the firemen*'* (Working Paper No 10, The Flinders University of South Australia Institute of Labour Studies, June 1974) 3; N. F. Dufty, 'The firemen's union*'* (Working Paper No 20, The Flinders University of South Australia Institute of Labour Studies, February 1977) 6.

being a previous regular member of the defence force.[211] One third of firemen had under five years of service, another third had between five to nine years' service and a final third had over nine years of service.[212] Despite the fact that two major wage agreements were reached in the 1970's the study found that the Fire Brigade's industrial relations record was held in good esteem by the survey's participants and that this was based on the relationship between the Board and the Firefighter's Union when negotiating workplace rights.[213] The survey contributed to the success of the union's negotiations because it was able to gauge the demographic of its membership and gain insight into members perceptions which is information that can be used to plan for recruitment and future enterprise agreement negotiations. Another factor that may have played a part in the success of the negotiation of the two major wage agreements was the unions' historically close links in Western Australia with the Labor Party.[214]

In 1999, the Western Australian Government established the Fire and Emergency Services Authority of WA to streamline both career and volunteer WA Fire and Rescue Services such as the Bushfire Service, State Emergency Service and the Volunteer Marine Rescue Service under the direction of one board and one Chief Executive Officer.[215] As a result, the Fire and Emergency Services Authority of WA is one of the world's largest fire districts.[216] On 1 November 2012, the Fire and Emergency Services Authority of WA was restructured and became a government department headed by a Fire and Emergency Services Commissioner.[217]

Firefighters in Western Australia have historically been conservative when taking industrial action. In the instances of industrial action that occurred in the 1920's, despite section 104 of the *Industrial Arbitration Act 1912* (WA) prohibiting strikes and lockouts, firemen still took industrial action which resulted in the maintenance of a stronger firefighting industry equip with professional

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[211] N. F. Dufty, 'Work and its correlates - the case of the firemen*'* (Working Paper No 10, The Flinders University of South Australia Institute of Labour Studies, June 1974) 3.
[212] Ibid 4.
[213] Ibid 13-14.
[214] N. F. Dufty, 'Work and its correlates - the case of the firemen*'* (Working Paper No 10, The Flinders University of South Australia Institute of Labour Studies, June 1974) 26.
[215] 'Corporate History', *Department of Fire & Emergency Services* (Web Page) <https://www.dfes.wa.gov.au/aboutus/corporateinformation/Pages/history.aspx>.
[216] 'If Somebody Yelled Fire!', *Department of Fire & Emergency Services* (Web Page) <https://www.dfes.wa.gov.au/schooleducation/heritage/Pages/default.aspx>.
[217] *Fire and Emergency Services Act 1988* (WA) s 52, as at 1 November 2012.

permanent firefighters. Also, in the instance of the 1970's wage agreement negotiations limited industrial action was taken by the union, but its industrial objectives were still achieved. Since the 1970's, no industrial action has been taken by the firefighting industry despite amendments to the *Industrial Relations Act 1979* (WA) now enabling this. Further, the limited industrial action taken by firefighters suggests that the profession has taken a conservative approach to the use of industrial action to resolve employment disputes.

E *Industrial Action in the Nursing Profession*

1 *The Formation of Nursing as a Profession*

Prior to the 1900's, when the first settlers were arriving in Australia, nursing was yet to be regarded as a profession and no formal training existed, meaning any person could have called themself a nurse.[218] Any medical surgery was conducted by a doctor and their nurse assistant at the patient's home, due to the very limited hospital facilities at this time.[219] The assistant to the doctor would be formally recognised as a nurse if they received a letter of reference or recommendation of their practical experience from the doctor.[220] Between 1894 to 1901, the Colonial Surgeon was in complete control of all government hospitals and was only responsible to report to the Colonial Secretary.[221] Following this, the *Hospitals Act 1894* (WA) was introduced which provided for the management of Public Hospitals including the nomination and removal of nurses.[222] The first formal qualifications requirement for nurses in Western Australia did not exist until the commencement of the *Nurses Registration Act 1921* (WA) which provided for the creation of a Nurses Registration Board and the limited requirement to complete three years of nurse training.[223]

[218] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 2-4, 14.
[219] Ibid 2-4.
[220] Ibid.
[221] Ibid 5.
[222] *Hospitals Act 1894* (WA), as enacted.
[223] *Nurses Registration Act 1921* (WA) s 5.

2 *The Role of State and Federal Nursing Worker Associations*

In 1899, due to a lack of resources and shortage of nurses following the Boar War, the Australasian Trained Nurses Association of New South Wales was formed.[224] This was the first Australian nurses' association formed in the country.[225] Soon after, Western Australia formed its own branch of the Australasian Trained Nurses Association in 1907.[226] The formation of the Western Australian Branch of the Australasian Trained Nurses Association was because it was the sole recognised provider of a training program, with an examination process that was required to be passed for membership to the Association and mutual recognition of studies that had been completed.[227] The Australasian Trained Nurses Association's rules contained a number of problems for Western Australia's nurses, with difficulties sourcing accredited hospitals being a primary issue and the lack of resources at the time owing to Western Australia's geographical isolation.[228] Consequently, a second nurses association was formed in 1909, known as the Western Australian Nurses Association.[229] The first industrial action was also undertaken by Western Australian nurses during this time.[230] A protest by nurses and the matron at Perth Children's Hospital occurred following unethical behaviour of the medical superintendent resulting in the transfer of children in care to the Perth Hospital.[231] Outsourced nurses and volunteers replaced protesting staff for the period of the protest.[232] The protest was done discreetly and a significant amount of planning was done by the nurses to ensure that the children in care would still be able to access hospital services.[233] One recorded result of this protest by nurses was that the Australasian Trained Nurses Association deregistered the Perth Children's Hospital as one of its few training schools.[234] The Perth Children's Hospital was later reregistered when the matron and medical superintendent both resigned.[235]

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[224] Australian College of Nursing, 'The Australasian Trained Nurses Association 1899', *Nurse education in Australia: Part 3* (Web Page, 27 March 2020) <https://www.acn.edu.au/nurseclick/nurse-education-in-australia-part-3>.
[225] Ibid.
[226] Ibid.
[227] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 18, 25.
[228] Ibid 41.
[229] Ibid.
[230] Ibid 57.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.

In 1924, a Federal nursing union, the Australian Nursing Federation, formed as an unincorporated association of various state branches.[236] The Australian Nursing Federation encouraged domestic autonomy in each state and was established to promote the rights and interests of the nursing profession.[237] Prior to this, various States had their own professional associations, all of which generally opposed any suggestion of industrial action.[238] In September 1934, the Western Australian Nurses' Association Industrial Union of Workers was registered under section 10 of the *Industrial Arbitration Act 1912* (WA).[239] The Western Australian Nurses' Association Industrial Union of Workers operated alongside the W.A. Male and Female Mental Nurses' Industrial Union of Workers, Claremont and the Hospital Employees' Industrial Union of Workers, W.A. Coastal Branch.[240]

3 *Examples of Industrial Action by Nurses*

During World War II, significant labour shortages existed which disproportionately affected women's pay rates. In particular, the Commonwealth Arbitration Court permitted women in vital industries to be paid not less than 75% of the corresponding rate for men despite it being an already low paid profession where staff worked non-standard long hours.[241] These poor employment conditions resulted in nurses giving up nursing work in replacement of war work, which paid women 90% of the corresponding rate for males.[242] On 4 August 1944, nurses working at the Claremont Hospital for the Insane took industrial action in protest of the poor pay, lack of recognition, social life restrictions and unfair Manpower Regulations that prevented them from leaving their employment in favour of better paid defence work.[243] The Manpower Directorate was

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[236] Australian Nursing Federation, 'The Australian Nursing Federation', *About Us* (Web Page, 2021) <https://www.anfiuwp.org.au/about-us.php>.

[237] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 73-4.

[238] Glenda Strachan, 'Not Just a Labour of Love: Industrial Action by Nurses in Australia' (1997) 4(4) *Nursing Ethics* 294, 296-298; Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 180.

[239] *Application for registration as an industrial union of the "Western Australian Nurses' Association Industrial Union of Workers, Perth"* (1934) 14 WAIG 177, 178.

[240] Ibid 177.

[241] 'The ANF celebrates 75 years' (1999) 6(8) *Australian Nursing Journal* 14, 14-21.

[242] Ibid.

[243] Gail Reekie, 'Industrial Action by Women Workers in Western Australia during World War II' [1985] 49 *Liverpool University Press* 75, 80.

established by the Commonwealth Government to manage worker shortages and was renowned for implementing tactics such as encouraging married nurses to return to work, imposing fines on absentee employees and imprisoning workers that did not attend for work.[244] Nurses at the time were in critically short supply and would work long hours, under extreme pressure and for low pay.[245] When the nurses at Claremont Hospital for the Insane took industrial action it was only brief and in the form of a six hour walk out in protest of a directive from the Minister that further reductions in female staff would occur.[246] A further aggravating circumstance for the industrial action was that the Claremont Hospital for the Insane was not an accredited training school with the Australasian Training Nurses Association.[247] Staff at Claremont Hospital for the Insane had their own industrial union representing the nurses, and this union had affiliations with the Australian Labor Party.[248] The industrial action was brief, however because it occurred during wartime a short term resolution was agreed which involved an immediate call for trainee nurses to volunteer their time to assist.[249] The law was changed following this protest to enable the creation of a training course in mental nursing, resulting in State registration and final examination by the Nurses' Registration Board. Additionally, the Midwives Board, which had control of training of midwives, was abolished and this training was reverted to the Nurses Registration Board.[250] Ultimately, nurses at Claremont Hospital for the Insane were satisfied with the changes to pay, working conditions, commissioned renovations and upgraded facilities at the hospital and returned to work again.[251]

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[244] 'The ANF celebrates 75 years' (1999) 6(8) *Australian Nursing Journal* 14, 14-21.

[245] 'Eighteen Months' Old Infant In Adults' Asylum', *Sunday Times* (Perth, 20 February 1944) 3.

[246] Gail Reekie, 'Industrial Action by Women Workers in Western Australia during World War II' [1985] 49 *Liverpool University Press* 75, 80-1; Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 126.

[247] Anthony R. Henderson and Philippa Martyr, 'Too little, too late: Mental health nursing education in Western Australia, 1958-1994' (2013) 22(3) *International Journal of Mental Health Nursing* 221, 223.

[248] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 126; Anthony R. Henderson and Philippa Martyr, 'Too little, too late: Mental health nursing education in Western Australia, 1958-1994' (2013) 22(3) *International Journal of Mental Health Nursing* 221, 223.

[249] Gail Reekie, 'Industrial Action by Women Workers in Western Australia during World War II' [1985] 49 *Liverpool University Press* 75, 81.

[250] Carol Ann Piercey, Nurse education in Western Australia from 1962-1975: A historical perspective of influences and changes' (PhD Thesis, Curtin University of Technology, June 2002) 85.

[251] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 127-8.

The 1950's and 1960's were relatively conflict free years for the nursing profession. The only relevant feature was in 1954, when the Western Australian Nursing Association and the Western Australian branch of the Australasian Trained Nurses Association unified and formed a single nursing representative body for Western Australia known as the Royal Australian Nursing Federation (W.A. Branch) Industrial Union of Workers.[252]

In 1974, training for the nursing profession was transferred from the West Australian Branch of the College of Nursing Australia to the Western Australian Institute of Technology.[253] This caused issues in the profession as only a three year diploma option was available to student nurses, rather than a degree.[254] Graduates of the new Western Australian Institute of Technology took industrial action in the form of a boycott at the graduation ceremony when they were conferred with a diploma rather than degree qualification.[255] This boycott was supported by the Royal Australian Nursing Federation who also endorsed a further peaceful rally demonstration in Perth's CBD; these industrial actions could have been regarded as a strike or lockout and prohibited under section 132 of the *Industrial Arbitration Act 1912-1973* (WA).[256] The Western Australian Institute of Technology relented and Western Australia became the first State to run a tertiary nursing degree.[257]

In 1998, nurses employed by the Metropolitan Health Service Board in Western Australia were granted leave from the Australian Industrial Relations Commission to take Statewide industrial action in order to improve their working conditions and entitlements.[258] The industrial action occurred over four months with a six day strike in June, and included a work-to-rule ban, bed closures at public hospitals and the organised cancellation of non-emergency elective surgery at

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[252] Ibid 144.

[253] Carol Ann Piercey, Nurse education in Western Australia from 1962-1975: A historical perspective of influences and changes' (PhD Thesis, Curtin University of Technology, June 2002) 232.

[254] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 175-6.

[255] Carol Ann Piercey, Nurse education in Western Australia from 1962-1975: A historical perspective of influences and changes' (PhD Thesis, Curtin University of Technology, June 2002) 1; Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 175-6.

[256] Victoria Hobbs, *But westward look: nursing in Western Australia 1829-1979* (University of Western Australia Press, 1980) 175-6; *Industrial Arbitration Act 1912 -1973* (WA) s 6 (definition of 'strike').

[257] Charlotte R. Kratz, 'Learning to pass – a report of a study of graduates from the Department of Nusing, Western Australian Institute of Technology, Perth' (1983) 20(3) *International Journal of Nursing Studies* 149.

[258] *Minister for Health for Western Australia, Re – 577/98* [1998] AIRC 450.

major public hospitals in the CBD.[259] During the six day strike, around 3,000 nurses protested at Parliament House and protest lines were erected at public hospitals.[260] The State Government claimed that the industrial action being taken by the nurses endangered the life, personal safety, health or welfare of the Western Australian population. However, following an agreement by the parties, the government later withdrew this claim and the Nursing Union agreed to not increase its current level of industrial action while negotiations continued.[261] Although the industrial action resulted in an agreement being reached, this agreement was later disputed and further industrial action occurred as nurses sought better entitlements such as a pay rise and the implementation of a single wage agreement covering all public sector nurses.[262] The unions desired outcome from the industrial action was to ensure that all nurses got paid the same for doing the same job and to protest the proposed changes to working conditions including working hours, penalty rates and sick leave entitlements.[263] Although this was not achieved at this time, the industrial action shows the impact that nurses have on the community.

During the early part of 2004, nurses in regional areas of Western Australia threatened to take industrial action in the form of a series of work stoppages, in an effort to draw attention to their poor pay and working conditions.[264] The industrial action was relatively peaceful with the intention to only "make a bit of noise… a bit of a visual display" without being anything too wild.[265] The purpose of the industrial action was to get nurses a 15% pay rise over a 3 year period.[266] This industrial action resulted in a 14.7% pay rise over 3 years for the state's nurses which would apply to the state's 12,000 nurses. Additionally, the state government committed to improve working conditions by better regulating workloads, introducing new shift allowances, increasing the amount of paid parental leave, extending the Sunday night duty loadings to run until 7:30am the

[259] Peter Reeves, 'WA government waves stick at nurses' (1998) 5(9) *Australian Nursing Journal* 5; Dimitri Serghis, 'WA nurses pay fight set to escalate' (1998) 5(7) *Australian Nursing Journal* 5; Dimitri Serghis, 'Commission set to rule in WA dispute' (1998) 6(2) *Australian Nursing Journal* 15.
[260] Peter Reeves, 'WA nurses' strike on hold as commission steps in' (1998) 6(1) *Australian Nursing Journal* 5.
[261] Government of Western Australia, 'Registration of enterprise agreement for metro hospital nurses with AIRC' (Media Statement, 4 December 1998) <https://www.mediastatements.wa.gov.au>; Nurses (Metropolitan Health Service Board) Enterprise Agreement 1998 N0868 Cas S Doc Q9134.
[262] Nurses (Metropolitan Health Service Board) Enterprise Agreement 1998 N0868 Cas S Doc Q9134.
[263] Peter Reves, 'WA nurses stand firm on claim' (1998) 5(10) *Australian Nursing Journal* 5; Dimitri Serghis, 'WA nurses pay fight set to escalate' (1998) 5(7) *Australian Nursing Journal* 5.
[264] 'Nurses Plan Industrial Action over Pay Offer', *ABC Regional News* (Sydney, 8 October 2004) 1.
[265] Ibid.
[266] Ibid.

following day, introducing new on-call arrangements for senior registered nurses and offering cultural and bereavement leave.[267]

These examples of industrial action in the nursing sector have been triggered by poor working conditions, lack of proper training and resource constraints. In the past, industrial actions in this sector have been done out of desperation for improving quality of care to patients, rather than for purely personal or financial motives. It is clear from the infrequency and severity of industrial actions taken that the profession has faced difficulty in deciding to take industrial action. The public nursing sector has endeavoured to comply with the industrial laws of the day and history suggests that industrial action is taken a last resort. The most recent industrial action in 2004 was done peacefully as nurses recognised the essential nature of their role, this was despite legislation offering greater protections for industrial action to occur.

F *Conclusion*

This chapter shows the history of employee unions in core public essential service professions primarily in the State of Western Australia. Further, it describes the types of industrial action taken by each of these professions and the contextual circumstances around why that course of action was taken by the worker representative body. In summary, history suggests that industrial action by the essential service professions of police, teaching, firefighting and nursing has significant consequences and is generally only used when there is a strong feeling of disagreement over the employment conditions. It is apparent from this chapter that the impact on the community is a primary consideration taken by the unions before engaging in industrial action.

[267] Government of Western Australia, 'Gallop Government strikes pay deal with nurses' (Media Statement, 30 March 2005) <https://www.mediastatements.wa.gov.au>.

III CHAPTER 3: ANALYSIS OF CURRENT INDUSTRIAL ACTION IN WESTERN AUSTRALIA'S ESSENTIAL SERVICES

The previous chapter set out the pre-21st century history of industrial action in several critical public sector essential service professions under the State system's *Industrial Relations Act 1979* (WA). This chapter looks at current industrial actions under the Western Australian industrial relations system. The aim of this chapter relates to the primary research question and seeks to promote a greater understanding of the Western Australian industrial relations system to determine what restrictions apply to public sector essential service professions when they take industrial action. Then, the next chapter analyses industrial action taken under the Federal industrial relations system's *Fair Work Act 2009* (Cth), which assists in determining a secondary research question by considering whether it more effectively facilitates industrial action by essential service professions. Both industrial relations systems exist in Australia and apply different legislation around how to take industrial action lawfully. Whether the State or Federal industrial relations system applies depends on whether an essential service worker is a State system public service employee, which is an employee of the Western Australian Government.

A *Introduction*

In Western Australia, the *Industrial Relations Act 1979* (WA) legislates the requirements for State system public sector employees to engage in industrial action. Relevantly, section 42B of the *Industrial Relations Act 1979* (WA) requires that when parties commence bargaining for a new industrial agreement, it must be done in good faith. Section 44 of the *Industrial Relations Act 1979* (WA) empowers the WAIRC to deal with industrial disputes. The WAIRC can do this by convening a compulsory conference and summonsing a party to attend the WAIRC whenever industrial action has or will likely occur.[268] Finally, section 93 of the *Industrial Relations Act 1979* (WA) requires the WAIRC's Registrar to inform the Chief Industrial Commissioner of any occurrence or likely occurrence of industrial action. Although sections 42B, 44 and 93 of the *Industrial Relations Act 1979* (WA) provides some guidance for instances of industrial action in

[268] *Industrial Relations Act 1979* (WA) s 44.

the State industrial relations system, this chapter will highlight that these sections are broadly worded and do not specifically apply to essential service workers.

B *Industrial Actions by Police in the Early 21st Century*

1 *Current Role of the Union*

Each jurisdiction in Australia has its own union for police which is registered under the State's industrial legislation. When joining the State union, police officers are also registered with the Federal Police Association of Australia.[269] Each State police union or association has autonomy over its operations and is separate from the Federal Police Association. This is because policing in Australia is a State matter.[270] Since the 1920s, the police unions in Australia have continued to organise and attend an annual conference; this conference is attended by police ministers, shadow police ministers and premiers.[271] Any industrial action in the WA Police Force is currently regulated through, the *Police Force Act 1892* (WA), *Police Force Regulations 1979* (WA) and the *Industrial Relations Act 1979* (WA). Today, the police union maintains one of the highest densities of union membership than most other public sector unions with almost 100% membership of all officers across the State.[272] Reasons for the high density of police union membership may be because the union offers legal defence insurance and death benefits. Significantly, when it comes to industrial action, the WA Police Union has proved itself to be a strong advocate of better wages and conditions for police in the State since its inception.[273] For instance, in the last twenty years, the Western Australian Police Force has engaged in several forms of industrial action, including

[269] Mark Burgess, Jenny Flemming and Monique Marks, 'Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness' (2006) 7(5) *Policy Practice and Research* 391, 393.

[270] Mark Finnane, 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 12; Mark Burgess, Jenny Flemming and Monique Marks, 'Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness' (2006) 7(5) *Policy Practice and Research* 391, 393.

