Introduction

Strike ballots and the law in comparative perspective

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Introduction

The articles which comprise this special issue of the *Journal* were originally presented at a *Strike Ballots Workshop* held at the University of Sydney in August 2015.

The idea for the workshop originated in an ARC-funded project on the operation of the protected industrial action ballot provisions in Div 8 of Part 3-3 of the Fair Work Act 2009 (Cth) (FW Act) which we are currently undertaking together with Richard Johnstone from Queensland University of Technology and Catrina Denvir from Sydney University (Ballots Project).[1]

The Ballots Project consists of two principal elements: first, a quantitative review of all applications for protected industrial action ballot orders (PABO) for the period 1 July 2015–30 June 2016; and second, a qualitative study of a sample of total applications for that period. The purpose of the second element is to try to obtain a deeper understanding of the ways in which the ballot provisions operate in practice, and in particular of their impact upon the attitudes and behaviours of participants in the bargaining process. This phase of the Project includes conducting interviews with representatives of ballot applicants and employer respondents, and also with key stakeholders such as representatives of worker and employer organisations.

Consideration of the substantive content of Div 8, and the contentious circumstances in which the provisions now set out therein were originally introduced, inevitably raises questions as to the approach to this issue which has been adopted in other jurisdictions — especially those where workers who organise or participate in industrial action would, in the absence of some form of legislative protection, be exposed to legal penalty for doing so.

Preliminary analysis of these issues suggested that there is remarkably little secondary literature concerning the role and functioning of ballot provisions in such countries.[2] The purpose of the workshop was to start to fill that gap by examining the relevant law and practice in a group of six countries with particular reference to the factors, which led to the adoption (or non-adoption)

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1 'Protected action ballots and protected industrial action under the Fair Work Act 2009: The impact of ballot procedures on enterprise bargaining processes', ARC DP140100902.

2 For a conspicuous exception with respect to the UK see R Undy et al, *Managing the Unions: The Impact of Legislation on Trade Unions' Behaviour*, Clarendon Press, Oxford, 1996.

of mandatory ballot provisions, and to the practical effects of ballot provisions, in each jurisdiction. In order to minimise the risk of overstating the practical impact of legislative interventions, David Peetz was invited to explore the relationship between legal regulation and industrial disputation at an international and domestic level from an industrial relations perspective.

The legal systems of five of the six countries selected for study are based on English common law: Australia, Canada, New Zealand, the United Kingdom (UK) and the United States of America (USA). The legal system of the sixth — South Africa — is based on Roman-Dutch law, but with strong common law influences. In other words, for present purposes, all six jurisdictions can be said to share a common legal tradition. In all six, industrial action would be unlawful as breach of contract and in tort/delict — absent some form of statutory intervention.[3]

As appears from the articles in this special issue, there are many significant differences between the jurisdictions in terms of their approach to workplace regulation in general, and the use of strike ballots in particular. These differences are reflected in whether mandatory ballot requirements have been adopted; the kinds of ballot requirements that have been put in place; the rationale for their introduction; the use to which they have been put in practice; the attitudes of the industrial players to the requirements; and their practical effect.

It should also be noted that all six jurisdictions are members of the International Labour Organisation (ILO), with the consequence that each of them is under a constitutional obligation to respect the principles of freedom of association. That in turn requires that law and practice in each country must respect the right to strike,[4] as that term has been interpreted and applied by the ILO's supervisory bodies.[5]

In addition, all jurisdictions bar New Zealand and the USA have ratified the *Freedom of Association and Protection of the Right to Organise Convention*, 1948, No 87 (*Convention No 87*) — an instrument which has been read so as to protect the right to strike as an exercise of the union autonomy which is guaranteed by art 3 of the Convention.[6] As appears below, the supervisory bodies have consistently taken the view that strike ballot requirements are not inherently inconsistent with the right to strike, but that in certain circumstances they may interfere with that right to an unacceptable degree. As also appears below, law and practice in several of the six jurisdictions sit

3 In all six jurisdictions there has at various times been, and indeed still is, some form of statutory proscription of industrial action, in addition to these common law exposures.

