

GUIDE TO THE FAIR WORK ACT 2009

1 OPERATIVE DATE

The *Fair Work Act 2009* will operate from 1 July 2009, except that the National Employment Standards (NES) and modern awards will operate from 1 January 2010.

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 deals with transition from the current laws to the new laws. A summary of the Bill is attached to this Guide. The summary explains:

- How the new system operates in the ‘bridging period’ (1 July-31 December 2009) before modern awards and the NES commence;
- What happens to awards and agreements made under the WR Act; and
- Changes made to the regulation of unions (including State-based unions).

2 TERMINOLOGY

The new laws introduce new terminology and some new concepts to our IR laws.

The most important of these are the concepts relating to the coverage and application of industrial instruments.

An instrument (award or agreement) ***covers*** an employer or employee if they are within its scope/coverage (whether or not it actually operates to set conditions of employment at a particular time).

An instrument (award or agreement) ***applies*** to an employer or employee if it operates or sets terms and conditions of employment at a particular time. In this way an employee can remain covered by an award (and enjoy any statutory rights that emanate from being within the scope of an award such as eligibility to bring an unfair dismissal claim) even if the award does not apply to the employee at the time because an agreement is in operation or because the employee has accepted a \$100,000 income guarantee.

3 THE OBJECTS OF THE ACT

The objects of the Act are:

- ... to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
- providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and

- ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

4 COVERAGE OF THE LAW

The new laws will apply to national system employers. This concept, similar to that in the current Act, will include: constitutional corporations; some specified employers engaged in interstate trade and commerce; the Territories; and State referred employers (if and when those States refer powers).

Like the current Act, some provisions of the legislation (relating to unlawful termination of employment, and parental leave) will apply to all employers and employees.

The Act expressly “covers the field” to the exclusion of certain State laws but expressly preserves other State laws. The list of preserved State laws has been expanded to include, inter alia, State laws on training, victims of crime, union registration, workplace surveillance and trading hours (s 27(2)).

The extraterritorial application of the legislation has been expanded, and now can include, by regulation, non-citizen crew on Australian ships (s 34).

ACTU Comment: The Act does not apply to workers who are not employees. However it does create an offence of sham contracting (see general protections), and provides some new mechanisms to assist regulate the working arrangements of workers engaged on contracts for services.

5 THE SAFETY NET: NATIONAL EMPLOYMENT STANDARDS AND MODERN AWARDS

Framework

Minimum labour standards will be set through legislated National Employment Standards (NES) and tribunal-determined modern awards.

Minimum wages for skill-based classifications will be contained in modern awards, including a default award for any employees who have traditionally been covered by an award but who are not

within the coverage of the new, modern awards. In addition, national minimum wages will be set to ensure there is a minimum rate for award-free employees.

National Employment Standards

Content

The NES provide for:

- A 38 hour week and a the right to refuse unreasonable overtime
- Parental leave
- Flexible work for parents
- Annual leave
- Personal leave
- Community service leave
- Long service leave
- Public holidays
- Notice and redundancy
- Information statement

The NES contained in the Act are similar to the Exposure Draft of the NES released in June 2008. Some of the changes include:

- Where the first draft allowed awards to set definitions for the NES (eg 'shift worker'), the new NES allows workplace agreements to also provide this detail.
- Clarification that NES on right to request flexible working arrangements and on community service leave do not exclude state or territory laws in relation to these matters, to the extent that the entitlements under those laws are more beneficial to employees.
- Awards (and agreements) can cash out annual leave provided that the employee is left with a bank of 4 weeks' annual leave and 15 days' personal/ carer's leave).
- 'Regular' casuals are now counted towards the small business definition (even if they have been there for less than a year).

Right to request

The NES provides for a right to request flexible working arrangements, and a right to request extended parental leave. However, an employer can refuse on 'reasonable business grounds'. FWA is only allowed to inquire into the reasonableness of the employer's refusal if the parties have agreed that it can (for instance, in an enterprise agreement) (s 739(2)).

Intersection rules

Awards and enterprise agreements can build on the NES but cannot derogate from them, in the sense of providing a term that is detrimental to the employee when compared to the NES (unless permitted by regulations: see s 55, 127).

The same goes for contracts of employment. However, it seems that the government intends to make regulations allowing award-free (high income) workers to contract out of parts of the NES (s 128.129).

Awards

The new laws assume all awards have been modernised. (The transitional Act will deal with any legacy matters relating to awards that have not been modernised, for example enterprise awards).

Modern awards have the objective (the 'modern award objective') of providing a fair and relevant minimum safety net of terms and conditions, having regard to:

- relative living standards and the needs of the low paid; and
- the need to encourage collective bargaining; and
- the need to promote social inclusion through increased workforce participation; and
- the need to promote flexible modern work practices and the efficient and productive performance of work; and
- the principle of equal remuneration for work of equal or comparable value; and
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

Adjustments

Part 2-3 of the Act set out FWA's power to set and adjust minimum wages and to make and vary awards. Together they provide for:

- annual reviews of wages in awards and the National Minimum Wage;
- regular four yearly reviews of awards (commencing in 2014); and
- review of awards between the four-yearly reviews, but only:
 - to remove ambiguity, uncertainty or discriminatory terms; or
 - if it is necessary to achieve the modern awards objective.

In any 4 yearly review (or interim review), wages can only be adjusted on work value grounds (s 156).

FWA will review awards on its own initiative, or else on the application of a party covered by the award (or a union that has a member covered by the award). HREOC can also apply to have discriminatory terms reviewed. FWA will review modern awards in 2012 to assess whether they are meeting the modern award objective and are operating effectively. The Explanatory Memorandum says this can include assessment of whether IFAs are being used appropriately.

Content of awards

The laws set out:

*Matters that **may** be dealt with in awards:* (s 139) these are the same as those listed in current section 576J of the Act. In addition, there is provision for industry-specific redundancy schemes (s 141) and automatic adjustment of allowances (s 149);

*Matters that **must** be dealt with in awards:* all awards must contain a flexibility clause (s 144), and a disputes settlement procedure (DSP) (s 146). The flexibility clause requirements are based on the model clause developed by the Full Bench of the AIRC in its decision on 12 June 2008, although not all of the safeguards identified by the Commission in that decision are required in the Act. The DSP that the AIRC has drafted does not allow FWA to arbitrate disputes, except by consent (s 739(4));

Impermissible content in awards: awards cannot include objectionable or discriminatory terms (s 150, 153), clauses requiring unreasonable deductions from pay (s 151), clauses that provide for state based differentials (s 154), or clauses dealing with long service leave (s 155). They also cannot confer a right of entry (s 152). However, since awards may contain clauses that deal with representation, consultation and dispute settlement, FWA will need to reconcile these provisions (ie how a worker's right to representation can be made effective if their representative has no enforceable rights to enter the workplace to represent the person).