[271] Mark Finnane, 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 5.

[272] WA Police Union of Workers, 'Membership' (Web Page, 2021) <https://www.wapu.org.au/about/membership.html>.

[273] Mark Finnane, 'Police Unions in Australia: a History of the Present' (2000) 12(1) *Current Issues In Criminal Justice* 5, 5; Robert Guthrie, 'Sick leave and workers' compensation for police officers in Australia' (2010) 17(5) *Journal of Law and Medicine* 816, 816.

the blue flu, which is a form of industrial action that occurs when unionised police officers go on strike by taking sick leave, and other industrial actions such as rallies, work bans and strikes.[274]

2 *The Significance of the West Australian Police Union's 2017 Industrial Action*

In April 2017, the WA Police Union began preparing for the re-negotiation of the industrial agreement that would expire in June of 2017.[275] As these negotiations were not progressing, the matter was brought before the WAIRC's Public Service Arbitrator.[276] The Senior Commissioner considered the proposed log of claims, consisting of motions from Annual Conferences held since registering the 2014 Industrial Agreement, branch motions and outcomes from reviews conducted by WA Police Union since the last agreement came into effect. The Senior Commissioner also considered the existing agreement entitlements.[277] The WA Police Union sought a reasonable salary rise, including an increase that would cover the two years before the 2014 industrial agreement was reached, since it had accepted an offer on the basis that the government would recognise this in the next round of industrial agreement negotiations.[278] The union therefore sought a *catch up component* to compensate for this prior loss whilst acknowledging the Government's State Wages Policy which capped pay rises to 1.5% for public sector employees.[279]

By June of 2017, the WA Police Union and the State Government had still not agreed to a new Industrial Agreement. Police officers had campaigned to get a 1.5% pay rise by taking part in a work-to-rule campaign.[280] The WA Police Union rejected an offer of a capped $1,000 pay rise,

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[274] Dana McCauley, 'Unions defiant in the face of illegal strike warning', *Sydney Morning Herald* (online, 14 October 2018) <https://www.smh.com.au/politics/federal/>; George Tilbury, 'Industrial campaign escalated' (19 October 2017) *WAPU Police News* 8-9.

[275] Claire Lloyd, 'WAPU begins work towards replacement Industrial Agreement for police officers' (26 April 2017) *WAPU Police News,* 22-23; *Western Australian Police Union of Workers v Commissioner of Police* [2017] WAIRC 00847.

[276] *Western Australian Police Union of Workers v Commissioner of Police* [2017] WAIRC 00847.

[277] Claire Lloyd, 'WAPU begins work towards replacement Industrial Agreement for police officers' (26 April 2017) *WAPU Police News,* 22-3.

[278] Ibid.

[279] Ibid.

[280] Graeme Powell, 'WA Police wasting time with escalated wage claim, Minister says', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/>; *Western Australian Police Union of Workers v Commissioner of Police* 2017 WAIRC 00847, 187.

instead claiming that this was unfair as firefighters had just secured a 1.5% increase.[281] During this form of industrial action, officers issued cautions instead of fines for minor traffic and alcohol-related offences and warned motorists of upcoming speed cameras by parking their cars with lights flashing nearby.[282] They also failed to summons offenders to court until after 7 September 2017, when the State Budget was set to be released.[283] The WA Police Union's sentiments were that "the government had broken an election promise around wage increases and had moved the goalposts midway through their negotiations."[284] By August 2017, tensions over an Industrial Agreement not being reached caused approximately 1,000 WA Police Union Members and the public to rally Parliament over the break of its police pay promise.[285] Banners held by those rallying said statements such as 'Resource The Force', 'We're Worth More Than $1000' and '38 hour Week And We'll Do The Deal', and speakers also voiced this message.[286] On 23 September 2017, the WA Police Union escalated its action and directed its member police officers to return to police stations and only attend Priority One and Priority Two jobs, which included life-threatening incidents only.[287] This escalation arose after the WA Police Union's Board decided to suspend the campaign for four weeks, in the hopes of facilitating a new Industrial Agreement.[288]

Following a period of suspension by the WA Police Union from campaigning, the Government's latest offer did not include the promised key entitlements, such as the 1.5% pay increase or the introduction of a 38-hour workweek.[289] After six months of negotiations, the dispute escalated, and the Union initiated industrial action which lasted for three hours. During the brief industrial action, officers only attended at Priority One and Priority Two jobs.[290] Concurrently with this

[281] AAP, 'Officers criticise police union action: Commissioner', *PerthNow* (online, 5 October 2017) <https://www.perthnow.com.au/news/wa/>; Giuseppe Carabetta, 'Fair Work Bargaining for Police: A Proposal for Reform' (PhD Thesis, University of Sydney, 2020) 270.

[282] Graeme Powell, 'WA Police wasting time with escalated wage claim, Minister says', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/>; *Western Australian Police Union of Workers v Commissioner of Police* 2017 WAIRC 00847, 187.

[283] Graeme Powell, 'WA Police wasting time with escalated wage claim, Minister says', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/>; *Western Australian Police Union of Workers v Commissioner of Police* 2017 98 WAIRC 00847, 187.

[284] George Tilbury, 'Is the honeymoon period over for the new government?' (21 June 2017) *WAPU Police News*, 8-9.

[285] Ibid.

[286] Ibid.

[287] George Tilbury, 'Industrial campaign escalated' (19 October 2017) *WAPU Police News* 8-9.

[288] Steven Glover, 'Campaign for fair and reasonable offer' (19 October 2017) *WAPU Police News* 18-9.

[289] Ibid.

[290] Ibid.

industrial action, in August 2017, police prosecutors declined to request court costs be awarded to the State in prosecutions before magistrate's courts. It was estimated that these industrial actions cost the State around $300,000 per day.[291]

On the day after the industrial action commenced, in which police officers only attended at Priority One and Priority Two jobs, the Police Commissioner issued a broadcast requiring police officers to cease industrial activity.[292] Within ten minutes of this broadcast, the WA Police Union President stated that the industrial action was always going to be short lived.[293] Accordingly, the President of the WA Police Union instructed its members to comply as the Police Commissioner had issued a lawful direction to cease the industrial activity.[294] This caused significant tension between the WA Police Union and the Police Commissioner who accused the union of "overstepping the line".[295] The WA Police Union claimed that at no stage during this action was community safety compromised; however, it further fractured the relationship between the union and the Government.[296] The industrial action was seen by the WAIRC to pose a "clear potential risk to the safety and security of the public and was only ceased some four hours later following an order from the Commissioner of Police under regulation 401 of the *Police Force Regulations 1979* (WA), which states that "[e]very member shall carry out such functions, duties and responsibilities as the member is directed by or on behalf of the Commissioner."[297] The WAIRC also held that during the night of 26 September 2017, the WA Police Union's President and Vice-President did not have access to the WA Police Force's email system, which prevented communications between

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[291] *Western Australian Police Union of Workers v Commissioner of Police* 2017 WAIRC 00847, 187.

[292] Steven Glover, 'Campaign for fair and reasonable offer' (19 October 2017) *WAPU Police News* 18-19; AAP, 'WA Police ordered to stop strike action', *Eastern Reporter* (online, 28 September 2017) <https://www.perthnow.com.au/community-news/eastern-reporter/>.

[293] Steven Glover, 'Campaign for fair and reasonable offer' (19 October 2017) *WAPU Police News* 18-19; AAP, 'WA Police ordered to stop strike action', *Eastern Reporter* (online, 28 September 2017) <https://www.perthnow.com.au/community-news/eastern-reporter/>.

[294] Steven Glover, 'Campaign for fair and reasonable offer' (19 October 2017) *WAPU Police News* 18-19; AAP, 'WA Police ordered to stop strike action', *Eastern Reporter* (online, 28 September 2017) <https://www.perthnow.com.au/community-news/eastern-reporter/>; 'Defiant WA police union says game on', *WAtoday* (online, 27 September 2017) <https://www.watoday.com.au/national/western-australia/>.

[295] AAP, 'Officers criticise police union action: Commissioner', *PerthNow* (online, 5 October 2017) <https://www.perthnow.com.au/news/wa/>; George Tilbury, 'Industrial campaign escalated' (19 October 2017) *WAPU Police News* 8-9.

[296] George Tilbury, 'Industrial campaign escalated' (19 October 2017) *WAPU Police News* 8-9.

[297] *Western Australian Police Union of Workers v Commissioner of Police* 2017 WAIRC 00847, 187; *Police Force Regulations 1979* (WA) reg 401.

the Union and its members during enterprise bargaining.'[298] The following day, representatives from both the WA Police Union and the Government attended the WAIRC, which had issued orders and recommendations under section 44(6)(ba) of the *Industrial Relations Act 1979* (WA) to cease all industrial action and to restore the WA Police Union's President and Vice-Presidents access to the WA Police email system.[299] Following the cessation of the industrial action, on 8 February 2018, the Western Australian Police Union of Workers and the Commissioner of Police reached an agreement titled the *Western Australia Police Industrial Agreement 2017*. About 86% of the WA Police Union's members reluctantly voted in favour of the third and final offer made by the State Government for a new agreement, this agreement followed difficult and protracted negotiations by the parties.[300] As a result, the WAIRC registered the *Western Australia Police Industrial Agreement 2017* on 14 February 2018.[301] This industrial agreement provided for a $1,000 pay rise per annum and other police-specific entitlements such as time off in lieu paid at overtime rates, an expanded officer in charge allowance and the payment of higher duties allowance on a per shift basis.[302] However, members of the WA Police Union expressed their dissatisfaction with the negotiated outcome and committed to push for a 38 hour working week in the next round of negotiations.[303]

3 *Actions of the WA Police Union in the Last 10 Years*

On 30 June 2019, the Western Australian Police Industrial Agreement 2017 expired.[304] Following this, negotiations between the WA Police Union and the State Government to register a new agreement began in February 2019.[305] Following the bargaining period, a flat rate increase of $1,000 per annum, which was the upper limit of the State Government's wages policy, was rejected by the Union. This caused the WA Police Union to make an application to the WAIRC for

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[298] *Western Australian Police Union of Workers v Commissioner of Police* 2017 WAIRC 00847, 187.
[299] Steven Glover, 'Campaign for fair and reasonable offer' (19 October 2017) *WAPU Police News* 18-19; *Western Australian Police Union of Workers v Commissioner of Police* 2017 WAIRC 00847, 187.
[300] Steven Glover, 'Members reluctantly accept improved offer' (February 2018) *WAPU Police News* 10-11.
[301] *Western Australian Police Union of Workers v Commissioner of Police* [2018] WAIRC 00112, 42 ('*Western Australia Police Industrial Agreement 2017*'); Steven Glover, 'Members reluctantly accept improved offer' (13 February 2018) *WAPU Police News* 10-13.
[302] Steven Glover, 'Members reluctantly accept improved offer' (February 2018) *WAPU Police News* 10-11.
[303] Ibid.
[304] *Western Australia Police Industrial Agreement 2017* [2018] WAIRC 00112.
[305] Harry Arnott, 'Fifth and final offer to be presented to Members' (16 December 2019) *WAPU Police News* 8-9.

arbitration of the industrial agreement dispute.[306] Although no industrial action had been taken in the most recent round of industrial agreement negotiations, the WA Police Union rejected the State Government's final offer with the matter being arbitrated in the WAIRC.[307] The outcome of industrial agreement negotiations is an enterprise order that will replace the Western Australian Police Industrial Agreement 2017 and likely remain in place for two years.[308] On 29 April 2020, the WAIRC made a declaration under section 42H(1) of the *Industrial Relations Act 1979* (WA) that the bargaining period between the WA Police Union and WA Police Force had ended.[309] Shortly after this, negotiations continued where the parties reached an agreement on all but one issue, namely the request by the Union for five additional days leave. The Senior Commissioner, as Public Service Arbitrator, resolved this issue by issuing orders that the *Western Australia Police Force Industrial Agreement 2020* contain a new clause providing for two paid annual leave rest days per police officer.[310] Despite a new industrial agreement in place, there still remain a number of unresolved differences between the Police Commissioner and the WA Police Union, that could cause industrial action in future negotiations.

4 *WA Police Unions Role as Advocate for Law Reform of Industrial Action in Police Profession*

In November 2017, the WA Police Union made a submission as part of the Ministerial Review of the State Industrial Relations System completed by Mr Mark Ritter SC.[311] The WA Police Union raised several issues in its comments to the Ministerial Review of the State Industrial Relations system, including submissions relating to the restrictive nature of industrial action in this sector.[312] Firstly, the WA Police Union states that:

> Section 14 (of the *Police Force Act 1892* (WA)) requires officers to obey all lawful commands from their superior. The requirement effectively prevents officers from engaging in strike action. Such a requirement is necessary for community safety. It nonetheless restricts the ability of WAPU

[306] Stephen Easton, 'Public sector industrial briefs: Hodgman pulls the plug, McGowan sweetens the deal', *The Mandarin* (online, 27 June 2019) <https://www.themandarin.com.au/>.
[307] WA Police Union, 'Police Union files for arbitration' (Media Release, 20 May 2020) <https://www.wapu.org.au/wapu-media/media-releases/>.
[308] Ibid.
[309] W*estern Australian Police Union of Workers v Western Australian Police Force* [2020] WAIRC 00269.
[310] *Western Australian Police Union of Workers v Commissioner of Police* [2021] WAIRC 00047, [319].
[311] WA Police Union, Submission to Ministerial Review of the State Industrial Relations System (November 2017).
[312] Paul Hunt, 'IR Review to improve the system?' (15 December 2017) *WAPU News* 40-41.

> Members to pursue and advance their interests compared to other public sector employees. WA Police industrial agreement negotiations are traditionally complex and drawn out, due in part to the fact that WAPU members are limited in the types of industrial action they can undertake.[313]

A second comment made by the WA Police Union in its submission to the Ministerial Review of the State Industrial Relations system was that:

> Section 42B(3) of the *Industrial Relations Act 1979* (WA) also gives the WAIRC the discretion to determine that a party engaging in industrial action is in breach of their duty to bargain in good faith. However, section 42D states that the duty of good faith does not require a concluded agreement. No bargaining party is required to agree to an industrial agreement either in whole or part. For WAPU Members, Section 42D can have the effect of unnecessarily protracting industrial agreement negotiations. When bargaining fails to reach an agreement, the only solution currently available is for arbitration under Section 42G or 42I.[314]

As for the second comment made by the WA Police Union, 'the Union went on to raise the example of 2016 and 2017 State Wage Policies that capped the salary increase per annum and resulted in the union and the State being limited in their ability to explore productivity improvements or other offsets.'[315]

The WA Police Union's submission to the Ministerial Review of the State Industrial Relations System concluded with the union making suggestions to counteract the restrictions that members of the WA Police Union face when taking industrial action.[316] The WA Police Union's submissions raise the restrictive nature of industrial action in this essential public service profession. These submissions are yet to result in any substantial changes to the laws regulating industrial action in this profession.

5 *Analysis of Recent Police Industrial Actions*

The primary reason the WA Police Union has taken industrial action regularly in the last few years is that it has not achieved the employment conditions that its members were seeking. The WA

[313] WA Police Union, Submission to Ministerial Review of the State Industrial Relations System (November 2017) 5.
[314] WA Police Union, Submission to Ministerial Review of the State Industrial Relations System (November 2017) 12.
[315] Ibid.
[316] Ibid 13-14.

Police Union is limited in what industrial action it can take, to ensure the community is not harmed. Regardless of these limitations impacting on police taking industrial action, the profession still manages to advocate for the interests of its members effectively. Some types of industrial action typically taken by police include work-to-rule campaigns, performing work differently and rallies. These recent industrial actions taken by the WA Police Union were successful because almost all police officers supported and participated in them. The benefit for the WA Police Union in having nearly 100% of police officers as its members means that industrial actions are impactful and can cause significant disruption to the operation of society.

C *Industrial Actions by Teachers in the Early 21st Century*

1 *The Importance of the 2008 Stop Work Strike*

Due to the impact of teachers' industrial actions amounting to nothing more than a mere inconvenience, teachers are not seen as an essential service profession and as such they are not subject to the same limitations around industrial action as the essential service professions of police, firefighting and nursing.[317] Nevertheless, limitations such as public sentiment and procedural restrictions on industrial action if it is not done in accordance with requirements set out under the *Industrial Relations Act 1979* (WA) still apply to teachers.[318] The most significant occurrence of industrial action in the teaching profession in recent times occurred in 2008.[319]

In *Department of Education v SSTUWA*,[320] an order was made by the WAIRC following an application for a conference under section 44 of the *Industrial Relations Act 1979* (WA) after around 5,000 teachers attended a stop-work meeting to advocate for better pay, working conditions and the release of a critical report by Professor Lance Twomey.[321] The Premier commissioned the Twomey Report to consider and report on the long term issues affecting the teaching workforce

[317] International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office*, 5th rev ed, 2006) 119, 121.
[318] *Industrial Relations Act 1979* (WA) ss 44(7)(b), 42B.
[319] 'WA: Teachers to Stop Work Next Thursday.' *AAP General News Wire*, (online, 21 February 2008).
[320] Ibid.
[321] '5,000 Teachers Attend Stop Work Meeting', *ABC Premium News* (online, 28 February 2008); 'WA: Teachers to make Decision on IRC no Strike Order.' *AAP General News Wire*, (online, 26 February 2018).

and ultimately raised the issue of significant teacher shortages.[322] Eventually, the WAIRC became involved to resolve this dispute.[323] The application was made "to prevent the threatened and existing industrial action concerning the finalisation of a replacement agreement for the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006*."[324] Leading up to the conference, the SSTUWA directed its members that effective from 4 February 2008 they were to:

- focus all contact time and duties other than teaching time only on the teaching and learning activities for your students;
- do not undertake voluntary unpaid activities, including meetings and committee work during lunchtime and outside regular school/college hours. Only participate in paid (contract payment or time off in lieu) additional activities out of school hours; and
- attend only two staff meetings of one hour duration during Term 1 of 2008.[325]

Later in June of that year, the SSTUWA also voted in favour of taking industrial action, including until the Twomey Report was released, this industrial action included:

- refusing to include the data from student reports into the records management system or release it in any way;
- a campaign of rolling half-day strikes;
- having teachers decline entry of students into classrooms once the maximum class size has been reached; and
- teachers not doing any planning, preparations or organisation of extra-curricular activities for the 2009 school year throughout any arbitration process.[326]

As a result, the WAIRC made a decision which brought the industrial action to an end. The WAIRC's decision resulted in six orders being made, relevantly that the SSTUWA:

- not proceed with the proposed rolling half-day stoppages industrial action;

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[322] Jenny Lane, 'The Resources Boom : Cash Cow or Crisis for Preservice Teacher Education in Western Australia?' (2008) 33(1) *Australasian Journal of Teacher Education* 62, 64-5; Government of Western Australia, 'Teacher taskforce takes it to the people' (Media Statement, 13 June 2007) <https://www.mediastatements.wa.gov.au/>; Government of Western Australia, 'Major shake-up of teacher recruitment practices recommended' (Media Statement, 24 May 2007) <https://www.mediastatements.wa.gov.au>.

[323] *Director General, Department of Education and Training v SSTUWA* [2008] WAIRC 00367.

[324] *Director General, Department of Education and Training v SSTUWA* [2008] WAIRC 00367.

[325] Ibid.

[326] *Director General, Department of Education and Training v SSTUWA* [2008] WAIRC 00367; Andrea Hayward, 'Twomey report - teachers need pay rise', *WAtoday* (online, 18 June 2008).

- re-commence reporting of student reports to the records management system to allow written reports to be issued to parents and students by the end of Semester 1; and
- not engage in any industrial action concerning the finalisation of the terms and conditions of the negotiations relating to the enterprise agreement until the date that the WAIRC makes an enterprise order, and if so made, until the finalisation of the terms of that order.[327]

The industrial action by teachers was ultimately a success with a mutually agreed outcome being reached which provided for improved pay and conditions. The agreement between the government and the teaching sector meant that teachers in Western Australia received a significant increase in salary of about 20% which included a 6% interim payment that had already been made to teachers.[328] Additionally, as part of the long running negotiations and industrial action, the government released the Twomey Report which highlighted issues facing the teaching workforce.[329]

2 *Outcomes Resulting from Threats to Take Industrial Action*

On 19 September 2014, the SSTUWA and two other unions collectively took a half day of industrial action.[330] A further full day of protected industrial action, known as a 'community day of action', was also directed by the SSTUWA on 1 April 2014.[331] This threatened industrial action over lack of funding and budget cuts in the teaching sector did not proceed. [332] However, the industrial action was proposed in order to pressure the then Barnett State Government to commit to funding the transition of year seven students into high schools in 2015 in order to bring Western Australia in line with other states.[333] In this instance, although industrial action did not eventuate, the threat of it resulted in the Government allocating money to fund the transition of students to high school.