4 In ILO parlance, 'strike' includes a refusal to report for, or to perform, work. It also includes other forms of peaceful industrial action such as partial work bans, picketing, go-slows, and workplace occupations. The term is used in this broader sense throughout this article.

5 The principal supervisory bodies for present purposes are the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the Conference Committee on the Application of Conventions and Recommendations (Standards Committee) and the Governing Body's Committee on Freedom of Association (CFA). See further J-M Servais, *International Labour Law*, 4th edn, Kluwer Law International, 2014, pp 301–15.

6 This reading of *Convention No 87* is highly contested. See, eg, C La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 *ILJ* 338.

somewhat uncomfortably with those standards.[7]

Two principal themes emerge from the jurisdictional studies:

- The first is that a range of different rationales have been used for the introduction of strike ballot requirements, but that the common theme is a stated need to protect or to promote 'democratic' decision-making. It also emerges that in many instances there are significant differences between the real or underlying purpose of ballot requirements and their ostensible rationale.
- The second theme is that there is significant room for doubt as to whether ballot requirements achieve either their stated or unstated objectives.

There are many other interesting points of comparison between law and practice in relation to ballots in the six jurisdictions. These include:

- Strike ballot provisions are more of a live issue in some jurisdictions than in others, and are mandatory in some, but not in others.
- There are interesting differences as to the regulatory techniques which have been adopted in the various jurisdictions — for example as between an express requirement to conduct a ballot as a precondition for taking lawful industrial action or requiring that unions adopt rules requiring the conduct of such ballots.[8]
- The use of different regulatory techniques within the jurisdictions impacts upon the degree to which strike ballot procedures become juridified, and the ability of employers to utilise the legal process to impede worker access to lawful strike action.

Rationales for Ballot Requirements

In Australia in August 1998, the then-Minister for Workplace Relations and Small Business issued a ministerial discussion paper entitled *Pre-industrial Action Secret Ballots*. In this paper it was suggested that secret ballots could 'strengthen the accountability and responsiveness of unions to their members'; 'facilitate freedom of choice by allowing employees to express individual preferences freely'; force unions 'to become more responsive to the needs of

7 For examination of international protection of the right to strike see: R Ben-Israel, *International Labour Standards: The Case of Freedom to Strike*, Kluwer Law and Taxation Publishers, Deventer, 1988; B Gernigon, A Odero and H Guido, *ILO Principles Concerning the Right to* Strike, ILO, Geneva, 2000; T Novitz, *International and European Protection of the Right to Strike*, Oxford University Press, Oxford, 2003; S McCrystal, *The Right to Strike in Australia*, Federation Press, Sydney, 2010, chap 2 and 10; A Jacobs, 'The Law of Strikes and Lockouts', in R Blanpain (Ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, 11th edn, Kluwer Law International, 2014, chap 22.

8 None of the jurisdictions imposes a ballot requirement in relation to employer lockouts. This is hardly surprising in light of the fact that decisions to lock out are usually taken by the employer alone, rather than in concert with others. Note, however, Margaret Wilson's description of suggestions in New Zealand that lockouts should be preceded by a ballot of shareholders.

their members'; and ensure that only industrial action with 'the genuine support of the employees concerned' was 'legitimised' by being accorded legal protection.[9]

These aspirations neatly encapsulate what might be termed the 'democratic imperative' for ballot requirements, and are clearly reflected in the rhetorical justifications for recent legislative changes in New Zealand and (at least initially) the UK, and for attempts to (re)introduce ballot requirements in South Africa.

The democratic imperative appears to be based on the premise that unwilling and/or unknowing workers are commonly led/coerced into taking industrial action by ideologically-driven and/or industrially irresponsible union leaders, and that this would not happen if the workers concerned had the right to express their democratic voice in a secret ballot. There is very little objective, empirical support for either hypothesis. This is evidenced by the fact that in those jurisdictions which have mandatory ballot requirements industrial action is almost invariably endorsed by large majorities, while as Peetz shows, there is no compelling evidence of a causal connection between the introduction of ballot requirements and declining levels of industrial disputation.