***ACTU Comment:** The Act does not provide for exceptional matters to be included in modern awards. This may leave State based employees worse off.*

Application of awards – high income earners

An employer may provide an employee with a written guarantee that their annual earnings will exceed the high income threshold (\$100,000 indexed from August 2007 under regulations). The employee must agree to the guarantee. If they do so, the award will not *apply* to them (although it continues to 'cover' them, for various purposes under the Act).

The payments that count towards the high income threshold include:

- Wages;
- The agreed value of non-monetary benefits; and
- Superannuation top-ups

Payments that are excluded include uncertain or 'at-risk' forms or pay, such as commissions, bonuses or overtime (unless the employer guarantees to pay them).

Take home pay orders

FWA will be able to make orders to remedy any reduction in take-home pay that is caused by the award modernisation process. Applications can be made on behalf of classes of employees. Note it may be difficult to establish causation in cases where the employer makes changes to working arrangements some time after 1 January 2010.

Enterprise awards

Enterprise awards (including enterprise NAPSA's and NSW PSCA's) will expire on 31 December 2013, unless earlier terminated or replaced by a modern enterprise award.

A person covered by the enterprise award can apply to FWA to terminate the enterprise award. FWA will have regard to factors including whether there is an appropriate modern award that employees can fall back upon.

A person covered by the enterprise award can apply to FWA to replace it with a modern enterprise award. In considering the application FWA must consider factors including whether there is an appropriate modern award that could otherwise cover the employees. If FWA decides to make a modern enterprise award, it must make it in accordance with the usual 'modern awards objective' (ie providing a relevant safety net) but also considering the 'modern enterprise awards objective' (ie to reflect historic enterprise-based arrangements). It must also ensure that the awards meet the usual rules about the form and content of modern awards (eg provides for IFAs, etc). If employees lose take-home pay as a result of the modernisation process, FWA can make a take-home pay order.

Minimum wage fixation

Minimum wage criteria

FWA will set and annually review the national minimum adult, junior trainee, and disability wages and casual loadings. FWA will also set, and annually review, skill based classification wage rates in awards. In reviewing the federal minimum wages and award wages FWA must have regard to the 'minimum wages objective', namely:

- The performance and competitiveness of the Australian economy including productivity, inflation and employment growth;
- Promoting social inclusion through increased workforce participation;
- Relative living standards and the needs of the low paid;
- equal pay for work of equal or comparable value; and
- Providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

Minimum wage fixing processes

FWA's 7-member Minimum Wage Panel will review minimum wage and award wages each year, with increases to take effect on 1 July following the review. The Panel will be comprise the President of FWA, 3 specialist Minimum Wage Panel members, and 3 other FWA members (who may be MWP members too).

The review of minimum wages will no longer be arbitration of unresolved wage claims by unions. This means there is no obligation on FWA to conduct a traditional, adversarial wage case. Instead it will be up to FWA to determine the procedures it will undertake, and the extent to which it conducts its own research, holds hearings or conferences and so forth. The Act provides for interested persons to make submissions to FWA, and for there to be the opportunity to comment on others' submissions. It also provides that FWA must publish the research that it is considering so that interested parties can respond to any material before FWA.

Disputes about the safety net

Disputes about the application of awards

The AIRC has inserted a DSP into modern awards that allows FWA to exercise all of its powers to resolve the dispute. This means FWA will be able to call compulsory conferences, conciliate, etc (s 592).

However, since the model clause does not expressly provide for arbitration, FWA *cannot* arbitrate unless both parties agree (s 739(4)). Even if they agree, FWA must not make an arbitral decision that:

- affects the operation of the NES or an award; or
- is inconsistent with the rights and obligations under the Act or an instrument made under the Act.

This appears to be to ensure that the integrity of the safety net is not disturbed by ad hoc decisions that have the effect of amending the standards.

Disputes about the application of the NES

For employees without an enterprise agreement, there will be no provision for FWA to arbitrate disputes over the application of the NES. If a worker considers that there has been a breach of a NES entitlement, they may pursue their claim in court (see below). FWA may be involved in conciliating these claims (see below also).

On the other hand, for workers with an enterprise agreement (or if a worker's contract of employment contains a procedure for dealing with disputes over *matters* dealt with in the NES such as leave, etc) then FWA can conciliate the dispute (including by calling compulsory conferences). It can also arbitrate the dispute with the consent of the parties (which may be expressed in the agreement's DSP).

Breaches of awards and the NES

There will be new processes for *alleged breaches* of awards and NES.

New Fair Work Divisions of the Federal Court and the Federal Magistrates' Court will have jurisdiction in relation to compliance with the NES and modern awards. The Courts will be able to make any order necessary to deal with the breach, including issuing injunctions (s 545).

The small claims procedures will be available for claims up to \$20,000. Lawyers will only be permitted with the leave of the court. This rule does not apply to union lawyers, of course!. Claims of a breach of workplace entitlements can also be pursued in the State Magistrates' Courts.

In an effort to provide a seamless intersection between FWA and the Courts, FWA will be able to provide registry services for the Courts so that applications can be filed with FWA.

In an effort to ensure most matters are settled by FWA, the Courts will be able to refer parties to FWA for conciliation prior to hearing, and FWA will be able to use all of its disputes procedures including compulsory conferences, and arbitration where both parties consent.

There is also a new provision whereby costs can be awarded if matter could have been resolved at FWA but party refused to participate in mediation (s 570).