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[327] *Director General, Department of Education and Training v SSTUWA* [2008] WAIRC 00367.

[328] *Director General, Department of Education and Training v SSTUWA* [2008] WAIRC 01727; Government of Western Australia, 'Teachers say yes to new $1billion pay deal' (Media Statement, 3 December 2008) <https://www.mediastatements.wa.gov.au/>.

[329] Government of Western Australia, 'Government releases Twomey report as an act of good faith' (Media Statement, 18 June 2008) <https://www.mediastatements.wa.gov.au/>.

[330] Department of Education Annual Report 2013-2014, *Annual Report 13:14* (Report, 12 September 2012) 39, 43.

[331] Ibid 44.

[332] Nicolas Perpitch, 'Union threat over education budget politically motivated WA Education Minister Peter Collier says' *ABC News* (online, 18 May 2015) <https://www.abc.net.au/news/>.

[333] 'WA Teachers Threaten Strike Action' *WAToday* (online, 9 June 2013) <https://www.watoday.com.au/national/western-australia/>.

In early 2018, the SSTUWA threatened to launch industrial action over several issues, including their demands for better protection from violent children and parents following an increase in extreme violence from younger people which was significantly affecting its members.[334] The SSTUWA sought to use upcoming enterprise bargaining negotiations to advocate for the introduction of a register for the mandatory reporting of violence against its members, as currently only attacks on other students are reported.[335] Other issues that contributed to the proposed industrial action included the SSTUWA seeking to reduce the out-of-classroom work of teachers.[336] In the end, no industrial action needed to be taken as the threat of a strike saw the development of an action plan for preventing and responding to violence in schools.[337]

The SSTUWA planned for the second occasion of industrial action to go ahead in early 2018, where it continued to campaign against education cuts. However, the decision was later made to not proceed with a public education rally but continue to support the planned industrial action taken by the CPSU/CSA Union's members, which included teaching support and service staff.[338] The education cuts would have resulted in $64 million in cuts to education to take effect from 2019 that would have shut down many school programs across the State.[339] The SSTUWA decided not to proceed with the rally. This choice was made in light of the government's decision to not go ahead with the decisions to suspend Level 3 Classroom teacher applications, close the Schools of the Air program, close the Northam and Moora residential college facilities and close the Statewide secondary gifted and talented program.[340] The proposed industrial action by the CPSU/CSA Union

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[334] Josh Zimmermann, 'WA teachers threaten strike over classroom violence' *PerthNow* (online, 7 January 2018) <https://www.perthnow.com.au/news/education/>.

[335] Josh Zimmermann, 'WA teachers threaten strike over classroom violence' *PerthNow* (online, 7 January 2018) <https://www.perthnow.com.au/news/education/ >.

[336] Ibid.

[337] Government of Western Australia, 'McGowan Government takes action on violence in schools' (Media Statement, 30 July 2018) <https://www.mediastatements.wa.gov.au>.

[338] SSTUWA, 'SSTUWA to continue campaign against education cuts' (Media Release, 22 January 2018); 'Industrial action over WA education cuts' *AAP General News Wire* (online 19 January 2018); James Carmody, 'Unions threaten strike on first day of school in WA despite Government backflip over funding cuts' *ABC News* (online, 12 January 2018).

[339] Robert Ballantyne, 'Teachers strike over massive blow to schools' *the educator australia* (online, 21 December 2017) <https://www.theeducatoronline.com/k12/news/>.

[340] SSTUWA, 'SSTUWA to continue campaign against education cuts' (Media Release, 22 January 2018); James Carmody, 'Unions threaten strike on first day of school in WA despite Government backflip over funding cuts', *ABC News* (online, 12 January 2018) <https://www.abc.net.au/news/>; Robert Ballantyne, 'Teachers strike over massive blow to schools' *the educator australia* (online, 21 December 2017)

and the SSTUWA caused significant media attention and was likely one of the reasons why the government backtracked on its initial decision.[341]

3 *Latest Collective Bargaining of the Teachers Union*

The School Education Act Employees' (Teachers and Administrators) General Agreement 2017 expired on 5 December 2019 and "covered all employees who are employed under section 235 of the *School Education Act 1999* by the Director-General of the Department of Education of Western Australia in the classifications outlined in section 237 of the *School Education Act 1999* (WA) and regulations 127 and 127A of the *School Education Regulations 2000* (WA) who are members or are eligible to be members of the SSTUWA or the Principals' Federation of Western Australia."[342] Before the expiration of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2017*, the Union produced a log of claims that were approved by the membership and then served on the employer, the Department of Education, as part of the formal negotiations.[343] A new agreement was endorsed by the Executive of the SSTUWA on 31 March 2020 and consequently voted on by the members.[344] As workers in the teaching profession have recently reached a new industrial agreement, it is unlikely that any dispute leading to industrial action will occur in the short term. However, this may change in the lead up to the next round of industrial agreement negotiations.

4 *Analysis of Recent Teachers Industrial Actions*

The SSTUWA has not engaged in any significant industrial action in the last decade. The most recent spate of industrial action taken by teachers in 2014 was not motivated by improving staff better pay and conditions but instead to advocate for more funding for the year seven cohorts that would be transitioning to high schools. Although the impact of the two half-day strikes by teachers did not significantly impact the life, safety or well-being of a community, the motivation behind

<https://www.theeducatoronline.com/k12/news/>; Sarah Ison, 'Schools fear cuts fallout' *Busselton Dunsborough Times* (26 January 2018). <https://www.bdtimes.com.au/news/south-west/>.

341 Ibid.

342 The School Education Act Employees' (Teachers and Administrators) General Agreement 2017 [2008] WAIRC 00359; *Director-General, Department of Education v SSTUWA* [2018] WAIRC 00359.

343 Pat Byrne, 'Log of Claims to tackle critical issues' (October 2019) *Western Teacher* 5.

344 Pat Byrne, 'Member vote on the Agreement in Principle (Schools)' (May 2020) *Western Teacher* 6.

the strikes resulted in considerable community support. Compared with the other essential services such as police, firefighting and nursing, the teaching profession has received strong support from the public when taking industrial action, which has helped it to achieve its industrial objectives. This has meant that on occasion the type of industrial action has severe enough ramifications to warrant teaching being regarded as essential. By teachers taking industrial action to improve the quality of education for their students, this meant that it had the support of the parents, which played a significant role in the success of the industrial action.

D *Industrial Actions by Firefighters in the Early 21st Century*

1 *The Role of Volunteer and Career Firefighters*

The role of firefighters has significantly evolved from what Western Australia had in the late 1800s. Today, not only do the firefighters put out fires in the community, but their roles also included providing road accident and specialist rescue support, responding to incidents involving hazardous materials, undertaking emergency medical response, providing guidance on structural fire safety matters, organising and running community education sessions and other community engagement activities.[345] The firefighter's role has adapted over time to the needs of the community.[346] The role of firefighters is especially important given that Australia is considered one of the most spacious and driest countries in the world.[347] Other challenges such as population growth, demographic changes, climate change, urbanisation, globalisation and the communities needs and expectations have all played a large part in the development of the occupation of firefighting.[348] The use of up to date technology, vehicles, personal protective equipment, rescue equipment, communication tools, training, leadership and procedures all support the effective functioning of the profession.[349]

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[345] David O'Byrne, Submission 70 to the Parliament of Victoria, *Report of the Victorian Fire Services Review* (October 2015).

[346] Jim McLennan & Adrian Birch, 'A potential crisis in wildfire emergency response capability? Australia's volunteer firefighters' (2005) Global Environmental Change Part B: Environmental Hazards 102.

[347] Ibid.

[348] David O'Byrne, Submission 70 to the Parliament of Victoria, *Report of the Victorian Fire Services Review* (October 2015).

[349] Ibid.

The reliance on volunteer firefighters is another unique attribute of Australia's firefighting industry. Very few salaried firefighters are employed in rural areas, so the profession needs to rely on its volunteers. It is estimated that the ratio of volunteer firefighters to career firefighters is around 1:140.[350] The volunteer firefighters are provided with training, equipment and personal protective clothing to complete their duty as safely and effectively as possible, given the infrequent nature of their engagement.[351]

2 *Impact of Various Industrial Actions by Firefighters*

One significant example of industrial action in this sector occurred in 2006, where around 600 firefighters took industrial action after negotiations over their pay with the State Government did not result in the parties reaching a new industrial agreement.[352] Industrial action ensued where firefighters participated in an overtime ban, refusing to undertake training and responding only to emergency triple zero calls.[353] The consequential impact of this industrial action saw the temporary closure of stations. Closures occurred because, at that time, a significant number of firefighters worked 25 hours of overtime on top of a 48 hour week, on a four days on and four days off roster.[354] The Secretary of the United Firefighters Union in Western Australia, Dave Bowers, publicly announced that "the WA government has exploited the traditional unwillingness of the union to put public safety at risk, and dragged out pay negotiations."[355] It was not until an urgent application for a conference was brought under section 44 of the *Industrial Relations Act 1979* (WA) by the Fire and Emergency Services Authority of Western Australia that the WAIRC made orders to stop the industrial action.[356] The WAIRC considered the applicant's argument that the bans would limit its ability to respond to emergencies and that the training ban would impact the applicant's ability

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[350] Jim McLennan & Adrian Birch, 'A potential crisis in wildfire emergency response capability? Australia's volunteer firefighters' (2005) Global Environmental Change Part B: Environmental Hazards 102.

[351] Ibid.

[352] Kim MacDonald, 'Firefighters reject 9.5pc pay rise', *Australasian Business Intelligence* (Gale General OneFile, 23 May 2006); Jessica Strutt, 'Firefighters take industrial action over pay', *Australasian Business Intelligence* (Gale General OneFile, 21 June 2006); *Fire and Emergency Services Authority of Western Australia v United Firefighters' Union of Australia (West Australian Branch)* 2006 WAIRC 04595.

[353] Jessica Strutt, 'Firefighters take industrial action over pay', *Australasian Business Intelligence* (Gale General OneFile, 21 June 2006).

[354] Kim MacDonald, 'Overtime ban may close fire stations', *Australasian Business Intelligence* (Gale General OneFile, 21 May 2006).

[355] Ibid.

[356] *Fire and Emergency Services Authority of Western Australia v United Firefighters' Union of Australia (West Australian Branch)* 2006 WAIRC 04595.

to ensure adequate personnel were available.[357] The WAIRC also considered the union's argument that the phone ban would have a minimal impact on the service to the public or response to call-outs.[358] Ultimately, the WAIRC held that the United Firefighters' Union Australia (West Australian Branch) and its members immediately lift the ban.[359] Further, Commissioner Harrison ordered that the union and each of its officials ensure that work resumed immediately in line with the first order.[360]

A second significant instance of industrial action in this sector took place in May and June 2011.[361] The type of industrial action taken included 12 work to rule campaigns and administrative bans.[362] Although the prohibitions did not affect the delivery of emergency response service to the community, the impact of these administrative bans saw standard processing of procedures not being completed, prevention of employees participating in Fire and Emergency Authority project work and no training being undertaken.[363] This caused delays in the recruitment of firefighters and a lack of progression for employees to take on acting positions.[364] The 2011 industrial action occurred because firefighters had been required to undertake duties such as hosing down slippery roads and clearing human remains from roadways.[365] These tasks subjected firefighters to biohazards, and as such, the performance of these cleaning tasks required specialist training which had not been provided to firefighters and was supposed to be done by professionally trained private contractors.[366]

Industrial action in the firefighting profession has not occurred since 2018, where the United Firefighters Union took industrial action in an attempt to stop the Department of Fire and Emergency Services ('DFES') from continuing to appoint non-firefighters into leadership positions.[367] The United Firefighters Union took short-lived industrial action as it complained that

[357] Ibid.
[358] Ibid.
[359] Ibid.
[360] Ibid.
[361] Fire and Emergency Services Authority of Western Australia, *Annual Report 10:11* (Report, 22 August 2011) 141.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Linda Cann, 'Fireys draw the line', *Sunday Times* (Gale OneFile: News, 12 June 2011) 40.
[366] Ibid.
[367] Daniel Emerson, 'Union fights DFES over its top job selection', *The West Australian* (online, 19 January 2018).

under the enterprise agreement, "senior positions are only open to employees who have firefighting or equivalent competencies as agreed by the union".[368] Following the industrial action, there was no commitment made by DFES to appoint only firefighting employees to senior positions. However, the topic of the culture of appointment to senior positions was highlighted following an inquiry by DFES into why its first female superintendent, who did not have a firefighting background, resigned after 18 months.[369] The review found that the female superintendent resigned for reasons other than sexist bullying or gender discrimination but that DFES did have low participation of women in firefighting roles which needed to be a focus for improvement.[370] Although neither the industrial action or the inquiry caused for change in the way that senior positions are filled, it did identify deficiencies in the diversity of its senior workforce.

3 *Analysis of Recent Firefighter Industrial Actions*

Aside from the short-lived industrial action in 2018, the United Firefighters' Union of WA has not engaged in anything large scale since 2011. The importance of firefighting to society means that any reduction in the provision of this service would cause significant social and political detriment. For example, in the 2006 industrial action, the closure of stations caused such a disruption to society that the WAIRC needed to be involved to resolve the dispute.[371] Based on the dire consequences, drawn from the result of the 2006 industrial action, it can be concluded that disruption of the firefighting services have serious ramification causing significant social and political detriment.

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[368] Ibid.

[369] Daniel Emerson, 'Union fights DFES over its top job selection', *The West Australian* (online, 19 January 2018); Public Sector Commission, Parliament of Western Australia, *Review of response to a complaint and approach to gender inclusion* (Report, 27 July 2018) 13.

[370] Public Sector Commission, Parliament of Western Australia, *Review of response to a complaint and approach to gender inclusion* (Report, 27 July 2018) 5-6.

[371] *Fire and Emergency Services Authority of Western Australia v United Firefighters' Union of Australia (West Australian Branch)* 2006 WAIRC 04595.

E *Industrial Actions by Nurses in the Early 21st Century*

1 *The Current Role of the Union*

The Australian Nursing Federation Industrial Union of Workers Perth is Western Australia's largest industrial union with a membership base of around 35,000 people.[372] Because the nature of the work that nurses in the State industrial relations system do is essential to maintaining the life, safety, health or welfare of the community, the *Industrial Relations Act 1979* (WA) imposes a stricter standard on this profession for industrial action compared to other non-essential professions.[373] Additionally, because nursing is regarded as an essential service profession internationally, society accepts that the profession can be subject to a greater degree of limitation around taking industrial action.[374]

2 *The Significance of the 2013 Work Bans Strike*

In 2013, 10,000 nurses and midwives participated in industrial action in Western Australia to improve their working conditions and obtain a 20% pay rise over three years.[375] Members of the Australian Nurses Federation took industrial action in the form of work bans, such as one in five beds being closed, and this caused public hospitals to cancel elective surgery for a week.[376] Additionally, the work bans resulted in a flow-on effect that increased numbers of persons attending emergency departments.[377] Further, a 24-hour strike was planned for the 25 February 2013, which caused the Department of Health to threaten de-registration and disciplinary action if it proceeded.[378] The work bans and bed closures lasted for only one week because the government made an urgent application to the WAIRC, which then made an order to immediately cease industrial action.[379] The reason for the WAIRC's decision to order a stop to the work bans was

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372 Australian Nursing Federation, 'About Us' (2021) <https://www.anfiuwp.org.au/about-us.php>.

373 *Industrial Relations Act 1979* (WA) ss 44, 42B.

374 International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office*, 5th rev ed, 2006) 119, 121.

375 Department of Health (WA), 'Nurses ordered to lift work bans' (Media Release, 23 February 2013); Chris Jenkins, 'WA nurses go on strike', *Green Left* (Australia, 24 February 2013).

376 Department of Health (WA), 'Nurses ordered to lift work bans' (Media Release, 23 February 2013).

377 Ibid.

378 Chris Jenkins, 'WA nurses go on strike', *Green Left* (Australia, 24 February 2013); Paul Lampathakis, 'Strike nurses face the sack' *PerthNow* (online, 24 February 2013).

379 *Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth* [2013] WAIRC 00089; *Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth* [2013] WAIRC 00100.

because the bans would have an increasingly adverse effect upon patients of the Western Australian public health system.[380] Furthermore, an order by the WAIRC was issued before the planned 24-hour strike occurred which caused many Australian Nursing Federation members to withdraw from taking action for fear of deregistration. Some nurses continued with the planned stop work strike by putting in place safety measures to ensure public safety was maintained while they attended events that the Premier was present at.[381] This industrial action resulted in a 14% pay raise for nurses in the State, rather than the 20% that was sought.[382] Although nurses accepted the 14% pay raise, many remained upset that working conditions such as retention bonuses, qualification allowance extended to casuals, pro-rata long service leave available after five years and an annual professional development allowance were not conceded.[383] As a result of the work bans and bed closures, the risk to the life and safety of persons affected by these industrial actions caused fear and uncertainty to the community.[384]

3 *Analysis of Nursing Industrial Actions*

Since 2013, the Australian Nursing Federation has not taken any further industrial action. Despite this, disputes in the profession have remained with industrial action threatened in 2015 over lack of unsterilised equipment.[385] The union's reluctance to put the community at risk, the success of the 2013 industrial action and the fact that employees in the Western Australian health sector are paid one-fifth more than their interstate counterparts may explain the lack of industrial action.[386] The Australian Nursing Federation in Perth also tends to strike when working conditions and pay have reached a crisis level, rather than take regular strikes. The union's approach to taking less frequent, but larger-scale, strikes is to minimise the number of times the community is at risk due

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[380] Department of Health (WA), 'Nurses ordered to lift work bans' (Media Release, 23 February 2013); *Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth* [2013] WAIRC 00089; *Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth* [2013] WAIRC 00100.

[381] Paul Lampathakis, 'Strike nurses face the sack' *PerthNow* (online, 24 February 2013).

[382] 'WA nurses vote in favour of government's 14 per cent pay offer', *Australian Nursing & Midwifery Federation* (Web Page, 26 February 2013); Chris Jenkins, 'WA nurses go on strike', *Green Left* (Australia, 24 February 2013).

[383] 'WA nurses vote in favour of government's 14 per cent pay offer', *Australian Nursing & Midwifery Federation* (Web Page, 26 February 2013).

[384] David Weber, 'Doctors, nurses strike pay deals for 1.5% increases with WA Government', (ABC News, 11 Oct 2016) <https://www.abc.net.au/news/>.

[385] 'Nurses threaten strike at Fiona Stanly hospital over unsterilised equipment' *The Guardian* (online, 7 April 2015) <https://www.theguardian.com/australia-news>.

[386] Rebecca Carmody, 'Nurses out-of-pocket as negotiations drag on over new pay deal' *ABC News* (online, 22 July 2016) <https://www.abc.net.au/news/>.

to industrial actions. Despite the infrequency of industrial action in this field, the 2013 work bans and strike show that it remains an effective tool to achieve industrial objectives in a short timeframe.

F *Conclusion*

In conclusion, this chapter has discussed the instances of industrial action that have occurred in Western Australia. This section has also highlighted that legislation in the State industrial relations system does not specifically restrict public sector essential service workers from taking industrial action. Rather, sections 42B, 44 and 93 of the *Industrial Relations Act 1979* (WA), which relate to industrial action, are broadly drafted and are applied to both Western Australia's non-essential and essential service workers. This outcome supports the view that Western Australia's industrial laws are restrictive, however not overly so. Further, the chapter highlights the profound impact on the community that arises when essential public service professions, including police, teaching, firefighting and nursing take industrial action. The sectors of teaching and nursing have taken less industrial activity in the last decade than the professions of firefighting and policing. Further, teachers, firefighters and nurses recently took industrial action for reasons other than increasing pay. This shows that industrial action can be an effective tool to advocate for improved service to the community and also for self-interest. Despite the apparent constraints faced by essential services taking industrial action, this altruistic motivation has resulted in outcomes such as more funding for school students, improved cleaning of slippery roads for road users and better sterilisation of hospital equipment used by patients in hospitals. These non-pay motivators for taking industrial action also assist the essential service professions in garnering the community's support and assist in justifying their need to take industrial action, even though it can place a community at risk.