These realities lend support to Margaret Wilson's assertion that the introduction of ballot requirements in New Zealand in 2012, and further restrictions on strike action in 2014, were not driven by the democratic imperative, but rather were profoundly anti-democratic initiatives, the real purpose of which was to weaken trade unions who, on her analysis play, or ought to play, an important role as guarantors of democracy in a pluralist society. Tonia Novitz's description of the British government's explicit acknowledgement of the economic rationale for recent changes to the ballot requirements in that country also lends substance to this analysis.

Looking beyond the rhetoric of democratic decision-making, the national studies suggest that there are a number of reasons why governments may be attracted to the idea of mandatory ballot requirements:

- An ideological commitment to curtailing the power, or perceived power, of trade unions by imposing procedural and/or substantive restrictions on their capacity to use what is traditionally assumed to be their most powerful weapon, the capacity to take strike action. As with the democratic imperative, this policy driver may be presented in the guise of the need to promote 'responsible' trade unionism, as has historically been the case in Canada.
- A perception that industrial disputation is 'bad for the economy', with the logical consequence that measures which have the effect of curtailing such disputation are a 'good thing' — as evidenced by the British government's assertions that the recent changes to the ballot provisions were necessary to preserve the 'economic welfare of the nation'.[10]

9 Minister for Workplace Relations and Small Business, *Pre-Industrial Action Secret Ballots*, Ministerial Discussion Paper, Parliament of Australia, Canberra, 1998, at 2–7.

10 Novitz in this edition, text preceding n 86.

- A philosophical commitment to the encouragement of collective bargaining, but offset by a desire to ensure that bargaining is 'orderly' and confined within acceptable limits — as by ensuring that industrial action occurs only where certain procedural and/or substantive criteria have been satisfied. Sara Slinn and Eric Tucker characterise this as 'light regulation'.
- A desire to ensure that the limits and methods of industrial action available to industrial actors are constrained by the law, rather than being left solely to the discretion of the participants in the industrial process.
- A perception that the 'privilege' of protection against common law (or statutory) liability in respect of industrial action must come at the cost of observance of procedural and/or substantive rules relating to the circumstances in which that privilege may be exercised. Put differently, the imposition of such constraints can be seen as a way to legitimise placing unions and workers 'above' the law for certain purposes.

These factors can, to varying degrees, be seen to have been in play in the recent introduction of mandatory ballot requirements in Australia, New Zealand and the UK, and in attempts to reintroduce such a requirement in South Africa. They were also in play in the 1920s when the ballot requirement was originally introduced in South Africa, and in pre-War Canada.

The Canadian provisions in particular appear to have been driven by a desire on the part of federal and provincial governments both to reduce levels of industrial disputation, and to promote 'responsible' trade unionism and democratic decision-making. The relevant provisions remain in place, but are now much less contentious than in the past. Slinn and Tucker suggest that this is because the steep decline in industrial disputation in Canada in recent years means that strikes are no longer seen as a significant threat to the economy, with the consequence that governments are less inclined to look to techniques such as strike ballots as a means of curtailing industrial action. They are of the clear view, however, that the decline in levels of disputation should not be attributed to the existence of ballot requirements or, indeed, of other forms of repressive industrial legislation.

As concerns the USA, Alexander Colvin points out that there are still some statutory ballot provisions in place, but that they have fallen into disuse — apparently because they were perceived to be ineffectual as a means of preventing industrial action, and because employers have access to a range of other, more effective, ways of curtailing such action. Interestingly, however, many American unions include provision in their constitutions which require the conduct of a ballot of members before industrial action can occur. In other words, the various legislatures have, by and large, not subscribed to the 'democratic decision-making' rationale for ballot requirements, but organised labour has voluntarily adopted such requirements — presumably in order to legitimise the exercise of industrial muscle both in terms of public perception and in the minds of their members. It may also, of course, reflect a genuine commitment to democratic decision-making.

As Peetz shows, there have been steep declines in levels of disputation in all of the jurisdictions under discussion, apart from South Africa. The same is

true for many other parts of the world. The fact that this decline occurred in Australia, New Zealand and (to a lesser extent) the UK well before the introduction of mandatory ballot requirements clearly lends support to the view that the decision to legislate in those countries was driven by concerns other than reduction in levels of disputation and democratic decision-making. As Peetz sees it, the relevant factors included economic, institutional and cultural considerations which are indicative of a 'broader shift in power from labour towards capital'.[11]

The Ballot Requirements

Origins

Of the six jurisdictions, all bar South Africa and (in effect) the USA retain mandatory ballot requirements.[12] Paradoxically, in both of those countries, trade unions have voluntarily imposed such a requirement upon themselves.