***ACTU Comment:** The Act does not provide a remedy where the employer is not breaching the NES or award but is exercising a discretion that they lawfully possess in a manner that is unfair. In order to attract the jurisdiction of the Court, the industrial instrument should be drafted, as far as possible, to require employers to behave ‘reasonably’ (eg where the NES requires that an employer should be reasonable in determining whether to grant an application for annual leave). The ACTU will assist with draft clauses for modern awards and agreements.*

6 BARGAINING AND AGREEMENTS

Types of agreements

There will be a number of forms of collective agreement, all referred to as ‘enterprise agreements’:

Single business agreements, made between an employer and the employees (within the scope of the agreement) who work in a single business (or a geographically or organisationally distinct part of the business);

Single interest employer agreements made between a number of employers who have a common interest and their employees. The employers that can make a single interest employer agreement are employers that:

- Are engaged in a joint venture;
- Are engaged in a common enterprise;
- Are related corporations;
- Are franchisees of the same franchisor; or
- Have obtained a ‘single interest declaration’ from the Minister.

Greenfield agreements (single or multi-business) made between one or more employers and relevant unions (see below as to identifying the relevant unions);

Voluntary multi-business agreements, made between any combination of employers and their employees, but without recourse to protected industrial action or good faith bargaining orders;

Low paid multi-business agreements, made to cover a designated group of low paid employees and their employers, under the facilitated low paid bargaining stream (ie but recourse to protected industrial action or good faith bargaining orders, but with the possibility of last resort arbitration).

The rules relating to FWA’s role in bargaining and to industrial action vary depending on the type of agreement (see below).

“Parties” to agreements

Agreements (other than greenfields agreements) are made between employers and the employees covered by the agreement. A union that is a bargaining representative (ie has a member to be covered by the agreement) can, at the union’s election, be named as covered by the agreement.

The consequence of a union being ‘covered’ by an agreement is that they:

- Have rights (and obligations) under the agreement, according to its terms (eg the union can take the benefit of a clause that says “The employer will renegotiate this agreement with union X”).
- Can enforce the agreement in its own name (ie even without an affected member).
- Can apply to vary or terminate the agreement, etc.

The mechanism for a union to be covered is for FWA to note, in its decision to approve the agreement, that the union is covered. A union that is a bargaining representative for the agreement can apply to FWA to be covered and FWA *must*, if it approves the agreement, note in the decision that the agreement covers the union.

For greenfields agreements a union or unions that made the agreement with the employer(s) is covered.

Greenfield agreements

Greenfields agreements will be available where there is a “genuine new enterprise”. It is not clear if this covers cases where an employer commences new ‘activities’ within an existing business.

Greenfield agreements may be made between an employer or employers and one or more unions who cover a majority of workers likely to be covered by the agreement. There remains the risk that an employer can employ one person at a greenfields site and make an enterprise agreement with that person. However, potentially FWA will not approve the agreement if it considers that the employer has acted in bad faith by cutting out the unions (see s 187(2)).

FWA must be satisfied that the union(s) that made the agreement are able to represent the employees that will be covered by the agreement and that it is in the public interest that the agreement be made.

Operation and duration of agreements

Agreements can operate for a period of 4 years or a shorter period as stipulated in the agreement.

An agreement ceases to operate when it is terminated by FWA (after its nominal expiry date), or on the day when a new overlapping agreement commences operation.

Only one agreement can apply to an employee at any one time. If an earlier agreement covers an employee and a later agreement is made which is expressed to cover the employee then (unless the parties terminate the operative agreement) the later agreement cannot apply until the earlier agreement passes its nominal expiry date. On that date, the earlier agreement ceases to apply to the employee.

Table: Types of agreements

| Agreement | Persons covered | FWA role and powers | Protected action |
|------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Single business | Employees within scope of the agreement, employer and, at the election of the union, any union that is a bargaining representative | <p><u>Role:</u> Scope orders, Majority support orders; Good faith orders</p> <p><u>Powers:</u> compulsory conferences, orders.</p> <p>Workplace determination if persistent breach of good faith orders.</p> | <p>Protected action available.</p> <p>Workplace determination if industrial action causing harm to economy or significant part, to public health or welfare, or protracted action causing significant harm to the bargaining parties.</p> |
| Single interest employer | As for single business | <p>As for single business</p> <p>Also issue certificate that franchisees or employers offering single integrated service may bargain as one employer.</p> | <p>No protected action (or coercion) prior to issue single interest employer certificate.</p> <p>Where certificate not required, or once certificate issued, protected action available as for single business agreements.</p> |
| Low paid multi business | As for single business | <p>Authorise multi employer bargaining, include or exclude particular employers</p> <p>Facilitate bargaining – will strongly control process and will concern itself with merits of claims (eg make recommendations).</p> <p>Order relevant third party (can bring funding body or head contractor to the table)</p> <p>Workplace determination where parties consent, or in limited circumstances.</p> | No |
| Greenfields | Employer and relevant unions | As for single business, except majority support not relevant | Not relevant (no employees) |
| Voluntary Multi business agreement | As for single business | None | No, and FWA must refuse to approve the agreement if there has been any coercion. |

Content of agreements

Agreements may contain ‘permitted matters’.

Agreements can deal with:

- matters pertaining to the relationship between the employer and employees;
- matters pertaining to the relationship between the employer and any union to be covered by the agreement;
- payroll deductions to a third party; and
- matters that relate to the operation of the agreement.

ACTU Comment: *While this falls short of the government’s election commitment to allow parties to bargain on any matter, it is a broader scope for agreements than was provided for under the 1994 legislation, which provided for agreements in settlement of industrial disputes, and is at least as broad as the various State laws that allow for agreements on industrial matters.*

FWA will not be required to scrutinise agreements for terms that are not permitted terms. Where an agreement contains such terms, the agreement will be valid, but the terms that are not permitted will be unenforceable, and can be severed from the agreement by a court to the extent required (s 253).

Importantly, industrial action in pursuit of an agreement that contains non-permitted matters is still protected, provided the bargaining representative reasonably believed the claims were permitted (s 409).

Mandatory content of agreements

Agreements are required to contain the following:

- A flexibility clause: a model flexibility clause will apply, unless the parties agree on an alternative one (s 202). Any term agreed between the parties must contain a range of safeguards (based on the AIRC’s model flexibility clause for awards) – for example, agreements must be in writing and can be terminated by giving four weeks notice;
- A clause providing for consultation in the event of major workplace change (and representation for employees in that consultation). There will be a model clause deemed to be included in all agreements, unless displaced by the parties; and
- A nominal expiry date (4 years or less);
- A DSP that provides for settlement of disputes under the agreement or the NES. The dispute resolution process must be conducted by an independent party (which can be FWA) and must allow employees to be represented (s 186(6)). The government has indicated that it will publish a model DSP for agreements, which provides for arbitration of disputes by FWA.