IV CHAPTER 4: ANALYSIS OF CURRENT INDUSTRIAL ACTIONS IN AUSTRALIA'S FEDERAL ESSENTIAL SERVICES

The previous chapters set out the legislation and history of industrial action in core Western Australian public sector essential service professions. This chapter will look at the case law around industrial action taken by workers who deliver various essential services and whose employment entitlements are covered by the Federal industrial relations system. Workers in the Federal industrial relations system include all States aside from Western Australia, because they have referred their industrial relations powers back to the Commonwealth.[387] Although the Federal industrial relations system covers some public sector essential service workers in Western Australia, these employees are not the focus of discussion in this chapter. Further, this chapter will use several essential service professions as examples to demonstrate situations where the Fair Work Commission ('FWC') must terminate industrial action, or where the FWC may terminate industrial action.[388] In summary, this chapter focuses on reviewing case law examples of industrial actions taken in recent years under the Federal *Fair Work Act 2009* (Cth) for the purpose of determining what services are essential and comparing the effectiveness of the Federal industrial relation system with the Western Australian State industrial relations system. Whether the Federal industrial relations system is comparatively better in facilitating industrial action for essential service workers than the Western Australian State industrial relations system is a secondary objective of this thesis and relevant to a recommendation discussed later in this thesis.

A *Introduction*

The *Fair Work Act 2009* (Cth) defines industrial action differently from the way that the *Industrial Relations Act 1979* (WA) and provides for two types of actions, either protected or unprotected industrial action.[389] Under the Federal industrial relations legislation, for industrial action to be legitimate and regarded as protected industrial action, a party must take it in the course of

[387] *Australian Constitution* s 51(xxxvii).
[388] Fair Work Commission, 'When the Commission must suspend or terminate', *Industrial action benchbook* (2019) <https://www.fwc.gov.au/industrial-action-benchbook>.
[389] *Fair Work Act 2009* (Cth) s 19.

enterprise agreement negotiations.[390] Any unprotected industrial action which is threatened, impending, probable or organised industrial action can be prevented by the FWC and penalties may be ordered.[391] Section 19 of the *Fair Work Act 2009* (Cth), 'industrial action' is defined as:

> Any action that includes:
>
> a. The performance of work by an employee that is different to the way that it is customarily performed, or the adoption of a work practice which causes a restriction, limitation or delay in the performance of a task.
> b. A ban, limitation or restriction on work performance, or, on the acceptance of or offering for work by an employee.
> c. A failure or refusal by an employee to attend work or to perform any work task while at work.
> d. The lockout of employees by the employer by way of preventing the employees from performing work under their contracts of employment without terminating those contracts.[392]

Section 19(2) of the *Fair Work Act 2009* (Cth) goes on to expressly exclude specific actions from the definition of industrial action.[393] These excluded actions include those that have been agreed to by the disputing parties, and actions not taken by an employee, based on their reasonable concern that it would expose them to an imminent safety risk; and that the employee instead undertook other work that was safe and appropriate.[394]

1 *What is Industrial Action in the Context of an Essential Service*

The decision in *UFU v ACT Public Service*[395] provides a relevant case example of the application of the *Fair Work Act 2009* (Cth) section 19 to determine if industrial action occurred among firefighters. In *UFU v ACT Public Service*[396] a proposed protected industrial action ballot prepared

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[390] *Fair Work Act 2009* (Cth) pt 3-3; Dana McCauley, 'Unions defiant in the face of illegal strike warning', *Sydney Morning Herald* (online, 14 October 2018) <https://www.smh.com.au/politics/federal/>.
[391] *Fair Work Act 2009* (Cth) pt 3-3; Dana McCauley, 'Unions defiant in the face of illegal strike warning', *Sydney Morning Herald* (online, 14 October 2018) <https://www.smh.com.au/politics/federal/>.
[392] *Fair Work Act 2009 (Cth)* ss 19(1), (3).
[393] Ibid s 19(2).
[394] Ibid.
[395] *United Firefighters' Union of Australia v The Head of Service of the ACT Public Service on behalf of Australian Capital Territory T/A ACT Fire and Rescue* [2019] FWC 1022 ('*UFU v ACT Public Service*').
[396] Ibid.

by the United Firefighters' Union of Australia on behalf of its membership was in dispute.[397] Of particular interest in this decision is that it considers the application of the definition of industrial action to determine whether specific questions proposed by the United Firefighters' Union of Australia are industrial actions or not.[398] For two of these actions, namely 'a ban that employees start and finish work based on the hours of work outlined in the Enterprise Agreement unless it is for an emergency fire call, and, for a ban on any restriction to leave requests, unless it conflicts with the terms of the Enterprise Agreement' Commissioner Wilson determined them to be industrial actions.[399] Commissioner Wilson found both of these bans to be industrial actions because they were 'capable of referring to work by an employee in a manner different to that which is customarily performed.'[400] Additionally, Commissioner Wilson found that several actions were not industrial actions; these actions included, firstly, a ban on following all Australian Capital Territory Government policy on social media, and, secondly, a ban on complying with any direction to circumvent the effects of industrial action taken.[401] In the instance of the first ban that was not found to be an industrial action, this involved work not done by an employee and completed in a different way than is customarily performed.[402] In the latter instance, this ban was framed too broadly for the FWC to be able to find that it adequately connects with the definition of industrial action contained in section 19 of the *Fair Work Act 2009* (Cth).[403] When firefighters take industrial action, the first consideration is whether the actions fall within section 19 of the *Fair Work Act 2009* (Cth)'s definition of industrial action. Secondly, before any lawful action can occur the legislative requirements to take protected industrial action need to be completed. This example demonstrates that for essential service professions such as firefighters, there are further prerequisites to taking industrial action to ensure no significant disruption to society. These further prerequisites include consideration of the type, scale and timing of any industrial action. Because the public relies on the provision of essential services, the further prerequisites need to be addressed to ensure both the employer and the employee are able to take industrial action without causing irreversible harm to a community or individuals in it.

397 Ibid.
398 Ibid [4].
399 Ibid [24]
400 Ibid [24].
401 Ibid [25]-[27].
402 Ibid [25].
403 Ibid [26].

2 *When can the FWC Terminate or Suspend Industrial Action*

The relevant provisions of the *Fair Work Act 2009* (Cth) relating to industrial action which will be discussed in this section include section 424(1) which relates to the power to compel the FWC to 'suspend or terminate threatened, impending or probable protected industrial action if it considers that it would endanger the life, the personal safety or health, or the welfare of the population or a part of it, or cause significant damage to the Australian economy or an important part of it.'[404] Secondly, the *Fair Work Act 2009* (Cth), section 409 which sets out the requirements for certain industrial action, referred to as employee claim action, which is action organised by employees and for the purpose of advancing claims relating to the negotiation of an enterprise agreement.[405] Additionally, employee claim action must meet the additional outlined requirements such as being authorised by a protected action ballot, not in pursuit of unlawful terms, not part of pattern bargaining, not relating to a demarcation dispute and complied with any notice requirements.[406] Thirdly, the *Fair Work Act 2009* (Cth), section 437 provides for the grant of a protected action ballot order, an order that the FWC can make to 'require employees to complete a protected action ballot to determine whether they want to engage in particular protected industrial action.'[407] Finally, the *Fair Work Act 2009* (Cth), section 411 which defines employer response action as 'occurring during enterprise agreement negotiations when industrial action is organised or engaged in by employees or their representative, or when an employer takes action against one or more employees that would also be covered by the agreement.' [408]

Part 3-3 of the *Fair Work Act 2009* (Cth) relates to the regulation of industrial action by Federal system employees and employers. The explanatory memorandum to the *Fair Work Act 2009* (Cth) best explains the intent of part 3-3 and its function in balancing the interests of the disputing parties and the community. The explanatory memorandum for the *Fair Work Bill 2008* (Cth) outlines that:

[404] *Fair Work Act 2009* (Cth) s 424.
[405] Ibid s 409.
[406] Ibid.
[407] Ibid s 437.
[408] Ibid s 411.

> The bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease - at least temporarily. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate industrial action in the course of bargaining.[409]

The *Fair Work Act 2009* (Cth), part 3-3 operates in several ways; it defines what protected industrial action is, outlines when industrial action can take place, deals with the types of orders that can be made by the FWC relating to industrial action, provides for the Minister's powers to make orders relating to industrial action, sets out the process for authorising industrial action, establishes restrictions around taking industrial action and sets out how to make industrial action applications to the FWC.[410] For industrial action to be protected industrial action, it requires that:

- it is related to enterprise agreements that are not a greenfields or multi-enterprise agreement;[411]
- it is done in a genuine attempt to reach an agreement;[412]
- the party gave proper notice;[413] and
- it was conducted after the nominal expiry date of the enterprise agreement.[414]

Unlike in the State industrial relations system discussed in the previous chapter, the FWC makes explicit provision for suspending and terminating industrial action. There are only two circumstances where the FWC can suspend or terminate protected industrial action. Firstly, industrial action that is causing or is threatening to cause significant economic harm to the employer, any employees or any third party can cause the FWC to stop the industrial action.[415] For example, essential service workers engaged in the aviation and tourism industry whose industrial action could cause significant economic harm by not having the free flow of cargo and passenger

[409] *Fair Work Bill 2008* (Cth) cls 267-68.
[410] *Fair Work Act 2009* (Cth) s 406.
[411] Ibid s 413(2).
[412] Ibid s 413(3).
[413] Ibid s 414.
[414] Ibid ss 415, 417.
[415] Ibid ss 423, 426.

transport could have their industrial action prevented by the FWC.[416] This justification could also apply to teachers, because significant economic harm could be caused by industrial action that causes students to not be properly educated and cared for.

A second circumstance that the FWC may suspend or terminate protected industrial action is if the action has, is or would threaten to endanger the life, safety, health or welfare of any part of the population.[417] For example, workers engaged in typically essential services such as policing, nursing and firefighting could be ordered to have their industrial action stop if it causes real or potential danger to society by not having their services fully available to the community. This circumstance would require the FWC to determine that there is more than a mere inconvenience at stake and instead a real threat to the community would have to arise before any industrial action is ordered to cease.[418]

The FWC also has a limited discretion to suspend protected industrial action if it considers it appropriate.[419] The Minister is also able to make a declaration terminating protected industrial action in certain circumstances.[420] Any protected industrial action must also be authorised by a fair and democratic secret ballot that complies with specific requirements.[421] The conduct and effect of a protected action ballot is set out in the *Fair Work Act 2009* (Cth).[422] With this legislation in mind, the remainder of this chapter discusses the case law examples of essential service industrial action in the Federal industrial relations system.

3 *The Impact of High Court Decisions on Industrial Action in Essential Services*

This section discusses a notable case determined in the High Court of Australia that had a significant impact on the ability of public sector essential workers to take industrial action. The decision of *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*

[416] *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, [10].
[417] *Fair Work Act 2009* (Cth) s 424; Giuseppe Carabetta, 'International Labour Law Standards Concerning Collective Bargaining in Public Essential Services' (2014) 19(2) *Deakin Law Review* 275, 301-2.
[418] *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165, [5].
[419] *Fair Work Act 2009* (Cth) s 425.
[420] Ibid s 431.
[421] Ibid s 435.
[422] Ibid.

('*Coal and Allied*')[423] established a subjectivity test to determine the consequences of any industrial action and is still relevant today. Although this decision occurred pre-*Fair Work Act 2009* (Cth) legislation, the similarity between section 170MW of the *Workplace Relations Act 1996* (Cth) and section 424 of the *Fair Work Act 2009* (Cth) has resulted in the courts continuing to apply some of the reasoning from this decision including that the consequences of industrial action need to be considered based on a decision-maker's subjective assessment and value judgement of the relevant circumstances.[424]

At the time of the High Court of Australia's decision in *Coal and Allied*,[425] section 170MW(1) of the *Workplace Relations Act 1996* (Cth) related to the Commission's power to suspend or terminate industrial action occurring in the course of bargaining for a new industrial agreement in certain circumstances.[426] One of the circumstances where the Commission may suspend or terminate industrial action being taken included where the industrial action either threatens to *endanger the life, the personal safety or health, or the welfare* of the population, or, to cause *significant damage to the Australian economy* or an important part of it.[427] The effect of including the ability to suspend or terminate industrial action if it caused significant damage to the economy, enabled the Commission to restrain both essential and non-essential essential services from taking industrial action.[428] However, the fact that section 170MW of the *Workplace Relations Act 1996* (Cth) went beyond legislating for just essential services taking industrial action breached Australia's international labour obligations.[429]

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[423] [2000] HCA 47 ('*Coal and Allied*').

[424] *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165, [49]; *Parks Victoria v Australian Municipal, Administrative, Clerical and Services Union and others* [2012] FWA 5890, [11]; *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 3410, [9]; *Metro Trains Melbourne Pty Ltd v Australian Rail Tram and Bus Industry Union* [2015] FWC 6037, [26]; *Victoria v Liquor Hospitality and Miscellaneous Union* [2009] FWA 44, [31]-[32].

[425] *Coal and Allied* [2000] HCA 47.

[426] *Workplace Relations Act 1996* (Cth) s 170MW(1).

[427] Ibid s 170MW(3).

[428] *Observation (CEACR)* ILC Doc 87 (adopted 1998) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.

[429] Ibid.

The *Coal and Allied*[430] decision relates to industrial actions taken by workers at the applicant's mine in support of negotiating a new industrial agreement.[431] These industrial actions were said to not only threaten the welfare of the Hunter Valley community but also, if it escalated, it had the potential to significantly danger the Australian economy.[432] In this decision, the High Court considered the *Workplace Relations Act 1996* (Cth), section 170MW(3) and stated that 'the nature of the threat would involve the decision-maker to apply their subjectivity and value judgement.'[433] Further, concerning the *Workplace Relations Act 1996* (Cth), section 170MW(3)(b) 'the test is not just a matter of impression or value judgement because the presence of the words significant and important in that section suggests the decision-maker must have a basis to be satisfied above generalised predictions of the likely consequences of the industrial action in question.'[434] The subjectivity test laid down in this decision remains relevant today and has been applied to cases where the industrial action is threatening to cause significant damage to the whole or any part of the Australian economy.[435] The subjectivity test requires a decision-maker to consider the circumstances of a matter and have a basis for determining the likely consequences of the industrial action.

B *Identifying Essential Services*

This thesis has focused on the essential services of policing, teaching, firefighting and nursing. This next part discusses what factors to consider when identifying whether a profession is essential or not in the context of industrial action taken under the *Fair Work Act 2009* (Cth), sections 411 and 424. It is important to identify whether a service is essential because industrial action taken by these professions have the potential to 'endanger the life, personal safety or health or welfare of the population, or a part of it' and can thus by terminated or suspended by a FWC order.[436] Because protected industrial action taken by non-essential services cannot be terminated or suspended it is

[430] *Coal and Allied* [2000] HCA 47.
[431] *Coal and Allied* [2000] HCA 47.
[432] *Coal and Allied* [2000] HCA 47, [1]-[4].
[433] Ibid, [28].
[434] Ibid.
[435] *Queensland Corrective Services v Together Queensland, Industrial Union of Employees* [2019] QIRC 82, [2]; *State of Victoria - Department of Human Services v Health Services Union* [2012] FWA 8376, *[53]; Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44, [28]-[35].
[436] *Fair Work Act 2009* (Cth) s 424.

necessary to determine if a service is essential or not to know whether section 424 of the *Fair Work Act 2009* (Cth) can apply.[437] This section will review six cases examples to identify the types of industrial action taken by these professions and the context around the industrial action to determine whether the nature of work completed each profession is essential. This section will also discuss industrial action in the established essential services of teaching and nursing in a Federal industrial relations system context.

1 *Indicators of Essential Services*

The decisions discussed in the following paragraphs looks at the nature of employees' work in the state emergency services sector, air transport, corrective services and ambulance professions and whether a subjective assessment of any industrial action taken by these workers would cause the profession to be regarded as an essential service. The decisions consider factors such as the kind of industrial action being taken and the bargaining relationship between the parties. These services were found to be essential because the nature of the work would have caused more than a mere inconvenience to a part of the Australian community if industrial action were allowed to occur.

In *Parks Victoria v Australian Municipal, Administrative, Clerical and Services Union & Ors,*[438] Parks Victoria sought to terminate protected industrial action. The protected industrial action that was the subject of this dispute included indefinite or periodic bans on participating in emergency response by the Australian Workers' Union and the Community and Public Sector Union, and indefinite or periodic bans on emergency response from the Australian Municipal, Administrative, Clerical and Services Union.[439] The applicant, Parks Victoria, is a support agency for other lead agencies which undertake emergency response duties for situations that include; search and rescue, bushfire suppression, flood response, oil and chemical pollution, non-hazardous and hazardous waterway pollution and wildlife incidents.[440] Deputy President Smith considered section 424 of the *Fair Work Act 2009* (Cth) and the context around the protected industrial action, namely, the duration of the bargaining, an assessment that bargaining had reached an impasse, the nature of

[437] *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 341, [36].
[438] [2012] FWA 5890.
[439] Ibid [5].
[440] Ibid [6]-[7].

the proposed protected industrial action and the impact of that action, if implemented, on those people or persons that may need an emergency response.[441] The FWC found that the protected industrial action was *threatened, impending or probable* and that it threatened to 'endanger the life, personal safety or health or welfare of the population, or a part of it.'[442] The nature of this work was regarded as essential because any stoppage in the delivery of emergency response services would cause more than a mere inconvenience to a part of the Australian community by actually putting the life, health and safety of persons in it at risk. This decision is an example of the application of section 424 of the *Fair Work Act 2009* (Cth) to the consideration of whether to allow an essential service's industrial action to go ahead or suspend or terminate it.

Secondly, in the *Minister for Tertiary Education, Skills, Jobs and Workplace Relations,*[443] air transport workers were considered an essential service due to the significant damage the employer's response action in retaliation would have on Australia's tourism industry.[444] The decision also provides insight into circumstances where a government reacts to an employer taking industrial action against its employees.[445] In this decision, employees of Qantas intended to take minor protected industrial actions, so as not to trigger any suspension or terminations.[446] However, in response to the employee's industrial action, Qantas took protected employer response action against its employees under the *Fair Work Act 2009* (Cth), sections 411 and 424.[447] The employer response action involved locking Qantas employees out of the workplace, to push them into terminating their protected industrial action.[448] The FWC determined that the employee industrial action was unlikely to cause significant damage to the economy; however, it determined that Qantas's employer response industrial action would cause significant economic damage that was more than a mere inconvenience.[449] The FWC found that Qantas was an essential service after evidence demonstrated the importance of airline passenger and cargo transport to the economy and the significant damage to the economy's aviation and tourism industry if there were to be any stop

[441] Ibid [15].
[442] Ibid [14].
[443] [2011] FWAFB 7444
[444] *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, [13]-[16].
[445] Ibid [8].
[446] Ibid [2].
[447] Shae McCrystal, 'Why is it so hard to take lawful strike action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129, 137.
[448] Ibid.
[449] *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, [10].

in the provision of this service.[450] This decision highlights that the context of the industrial actions is relevant to whether a profession is an essential service. In this decision, it was not the employees' industrial actions that caused air transport workers to become an essential service, but the employer's intention to lock out its employees from the workplace which caused more than a mere inconvenience and enabled the FWC to make an order under section 424 of the *Fair Work Act 2009* (Cth). Based on this decision, it can be concluded that employer response action may lso form the basis for a service to be regarded as essential.