As Paul Benjamin and Carole Cooper relate, recent attempts to reintroduce a mandatory ballot requirement in South Africa encountered fierce, and successful, resistance from the trade unions. The authors suggest that this resistance can be attributed both to a continuing reaction against the use to which the ballot requirements were put during the apartheid era, and to the fact that the individual right to strike is constitutionally entrenched. It is interesting, however, that the unions which vehemently opposed the reintroduction of mandatory ballot requirements are content to live with voluntarily-assumed requirements which have the same effect.

In the USA, unions are also content to live with voluntarily-assumed ballot requirements, and there is no real agitation for the introduction of mandatory ballot requirements. As noted earlier, Colvin suggests that this may reflect the fact that there are so many legal and institutional obstacles to taking industrial action that employers simply do not see the need for mandatory ballot requirements as a means of limiting the occurrence of industrial action. Unions, meanwhile, seem to see them as a way of lending democratic legitimacy to taking industrial action.

In Canada, the ballot requirements date from the early part of the twentieth century. They were controversial in their time, but have now become largely institutionalised, and as Slinn and Tucker explain, are not a focus of debate at either federal or provincial level.

The same is broadly true in New Zealand. The mandatory requirements were first introduced in 2012, and originated in a private member's bill which subsequently received government support. Further amendments in 2014 imposed additional restrictions on access to industrial action. As Wilson explains, these Bills attracted little opposition, largely because most unions already had ballot requirements in their rules.

The situation is rather different in Australia and the UK.

Mandatory ballot requirements in Australia were introduced as part of the

11 Peetz in this edition, text following n 50.

12 Jacobs, above n 7, pp 752–3 notes that in addition to Australia, the United Kingdom and Canada, mandatory ballot requirements can be found in countries as diverse as Chile, Czech Republic, Ireland, Lithuania, Japan and Singapore.

'Work Choices' package in 2005.[13] They were clearly driven by the Howard government's neoliberal economic and social agenda, and as such were strenuously opposed by the unions. The Rudd government took office in 2007 with a clear commitment to the repeal of Work Choices. It honoured that commitment, but in the event retained the Work Choices ballot provisions with only marginal amendment. They are now regarded as a largely non-contested part of the statutory bargaining regime.

As Novitz explains, the mandatory ballot provisions in the UK are part of the legacy of the Thatcher era, and have also become a more or less settled part of the system.[14] However the recent changes to the quorum requirements have been fiercely resisted by the labour movement.[15] It remains to be seen whether they too become institutionalised and whether they have any significant impact upon already low levels of industrial disputation in that country.

What are the Requirements?

Unions in Canada and New Zealand have a broad discretion as to how to give effect to the mandatory ballot requirements, while in the USA and South Africa it is entirely up to individual unions whether or not they ballot, and what form of ballot requirement (if any) they choose to adopt.

In the UK, ballot requirements have recently become significantly more onerous in consequence of the hotly contested amendments effected by the Trade Union Act 2016 (UK). As explained by Novitz, the new provisions require that not only must there be a ballot, but at least 50% of those eligible to vote must cast a valid ballot, and a majority of that 50% must vote in favour of taking industrial action. Furthermore, in 'important public services' at least 40% of those *eligible* to vote must vote in favour to taking action: that is, the majority who vote in favour of the proposed action must constitute at least 40% of the total 'electorate'.

There are also detailed provisions governing the information that must be provided on the ballot paper (including a 'health notice' to voters concerning the potential for termination of employment, and a statement of the matters remaining in dispute). Ballots may only be conducted by post, although in a last-minute concession, the government agreed to commission an independent review of electronic balloting to ascertain whether it could be made tamper-proof. Where ballots are successful, the 'mandate' for strike action will expire after 6 months. Given the highly prescriptive character of the UK legislation, there is potential for significant employer scrutiny of, and challenge to, strike ballots.