Finally, note that the base rate of pay under an agreement is not permitted to fall below the applicable award rate. If it does, the higher award rate is taken to apply as a term of the agreement (s 206).

ACTU Comment: *the ACTU is developing template clauses to be used in bargaining.*

Agreements cannot contain unlawful terms

Agreements cannot contain ‘unlawful terms’. These include provisions that:

- Breach the general protections (freedom of association and anti discrimination);
- Seek to extend unfair dismissal protections to people who have not served the statutory qualifying period;
- Provide for the payment of a bargaining services fee to a union; and
- Provides for additional rights of entry to premises for ‘discussions with eligible members’ or ‘investigating breaches of the Fair Work Act’ or ‘investigating breaches of OH&S laws’.

Finally, FWA may decline to approve an agreement that contains terms that require a person to commit an offence (or contravene a civil penalty provision) under Commonwealth (but not State) law (s 192).

ACTU Comment: *it seems that we are allowed to bargain for a right of entry for other purposes, such as entry for ‘inductions’ or ‘discussions with management’.*

An agreement that contains unlawful terms can be remedied by the employer providing undertakings to FWA. The undertakings cannot financially disadvantage employees, or result in a significant change to the agreement. FWA must seek the views of bargaining representatives before accepting undertakings.

The ‘better off overall test’

An agreement must generally pass the ‘better off overall’ test (‘BOOT test’) – that is, each award-covered employee must be better off under the agreement than under the relevant modern award (at the test time), disregarding any individual flexibility arrangements the employee may have entered into under the award.

The only exception is that FWA has discretion to approve an agreement that fails the BOOT test in exceptional circumstances (such as a short-term business crisis). Any agreement so approved has a short (nominal) life of 2 years. Note that the Transitional Act stipulates how the BOOT is applied before modern awards are operative. The comparison is to the underlying federal award (or NAPSA), and the AFPCS, including wages from the pay scales.

7 AGREEMENT MAKING PROCESS

Starting bargaining

There is no requirement to serve a formal notice initiating bargaining. In practice, a union will simply ask the employer to negotiate. In most cases (we hope) the employer will simply agree to bargain, and the process will continue as set out below.

In the event that the employer refuses to bargain, the union can apply for a ‘majority support order’ in order to compel the employer to bargain (see below).

Once the employer has agreed to bargain (or once they have been compelled to bargain by FWA), they must notify their employees of their right to be represented in bargaining. This notice must be given within 14 days. The employer must also issue a representation notice where they wish to commence bargaining by making a unilateral offer to the workforce.

Bargaining representatives

Union members are presumed to be represented by their union unless they indicate to their employer (but not necessarily to the union) that they wish to be represented by another bargaining representative.

Employees who are not union members can nominate the union and the union may accept the nomination. Employees can also nominate themselves or anyone else as their bargaining representative.

ACTU Comment: This means that an agreement is not made exclusively between an employer and one union – there may be multiple unions covered by an agreement.

Bargaining conduct

During bargaining, the bargaining representatives must act ‘in good faith’. The Act states that this includes:

- Recognising and bargaining with the other bargaining representatives;
- Attending and participating in meetings at reasonable times;
- Disclosing relevant information (other than commercial-in-confidence information) in a timely manner;
- Responding to proposals made by a party in a timely fashion;
- Giving genuine consideration to the proposals of the other parties, and providing reasons for responses; and
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Voting on proposals

The employer may request employees to vote on a proposed agreement. This can only be done 21 days after it issued the representation notice.

The employer is required to provide employees with access to the proposed agreement at least 7 days prior to seeking approval of the agreement, and must explain the effect of the agreement to them.

An agreement is approved when a valid majority of those voting for the agreement approve the agreement. Like the current Act, the employer is responsible for holding the vote and may seek approval of the proposed agreement by means of a ballot or by any other method.

All agreements are to be submitted to FWA for approval within 14 days. Either the employer or another bargaining representative can lodge the agreement. If the employer lodges the agreement, there is no express requirement for them to confirm to the other bargaining representatives that they have done so (but this might be dealt with in the regulations). It is important that unions are advised

when the agreement is lodged so that they can notify FWA if they want to be covered by the agreement.

FWA Approval

Prior to approving an agreement, FWA must be satisfied that:

- The pre-approval requirements have been met;
- The group of employees with whom the agreement was made were not unfairly chosen;
- The employer and employees genuinely agreed to make the agreement;
- Every single one of the employees covered by the agreement are 'better off overall' by entering the agreement, compared to the relevant modern award (note – it is not clear how the BOOT test will work before modern awards are made in 2010!);
- The terms of the agreement do not undercut the NES; and
- The agreement does not contain unlawful content (cf impermissible content).

Any union that was a bargaining representative for the agreement may apply to FWA during the 7 day consideration period to object to the approval of the agreement, on the grounds set out above.

Operation, variation and or termination of agreements

Agreements commence 7 days after they are approved (or a later day specified in the agreement) (s 54).

Once operative, the employer(s) and employees covered may make a variation to the agreement. Any person covered by the agreement may then apply for to FWA to have the variation approved. The variation becomes operative 7 days later.

Before its nominal expiry date, an agreement can only be terminated by mutual agreement of the employer(s) and a majority of employees (with subsequent approval by FWA). After the nominal expiry date, it can be terminated by FWA on the application of any person covered by the agreement (including a union), so long as it is not contrary to the public interest to do so.

Note that the Act does not currently require employers to notify the bargaining representatives of an application to vary or terminate the agreement.

Role of FWA in facilitating agreement-making

FWA may facilitate bargaining by making the following orders:

- Scope orders;
- Majority support orders;
- Good faith bargaining orders;
- Low paid authorisations;
- Single interest employer declarations; and
- Workplace determinations.

In addition, FWA can conciliate at any stage during bargaining, and has the power to call compulsory conferences (s 240). This is equivalent to former section 170NA of the old WR Act. It can also arbitrate any bargaining dispute by consent.

We now examine some of the specific orders FWA can make.

Scope orders

Where there is disagreement over the proposed scope of an agreement, the employer or employees or their bargaining representatives can apply to FWA for a scope order. A bargaining representative can apply for scope order if they are concerned that bargaining is not progressing efficiently or fairly by reason that the agreement will not cover the appropriate employees.