In the *State of Queensland (Queensland Corrective Services) v Together Queensland, Industrial Union of Employees* decision, this case considered why industrial action is restricted for essential services in the public sector.[451] A corrective services company brought this application where the question of whether protected industrial action threatens or would threaten to endanger the personal safety or health or welfare of the State's population or part of it was determined. In this case, the Queensland Industrial Relations Commission made an order to suspend protected industrial action after the applicant raised a range of issues that would arise from a shortage of staff while the protected industrial activity was expected to occur.[452] The applicant's submission set out the specific consequences that the proposed 24-hour stoppage action would have on the company. Additionally, the employer had made all endeavours to try and mitigate the impact that the protected industrial action would have had. After considering the merits of the case, the Queensland Industrial Relations Commission determined to grant the order suspending the action and commented that for any 'future protected action to be taken at the site, further efforts will be needed to ensure that there is sufficient coverage in place so that people can exercise their right to take protected action.'[453]

In a separate spate of protected industrial action taken by members of Together Queensland, Industrial Union of Employees, Queensland Corrective Services sought an order of the Queensland Industrial Relations Commission to suspend the action on the basis that 'it endangered the life,

[450] Ibid [9].
[451] *State of Queensland (Queensland Corrective Services) v Together Queensland, Industrial Union of Employees* [2019] QIRC 138.
[452] Ibid.
[453] Ibid [10].

personal safety or health or welfare of some of the State's population.'[454] The Queensland Custodial Services sought this order from the Queensland Industrial Relations Commission because no contingency team was organised to cover the loss of staff participating in the proposed protected industrial action.[455] However, as the protected industrial action was almost at an end, the Queensland Industrial Relations Commission decided to dismiss the application on the basis that such an order would not have any utility at such a late stage.[456]

In *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union,*[457] the decision compared the similarity between industrial action legislation in the *Fair Work Act 2009* (Cth) and the repealed *Workplace Relations Act 199*6 (Cth). Significantly, this decision considered whether ambulance services were essential services. The decision related to whether protected industrial action by way of a four-hour stoppage of work at various branches was 'threatened, impending or probable, as opposed to possible, and, whether this meant that it would threaten to endanger the life, the personal safety or health or the welfare of the population or a part of it.'[458] The applicant, Ambulance Victoria, is responsible for the provision of pre-hospital emergency care and patient transport for the Victorian community and sought orders to terminate the proposed industrial action per section 424 of the *Fair Work Act 2009* (Cth).[459] Senior Deputy President Kaufman considered whether, if the applicant was successful, it was appropriate to terminate or suspend the proposed industrial action contained in the protected action ballot taken by the Liquor, Hospitality and Miscellaneous Union. As the Liquor, Hospitality and Miscellaneous Union only opposed the order and did not submit that a suspension was appropriate, the question was whether to dismiss the application or uphold the application and terminate the proposed industrial action.[460] In likening section 424 of the *Fair Work Act 2009* (Cth) to section 170MW(3)(a) of the *Workplace Relations Act 1996* (Cth), Senior Deputy President Kaufman was satisfied from the evidence that the proposed protected industrial action would 'increase ambulance response times not only in the areas affected by the strikes but also in other branch areas where resources may be deployed to

[454] Ibid [1].
[455] Ibid [5].
[456] Ibid [11].
[457] [2009] FWA 44.
[458] *Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44, [1], [9].
[459] Ibid [3].
[460] Ibid [27].

and that these consequences would arise regardless of any minimising actions taken by Ambulance Victoria.'[461] The impact of the proposed industrial action meant that ambulance services were classified as essential services.[462]

2 *Indicators of Non-Essential Services*

This section will look at recent industrial action taken by public transport workers and paramedics in the Federal industrial relations system. Relevantly, the case law demonstrates that for a service to be recognised as an essential service in the Federal industrial relations system it requires that the result will amount to *more than a mere inconvenience*, meaning that 'the impact of the action needs to cause a significant disruption or inconvenience to people.'[463] This test was applied in the decisions of *Transit Australia Pty Ltd v Transport Workers' Union of Australia*, *Metro Trains Melbourne Pty Ltd v Australian Rail, Tram and Bus Industry Union*[464] and *St John Ambulance Australia (NT) Inc v United Voice*[465] where the FWC determined it could not exercise its power to suspend or terminate industrial action under the *Fair Work Act 2009* (Cth), section 424 because public transport is not an essential service. This section identifies that the characteristic feature of whether a profession is an essential service is that industrial action in the sector would amount to more than a *mere inconvenience*. The decisions in this section look at the balancing act between the interests of an employer, employees and stakeholders that a decision-maker has to make when deciding to terminate or suspend industrial action in this field.

In *Transit Australia Pty Ltd v Transport Workers' Union of Australia*, the decision considered the question of whether public transport is an essential service and found that it was not.[466] The decision relates to an application made by Transit Australia Pty Ltd, trading as Sunshine Coast Sunbus ('Transit') to suspend or terminate protected industrial action taken by the Transport Workers' Union of Australia on behalf of its members.[467] The protected industrial action taken by

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[461] Ibid [28]-[35].
[462] *Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44.
[463] *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 341, [36]; *Metro Trains Melbourne Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2015] FWC 6037, [24], [32].
[464] [2011] FWA 341, [36].
[465] [2011] FWA 4782, [9].
[466] *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 341.
[467] Ibid [1].

Transit employees included a 24-hour stoppage of work.[468] Commissioner Asbury considered the circumstances of the protected industrial action and found that 'although the industrial action would inconvenience the travelling public, more than a mere inconvenience was required before the power to suspend or terminate protected industrial action could be exercised.'[469] The FWC found that the industrial action did not meet the threshold of being more than an inconvenience and consequently dismissed the application.[470] Further, Commissioner Asbury commented that although public transport is 'an important service and the public depends on it, it is not an essential service'.[471] The reason for public transport not being regarded as an essential service was because, at its worst-case scenario, 'it only amounted to an inconvenience rather than mean the difference between life and death.'[472] This decision further reinforces the notion that for a service to be essential there needs to be more than a mere inconvenience caused by not providing that service. In the case of public transport, although it is an important service, it is not essential because it does not satisfy the element of being more than a mere inconvenience.

A second public transport industry decision which tested whether the public transport service was essential involved Metro Trains Melbourne Pty Ltd. Metro Trains Melbourne Pty Ltd made an application to the FWC for an order to terminate the protected industrial action proposed by the Australian Rail, Tram and Bus Industry Union's members.[473] The industrial action the subject of this dispute was a ban on the compliance with any direction to terminate a late-running train service other than for critical reasons, and a four-hour stoppage of work.[474] Commissioner Gregory dismissed the application because although the proposed industrial action would cause significant disruption and inconvenience, the evidence was not sufficient to establish that there was a threat to the personal safety or health or welfare for the whole, or any part of, the population.[475] Again the test of whether there was more than mere inconvenience was applied to the circumstances. This test resulted in the finding that although there would be a significant disruption or inconvenience,

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468 Ibid [2].
469 *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 341, [32]; *Fair Work Act 2009* (Cth) s 424(1)(c).
470 *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 341, [30].
471 *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 341, [36].
472 Ibid.
473 *Metro Trains Melbourne Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2015] FWC 6037, [1].
474 Ibid [1]-[3].
475 Ibid [24], [32].

it needed to be more than that for the FWC to step in and make an order terminating or suspending the industrial action.

Finally, the decision in *St John Ambulance Australia (NT) Inc v United Voice*,[476] involved St John Ambulance Australia (NT) Inc and their application to suspend or terminate protected industrial action taken by paramedic employees, on the basis that it threatened to endanger the life, personal safety or health of the population or part of it.[477] This decision considered the explanatory memorandum accompanying the *Fair Work Act 2009* (Cth) to conclude that the work subject to the industrial action undertaken by the paramedics would only amount to a mere inconvenience if not performed.[478] The protected industrial action in this instance involved a ban taken by paramedics in relation to one of their work duties, namely, the transfer (or "repatriation") of patients from hospitals in the Northern Territory to their homes or other areas such as aged care centres.[479] This decision followed the reasoning of the Full Bench of the Australian Industrial Relations Commission in *Victoria v Health Services Union of Australia*,[480] a decision relating to section 170PO of the *Industrial Relations Act 1988* (Cth), which is a section that is of similar language to section 424 of the *Fair Work Act 2009* (Cth).[481] In *Victoria v Health Services Union of Australia*, the Commission determined that the word "welfare" should be given its ordinary meaning.[482] However, Vice President Lawler distinguished that in the *St John Ambulance Australia (NT) Inc v United Voice* decision 'the exact meaning of the word "welfare" in the context of section 424(1)(c) and what constitutes the endangerment of the whole or a part of the population was not clear, and therefore it was necessary to look at the Explanatory Memorandum for Division 6 of part 3-3 of the *Fair Work Act 2009* (Cth)'.[483] In summary, the Explanatory Memorandum for Division 6 of part 3-3 of the *Fair Work Act 2009* (Cth) contained as follows:

- Division 6 establishes when protected industrial action relating to a proposed enterprise agreement can be suspended or terminated.

[476] [2011] FWA 4782
[477] Ibid.
[478] *St John Ambulance Australia (NT) Inc v United Voice* [2011] FWA 4782, [9].
[479] Ibid [3]-[6].
[480] *Victoria v Health Services Union of Australia* (1995) 37 AILR 3-091.
[481] *St John Ambulance Australia (NT) Inc v United Voice* [2011] FWA 4782, [7].
[482] Ibid [7]-[8].
[483] Ibid [9].

- The consequences of having industrial action suspended or terminated means that it brings the right to take industrial action to an end. Suspended industrial action may resume in accordance with the legislated requirements and terminated industrial action may be subject to a workplace determination contained in part 2-5 of the *Fair Work Act 2009* (Cth).
- Legislation recognises the right to take protected industrial action during bargaining. However, the *Fair Work Act 2009* (Cth) also recognises that instances can arise where the impact of the industrial action is severe that it is in the parties' interests or public's interest that the industrial action cease.
- Suspending or terminating industrial action under the *Fair Work Act 2009* (Cth) is not intended to occur when the industrial action causes only a mere inconvenience or to prevent legitimate protected industrial action while bargaining.[484]

Vice President Lawler found 'the welfare of a part of the population was not endangered as a result of the repatriation ban beyond the level of mere inconvenience to which the explanatory memorandum refers.'[485] In conclusion, although the protected industrial action taken by paramedics caused St John Ambulance (NT) Inc and its management staff difficulty, it was the outcome intended by United Voice. Further, United Voice and its members were within their rights to undertake this form of industrial action, in the interests of negotiating to secure a new enterprise agreement with improved terms and conditions. This decision highlights the need for the work the subject of the real or threatened protected industrial action to be material or substantial. So there needs to be more than a mere inconvenience for the FWC to be able to make an order under section 424 of the *Fair Work Act 2009* (Cth) suspending or terminating protected industrial action.

C *Industrial Action Taken by Essential Workers in Australia*

Case examples of industrial action taken by public essential services workers in teaching, firefighting and nursing professions in all Australian states and territories except Western Australia will be discussed in this part. These case examples will illustrate real examples of how Australia's Federal industrial relations system operates to enable a comparison to the situation in the Western

[484] *St John Ambulance Australia (NT) Inc v United Voice* [2011] FWA 4782, [9].
[485] Ibid [24].

Australian industrial relations system. In addition, this section will discuss case decisions concerning the *Fair Work Act 2009* (Cth), sections 424, 409 and 437. This section excludes the profession of federally engaged police from its analysis because the Australian Federal Police has not taken any industrial action in recent years. This section demonstrates the differences and similarities in industrial action legislation in Western Australia versus industrial action taken in the Federal industrial relations system jurisdiction.

1 *Only Certain Teaching Duties are Essential*

This section reviews recent industrial action taken by education sector employees under the Federal industrial relations system. It also discusses case law where the decision-maker found that higher education academics and teachers in the Northern Territory are an essential service where the industrial action would have caused more than a mere inconvenience to a part of the community.[486] This section also looks at a decision which highlights the similarities between the Federal and Western Australian industrial relations systems.[487]

The decisions of *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch*[488] and *State of Victoria v Australian Education Union & Anor*[489] need to be considered. In these further decisions, the FWC determined that public school teachers were essential services. Because public school teachers were deemed to be essential their industrial action was suspended or terminated under section 424 of the *Fair Work Act 2009* (Cth).

In *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch,*[490] it considers whether public sector teachers in the Northern Territory's proposal to take protected industrial action would endanger the life, personal safety or health or welfare of others. The decision involved an application to suspend or terminate planned protected industrial action

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[486] *National Tertiary Education Union v University of South Australia* [2010] FWAFB 1014, [14], [15], [19]; *University of South Australia* v *National Tertiary Education Union* [2009] FWA 1535, [41]; *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9479, [41].

[487] *State of Victoria v Australian Education Union and the CPSU, The Community and Public Sector Union* [2013] FCA 72, [13], [14].

[488] *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9479.

[489] [2013] FCA 72.

[490] *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9479.

from being taken by public school teachers engaged throughout the Northern Territory on the grounds that it threatened, is threatening or would threaten to endanger life, personal health or safety to the welfare of a part or whole of the population.[491] The Commissioner for Public Education sought an order to suspend for six months the protected industrial action proposed by the Australian Education Union, which included an unlimited number of one hour to one working day work stoppages or bans or limitations.[492] The union's members had already engaged in prior protected industrial actions, but these were not an issue in this decision. The Fair Work Commissioner considered the application of the *Fair Work Act 2009* (Cth), section 424 and the context of the industrial action proposed by the Australian Education Union. The circumstances included that teachers were not taking class roll information, which meant that their employer could not exercise its duty of care to the students because it would not have regular or timely access to daily data.[493] Further, that management based workarounds of class roll information were prone to error and that the unlimited nature of this form of industrial action amplified the risk.[494] Commissioner Wilson considered that although he would grant the proposed order prohibiting this form of industrial action by the Australian Education Union - Northern Territory Branch, this did not rule out them deciding to take other forms of protected industrial action that did not endanger the population or any part of it.[495] Following this decision, the Commissioner for Public Employment in the Northern Territory took further employer response industrial action by informing employees who had participated in the four hour work stoppage to not return to work for the remainder of the day and not receive pay for the day's work.[496] These decisions considered the importance of the role of public sector teachers and the duty of care that the Commissioner of Public Employment has for students. In particular the first decision relevantly decided that the impact of the proposed industrial action was significant and required the FWC to make an order prohibiting the proposed industrial action from occurring.

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[491] *Fair Work Act 2009* (Cth) s 424(1)(c); *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9479, [1].
[492] *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9479, [5].
[493] Ibid [38].
[494] Ibid.
[495] Ibid [41].
[496] *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9803 [9], [25]-[27].

In the *State of Victoria v Australian Education Union & Anor,*[497] which saw the Australian Education Union and the Community and Public Sector Union jointly take industrial action against the State of Victoria. The decision considered the legality of the industrial action taken by teachers, principals and education support staff and the issue of whether a State Government can be defined as an employer. In this decision, Justice Jessup 'refused an application that sought to restrain the respondents from organising or engaging in industrial action proposed to be taken by teachers, principals and education support staff in Victoria.'[498] The type of industrial action that was the subject of this application involved an 'unlimited number of Statewide, regional or sub-branch stoppages of work that ranged from one to 24 hours in duration, or bans or limitations on how educators performed work.'[499] Two proposed industrial actions were of particular concern for the applicant; these included 'bans on working more than 38 hours in any week, and, a Statewide 24-hour work stoppage.'[500]

The application was dismissed on the basis that it did not identify any substantive unlawfulness of the proposed industrial action and because the applicant had made the application six months after the FWC granted the protected industrial action orders.[501] One point of interest found in Justice Jessup's reasons for the decision acknowledged that 'section 3(f) of the *Fair Work Act 2009* (Cth) recognises that the taking of industrial action is an aspect of the system of good faith bargaining contemplated by the *Fair Work Act 2009* (Cth), however subject to clear rules.'[502] His Honour also considered the jurisdictional question raised about whether a State Government was an employer under section 409 of the *Fair Work Act 2009* (Cth) and found that although the State of Victoria was not an employer as defined, the applicant was a referring State within the meaning of sections 30B(1) and 30D(1) of the *Fair Work Act 2009* (Cth).[503] This decision is relevant because it identifies that the power of the FWC to suspend or terminate industrial action includes an element of good faith bargaining. This requirement to bargain in good faith establishes a similarity in the

[497] [2013] FCA 72.
[498] *State of Victoria v Australian Education Union & Anor* [2013] FCA 72, [1]-[2].
[499] Ibid [4].
[500] Ibid [6].
[501] Ibid [20]-[22].
[502] Ibid [9].
[503] Ibid [13]-[14].

Federal and Western Australian industrial relations systems as it is included in the section 42B of the *Industrial Relations Act 1979* (WA) which was discussed in chapter three.

Although the FWC has stated that it will not suspend other merely inconvenient industrial actions taken by teachers, this is still a restriction on the kind of industrial action that can be taken and limits the profession's ability to advocate effectively for their employment conditions.[504] There is no counterbalancing mechanism to offset the restrictions imposed on teachers who wish to take actions in pursuit of advancing their employment conditions. By limiting the industrial activities of teachers, this affects their bargaining position when negotiating their workplace agreements.

2 *Industrial Action by Essential Nurses*

This section reviews recent industrial action taken by federally employed nurses. This section also discusses a decision where nurses had their industrial action suspended because it related to the provision of an essential service, and the actions taken would endanger the safety, health or welfare of part of a community.[505] Historically, nurses have been reluctant to take industrial action. The outcome of the 2011 decision *Victorian Hospitals' Industrial Association v Australian Nursing Federation* resulted in no further instances of this profession taking significant industrial action. In 2011, the Australian Nursing Federation took industrial action on behalf of its members, those members being employees in the Victorian public health system.[506] As a result of this protected industrial action, the Victorian Hospitals' Industrial Association, who is the bargaining representative for various Victorian public sector employers, applied to the FWC to terminate the industrial action on the basis that it 'threatened to endanger the safety, health or the welfare of users of the Victorian public health system.'[507] The protected industrial action taken by Victorian public health system employees included, with some exemptions; 'the closure of one-third of operational beds, refusal to re-open some non-operational beds, cancellation of one-third of operating sessions, ban on certain data collection, ban on completion of certain paperwork, ban on overtime and other foreshadowed industrial action.'[508] The Full Bench considered that an order

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[504] *Commissioner for Public Employment v Australian Education Union - Northern Territory Branch* [2013] FWC 9479, [41].
[505] *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165.
[506] Ibid.
[507] *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165, [1]-[2]; *Fair Work Act 2009* (Cth) s 424.
[508] *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165, [5].

under section 424 of the *Fair Work Act 2009* (Cth) needed to 'consider of all of the circumstances and be made in consideration of the evidence and submissions.'[509] Consequently, the Full Bench turned to the issue of 'the impact that the protected industrial action taken and threatened by the Australian Nursing Federation and its members had or is likely to have had on the Victorian public health system and its users.'[510] The Full Bench considered this issue in light of the evidence to determine whether it was enough to suggest that the protected industrial action has, or would threaten to, endanger the personal safety or health, or the welfare, of part of the population.[511] Terms used in section 424 of the *Fair Work Act 2009* (Cth), such as "welfare, endangerment and life", were given their ordinary meaning and covered any conduct that puts the physical or mental health at risk of material detriment.[512] Further, the Full Bench looked at the requirement of the impact of the Australian Nursing Federation's conduct and "whether it was more than a mere inconvenience to the persons concerned".[513] The FWC decided to suspend the protected industrial action for 90 days after it found that the impact of the protected industrial action was more than just a mere inconvenience and would endanger the safety, health or welfare of a part of the population.[514] This decision considered the nature of the profession of nursing and the circumstances of the industrial action. Because the industrial action would cause more than a mere inconvenience to society, the FWC ordered it to be suspended.

Since the decision in *Victorian Hospitals' Industrial Association v Australian Nursing Federation*,[515] Federally employed nurses have not taken any further significant industrial action.[516] The case example demonstrates that the nature of the work performed by nurses, such as managing operational beds, assisting in operating sessions, data collection, paperwork and overtime, is essential to society. Further, industrial actions relating to the performance of these duties may again cause the FWC to suspend the action. This restriction on the kind of industrial action that Federally employed nurses can take limits the profession's ability to advocate for their employment conditions. There is no mechanism currently in place to balance the restrictions

509 Ibid [12].
510 Ibid [48].
511 Ibid [48]-[49].
512 Ibid [51].
513 Ibid.
514 Ibid [56]-[60].
515 [2011] FWAFB 8165.
516 Ibid.

imposed on nurses that seek to campaign for changing their employment conditions. Although there is the possibility that nurses can take alternative industrial actions which do not result in more than a mere inconvenience, these would likely not achieve the same level of impact.

D *Conclusion*

In summary, this chapter has discussed the types of professions regarded as essential services and the application of section 424 of the *Fair Work Act 2009* (Cth). The chapter highlighted that in order for a service to be seen as essential, the primary requirement is that the industrial action proposed or taken must amount to more than a mere inconvenience to justify restricting an employee's lawful right to take action. The cases discussed in this section all relate to the *Fair Work Act 2009* (Cth) provisions and particularly the power of the FWC to suspend or terminate industrial action in professions where industrial action would cause more than a mere inconvenience.

This chapter also looked at the professions of teaching and nursing in the context of the Federal industrial relations system. Although the legislation in the Federal industrial relations system differs from the legislation under the Western Australian industrial relations system, there is still aspects of similarity between the two. The primary similarity is the *good faith* test contained in the Western Australian industrial relations system and the aspect of good faith bargaining inherent in section 424 of the *Fair Work Act 2009* (Cth).[517] The main difference in the *Fair Work Act 2009* (Cth) is that it makes explicit provision for the enabling and termination of protected industrial action, unlike the *Industrial Relations Act 1979* (WA) which makes no express provision. The express provisions outlined under the *Fair Work Act 2009* (Cth) suggest that this industrial relations system is more restrictive than what applies to public sector essential service workers in Western Australia. Whether the *Industrial Relations Act 1979* (WA) and *Fair Work Act 2009* (Cth) provisions relating to industrial action are compliant with international labour obligations will be discussed in the next chapter.

[517] *State of Victoria v Australian Education Union & Anor* [2013] FCA 72, [9].