In Australia, a union must obtain a PABO from the Fair Work Commission (FWC) before it can even conduct a ballot. As explored in our article with Catrina Denvir, the making of such orders is conditional upon the application

13 Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices). This measure extensively amended, but did not replace, the existing Workplace Relations Act 1996 (Cth).

14 For a descriptive analysis of the pre-amendment ballot provisions, see S Deakin and G S Morris, *Labour Law*, 6th edn, Hart, Oxford, 2012, pp 1072–89.

15 See M Ford and T Novitz, 'An Absence of Fairness . . . Restrictions on Industrial action and Protest in the Trade Union Bill 2015' (2015) 44 *ILJ* 522.

being made in proper form, and upon the union having been, and being, 'genuinely trying to reach an agreement with the employer of the employees who are to be balloted' at the time at which they apply for a PABO. The application must also specify the forms of industrial action for which approval is being sought. Furthermore, if the employer has refused to bargain, then before seeking the making of a PABO the union must first obtain a majority support determination (MSD) under ss 236–237 of the FW Act.[16]

The FW Act makes exceedingly elaborate provision in relation to the conduct of the protected industrial action ballot. In most instances these requirements mean that there is an interval of between 4 and 5 weeks between the application for a ballot and the declaration of a result. As in the UK, for proposed action to be approved, at least 50% of the employees to be covered by a proposed agreement must cast a valid ballot, and a majority of that 50% must vote in favour of the proposed action. The union is then required to give at least three working days' notice of its intention actually to take protected industrial action (PIA), and it must commence the action within 30 days of the declaration of the ballot — in other words, there is a 'use or lose it' rule.[17]

These provisions are even more complex than their British counterpart. They have, however, generated surprisingly little litigation, and few ballot applications appear to be rejected because of failure to comply with the technical requirements of the FW Act. It remains to be seen whether the introduction of the MSD requirement will cause employers to adopt a more aggressive approach to MSD and PABO applications. Early indications suggest that some employers have been prepared to try to use the new provisions to block PABO applications, albeit with limited success.[18]

The Practical Impact of the Balloting Requirements

In the nature of things, it is not possible accurately to assess the influence of strike ballot requirements on patterns of industrial disputation — especially in circumstances where, as Peetz shows, levels of industrial disputation are at historically low levels throughout the developed world, and where the decline in disputation does not seem to be any greater in countries which have mandatory ballot requirements as compared to those that do not. It does not necessarily follow that there is *no* correlation between ballot requirements and levels of disputation, but it does seem reasonable to assume that the influence of ballot requirements on levels of disputation is likely to be marginal at best.

It is also possible that ballot requirements can have the effect of legitimising industrial action rather than curtailing or stigmatising it. For example, if a particular course of industrial action has been approved by means of a democratic balloting process then all stakeholders may regard that action as

16 An MSD is a determination by the FWC to the effect that a 'majority of the employees who will be covered by the [proposed] agreement want to bargain with the employer, or employers, that will be covered by the agreement'. The MSD requirement applies only where the employer has refused to bargain, and was introduced in late 2015 to reverse the decision of the Full Court of the Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297; 218 IR 454; [2012] FCAFC 53.

17 FW Act s 459.

18 See, eg, *Maritime Union of Australia v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894.

having a degree of legitimacy that it might not otherwise possess. Employers may recognise that the action genuinely has the support of the workforce, rather than being the handiwork of a minority of militants or malcontents; workers may feel empowered by the fact that their fellow-workers have indicated their support for the action through a democratic process; the public (especially in the case of public sector disputes) may be less hostile towards disruption caused by democratically endorsed, rather than wild-cat, action; and governments may be more accepting of, or at least find it more difficult to be critical of, action which has been sanctioned through a democratic process.

Put differently, mandatory ballot requirements can be a double-edged sword for those who see them as a way of limiting the occurrence of industrial action: they may or may not have some marginal impact on levels of disputation, but they almost certainly serve to legitimate action which has been endorsed through a democratic balloting process. Indeed some of the data which are emerging from the Ballots Project suggest that the introduction of mandatory ballot requirements in Australia may have created at least two new pressure points for unions in bargaining.

The first derives from the fact that lodging a PABO application may signify to the employer that the union is truly serious about the possibility of taking industrial action. That in turn may make the employer more inclined to negotiate to a conclusion rather than face the loss and disruption occasioned by the taking of industrial action.