FWA must be satisfied that:

- the applicant has been bargaining in good faith,
- the applicant has notified the other party of its concerns,
- making the order will promote fair and efficient bargaining
- the scope of the order is fair (ie the group is fairly chosen)
- it is reasonable to make the order.

ACTU comment: in arguing about the fair scope of the order, arguments will centre around the structure of the business and the history of bargaining. However, we should not forget the fundamental right of employees to choose the other workers whom they wish to associate!

Majority support determinations

Where bargaining has not commenced because an employer refuses to bargain, an employee's bargaining representative may apply to FWA for a determination that a majority of employees within the scope of the proposed agreement wish to bargain with their employer.

FWA must be satisfied:

- That the majority of employees want to bargain; and
- that the group was fairly chosen – this is presumed if the agreement covers the whole business or a geo/operationally/organisationally distinct part of the business .
- FWA has broad discretion as to the method used to ascertain whether there is majority support.

Good faith orders

Where bargaining has commenced but where a party is acting in bad faith, a party can apply to FWA for a good faith order. These orders are also available where bargaining has *not* commenced, because an employer is ignoring a scope order or majority support order.

The nature of such orders is left to the discretion of FWA. Good faith orders can deal with the orderly conduct of bargaining. If bargaining is inefficient because there are too many people at the table, FWA can exclude a bargaining representative from bargaining. However, a representative who is excluded from the bargaining process retains all the rights of a bargaining representative,

including the rights to organise and take protected action and, if they are a registered organisation, to be covered by the agreement.

Low paid authorisations

A bargaining representative (including a union) may apply to FWA for a low paid authorisation. FWA *must* issue an authorisation where it is satisfied that it is in the public interest to do so, having regard to:

- Assisting low paid workers (not defined) who have not historically had access to the benefits of collective bargaining and face substantial difficulty in bargaining at the enterprise level;
- The history of bargaining;
- The relative bargaining strength of the parties;
- The current terms and conditions of the employees, compared to industry and community standards;
- The degree of commonality between the employers' businesses;
- The likely success of bargaining (having further regard to the views of the parties, whether a third party needs to be brought to the bargaining table, the applicant's willingness to pursue single-enterprise bargaining).

A low paid authorisation enables FWA to facilitate the making of the agreement through such mechanisms as directing third parties to the negotiating table, issuing non-binding recommendations, or (in limited circumstances – see below) making a workplace determination.

Single interest authorisations

FWA can issue a 'single interest employer authorisation' where 2 or more employers volunteer to bargain together as a single business. In doing so, the employers become vulnerable to good faith bargaining orders and protected industrial action.

FWA can only issue an authorisation where the employer applicants are:

- 2 or more franchisees who volunteer to bargain as a single business; or
- 2 or more employers that have sought, and obtained, a Ministerial declaration that they may bargain as one employer. This declaration is generally only available to employers that run similar, non-competing businesses that are substantially funded by government, whether directly or indirectly.

The certificate lasts for 1 year (but may be extended for a second year). FWA must refrain from issuing a certificate if the employers have been coerced into making the application.

ACTU Comment: *This provision is designed to enable certain public sector and not for profit employers bargain together as a single business, including conferring upon their employees a right to take protected industrial action during bargaining. It is not expected that many employers will meet the criteria, and that even fewer will apply for a certificate.*

8 WORKPLACE DETERMINATIONS

Outline of FWA powers to arbitrate during bargaining

FWA can make the following workplace determinations:

Where a party has persistently and seriously breached good faith bargaining orders;

In the low paid stream – where the parties consent or (in the absence of consent) where there is no prospect of an agreement; and

Where protected industrial action is threatening to cause or is causing significant harm to the economy, to the welfare of the community or part of it

Where protracted industrial action is causing significant harm to the bargaining parties.

The criteria for triggering a workplace determination, and the criteria used by FWA in arbitrating the bargaining claims, are different in each stream.

Serious breaches

In cases of a party flouting good faith bargaining orders, a bargaining representative may apply for a 'serious breach declaration'. A declaration may be granted if FWA is satisfied that:

- There have been serious and sustained breaches of orders that have significantly undermined bargaining;
- The other bargaining representatives have exhausted all other reasonable options to reach agreement;
- There is no prospect of agreement being reached; and
- It is reasonable to make the order.

Once this declaration is made, the parties have 21 days (which can be extended for a further 21 days by joint application of the bargaining representatives) to try to settle the bargaining dispute. If they cannot come to an agreement, a Full Bench of FWA *must* arbitrate the dispute by making a workplace determination.

This determination must include:

- Any terms that were agreed at the end of the post-declaration negotiating period; and
- Further terms dealing with the matters at issue; and
- Other machinery terms (nominal expiry date, coverage clauses, the usual mandatory terms for agreements)
- In deciding (by arbitration) what 'further terms' to include, FWA must consider:
- The merits of the case;
- The views of the parties;
- The public interest;
- How productivity might be improved;

- Whether the bargaining representatives behaved reasonably and in good faith; and
- Incentives to bargain in future.

The workplace determination operates, for most purposes, as if it were a workplace agreement. Accordingly, it ends when terminated, or when replaced by an enterprise agreement.

Low paid determinations

There are two ways in which FWA can arbitrate a low-paid stream bargaining dispute. First, if the parties jointly agree to arbitration, and FWA is satisfied that there is no prospect of the parties reaching agreement on their own, it can arbitrate the claim (by making a ‘consent low-paid workplace determination’).

The more likely route to arbitration is the unilateral one. A bargaining representative in the low paid stream can apply for arbitration of the claim (ie a ‘special’ low paid workplace determination). The trigger for arbitration is:

- The parties are unable to reach agreement;
- It is the ‘first contract’ for the employers named in the application (ie they have never been party to a workplace agreement);
- The employees’ conditions are substantially equivalent to those provided by the NES and awards;
- Arbitrating will promote bargaining in future;
- Arbitrating will promote productivity; and
- It is in the public interest to arbitrate.

Once FWA has decided to arbitrate the claim, its role is to close the gap between the parties – ie it must include any terms agreed between the parties at the time the application was made, and must arbitrate other matters that were “at issue”.