V CHAPTER 5: A REVIEW OF INTERNATIONAL OBLIGATIONS FOR INDUSTRIAL ACTION IN ESSENTIAL SERVICE PROFESSIONS

This chapter will consider Australia's international obligations when regulating industrial action among essential service workers to assist in determining a secondary research question on what further restrictions on public sector essential service workers are permissible and occur elsewhere. Further, it will review how a selection of other industrialised countries address situations where their essential service professions take industrial action. The countries used as comparators include Canada, the United States of America and New Zealand. Canada and the United States of America was chosen due to them also being westernised countries which have taken a different approach to applying the International Labour Organizations conventions by either prescribing for them in case law or by not opting not to ratify relevant conventions at all. New Zealand was selected due to its likeness to Australia in that it is also westernised and takes the most similar industrial relations approach to Australia. This chapter will focus on addressing a secondary thesis question on considering whether Western Australia's essential service professions should have greater limitations than others when taking industrial action by highlighting shortcomings of Australia's legislation regulating the right for essential service. workers to strike compared to other countries. Relevantly, this chapter considers the principles established by the ILO, which is the principal body promoting international labour standards. This thesis does not discuss the other international obligations which also regulate labour laws, such as the International Covenant on Economic Social and Cultural Rights.

The ILO is an agency affiliated with the United Nations, which comprises 187 member States, including Australia, which sets labour standards and develops policies and programs to promote human rights at work.[518] It does this by appointing representatives from Governments, trade unions and the business sector who meet annually in Geneva to discuss and legislate for international standards, these standards may then applied globally.[519] Representatives of the ILO prepare an annual report to the International Labour Office detailing the measures that each member country

[518] International Labour Organization (ILO), *About the ILO*, (2021) <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

[519] *Constitution of the International Labour Organization* arts 3 and 22; Roy J. Adams, 'America's Union-Free Movement in Light of International Human Rights Standards' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 215-6.

has taken to effect the provisions of conventions that it has ratified.[520] The ILO recognises the need for there to be certain limitations on industrial action and aims to have its conventions and recommendations form part of a nation's domestic labour laws, to encourage compliance.[521] This section will discuss some of the conventions the ILO has set down relating to the right to strike for essential service professions and review how international labour law applies in several other countries.

A *Introduction to International Labour Law*

The right to strike is not explicit in any ILO convention or recommendation; however, it is still recognised by the body generally as a fundamental human right.[522] Workers need to be able to ensure that their basic freedoms and entitlements are protected, so that they are not subjected to exploitation and abuse and can voice workplace issues.[523] As put by the ILO:

> [t]he 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.[524]

As will be discussed in this chapter, the right to strike is not explicitly stated but rather enshrined in the ILO's freedom of association principles, including Conventions 87 and 98. The right to strike for economic and social, rather than political, reasons is an intrinsic right which is contained in Convention 87 of the ILO's conventions and is a power that permits workers to form and remain

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[520] *Constitution of the International Labour Organization* arts 3 and 22; Roy J. Adams, 'America's Union-Free Movement in Light of International Human Rights Standards' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 215-6.

[521] Roy J. Adams, 'America's Union-Free Movement in Light of International Human Rights Standards' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 218.

[522] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev ed, 2006) 109.

[523] Zoe Hutchingson, 'The Right to Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law' (2010) 27(2) *UCLA Pacific Basin Law Journal* 119, 130.

[524] W.B. Creighton, W.J. Ford and R.J. Mitchell, *Labour Law Text and Materials* (The Law Book Company Limited, 2nd ed, 1993) 1331.

as part of an employee union.[525] The ILO's Convention 98 promotes collective bargaining and ensures that workers are not discriminated against based on their union association.[526] One researcher, who took a literal approach to the interpretation of Convention 87, has suggested that due to the ILO's lack of clear inclusion of the right to strike into its principles this indicates that the right to strike is not one of its principles.[527] However, it is widely regarded and is the view supported by ILO that a right to strike, subject to some exceptions for public servants and workers in essential services, is impliedly supported in its conventions.[528] This chapter will explain these conventions and discuss contextual examples of how a sample of countries have applied them to domestic legislation.

The term *strike* is interpreted broadly by the ILO. It includes other industrial conduct such as work bans, boycotts, go slow directions, withdrawal of labour, picketing and various other actions.[529] The ILO recognises the significance of the freedom of association principle and has established the Committee on Freedom of Association sub-committee to consider issues arising from it.[530] Although the Committee on Freedom of Association does not have enforcement powers, its role is to comment on and make recommendations to the Governing Body of the ILO on labour law violations.[531] The Committee on Freedom of Association has recognised that strikes are a human right and not just a social activity, and:

- the right to strike is an entitlement to any worker and their organisation;
- there are restrictions on categories of workers that have no right or limited right to strike;

[525] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev ed, 2006) 109, 111-2.

[526] Zoe Hutchingson, 'The Right to Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law' (2010) 27(2) *UCLA Pacific Basin Law Journal* 119, 128.

[527] Paul Mackay, 'The Right to Strike: Commentary' (2013) 38(3) *New Zealand Journal of Employment Relations* 57, 57-70.

[528] International Labour Office, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 102; Jeffrey S Votg, 'The Right to Strike and the International Labour Organisation (ILO)' (2016) 28(1) *King's Law Journal* 110, 113.

[529] Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) 760.

[530] James A. Gross, 'A Human Rights Perspective on United States Labour Relations Law: A Violation of the Rights of Freedom of Association' (1999) 3(1) *Employee Rights and Employment Policy Journal* 65, 71, 83.

[531] James A. Gross, 'A Human Rights Perspective on United States Labour Relations Law: A Violation of the Rights of Freedom of Association' (1999) 3(1) *Employee Rights and Employment Policy Journal* 65, 82; Roy J. Adams, 'The human right of police to organize and bargain collectively' (2008) 9(2) *Police Practice and Research: An International Journal* 165, 166.

- there is a clear link between the right to strike and promoting the economic and social interests of workers; and
- accepts that the legitimate right to strike should not be associated with penalties.[532]

The Committee of Freedom of Association has also stated that for a strike to be lawful, it must contain the following prerequisites:

- notice of the industrial action must be given in advance of it occurring;
- access to voluntary alternative dispute resolution mechanism;
- observation of a certain quorum that agrees to go ahead with the strike;
- a secret ballot should occur before strike action;
- implementation of safety measures to prevent accidents;
- establishment of a minimum service in some particular cases; and
- guarantees that non-strikers can maintain the freedom to work.[533]

Convention 87, which is the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), was ratified by Australia on 28 February 1973 and outlines the rules around legislating against the right to strike.[534] Again, on 28 February 1973, Australia ratified the Right to Organise and Bargaining Convention, 1949 (No. 98), which recognises that Australian workers are permitted to bargain with their employer over workplace interests.[535] Conventions 87 and 98 are arguably the most relevant and significant freedom of association conventions of the ILO. These two conventions are part of the eight core labour conventions, which include "addressing forced labour, freedom of association, organisation and collective bargaining, equal remuneration, discrimination, and child labour."[536] Additionally, Convention 151, known as the

[532] Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1, 11; International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev ed, 2006) 24, 109, 118, 133.

[533] Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1, 25; International Labour Office, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 105-107.

[534] International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention 87, adopted 9 July 1948, entered into force 4 July 1950).

[535] International Labour Organization, *Right to Organise and Collective Bargaining Convention* (Convention 98, adopted 1 July 1949, entered into force 18 July 1951).

[536] David Weissbrodt and Matthew Mason, 'Compliance of the United States with International Labour Law' (2014) 98(5) *Minnesota Law Review* 1842, 1844.

Labour Relations (Public Service) Convention, is commonly referred to alongside Convention 98 to ensure that reference to public sector employees only means those that are high-level.[537] Various articles of Convention 87 that directly pertain to the requirements when enacting legislation relating to the right to strike include articles 3, 9 and 10. Article 3 of Convention 87 provides that 'workers' and employers' organisations are entitled to unionise and no public authority can interfere with the lawful exercise of the union's organisation.'[538] Article 9 of Convention 87 relates to the police and armed forces and states that 'the convention does not apply to these workers; instead, these occupations get their industrial protections from domestic laws or regulations.'[539] Article 10 of Convention 87 defines an organisation as 'any organisation of workers or employers looking to further and defend their employment interests.'[540]

Although the right to strike is not explicit, two particular occupations provided in Article 9 of Convention 87 are an exception. The two occupations explicitly excluded from the ILO's stance on the right to strike are the police and armed forces.[541] Article 9 of Convention 87 enables a country to deny workers engaged in police or armed force occupations the right to strike, so long as this is allowed domestically.[542]

In the case of public service employees, the ILO has recognised that these workers are equally entitled to strike, but has also identified that the definition of a public servant differs between countries.[543] The ILO considers that a country's ratification of Convention 87 does not necessarily

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[537] Donald S. Wasserman, 'Collective Bargaining Rights in the Public Sector: Promises and Reality' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 57, 58; International Labour Organization, *Labour Relations (Public Service) Convention* (Convention 151, adopted 27 June 1978, entered into force 25 February 1981).

[538] International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention 87, adopted 9 July 1948, entered into force 4 July 1950), art 3(1)-(2).

[539] Ibid art 9.

[540] Ibid art 10.

[541] Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1, 17, 55; 'The human right of police to organize and bargain collectively' (2008) 9(2) *Police Practice and Research: An International Journal* 165, 167.

[542] Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1, 17; International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention 87, adopted 9 July 1948, entered into force 4 July 1950), art 9.

[543] Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1, 18.

imply that public service workers have a right to strike.[544] Where an essential public service's right to strike is restricted, the Committee on Freedom of Association and Committee of Experts agree that these employees should be provided with other sufficient guarantees to protect their workplace interests, such as access to impartial and prompt dispute resolution.[545] For jobs where public servants exercise their authority in the name of the State, the Freedom of Association Committee has found that the right to strike can be restricted or prohibited in circumstances where the strike can or may cause "serious hardship to the national community."[546] When it comes to services such as transport companies, railways, telecommunications, and electricity businesses, the ILO has stated that stoppages in these services may disturb a community's everyday life but will not cause a state of acute national emergency.[547] Additionally, a minimum service requirement in public utility professions can be set up around striking workers to restrict their industrial activities, to avoid irreversible damage and protect third parties' occupational interests.[548] Finally, in the case of essential services workers, in the strict sense of the term, the ILO considers that there is a restricted right to strike in services where "the interruption of which would endanger the life, personal safety or health of the whole or part of the population."[549] The ILO has found that for a strike to be prohibited in an essential service occupation, the strike must result in "a clear and imminent threat to the life, personal safety or health of the whole or part of the population."[550] These international requirements are consistent with the legislation in Western Australia's State industrial relations system and explicitly related to legislation in Australia's Federal industrial

[544] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 110.

[545] Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1, 17, 23.

[546] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 110-1.

[547] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 110.

[548] Jean-Michel Servias, 'ILO Law and the Right to Strike' (2009) 15 *Canadian Labour Law & Employment Law Journal* 147, 154; International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 110; Jeff Hilgert, 'Mapping the Boundaries of Human Rights at Work' (2009) 34(1) *Labour Studies Journal* 12, 26.

[549] International Labour Office, *Freedom of association and collective bargaining: General survey: third item on the agenda: information and reports on the application of conventions and recommendations* (Report III (Part 4B), International Labour Conference, 69th Session, 1983) [214]; International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 111.

[550] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 111.

relations system, both discussed in previous chapters, as Australia has endeavoured to ratify the conventions into domestic laws.[551]

What is an essential service has not been defined by the ILO and is determined by the organisation on a case by case basis to enable each country the scope to fit the definition within the country's particular circumstances. That said, the ILO's supervisory bodies have deemed certain professions as essential services. These professions include police and armed forces, hospitals and health sectors, firefighting services, public or private prison services, water and electricity services, telephone networks, school-age student food providers, school cleaners and air traffic controllers.[552] Even if a country determines that a service is not an essential service, it still can become one. A service can change from non-essential to essential if a strike 'lasts beyond a certain time or changes in scope and this then leads to an endangering of the life, personal safety or health of the whole or part of the population.'[553]

In summary, it is common for a country to regulate industrial action taken by workers in professions essential to society's function.[554] A country's laws should balance the right to strike with the interests of parties and stakeholders in a dispute. This may mean that restrictions on essential service professions taking industrial action are balanced with the option of alternative dispute resolution mechanisms.[555] Alternative dispute resolution is a means of conflict resolution where disputes are addressed via mediation, negotiation, conciliation or arbitration and are often done to avoid litigation.[556] The use of voluntary negotiation, conciliation and arbitration before industrial action is permitted by the ILO, so long as it is not compulsory and does not prevent the industrial action from occurring.[557]

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[551] *Western Australian Police Union of Workers v Commissioner of Police* [2017] WAIRC 00847; *Fair Work Act 2009* (Cth) s 424.

[552] Jean-Michel Servias, 'ILO Law and the Right to Strike' (2009) 15 *Canadian Labour Law & Employment Law Journal* 147, 153-4.

[553] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th rev ed, 1996) 111-2.

[554] Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) 763.

[555] Roy J. Adams, 'The human right of police to organize and bargain collectively' (2008) 9(2) *Police Practice and Research: An International Journal* 165, 166.

[556] James Duffy and Rachael Fields, 'Why ADR must be a mandatory subject in the law degree: A cheat sheet for the willing and a primer for the non-believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 1, 9-19.

[557] International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev ed, 2006) 114.

B *Interpretation of International Labour Obligations*

In addition to the freedom of association principles in the ILO's conventions ratified by Australia, the country is also a signatory to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which binds it to similar principles.[558] Article 22 of the International Covenant of Political Rights 'protects a person's right to freedom of association and ensures there is no restriction on exercising this right other than those prescribed by law. These protections include ensuring that there are no restrictions on armed forces or police, or is necessary for the national security, public safety, public order, protection of health or morals or the protection of the rights and freedoms of others.'[559] Additionally, Article 8 of the International Covenant on Economic, Social and Cultural Rights puts an obligation on member states to 'ensure the right of persons to form and join trade unions and strike conforms with the country's laws. Further, Article 8 also ensures that there is the lawful restriction of the right to strike for armed forces, police, or the State's administration.'[560] As mentioned, the ILO's conventions, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all contain provisions for the right to strike to be limited in certain circumstances such as for armed forces and administration of the State. The ILO has stated that the right to strike can be restricted or prohibited for public service occupations exercising authority in the name of the State if its granting would cause serious hardship to the community and if the profession has additional compensatory guarantees to safeguard industrial interests.[561] The ILO has stated that public servants may not be entitled to the right to strike if they work in professions such as officials working in the administration of justice, customs officers and employees performing administration, audit and collection of internal revenues.[562] As for essential services that may not be entitled to the right to strike, the ILO considers that this is any profession

[558] Zoe Hutchingson, 'The Right to Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law' (2010) 27(2) *UCLA Pacific Basin Law Journal* 119, 127.
[559] International Covenant on Civil and Political Rights, opened for signature 16 December 1966 (entered into force 23 March 1976) art 22.
[560] International Covenant on Civil and Political Rights, opened for signature 16 December 1966 (entered into force 23 March 1976) art 8.
[561] International Labour Organization, *Compilation of decisions of the Committee on Freedom of Association* (Geneva, 6th ed, 2018) [154]-[155], [163].
[562] Ibid [155].

where the existence of a clear and imminent threat to the life, personal safety or health of a whole or part of the population is the test.[563] The education sector is one of the few public sector professions expressly excluded from being regarded as an essential service because the possible long term consequences of strikes are not significant enough to cause serious hardship.[564] However, this determination is not absolute because the nature of a strike in the education sector could cause it to become an essential service.[565]

1 *Observations on the International Labour Organization's Convention 87*

The ILO, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all recognise the freedom of association principles. However, Australia's pursuit of these principles has been the subject of criticism from the ILO's Committee of Experts.[566] Concerning Australia's former Work Choices legislation, Australia has agreed with the ILO that aspects of its Federal workplace relations laws did not meet the ILO's standards ratified by Australia.[567] In or around 2007, the Committee of Experts raised the need for Australia to amend its Federal Work Choices laws to conform with international labour standards.[568] This involved provisions around lifting the protection of industrial action in support of multiple business agreements, pattern bargaining, secondary boycotts, sympathy strikes, prohibited content negotiations, strike pay and prohibiting industrial action if there was a danger to the economy by compulsory arbitration at the Minister's initiative.[569] The Committee of Experts also sought Australia to amend the *Crimes Act 1914* (Cth), which prohibits industrial action from

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563 Ibid [156]-[157].

564 Ibid [160].

565 Ibid [157]-[160].

566 Zoe Hutchingson, 'The Right to Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law' (2010) 27(2) *UCLA Pacific Basin Law Journal* 119, 137; *Observation (CEACR)*, ILC Doc 97 (adopted 2007) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.

567 *Observation (CEACR)* ILC Doc 98 (adopted 2008) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.

568 *Observation (CEACR)*, ILC Doc 97 (adopted 2007) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>; *Observation (CEACR)* ILC Doc 98 (adopted 2008) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>; *Direct Request (CEACR)* ILC Doc 99 (adopted 2009) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.

569 *Observation (CEACR)*, ILC Doc 97 (adopted 2007) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>; *Observation (CEACR)* ILC Doc 98 (adopted 2008) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>; *Direct Request (CEACR)* ILC Doc 99 (adopted 2009) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.

threatening trade or commerce with other countries or States and prohibited boycotts that obstructed or hindered the Government or the transport of international trade.[570]

In 2010, the Committee of Experts heard more concerns from the Australian Council of Trade Unions ('ACTU') that the newly introduced *Fair Work Act 2009* (Cth) did not remove the restrictive provisions in the previous Work Choices legislation.[571] Specifically, the ACTU alleged that legislation remained relating to industrial action being protected only if it was taken in the process of bargaining for an agreement.[572] The Government responded that 'the *Fair Work Act 2009* (Cth) represented a significant move away from the fundamental elements of the former Work Choices regime and was designed to balance the needs of employees, unions and employers and foster increased prosperity while safeguarding workplace rights and guaranteeing minimum standards.'[573] The ILO's Committee of Experts concluded that the Government should review the provisions in light of its previous comments in consultation with stakeholders, to bring them into full conformity with the relevant conventions.[574] Furthermore, the ILO Committee of Experts noted that under the *Fair Work Act 2009* (Cth) 'pattern bargaining remained unprotected unless parties genuinely sought to make an agreement and that industrial action remained unprotected if it supported the inclusion of unlawful terms and the bargaining representative reasonably believes the claims were permitted.'[575] The ILO emphasised that the right to strike is an intrinsic corollary of the freedom of association protected by Convention 87. The ILO requested that the Australian Government provide additional information on how these provisions applied under the *Fair Work Act 2009* (Cth) and further review these provisions with social partners to ensure that the convention was being fully applied.[576] The Committee yet again requested that the Government amend the *Crimes Act 1914* (Cth) to conform with the freedom of association and protection of the right to organise conventions and provide detailed information on any application of sections 30J and 30K of the *Crimes Act 1914* (Cth) in practice.[577] Later in 2012, the Committee of Experts

[570] *Observation (CEACR)*, ILC Doc 97 (adopted 2007) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.
[571] *Observation (CEACR)* ILC Doc 99 (adopted 2009) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO::>.
[572] Ibid.
[573] Ibid.
[574] Ibid.
[575] Ibid.
[576] Ibid.
[577] Ibid.

noted with regret that the Government had not made any amendment to the *Crimes Act 1914* (Cth) and that an independent review of the Western Australia's industrial relations system was underway, including the *Industrial Relations Act 1979* (WA), to ensure the unique State industrial relations system was compliant with ILO Convention 87.[578] To date, no amendment to the *Crimes Act 1914* (Cth) has occurred and Western Australia is continuing to review the proposed changes to the State system. The Committee of Experts continues to monitor Western Australia's progress towards compliance with Convention 87 and have repeated their request to have legislation relating to trade union membership removed and instead regulated by the internal rule of the organisation concerned.[579]

In 2010, the ILO's Committee of Experts again considered whether Australia's workplace laws were compliant with the Freedom of Association and Protection of the Right to Organise Convention.[580] The Committee of Experts noted that "the right to strike may only be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term."[581] The *Fair Work Act 2009* (Cth) requires that the FWC may only terminate protected industrial action where it causes or threatens to cause significant economic harm that is either imminent, protracted and not reasonably foreseeably resolved under section 423.[582] The Committee stated that although restrictions on legal industrial actions may interfere with trade and commerce, the economic impact of workers participating in industrial action is not determinative of an essential service and as such would not justify imposing restrictions on the right to strike.[583] As such, the ILO Committee of Experts again requested the Australian Government to take necessary steps, in consultation with its social partners, to review the offending provisions of the *Fair Work Act 2009* (Cth) and the *Crimes Act 1914* (Cth). The Committee of Experts sought to have the Australian Government bring these Acts into full conformity with the convention on Freedom of Association while continuing to require

[578] *Direct Request (CEACR)* ILC Doc 101 (adopted 2011) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.
[579] Ibid.
[580] *Observation (CEACR)* ILC Doc 101 (adopted 2011) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.
[581] Ibid.
[582] Ibid.
[583] Ibid.

the Government to provide detailed information on the application of these Federal workplace law provisions.