The second pressure point is where the ballot has been declared. Assuming (as is almost invariably the case) that the ballot has endorsed industrial action, the employer then knows that the union can take industrial action on three working days' notice.[19] Furthermore, it appears to be permissible in terms of the FW Act for a union to notify its intention to take industrial action for a particular time, and then abort the action at the last minute: this can clearly exert significant pressure on the employer where it has gone to the trouble and expense of putting in place contingency arrangements in anticipation of action which does not take place.[20] Even without the use of this technique, the mere fact of the successful ballot having been held will often exert significant pressure upon the employer to reach an agreement.

Ironically, therefore, it appears that in the Australian context at least, legislative provision, which was intended to curtail unions' capacity to take industrial action, has actually given unions some additional levers in bargaining — without their having to go to the trouble and cost (to members) of actually taking industrial action. In that sense, the ballot requirements may have had at least some effect upon levels of industrial disputation, but not in

19 FW Act s 414. The FWC has a discretionary power when approving a PABO application to provide for a longer notice period of up to 7 working days.

20 Arguably such conduct — especially if repeated on a number of occasions — could constitute 'capricious or unfair conduct that undermines freedom of association or collective bargaining' for purposes of the good faith bargaining requirements which are set out in FW Act s 228(1). In principle this could enable the employer concerned to seek a bargaining order under FW Act ss 229–233. We are not aware of any such applications having been made in the circumstances under consideration.

the manner, or with the effect, envisaged by the proponents of what is now Div 8 of Part 3-3 of the FW Act.

As against that, the complexity of the legislative requirements, and the time required to clear the regulatory hurdles, may sometimes give unions pause to consider whether it is worth the time and trouble of seeking approval for industrial action. In principle, this factor might also cause unions to ignore the statutory procedures and take unlawful industrial action rather than seeking a PABO and navigating the complexities of Div 8. It must be said, however, that recent Australian experience suggests that this happens only rarely, if at all.

It must also be recognised that the negotiating position of a union can be adversely impacted if industrial action is not approved by a ballot, or is approved only by a small majority. It is also possible that in some instances unions will be reluctant even to apply for a PABO due to an apprehension that it may not be possible to secure support for proposed action, or even to meet the 50% quorum requirement.[21]

Ballot Requirements and the ILO

As noted earlier, all member states of the ILO are under a constitutional obligation to respect the principles of freedom of association.[22] Among other things, this entails acceptance of the proposition that 'the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests'.[23] Those member states that have ratified *Convention No 87* are also obliged to respect this principle by force of arts 3, 8 and 10 of that Convention.[24]

The right to strike which has been recognised by the supervisory bodies of the ILO is not absolute. For example, the capacity to take industrial action may be restricted or even prohibited for particular groups of workers — such as certain categories of public servants, and workers in 'essential services'. Furthermore, it is permissible for national law and practice to impose preconditions upon lawful strike action — subject to the qualification that any such conditions 'should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations'.[25]

Permissible conditions can include a requirement that proposed industrial action be approved by ballot. However:

> In general, the Committee considers that requiring a decision by over half of the workers involved in order to declare a strike is excessive and could unduly hinder the possibility of calling a strike, particularly in large enterprises. In the Committee's view, if a country deems it appropriate to require a vote by workers before a strike

21 These issues will be explored in greater depth in the Ballots Project.

22 For overviews of ILO standards relating to freedom of association, and the associated supervisory procedures, see B Creighton, 'Freedom of Association', in Blanpain (Ed), above n 7, chap 11; Servais, above n 5, pp 100–20 and 301–11.

23 ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th edn, ILO, Geneva, 2006, at [522].

24 ILO, *Giving Globalisation a Human Face (General Survey on the Fundamental Conventions)*, ILC, 101st Session, 2012, Report III (Part 1B), at [117–122]. For discussion of recent controversies on this issue see La Hovary, above n 6.