In arbitrating these matters at issue, it must have regard to the usual factors criteria (set out above), plus an additional reminder to consider that ‘employers are able to remain competitive’. The only other substantive criterion is that the determination must pass the BOOT test.

Action causing harm to the population or economy

These provisions are largely unchanged from the current Act. In other words, if there is actual or threatened industrial action that is harming the population or economy, then FWA can either suspend the action or terminate it. If it decides to terminate the action, the parties have 21 days (which can be extended) to resolve the dispute. If there is no resolution, FWA *must* arbitrate the dispute. In doing so, it must include any terms that were agreed in the post-declaration negotiating period, plus any other matters still ‘at issue’. The usual criteria apply (see above).

Significant harm to the bargaining parties

This new provision will allow FWA to arbitrate a bargaining dispute where in cases of serious industrial deadlock. FWA can suspend or terminate industrial action where:

- There has been protected industrial action occurring for a protracted period of time; and
- The action is causing (or is imminently threatening to cause) significant economic harm to both the employees and to the employer (however, in cases where the employer has locked out employees, any harm suffered by the employer is ignored).

It seems that FWA will only terminate (rather than suspend) action where there is no prospect of an agreement being reached (see s 423(4)(f)). Once the action has been terminated, the same procedures apply as they do to other forms of industrial-action related arbitration. In other words, the parties have 21 days to resolve their differences (which period may be extended). If the dispute has not been resolved after that time, FWA must arbitrate the dispute by making a workplace determination that includes any agreed terms plus a settlement of matters 'at issue'.

In this stream, FWA may act on its own initiative, or upon application by a bargaining representative, or the Minister.

9 INDUSTRIAL ACTION

Definition of industrial action, and protected industrial action

The definition of industrial action is largely unchanged from the current Act. For example:

For employees – not attending work, attending but performing work in a different manner (but not conduct that is agreed to by the employer, or conduct based on OH&S concerns);

For employers – locking workers out.

The only significant change is that, where employees stop work because they fear for their safety, the employer will now bear the onus of proving the stoppage is industrial action.

Employee industrial action

Industrial action by employees in support of a claim (*employee claim action*) or in response to employer action (*employee response action*) can be protected, provided it is taken during bargaining, and meets the criteria to gain protected status.

To be protected, the bargaining representatives must:

- be genuinely trying to reach agreement as provided by the Act (so no action before the nominal expiry date of an agreement, no breaches of FWA orders, no pattern bargaining, no demarcation disputes, no seeking unlawful content, no unreasonable seeking of impermissible content);
- have obtained authorisation from employees through a secret ballot, and
- have given the employer adequate notice.

The Act removes some of the additional Work Choices hurdles for gaining protection, such as:

- **Acting in concert:** workers no longer lose protection if unprotected people act in concert with them.
- **Authorisation:** there is now no additional requirement for authorisation by committee management

The effect of action being protected is unchanged – ie employees cannot be victimised, discriminated against, sacked or sued (with the usual exceptions for personal injury, etc).

Employer industrial action

The only action by an employer that constitutes employer industrial action is a lock out. Lockouts will only be *protected employer action* if they are taken in response to employee industrial action (*employer response action*).

ACTU Comment: *If an employer does take other action (such as changing rosters for industrial purposes), we may still be able to (i) prosecute them for breach of the award/agreement (including, potentially, the mandatory consultation clause in agreements); and (ii) sue them for breach of the freedom of association provisions. Injunctions will be available for both claims.*

Pattern bargaining

Industrial action in pursuit of ‘pattern bargaining’ is not protected. Pattern bargaining is defined as bargaining for 2 or more agreements seeking common terms, where the bargaining representative is not genuinely seeking to reach an agreement with each employer. An employer may apply for an injunction to prevent pattern bargaining.

ACTU Comment: *This definition is not dissimilar to the current definition and will require unions seeking to pursue common claims to establish a body of evidence that they are genuinely bargaining at each enterprise.*

Protected Action Ballots

Like the current Act, action must be authorised by secret ballot.

Conducting the ballot

Where parties have commenced bargaining (but have failed to reach an agreement), a bargaining representative may apply to FWA for a secret ballot order. To obtain a ballot order, the bargaining representative/union must be ‘genuinely trying to reach agreement’. The person seeking the ballot can choose which employees to ballot (ie a union can ballot members, or all employees).

FWA must make a ballot order within 2 days, so far as is practicable. The AEC must conduct the ballot, unless FWA has authorized an alternative ballot agent (who is a fit and proper person). Where an alternative agent is appointed, FWA may appoint an ‘independent advisor’ to whom complaints about the conduct of the ballot may be directed, and who must report those complaints to FWA.

The AEC (or ballot agent) must work with the applicant to determine the time and form of the ballot. Where the AEC conducts the ballot the Commonwealth will bear all costs, whereas if a ballot agent conducts the ballot, the union is responsible for all costs.

The requirement for a quorum is retained, meaning a majority of employees on the roll of voters must vote, and that a majority of those who vote must approve the proposed industrial action.

***ACTU Comment:** The ballot provisions have been simplified. However employers will be able to delay the taking of industrial action, by mounting an argument that employees are not genuinely bargaining. The applicant will presumably bear the onus of proving they are genuinely bargaining. This can be contrasted to an application to prevent threatened unprotected action, where the employer will bear the onus of proving the union is not genuinely bargaining.*

In addition, the requirement that a majority of employees eligible to vote must participate in the ballot is both undemocratic and will add to the costs for unions conducting ballots across a large workforce.

Notice of action

Employees taking employee claim action must give the employer 3 working days notice of action (or, if ballot order provides for a longer period, then the longer period applies).

When action can be taken

Although protected industrial action is not available during the life of an agreement, an application for a ballot may be made up to 30 days prior to the nominal expiry date of the current agreement. This means a union can commence action the day after an agreement expires, provided the union has previously attempted to bargain in good faith, the action is authorised, and 3 days' notice has been given.

The government has retained the rule that any action that is authorised in a secret ballot must commence within 30 days of the ballot.

Stopping unprotected industrial action

As per the current Act, FWA must stop unprotected action (including unprotected action in the State systems that is harming constitutional corporations). It can do so on its own motion, or upon application by a person directly or indirectly affected. Orders must normally be made within 2 days, otherwise an interim order must be made. Injunctions for breach of a stop order will be available.