In 2014, the ILO Committee noted that the Australian Government requested a review of the *Fair Work Act 2009* (Cth) in consultation with stakeholders and an independent panel after identifying breaches of Convention 87.[584] The Australian Government has since consulted with stakeholders who agreed that the *Fair Work Act 2009* (Cth) does not need wholesale change but instead recommended that 53 technical amendments be made to comply with ILO Convention 87.[585] To date, the Australian Government has made 23 of the 53 technical amendments.[586] However, the ACTU remains concerned about sections 423, 424 and 426 of the *Fair Work Act 2009* (Cth). The union's concern relates to using the phrases "significant economic harm" and "significant damage to the Australian economy or an important part of it" which are still inconsistent with international labour law.[587] As such, the Committee of Experts requested follow up information on the remaining technical amendments suggested by the independent panel, and for the Australian Government to continue to review the contravening legislation to ensure ongoing interpretations by the judiciary complied with the Freedom of Association Convention 87.[588]

C *International Interpretations of Conventions 87 and 98*

This next section will look at a sample of other countries that have ratified the ILO's Convention 87 and 98. The remainder of the chapter will consider different interpretations of Convention 87 in regulating industrial action in core essential services in Canada, the United States of America ('USA')and New Zealand. The Canadian and New Zealand sections demonstrate the benefits of resolving industrial disputes by essential service workers through legislated alternative dispute resolution mechanisms. This section also outlines the weaknesses evident to the ILO in regulating industrial action in essential services in the USA. The significance of this analysis is to review what is acceptable practice around legislating the right to strike.

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[584] Observation (CEACR) ILC Doc 103 (adopted 2013) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.
[585] Ibid.
[586] Ibid.
[587] Ibid.
[588] Ibid.

1 *Canada*

Canada ratified the ILO's Convention 87 on 23 March 1972 and Convention 98 on 14 June 2017.[589] Canada has adopted a dualist approach to labour laws, which means any international law must be incorporated into domestic legislation for it to be legally recognised.[590] It was not until the 2000 decision of *Dunmore v Ontario (Attorney General)*[591] when international labour laws became included in domestic legislation. This decision arose following a dispute by agricultural workers which challenged their exclusion from the *Labour Relations and Employment Statute Law Amendment Act 1995* (Canada), because it infringed their rights and conflicted with the Canadian Charter of Rights and Freedoms.[592] The conflicting provision of the *Labour Relations and Employment Statute Law Amendment Act 1995* (Canada) that categorically excluded agricultural workers from its coverage was held unconstitutional, and the agricultural workers' appeal was allowed.[593] The decision resulted in a change in the perspective of the Canadian Supreme Court towards one which considered the collective right of the ILO's freedom of association principle.[594]

Before the decision in *Dunmore v Ontario (Attorney General)*,[595] the right to strike under Canadian Law was found by the Supreme Court not to be contained in the *Canadian Charter of Rights and Freedoms* or the Canadian Constitution.[596] The Labour Trilogy is the colloquial term referring to three cases that were heard and determined in the Supreme Court of Canada in 1987, which brought international laws into domestic legislation. In each of these three cases, the Canadian Courts found that the *Canadian Charter of Rights and Freedoms* did not contain the freedom of association principles.[597] The first of these cases was the 1987 decision of *Reference Re Public*

[589] International Labour Organization, *Right to Organise and Collective Bargaining Convention* (Convention 98, adopted 1 July 1949, entered into force 18 July 1951); International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention 87, adopted 9 July 1948, entered into force 4 July 1950).

[590] Judy Fudge and Heather Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27(2) *King's Law Journal* 89, 101.

[591] (2001) SCC 94.

[592] *Dunmore v Ontario (Attorney General)* (2001) SCC 94, [4]-[5].

[593] *Dunmore v Ontario (Attorney General)* (2001) SCC 94.

[594] Ken Norman, 'ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep' (2004) 67(2) *Saskatchewan Law Review* 591, 599.

[595] (2001) SCC 94.

[596] Tianjiao Yu, 'Right to strike: A comparison of Canadian and Chinese law' (LLM Thesis, Dalhousie University, 1998) 8-9.

[597] Ken Norman, 'ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep' (2004) 67(2) *Saskatchewan Law Review* 591, 597.

Service Employees Relations Act.[598] In this decision, the Supreme Court of Canada determined that the provincial legislation of Alberts that allegedly prohibited public servant's right to strike and imposed compulsory dispute resolution was allowable under Canada's domestic laws.[599] Secondly, in *Retail, Wholesale and Department Store Union v Saskatchewan,* the Court of Appeal ordered that striking dairy workers return to work after *The Dairy Workers (Maintenance of Operations) Act* was introduced, which did not violate the Canadian Charter of Rights and Freedoms.[600] Finally, the *Public Service Alliance of Canada v Canada* decision saw the court imposing a ban and two-year wage freeze on striking Federal public sector and railway employees.[601]

This decision in *Saskatchewan Federal Labour v Saskatchewan* has reinforced the country's application of the ILO's Convention 87 and the position that the freedom of association principle is not contained in the *Canadian Charter of Rights and Freedoms*.[602] In the decision of *Saskatchewan Federation Labour v Saskatchewan,* an issue for determination was whether it was legitimate for Canadian law to regard public sector workers as essential, the effect of which would prevent these workers from practising any right to strike.[603] Previous case law in Canada did not protect the right for essential service employees to strike.[604] The province of Saskatchewan was the last jurisdiction in Canada that did not have extensive laws regulating the provision of essential public services to the community during industrial action.[605] The introduction of *The Public Service Essential Services Act 2008* (Saskatchewan) saw essential services be defined in this province to include any service provided by the Government which prevents danger to life, health or safety.[606] However, the legislation was problematic because it had too broad an application and gave employers discretion to determine whether the service they provided was essential or not.[607]

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598 [1987] 1 SC. 313.
599 *Reference Re Public Service Employees Relations Act* [1987] 1 SCR 313, 314.
600 *Retail, Wholesale and Department Store Union v Saskatchewan* [1987] 1 SCR 460, 461.
601 *Public Service Alliance of Canada v Canada* [1987] 1 SCR 424, 438.
602 *Saskatchewan Federation Labour v Saskatchewan (SFL) (2015) SCC 4.*
603 Judy Fudge and Heather Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27(2) *King's Law Journal* 89, 90.
604 *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 SCR 424.
605 Judy Fudge and Heather Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27(2) *King's Law Journal* 89, 91.
606 *The Public Service Essential Services Act 2008* (Saskatchewan) c P-42.2 (interpretation of "essential services").
607 Judy Fudge and Heather Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27(2) *King's Law Journal* 89, 91; Mark Ferguson, 'Union

For example, the legislation only had a very limited right of review to the Saskatchewan Labour Relations Board for instances where the union contested the description of whether an occupation was essential.[608] The decision in *Saskatchewan Federation Labour v Saskatchewan*[609] saw presiding Justice Abella note that "the conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations…"[610] Abella J found the enacted legislation violated international labour obligations.

This decision led the Canadian Government to introduce new essential services legislation in October that same year. [611] The legislation passed in 2015 notably did not define essential services, instead it only broadly defined what a public employer was, established an essential services tribunal and made provision for arbitration by a Government-appointed arbitrator if disputes arose.[612]

In Canada, there are three exceptions to the general right to strike, two of which are relevant to essential service professions. Firstly, public servants who exercise the State's authority and are not working in State-owned industrial or commercial enterprises are limited in the industrial action that they can take.[613] Secondly, workers in public or private essential service professions are also limited in their capacity to strike.[614] Thirdly, there is still debate at the ILO on the scope of the definition of an essential service. Namely, whether an essential service is one where a stoppage by the service provider would cause a clear and imminent threat to the life, personal safety or health of all or part of a population.[615]

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suggests hearings, review of proposed labour bills: [Final Edition]', *Star - Phoenix* (Saskatoon, Sask, 14 February 2008); Mandryk Murray, 'Government botches labour law change', *Prince Albert Daily Herald* (Prince Albert, Sask, 19 March 2008).

608 Judy Fudge and Heather Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27(2) *King's Law Journal* 89, 91.

609 (2015) SCC 4.

610 Ibid [3].

611 'Essential services law deemed unconstitutional by Supreme Court' *The Canadian Press* (Saskatchewan, 30 January 2015). <https://www.cbc.ca/news/canada/saskatchewan/>.

612 Judy Fudge and Heather Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27(2) *King's Law Journal* 89, 107-108.

613 Jean-Michel Servias, 'ILO Law and the Right to Strike' [2009] 15 *Canadian Labour Law & Employment Law Journal* 147, 153.

614 Ibid.

615 Ibid.

Whether police in Canada have the right to strike changes depending on the province.[616] This is because there is recourse to conciliation and arbitration only in certain parts of Canada that prevent police from striking.[617] The only exception in Canada is the Federal police force, namely, the Royal Canadian Mounted Police, which until 1974 were forbidden by the Federal Government "from becoming a member of or in any way associated with any Trades Union Organization…" where a consequence of a breach was summary dismissal.[618] After 1974, rather than forbid the Royal Canadian Mounted Police from collective bargaining, the Federal Government implemented regulations which allowed for binding arbitration, whilst still preventing these workers from striking.[619]

This section has set out how Canada's dualist industrial relations system works for members who work in essential service fields. Industrial action in core services is available, but there are limitations for both public and private sector essential service workers. Further, for States that have prevented a profession from striking, these groups will still have access to conciliation and arbitration. The dispute resolution mechanism of binding arbitration exists only for the Federal police force, which is the country's only essential service profession that is not permitted a complete right to strike.[620] Canada's application of alternative dispute resolution to essential service professions has proved effective and has not been internationally criticized.

2 *United States of America*

Conventions of 87 or 98 have not yet been ratified by the USA, despite these being fundamental human rights and even though the ILO encourages member countries to ratify its conventions and recommendations.[621] However, as the USA is a member of the ILO, it is still required to recognise

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[616] Roy J. Adams, 'The human right of police to organize and bargain collectively' (2008) 9(2) *Police Practice and Research: An International Journal* 165, 167.

[617] Ibid.

[618] *Regulation forbidding members of the R. N. [Royal North] West Mounted Police and the Dominion Police to join Trade Unions etc,* SOR 1918-2213.

[619] *Supreme Court of Canada: Mounted Police Association of Ontario v Canada (Attorney General)* (2015) 1 SCC 3, [2], [107]-[110].

[620] Ibid.

[621] International Labour Organization, *Right to Organise and Collective Bargaining Convention* (Convention 98, adopted 1 July 1949, entered into force 18 July 1951); International Labour Organization, *Freedom of Association*

the importance of the body's principles.[622] Further, all members of the ILO are obligated to respect, promote and realise the freedom of association and right to collective bargaining principles, even if the country has not ratified them.[623] There are also follow up reporting requirements for non-ratifying countries with the ILO that requires non-ratifying member nations such as the USA to submit regular annual reports to demonstrate its compliance status.[624] Furthermore, the ILO's Committee on Freedom of Association also has the scope to hear and consider complaints lodged against a country even if it has not ratified a convention.[625]

The first suggested reason why the USA has not ratified Conventions 87 or 98 is because the country has domestic legislation in place that already regulates the right to strike, namely sections 7 and 13 of the *National Labour Relations Act* ('NLRA'),[626] which provides better protection than Conventions 87 and 98.[627] Congress brought the NLRA into effect in 1935, and its purpose is to regulate private sector employees' right to strike "to make the worker a free man" through the operation of the National Labour Relations Board.[628] Up until the 1930's, in the period prior to the NRLA,[629] the regulation of employees' freedom of association was done through employment contracts such as *yellow dog contracts*.[630] These yellow dog contracts, saw employers restricting

and Protection of the Right to Organise Convention (Convention 87, adopted 9 July 1948, entered into force 4 July 1950); Roy J. Adams, 'America's Union-Free Movement in Light of International Human Rights Standards' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 218.

622 Emily C.M. O'Neill, 'The Right to Strike: How the United States Reduces it to the Freedom to Strike and How International Framework Agreements Can Redeem It' (2011) 2(2) *The Labor & Employment Law Forum* 199, 206-7.

623 Steve Charnovitz, 'The ILO Convention on Freedom of Association and its Future in the United States' (2008) 102(1) *American Journal of International Law* 90, 93.

624 Steve Charnovitz, 'The ILO Convention on Freedom of Association and its Future in the United States' (2008) 102(1) *American Journal of International Law* 90, 93; Donald S. Wasserman, 'Collective Bargaining Rights in the Public Sector: Promises and Reality' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 58.

625 Richard McIntyre and Matthew M. Bodah, 'The United States and ILO Conventions 87 and 98' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 237.

626 29 USC §§ 151-169.

627 Richard McIntyre and Matthew M. Bodah, 'The United States and ILO Conventions 87 and 98' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 231; NRLA, 'The Right to Strike' (Web Page) <https://www.nlrb.gov/strikes>.

628 Emily C.M. O'Neill, 'The Right to Strike: How the United States Reduces it to the Freedom to Strike and How International Framework Agreements Can Redeem It' (2011) 2(2) *The Labor & Employment Law Forum* 199, 199, 209-10, 217; David Weissbrodt and Matthew Mason, 'Compliance of the United States with International Labour Law' (2014) 98(5) *Minnesota Law Review* 1842, 1845.

629 USC §§ 151-169.

630 Daniel Ernst, 'The yellow-dog contract and liberal reform, 1917-1932' (1989) 30(2) *Labour History* 251, 255.

union membership by limiting it as a condition of employment.[631] Yellow dog contracts would require that employees not join a union, or stipulate which union organisation employees could and could not associate with.[632]

The NLRA was expanded in1960, when the Government implemented a limited right to strike for public sector workers.[633] Sections 7 and 13 of the NLRA guarantees workers the ability to engage in industrial actions when collective bargaining and explicitly protects the right to strike.[634] The NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities.[635] Employees and employers not covered by the protections of the NLRA include government workers, independent contractors and agricultural workers.[636]

A second reason why the USA has not ratified Conventions 87 or 98 include that the country does not see unions as necessary to a well-functioning workplace.[637] The USA has strong laws which reduce worker labour rights in states with already weak employee protections.[638] Thirdly, the USA's policymakers believe that ratifying conventions means replacing the country's existing domestic legislation.[639] Fourthly, because membership to the ILO implies accepting its principles,

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631 Joel I. Seidman, 'The Yellow Dog Contract' (1932) 46(2) *The Quarterly Journal of Economics* 348, 348-9.

632 James A. Gross, 'A Human Rights Perspective on United States Labour Relations Law: A Violation of the Rights of Freedom of Association' (1999) 3(1) *Employee Rights and Employment Policy Journal* 65, 77.

633 Donald S. Wasserman, 'Collective Bargaining Rights in the Public Sector: Promises and Reality' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 58.

634 Emily C.M. O'Neill, 'The Right to Strike: How the United States Reduces it to the Freedom to Strike and How International Framework Agreements Can Redeem It' (2011) 2(2) *The Labor & Employment Law Forum* 199, 210-211.

635 National Labour Relations Board, 'Frequently Asked Questions' (Web Page) <https://www.nlrb.gov/resources/faq/nlrb>.

636 David Weissbrodt and Matthew Mason, 'Compliance of the United States with International Labour Law' (2014) 98(5) *Minnesota Law Review* 1842, 1848, 1855.

637 Richard McIntyre and Matthew M. Bodah, 'The United States and ILO Conventions 87 and 98' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 234; James A. Gross, 'A Human Rights Perspective on United States Labour Relations Law: A Violation of the Rights of Freedom of Association' (1999) 3(1) *Employee Rights and Employment Policy Journal* 65, 80.

638 Yunji Kim, Austin M Aldag and Mildred E. Warner, 'Blocking the Progressive City: How State Pre-Emptions Undermine Labour Rights in the USA' (2020) 58(6) *Urban Studies* 1158, 1160 and 1170; Steven Greenhouse, 'American unions have been decimated. No wonder inequality is booming', *The Guardian* (15 August 2019) <https://www.theguardian.com/>.

639 Roy J. Adams, 'America's Union-Free Movement in Light of International Human Rights Standards' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 216; Richard McIntyre and Matthew M. Bodah, 'The United States and ILO Conventions 87 and 98' in Richard N. Block et al (eds), *Justice on the Job* (W.E. Upjohn Institute for Employment Research, 2006) 234.

the USA is already bound to respect certain principles including those relating to freedom of association, despite not having ratified them.[640]

Today, the right to strike by essential services in the USA is largely permitted under the NLRA.[641] Strikes by employees are expressly permitted for the purpose of collective bargaining or other mutual aid or protection.[642] Further, unless otherwise provided for in the NLRA, 'nothing shall interfere with, impede, diminish or affect the limitations or qualifications on the right to strike.'[643] Guidance provided by the National Labour Relations Board suggests that strikes by either essential and non-essential workers can be deemed unlawful depending on the object, purpose, timing or conduct of the strikes.[644] Additionally, the only express limitation in the NLRA that restricts an essential service from industrial action in contained in section 8(g) which 'prohibits a union from engaging in any concerted industrial action at any health care institution without first giving at least 10 days' written notice to the institution and the Federal Mediation and Conciliation Service.'[645]

This section has set out how the USA's industrial relations system restricts industrial action for its essential service workers, even though it has not ratified Conventions 87 and 98. Despite not ratifying Conventions 87 and 98, the USA remains a member of the ILO, and there are still accountability requirements that the country must uphold. Although the USA is a member-only state which has decided not to ratify these conventions, the ILO has taken no action to require the country to ratify Conventions 87 and 98,

[640] James A. Gross, 'A Human Rights Perspective on United States Labour Relations Law: A Violation of the Rights of Freedom of Association' (1999) 3(1) *Employee Rights and Employment Policy Journal* 65, 72.
[641] USC §§ 7-8, 13.
[642] *NLRA* USC § 7.
[643] *NLRA* USC § 13.
[644] National Labour Relations Board, 'The Right to Strike' (Web Page) <https://www.nlrb.gov/strikes>.
[645] *NLRA* USC § 8(g).

3 *New Zealand*

New Zealand ratified Convention 87 in June 2003 and has yet to ratify Convention 98.[646] New Zealand labour law consists of statutes and common law, with the *Employment Relations Act 2000* (NZ) being the main source of law.[647] Either the Employment Relations Authority, the Employment Court, or the New Zealand Court of Appeal will determine labour law issues in New Zealand.[648] Legislation in New Zealand permits strikes and employer lockouts in non-essential service professions and essential service professions.[649] Essential services are extensively defined in Schedule 1 of the *Employment Relations Act 2000* (NZ) and generally covers professions involved in mining, electricity, State enterprise, water, sewerage, fire and emergency services, transport, ambulance, health care, pharmaceuticals, dairy and meat products and police emergency response.[650] However, in the case of essential service workers in New Zealand, further restrictions on the right to strike arise if their duties affect the public interest, these professions are required to meet several additional conditions before any industrial action can occur.[651] These other conditions include giving proper notice to the employer and the Chief Executive of the Department of Labour within 28 days of the commencement of the strike and not taking strike action before the date specified in the notice.[652] Notably, the *Employment Relations Act 2000* (NZ) emphasises mediation as the preferred means of resolving any employment relationship problem.[653] Mediation services are offered to parties once notice of a strike has been given to the Chief Executive, to assist the parties to avoid the need for a strike or lockout.[654] If mediation is unsuccessful, the parties can

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646 International Labour Organization, *Right to Organise and Collective Bargaining Convention* (Convention 98, adopted 1 July 1949, entered into force 18 July 1951); International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention 87, adopted 9 July 1948, entered into force 4 July 1950).

647 International Labour Organization, 'National Labour Law Profile: New Zealand' (Web Page, 2020) <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/>.

648 Ibid.

649 *Employment Relations Act 2000* (NZ) pt 8.

650 *Employment Relations Act 2000* (NZ) sch 1.

651 *Employment Relations Act 2000* (NZ) ss 90-1, sch 1; Ministry of Business, Innovation and Employment, 'Strikes and lockouts' *Employment New Zealand* (Web Page, 2020) <https://www.employment.govt.nz/starting-employment/unions-and-bargaining/>.

652 *Employment Relations Act 2000* (NZ) s 90(1)(b).

653 *Employment Relations Act 2000* (NZ) ss 92, 114; International Labour Organization, 'National Labour Law Profile: New Zealand' (Web Page, 2020) <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/>.