25 ILO, above n 23, at [547].

> can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level.[26]

These criteria would not pose any compliance problems in South Africa or the USA, where the inclusion of ballot requirements in union rules is entirely a matter for the union itself. Equally, no problem appears to arise in Canada or New Zealand where the ballot requirement simply consists of unions being obliged to conduct a ballot in advance of industrial action, with a minimum of legal prescription as to the conduct etc of the ballot. The situation may be otherwise in countries such as Australia and the UK where there are qualified majority requirements and more complex rules concerning the conduct of the ballot.

Both the CFA and the CEACR have expressed unease about Australian provision in this area:

> [T]he Committee recalls that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations. Furthermore, the requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in a large enterprise. The Committee requests the Government to ensure respect for these principles in practice, as well as to provide detailed information on the practical application of the secret ballot procedure provisions.[27]

As against that, the CEACR has suggested that the recently-adopted 50% quorum requirement in the UK is within the 'limits of reasonableness',[28] but that the 40% approval requirement for ballots in 'important public services' constitutes an obstacle to the right to strike where it applies outside the scope of 'essential services' in the strict sense of that term.[29] Concern was also expressed about the onerous procedural requirements imposed by the 2016 amendments, including the requirement that voting be by postal ballot only.

Conclusion

Clearly the national studies in this special issue describe quite divergent approaches to the role of strike ballots.

South Africa and the USA adopt a laissez faire approach to the issue, but unions in both countries overwhelmingly impose ballot requirements upon themselves through their rules and constitutions.

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26 ILO, above n 24, at [147].

27 *Case No 2698 (Australia)*, 357th Report of the CFA, 2010, at [225]. See also ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 101st Session, 2012, Report III (Part 1A), at 60. For analysis of this case, see S McCrystal, 'Fair Work in the International Spotlight: The CEPU Complaint to the ILO's Committee on Freedom of Association' (2011) 24 *AJLL* 163.

28 ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 105th Session, 2016, Report III (Part 1A), at 153.

29 Ibid. Essential services in this context mean those services whose interruption would constitute a threat to 'the life, personal safety or health of the whole or part of the population', see ILO, above n 23, at [581]–[594].

The law in Canada and New Zealand imposes a requirement to have rules providing for strike ballots, but takes a non-interventionist approach to the implementation of the requirement. In neither jurisdiction is the issue a focus of significant debate.

In contrast, the Australian and British legislation imposes a direct obligation upon unions either to apply to a public tribunal for permission to conduct a ballot as a precursor to conducting a ballot (Australia), or simply to conduct a ballot (UK). In both instances there is a quorum requirement that arguably is not consistent with the relevant ILO standards. Further, as demonstrated by Peetz, the tightening of access to industrial action in both countries runs contrary to the international trend which has been to maintain stability in the regulation of strike action, or even to liberalise it.

What conclusions can, therefore, be drawn from these studies?

It is clear from Peetz's article that the form which regulation of balloting requirements takes in any particular country may have little actual impact on levels of industrial disputation.

However, it does seem clear that the form of regulation does have an effect on the day-to-day practice of collective bargaining, the relationships between industrial actors, and the ease or otherwise with which the right to strike may be exercised.

In terms of the democratic imperative, all the national studies suggest that unions are essentially democratic institutions which accept and internalise the need for democratic processes to make decisions with respect to strike action. In those countries where the regulatory regime either adopts a laissez faire approach (South Africa and the USA), or mandates strike ballots without extensive regulation of the form or content of such ballots (Canada and New Zealand), strike ballots are not a live issue.

Australia and the UK (and apartheid-era South Africa) are the stand out jurisdictions in terms of their highly prescriptive approaches to the conduct of ballots. In all three jurisdictions it is clear that the ballot requirements serve(d) purposes quite separate from their ostensible democratic underpinning, and are/were squarely aimed at impeding the exercise of the right to strike. In that context, it is interesting to note the explicit shift away from the democratic imperative in favour of economic drivers in the course of recent controversies in the UK.

It is too early to determine what impact the new UK requirements will have. In Australia, despite the intrusiveness and complexity of both the Work Choices and FW Act iterations of the ballot requirements, they are now a largely non-contentious part of the statutory bargaining regime, and may even have provided unions with additional bargaining leverage in some instances. The fact remains, however, that both in their inception, and their implementation, the ballot requirements set out in Div 8 of Part 3-3 of the FW Act are in many respects inimical to democratic decision-making.