In addition, injunctions will be directly available from the court against:

- industrial action where pattern bargaining is occurring; or
- industrial action that takes place prior to the nominal expiry of an agreement.

However, there are no penalties for taking unprotected industrial action, except in the case of action taken before the nominal expiry date of an agreement.

Stopping protected industrial action

FWA orders

As set out above, FWA can suspend or terminate protected industrial action in the following cases:

FWA *must* suspend or terminate protected action (and make a workplace determination) if the action is causing (or threatening to cause) significant harm to the safety, health or welfare of the community or part of it, or to the economy.

FWA *may* suspend or terminate protected action (and make a workplace determination) if the action is causing or threatening to cause significant harm to all of the bargaining parties. If harm is threatened the harm must be imminent.

In addition:

- FWA *must* suspend industrial action where it believes this will assist the parties reach agreement (for ‘cooling off’)
- FWA *must* stop industrial action by non-national system employees (or employers) that is causing significant loss to a constitutional corporation – even if the action is ‘protected’ under State law.
- FWA *must* suspend protected industrial action where a third party is suffering significant harm.

Ministerial Declarations

The laws retain the power for the Minister to make a declaration terminating protected industrial action that threatens the population or economy.

Suspensions

Note that if FWA suspends protected industrial action, once the suspension period ends, employees can resume protected action (provided it is still authorised by the original ballot) without holding a fresh ballot.

Strike pay

Unlike the current Act, the new laws distinguish between protected and unprotected industrial action.

Unprotected action

For unprotected action, the ‘4 hour rule’ has been maintained. Where action is unprotected, the employer must withhold wages for the period of the industrial action or 4 hours (whichever is longer).

Protected action

Where industrial action is protected industrial action, the 4 hour rule has been modified.

If the action is a strike (or overtime ban), the employer must withhold pay for the duration of the industrial action.

If the action is a partial work ban, the employer can elect to:

- Pay the employees their full wage; or
- Stand down the employees, or lock out the employees and withhold all pay; or
- Give the employees a notice informing them that if they continue to work, the employer will withhold an appropriate proportion of the employees' pay.

FWA will be able to resolve disputes about the appropriate proportion of the employees' wages to withhold.

10 UNFAIR DISMISSAL

Unfair dismissal and unlawful termination are dealt with separately in the new laws. Unlawful dismissal is dealt with in general protections section (see below).

All employees may bring a claim for unfair dismissal except:

- High-income employees who are not 'covered by' an award or agreement
- Employees serving a qualifying period – normally 6 months (but see below re small business). Note that qualifying periods can be re-imposed in a transfer of business.

Fixed term and seasonal may apply if they are dismissed (as opposed to terminated due to expiry of contract). The Act includes an anti-avoidance provision to ensure that fixed term contracts are not abused to avoid the unfair dismissal laws. Trainees whose employment is limited to the duration of their traineeship cannot complain if they are dismissed at the end of their traineeship.

Small business

Until January 2011, a small business will be defined as one having fewer than 15 full-time equivalent employees. After that time, a small business will be one with less than 15 full-time, part-time or regular and systemic casual employees (regardless of length of service).

Small business employers enjoy:

- A longer qualifying period for their workers - 12 months, instead of 6; and
- The Fair Dismissal Code – 'compliance' with the Code will be a defence (at the jurisdictional stage) to an unfair dismissal claim. However, at the jurisdictional stage, FWA will be able to inquire into whether the requirements of the Code have been met.

Redundancy

A "genuine redundancy" is regarded as a fair dismissal. A genuine redundancy occurs where the employer no longer requires the work of the employee to be performed by anyone. This includes consideration of whether the person could have been redeployed in the business. It appears that FWA can inquire whether the redundancy is genuine at the jurisdictional stage of proceedings.

Process

An application must be filed within 7 days of the dismissal, although FWA can grant an extension of time.

FWA must first consider whether the application is within jurisdiction. It can do this on the papers. If the application is within jurisdiction, it must hold a conference. If the matter cannot be settled at the conference, it may hold a hearing (if it would be appropriate to do so).

FWA can issue the usual orders (reinstatement or compensation, capped). Appeals can be made to a Full bench, but the Full bench can only grant leave to appeal if it is in the public interest to do so. For appeals on grounds of factual errors, the error must be 'significant' in order to get leave to appeal.

11 TRANSFER OF BUSINESS

A transfer occurs where:

- One of the following 'transfers' occurs:
 - Asset transfer: the first employer transfers an asset of their business (tangible or intangible) to the second employer; or
 - Outsourcing: the first employer transfers the employee's work to a second employer, but remains the beneficiary of the work; or
 - In-sourcing: the second employer transfers the employees' work from the first employer into its own business;
 - Corporate reshuffle: the first employer transfers the employees' work to a second employer that is an 'associated entity' within the meaning of the Corporations Act; AND
- An employee from the old employer goes to work for the new employer, within 3 months of the transfer.

NES

The new draft of the NES provides details on how entitlements apply in transfer of employment situations (eg parental leave; annual leave, redundancy pay).

Awards

If the new employer is a federal system employer and operates in the same industry, then the same modern award will presumably apply to the employees' work (according to its terms). If the new employer is in a different industry, then a different modern award may apply. However, if the old employer was bound by an enterprise award, then the award *does* transfer (subject to any order of FWA).

We assume that the awards will contain transfer of business provisions ensuring that award entitlements that accrued under an old employer must be recognised by any new employer. On the other hand, the new employer will not be obliged to comply with any 'guarantee of annual earnings'

that the old employer gave (in order to ensure that the award did not apply to a high-income worker).

Note that the Act does not deal with transfers of employees from non-corporate employers in the State systems (who had the benefit of State awards) to employers who are in the federal system, or vice versa.

Agreements

In a transfer situation, any agreements that applied to the transferred workers under their old employer continue to apply to them (but not to the other workers in the second employer's business). The transferred agreement also applies to new starters hired by the new employer who perform the 'transferring work'.

However, FWA can make orders to modify this default rule. It can order:

- That the transferred agreement apply to existing workers employed in the second employer's business
- That the agreement not transfer in relation to some or all employees;
- That the transferring agreement be varied to remove terms that are not capable of meaningful operation in the new business.

Once again, the Act does not deal with transfers between employers in the State and Federal systems.