654 *Employment Relations Act 2000* (NZ) s 92.

apply for the Employment Relations Authority to decide on the matter, with a limited right of appeal to the Employment Court and then the Court of Appeal.[655]

The decision in *Attorney-General v National Union of Public Employees and ors*[656] relates to an interim injunction application by the Attorney General against the National Union of Public Employees, which was the union representing essential service employees engaged in the veterinary industry.[657] Following extensive unsuccessful mediation, members of the union sought to strike over requirements imposed on them to report on the health of exported animals.[658] Chief Justice Goddard noted that if the strike was lawful then it would be protected by the right to strike principle, which guarantees this right as a result of obligations New Zealand has made internationally.[659] However, the strike was not found to be lawful as it breached a requirement contained in section 90(1)(b) of the *Employment Relations Act 2000* (NZ) which requires that written notice be given not more than 28 days before a strike commences. This decision demonstrates the application of New Zealand's model of regulating the right to strike and the requirements for sufficient notice and mediation to occur prior to lawful industrial action occurring. Additionally, the case example is a useful demonstration of how New Zealand applies the requirements of its international obligations in its domestic legislation.

This section has set out how New Zealand's industrial relations system restricts its essential service workers by defining its application in domestic legislation. Although similar to the Canadian industrial situation, New Zealand relies on conciliation and arbitration mechanisms to resolve workplace disputes in essential service professions. This is despite not having ratified Convention 98. The use of conciliation and arbitration assists the parties to plan for industrial action, so it minimises the impact on society and attempts to avoid the need for any strike or lockout to occur. The ILO supports mediation as a form of dispute resolution for labour law issues. Rather than implementing a wholesale change of laws, New Zealand has enhanced its domestic legislation by

[655] International Labour Organization, 'National Labour Law Profile: New Zealand' (Web Page, 2020) <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/>.
[656] (2001) NZEmpC 4.
[657] Ibid [2], [6].
[658] Ibid [2]-[4].
[659] Ibid [22].

effectively integrating alternative dispute resolution mechanisms for addressing disputes relating to industrial action in essential services.

D *Conclusion*

This chapter has shown how international labour law applies and restricts other nations with essential service workers who seek to take industrial action. It highlights the ILO's requirement for there to be a right to strike but that certain situations require limitations on this. This right to strike may only be waived in essential service professions if it would otherwise result in serious hardship to the national community and other compensatory guarantees are in place for the occupation. The chapter also explained where Australia's Federal and Western Australian industrial relations laws fall short of its international obligations and the ILO's steps to correct this imbalance. These shortcomings include the technical amendments that remain outstanding to the *Fair Work Act 2009* (Cth) and progressing the outcome of the *Industrial Relations Act 1979* (WA) review to bring these domestic acts into compliance with Conventions 87 and 98. This chapter has also emphasised the usefulness of including alternative dispute resolution such as mediation into domestic legislation, a mechanism also supported by the ILO as outlined in the New Zealand example.

VI CHAPTER 6: RECOMMENDATIONS FOR REFORM IN WESTERN AUSTRALIA'S ESSENTIAL SERVICE PROFESSIONS

This chapter will highlight the findings in relation to the research questions identified. In relation to the first research question largely addressed in chapter three, the paper has determined that industrial laws regulating industrial action for essential service workers in Western Australia's Public Sector are restrictive, but not overly so, and as such only in need of minor adjustment. As for the second research question which was largely addressed in chapters four and five, this paper has found that Australia's Federal industrial relations system is not more facilitative than Western Australia's industrial relations system for essential service workers taking industrial action. Finally, in light of chapter five, this paper has established that for the third research question some essential service professions should have greater limitations than others when taking industrial action but counterbalancing mechanisms are required to ensure the right to strike is still accessible.

A *Introduction*

The remainder of this thesis addresses the recommendations in relation to each of the thesis question findings. When making recommendations, it is necessary to ensure that the conventions of the ILO are maintained and that the dispute resolution process is conducted as peacefully as possible. This can be achieved by ensuring that industrial disputes are addressed by the parties voluntarily and that any outcome is mutually agreed, which will ensure that any resolution is facilitated rather than forced.[660] This chapter considers possible changes to existing legislation of essential service professions taking industrial action, which would lead to a more fair and effective means of balancing stakeholder's affected by the right to strike. These changes are required to bring the *Industrial Relations Act 1979* (WA) into compliance with international standards.

[660] Jane Romeyn, 'Striking a balance: the need for further reform of the law relating to industrial action' (Research Paper No 33/2008, Parliamentary Library, Parliament of Australia, 25 June 2008) 8-12.

B *Recommendation 1: Proactive Dispute Resolution Measures*

In relation to the finding of the first research question that industrial laws regulating industrial action for essential service workers in Western Australia's Public Sector are unduly restrictive, this section will provide recommendations for amendments to the *Industrial Relations Act 1979* (WA). The recommendation relating to this research question seeks to improve Western Australia's compliance with its international obligations and consider what guarantees or other measures can be introduced to compensate public sector essential services for this restriction. As discussed in chapters two and three, Western Australia's essential service employees are subject to restrictions when taking industrial action, however these restrictions are not overly restrictive.[661] As a consequence, public servants in Western Australia need to be mindful that they are always bargaining in good faith when they seek to take industrial action, this can impair their ability to advocate for better employment conditions because the need of the community are taken into greater consideration. This section will consider and recommend that proactive dispute resolution measures can be implemented to further improve domestic legislation to enhance the equality of the right to strike for employers and employees, such as by the making a report to the WAIRC of any proposed industrial action.

As a society changes, adaptations to legislation can prevent instances of industrial action from arising and provide a mechanism to find amicable resolutions to complex problems.[662] In Western Australia, agreements encompassing workers' pay and working conditions contain an expiry date to ensure they are reviewed at least every three years to maintain currency.[663] The lead up to the renegotiation of an award or agreement often leads to pressure on the negotiating parties, as they strive to get the best possible deal that will be fixed for years to come. Despite the effectiveness industrial action can have in dispute resolution, is often not the preferred means of resolving an industrial problem; this is because it can be time consuming to organise, costly and further fracture relationships between the parties.[664] Further, as identified in chapter three, industrial action is only permitted while bargaining for a new industrial agreement, making this period particularly

[661] *Industrial Relations Act 1979* (WA) ss 42B, 44, 93; *Police Force Act 1892* (WA) s 14.
[662] Giuseppe Carabetta, 'International Labour Law Standards Concerning Collective Bargaining in Public Essential Services' (2014) 19(2) *Deakin Law Review* 275, 302.
[663] *Industrial Relations Act 1979* (WA) s 41A(1).
[664] Jane Romeyn, 'Striking a balance: the need for further reform of the law relating to industrial action' (Research Paper No 33/2008, Parliamentary Library, Parliament of Australia, 25 June 2008) 8.

volatile.[665] This section will look at what preventative steps the State Government can implement to ensure that negotiating parties are given the best opportunity to peacefully resolve workplace differences. These preventative recommendations are in addition to those contained in the *Employment Dispute Resolution Act 2008* (WA), which provides free and informal employment dispute resolution service by a WAIRC Commissioner regardless of the jurisdiction of the employee or employer.[666] Mediation by the WAIRC is available for any employment-related dispute and enables consenting parties flexibility to determine the power and functions of the Commissioner acting as mediator.[667] The measures proposed will seek to minimise the impact that the parties conflicted interests have during the stressful point in time that bargaining commences.

This chapter's first recommendation is for proactive dispute resolution measures; namely, a legislative amendment to enable parties to provide a brief report to the WAIRC several months before essential services bargaining commences. The purpose and content of this report is to allow a party the ability to inform an independent and impartial judicial body of any significant conflict between the essential service workers and their employer.[668] The report would be a formal and cost-effective means for parties to raise a dispute and outline the likelihood of any planned or proposed industrial action being considered. The benefit of this recommendation is that it notifies the WAIRC of any conflicts and industrial activity that may arise, allowing it sufficient time to make preparations for dispute resolution or escalation. Additionally, this report should remain confidential to the WAIRC. The State Government should also extend the WAIRC's powers to permit some limited steps necessary to minimise the impact of conflict on the community. The purpose of the report is not to try to resolve any dispute, but instead to facilitate voluntary conciliation and communication between parties. Voluntary conciliation can enable parties to discuss the proposed industrial action and offer the government the chance to share their budget before bargaining. The WAIRC can make any suggestion to conflicting parties that could take effect if a reasonable period has lapsed and neither party disputes the recommendation.[669] Enabling

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665 *Industrial Relations Act 1979* (WA) s 42B(3).

666 *Employment Dispute Resolution Act 2008* (WA) s 6.

667 Ibid s 10.

668 International Labour Organization, *Labour Relations (Public Service) Convention* (Convention 151, adopted 27 June 1978, entered into force 25 February 1981) art 8; International Labour Office, *Collective Bargaining in the Public Service: A Way Forward* (2013) 182.

669 Giuseppe Carabetta, 'International Labour Law Standards Concerning Collective Bargaining in Public Essential Services' (2014) 19(2) *Deakin Law Review* 275, 291; International Labour Organization, *Labour Relations (Public*

the WAIRC to take proactive preventative steps to pre-empt industrial action allows it to serve as an intermediary, thus minimising the impact and severity industrial action would otherwise have on the community. These steps could include alerting the WAIRC within 12 hours of a secret ballot, encouraging the parties to meet and discuss all issues of concern before proposing industrial action, and to narrow and identify the importance of each issue. This power is not one of compulsory arbitration, which is generally not permitted under international labour laws. Instead, this step is an optional action that a party can use to plan for inevitable essential public service industrial action with the support of a trained and independent mediator.[670]

The proactive role of the WAIRC's Commissioner would enable the judiciary to prepare parties for the disruption that any industrial action causes. The Commissioner's role may involve arranging for the preparation of recruitment of casual employees, facilitating a formal agreement to a minimum level of service throughout the industrial action or support increasing facilities to resolve some of the points of contention raised by the union.[671] The option to provide a report to the WAIRC would be voluntary by the parties, comply with international labour obligations and have the benefit of informing the judiciary of issues before the commencement of bargaining.[672] This prior notice empowers the WAIRC to provide a limited ability to try and minimise the amount of conflict to achieve the best outcome.

The ILO has stated 'legislation permitting voluntary conciliation and arbitration in industrial disputes before a strike cannot be regarded as an infringement of freedom of association if recourse to arbitration is not compulsory and does not prevent the calling of the strike.'[673] Legislating to permit prior notice to the WAIRC would not have the effect of removing or overly restricting the

Service) Convention (Convention 151, adopted 27 June 1978, entered into force 25 February 1981) art 8; International Labour Office, *Collective Bargaining in the Public Service: A Way Forward* (2013) 191.

670 Giuseppe Carabetta, 'International Labour Law Standards Concerning Collective Bargaining in Public Essential Services' (2014) 19(2) *Deakin Law Review* 275, 281, 299.

671 International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office*, 5th rev ed, 2006) [549]; Giuseppe Carabetta, 'Fair Work Bargaining for Police: A Proposal for Reform' (PhD Thesis, University of Sydney, 2020) 267-268.

672 Giuseppe Carabetta, 'International Labour Law Standards Concerning Collective Bargaining in Public Essential Services' (2014) 19(2) *Deakin Law Review* 280-281; International Labour Organization, *Right to Organise and Collective Bargaining Convention* (Convention 98, adopted 1 July 1949, entered into force 18 July 1951) art 4.

673 International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (*International Labour Office*, 5th rev ed, 2006) [549].

right to strike because the dispute resolution is voluntary. The impact of this recommendation is to have the purpose of working with the parties at an early stage to ensure that the community's life, personal safety or health is protected throughout negotiations among essential services professions.

C *Recommendation 2: Consider Creating a Harmonised Industrial Relations System*

This section will discuss a recommendation in relation to the second finding, to consider whether the federal industrial relations system is more facilitative of industrial action by essential services. This finding stems from the conclusions drawn in chapter four whereby the *Fair Work Act 2009* (Cth) takes a narrower approach to regulating industrial action than in the *Industrial Relations Act 1979* (WA). Additionally, comments from the Committee of Experts outlined in chapter five highlight international concerns around the need for wholesale change to the *Fair Work Act 2009* (WA) being still underway and the ACTU's concerns about amendments particular to the right to strike not being prioritised. As a result, one of the recommendations is to consider if there is merit in Western Australia's public sector essential service workers transitioning to the Federal industrial relations system.

The discussion in this section is limited in scope and purely considers the question of transitioning Western Australia's public sector essential service workers in the context of the conclusions highlighted in this thesis. As such, this thesis does not consider pay and employment condition comparisons or the consequences of transitioning only Western Australia's public sector workers to the Federal system and the impact this will have on the operation of the Western Australian Industrial Relations Commission.

There are clear disadvantages of Western Australia joining the Federal industrial relations system. Firstly, the historical significance of Western Australia's public sector would see the loss of established foundations such as case precedent and the possible decommissioning of the public service appeal board due to lack of use.[674] Secondly, as highlighted in chapter five, the Federal industrial relations system is not compliant with Australia's international labour obligations and

[674] Frank T. De Vyver, 'The 1920 Civil Service and Teachers; Strike in Western Australia' (1965) 7(3) *Journal of Industrial Relations* 281, 291-2; I.K.F Birch & A.P. Joyce, 'Teachers on strike: Going into conference in 1920' (1982) 24(1) *Critical Studies in Education* 57-73.

requires additional reporting and amendment until it conforms with the ILO's standards.[675] Finally, once the decision is made to transition these workers to the Federal industrial relations system this decision cannot be easily revoked.[676] The process to revoke a decision to transition to the *Fair Work Act 2009* (Cth) could require the State Government to amend section 14(2) of the *Fair Work Act 2009* (Cth), which defines a national system employer, to declare that these employees shall no longer be regulated under the Federal industrial relations system. Further an endorsement by the Minister would then be needed pursuant to sections 14(2)(c) and 14(4) of the *Fair Work Act 2009* (Cth) as well as plans made to re-establish the Western Australian industrial relations system to cover these employees.

Conversely, there are several benefits in harmonising the Federal industrial relations system with Western Australia's for public sector essential services. Firstly, the Federal industrial relations system is now well established from hearing and determining on matters from the other seven Australian states and territories, some of which have conferred all their industrial relations powers to the Federal industrial relations system, including that of public essential services workers.[677] Furthermore, the Western Australian Government has assisted in the enhancement of the *Fair Work Act 2009* (Cth) to the extent that it covers employers operating in Western Australia but who fall under the Federal industrial relations framework.[678] Secondly, the *Industrial Relations Act 1979* (WA) does not comply with international obligations and further reporting and amendment requirements have been imposed until it conforms with ILO standards.[679] Thirdly, there can be considerable complexity involved for stakeholders navigating the Western Australian and Federal industrial relations frameworks and creating a unified system will minimise the number of complexities.[680]

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[675] Observation (CEACR) ILC Doc 103 (adopted 2013) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.
[676] Mark Ritter SC, *Ministerial Review of the State Industrial Relations System – Final Report* (13 June 2018) 73-4.
[677] 'About Us', *Fair Work Commission* (Web Page) < https://www.fwc.gov.au/about-us>.
[678] Mark Ritter SC, *Ministerial Review of the State Industrial Relations System – Final Report* (13 June 2018) 13.
[679] *Direct Request (CEACR)* ILC Doc 101 (adopted 2011) <https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.
[680] International Labour Organization, 'National Labour Law Profile: Australia' (Web Page, 2021) <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/>.

In conclusion, the Western Australian industrial relations system is effective and well established. Both the Federal and Western Australian industrial relations systems need amendment to conform with international obligations. As such, there is no urgent need for Western Australia to confer its industrial relations powers in respect of its essential service workers to the Commonwealth. However, there are strong arguments for creating a unified industrial relations system such as reducing complexity in which industrial framework would apply, improved cohesion between Federal and Western Australian unions and the ability to work on improving a unified system to conform with ILO obligations, rather than invest effort into improving two systems.

D *Recommendation 3: Notice of Intention to Take Industrial Action*

In relation to the third finding that essential services should have greater limitations on the right to strike, this chapter considers that industrial action in Western Australia is far less legislatively prohibitive than the Federal industrial relations system but that improvements can still be implemented to better conform to international obligations. This preventative recommendation involves the capacity of an employee union or employers' representative to make an application to the WAIRC to give it notice of an essential service profession's initial intention to take industrial action. This approach is based on New Zealand's model, where a party looking to take industrial action must give notice of it to the Chief Executive Director of the Department of Labour.[681] Also, the *Fair Work Act 2009* (Cth), section 414(2) takes a similar approach to New Zealand, by stipulating that there is at least three days' notice as a precondition to taking protected industrial action.[682] The application, in this case, would be made voluntarily and soon after any decision to take industrial action has been made and at least two weeks before the industrial action occurs.

Any application to the WAIRC of proposed industrial action needs to be voluntary to comply with Australia's international obligations and for potential strategic reasons. For instance, a strategic reason for why the application needs to be voluntary to promote negotiation between parties could be because a union's tactic may include not alerting the other side of any protected industrial

[681] *Employment Relations Act 2000* (NZ) s 90, sch 1; International Labour Organization, 'National Labour Law Profile: New Zealand' (Web Page, 2020) <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/>.
[682] *Fair Work Act 2009* (Cth) s 414(2).

action.[683] Although union's strategies may complicate issues, they can be highly effective in industrial efforts. As such, there is a need to manage this complexity rather than removing it. The purpose of this kind of application is to enable the party seeking to take industrial action to have it pre-approved by the WAIRC, rather than expend a significant amount of time and resources organising it only to have the WAIRC order it cease. To allow this application, it may mean the government amends domestic legislation to include a new category of pre-approved industrial action, rather than having activities classified as either unprotected or protected. The pre-approved industrial action can contain a provision allowing it to become classified as protected industrial action, once the action has occurred. Pre-approved industrial action can ensure that the parties reach an agreement ahead of time to prepare for the industrial action and make whatever adjustments are necessary to ensure the life, personal safety or health of the whole or any part of the population is not compromised. Although, it is not essential for any proposed industrial action to be pre-approved, the outcome of such application can serve as guidance on the types of industrial action that a party can engage in and whether alternative actions need to be planned. Additionally, having industrial action pre-approved will serve to minimise the issue of the legality of the industrial action should a bargaining dispute later arise. Often when industrial action arises, it is not until after it has been planned or commenced that the person opposing the industrial action can apply to the WAIRC to seek an injunction or anther order to end the industrial action.[684] By this stage, the party taking industrial action has spent significant resources to prepare; so pre-approving industrial action can be an effective solution for all parties involved.

E *Conclusion*

Chapter six has discussed proactive recommendations that seek to support each of the three findings made. This chapter has also discussed the merit in Western Australia conferring its industrial relations powers in respect of its public sector essential workers to the Commonwealth and highlighted several significant benefits in conferring Western Australia's industrial relations powers in respect of its public sector essential services workers to the Commonwealth. These

[683] International Labour Organization, *Right to Organise and Collective Bargaining Convention* (Convention 98, adopted 1 July 1949, entered into force 18 July 1951) art 4.

[684] Giuseppe Carabetta, 'Fair Work Bargaining for Police: A Proposal for Reform' (PhD Thesis, University of Sydney, 2020) 270.

benefits include that an operational Federal industrial relations system exists, the *Industrial Relations Act 1979* (WA) contains breaches of Australia's international labour obligations and that having a unified industrial relations system would improve information sharing and reduce the complexity of having two Australian industrial relations systems.

The proactive recommendations discussed in this chapter were made with the view to reduce the frequency and severity of industrial action in Western Australia's public sector essential workforce. These recommendations include that a brief report should be given to the WAIRC before bargaining commences outlining any disputes that the parties may have to gauge the likelihood of industrial action occurring. A second proactive recommendation is to amend the *Industrial Relations Act 1979* (WA) to require certain notice of industrial action occur and make provision for pre-approved industrial action. These recommendations can be completed by way of amendment to the existing Western Australian industrial relations system and serve to improve the existing system.

In conclusion, any recommendation involving restrictions on public sector essential service workers' right to take industrial action should not cause them any detriment. Industrial action in these essential service professions needs to balance the security and safety of the community with the ability of any employee to advocate for their workplace rights. This thesis has discussed developments in the Western Australian industrial relations system in core essential service professions and referenced examples found in case law. The thesis then contrasts the Western Australian industrial relations experience with the Federal industrial relations system by using case examples from a broader range of essential service professions. Fourthly, the thesis highlights Western Australia's international obligations when legislating around the right to strike in essential service professions. The final chapter provided recommendations on how the Western Australian industrial relations system can be adapted to better cater for the right to strike in essential service professions.

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