12 RIGHT OF ENTRY

The new laws preserve most of the architecture of the current Act relating to right of entry.

Statutory rights of entry are only available to permit holders. To be granted a permit, the official must be a fit and proper person. Permits can be suspended in certain cases, and *must* be suspended if the permit holder is guilty of certain offences.

A union official who holds a permit may exercise a statutory right of entry – that is, they may enter a workplace (against the wishes of the employer or occupier) to inspect breaches and records, or to hold discussions with employees. To exercise a statutory right of entry, the permit-holder must give 24 hours' written notice (except for entry to inspect a breach of State OH&S laws... but the notice requirement applies if the permit-holder wishes to inspect records).

FWA continues to be able to settle disputes over the right of entry provisions by arbitration (although its arbitral orders award cannot confer additional rights of entry on permit holders).

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| <p>ACTU comment: Note that where an official enters premises with the agreement of the employer, the statutory right of entry scheme does not apply.</p> |
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There are however some important new provisions:

Discussions

- Entry onto premises to hold discussions with employees will be available (during breaks) where the permit holder's union is eligible to represent the employees. The permit holder will need to declare that the employees are within the union's eligibility rules (and face penalties for making false declarations).

- Because entry for discussion is linked to union rules, the making of a ‘non-union agreement’ (ie an enterprise agreement where no unions are covered) does not oust right of entry. Similarly, union officials will be able to visit all-AWA workplaces (where they have eligible members). Representation orders will be available where the right of multiple unions to enter a site is causing demarcation disputes.
- As with the current laws, the employer may direct where a permit holder may hold discussions with employees. However the location must not be a location that is not ‘fit for the purpose’ of holding discussions, or if the employer’s choice of location is made with the intention of making it difficult for workers to meet with unions.

Compliance

- Permit-holders will be able to enter premises where there are (properly enrolled) members working who are affected by the suspected breach. Permit holders will be able to view the records of non-members if this is necessary to substantiate that a breach has occurred. There are penalties for misusing non-member information collected this way.

13 DISPUTE RESOLUTION

The NES

FWA can conciliate disputes about the application of the NES as part of its (non-derogable) role in conciliating disputes under awards and agreements. If the parties agree (for instance, in an enterprise agreement), FWA will be able to arbitrate the dispute.

The courts will be responsible for determining claims that the NES has been breached. FWA will probably first conciliate these claims. The orders that courts will be able to make include issuing penalties, injunctions, reinstatement orders, etc.

Neither FWA nor any independent mediator will be able to ‘deal with’ disputes about the right to request under the NES unless the parties expressly agree.

Awards

FWA can conciliate disputes about the application of the awards (as per the DSP in each award). If the parties agree, FWA will be able to arbitrate the dispute.

The courts will be responsible for determining claims that awards have been breached. FWA will probably first conciliate these claims. The orders that courts will be able to make include issuing penalties, injunctions, reinstatement orders, etc.

Agreements

Bargaining process: FWA will have power to arbitrate disputes about bargaining conduct, by making good faith bargaining orders.

Bargaining content: FWA will have limited power to arbitrate wage/condition claims: as a last resort in the low paid stream; and in the general stream where industrial action is harming the population, economy or both parties.

Disputes about the application of the agreement: the parties to a workplace agreement *must* confer power on some third party (which may be FWA) to settle disputes about the application of the

agreement, whether by arbitration or something less than arbitration. The government will encourage arbitration, through its model clause.

Claims of breach of agreement: the courts will hear these claims, with FWA to conciliate first. For the first time, the courts will be able to issue injunctions to restrain breaches. An enterprise agreement can also confer power on FWA to hear and arbitrate these claims too.

Contracts of employment

FWA can conciliate disputes about the application of contractual provisions that deal with matters dealt with in the NES (eg leave) provided the contract allows third party conciliation;

For the first time (at least in the federal system), the courts will have original jurisdiction to hear claims about breaches of employees' contracts, where the terms in issue relate to matters covered in the NES. FWA will probably conciliate these claims first.

Other disputes

FWA will have power to settle a limited range of other disputes by arbitration, such as disputes over the right of entry provisions, disputes over transfer of business rules, disputes under the RAO schedule and so forth.

14 GENERAL PROTECTIONS

Part 3-1 of the Act provides a range of 'general protections' for all workers (regardless of whether they are in the federal system). The objects of the part are:

- to protect workplace rights;
- to protect freedom of association by ensuring that persons are
- free to join (or not join) unions
- free to be represented (or not be represented) by unions
- free to participate (or not participate) in lawful industrial activities;
- to provide protection from workplace discrimination; and
- to provide effective remedies.

An employer is prohibited from taking 'adverse action' against an employee (including dismissing them, discriminating against them, etc) because they possess, or exercise, a 'workplace right'. This is broadly defined to include:

- employment entitlements;
- industrial rights (including rights to participate in union and collective activities); and
- the capacity to make a complaint about their employer (to anybody), or participate in proceedings under workplace laws.

The onus is on the employer to prove that they did not take adverse action for a tainted reason.

Note that it remains prohibited for unions to:

- demand bargaining services fees;

- discriminate against employers because of the industrial arrangements; or
- coerce employers to employ a particular person.

There is a new prohibition against deliberately or recklessly making false or misleading representations about somebody else's workplace rights (s 345). This will help prevent employers from misleading employees about their rights, whether on hiring, during bargaining, or in the general course of employment.

There is also a new prohibition against taking 'adverse action' against an employee because of their sex, race, etc. Now that this is a workplace right, unions and workplace inspectors may enforce anti-discrimination law as any other workplace right.

The unlawful termination provisions have been decoupled from the unfair dismissal provisions. An employee who is unlawfully dismissed has 60 days to bring a claim (which period may be extended) in FWA. FWA must conciliate the claim; if that is unsuccessful, the applicant can initiate court proceedings (within 14 days).

Finally, the Act maintains strong prohibitions on sham contracting.

15 STAND DOWN

The stand-down provisions are largely unchanged from the current Act. In the absence of any contractual or enterprise agreement-derived right to stand workers down, the statute provides a right to stand workers down where there is a strike, machinery breakdown or other stoppage that the employer cannot reasonably be held responsible for.

Conversely, there is a prohibition on employers ordering unauthorised stand downs (with injunctions available).

16 COMPLIANCE

Most provisions of the Act can be enforced by workplace inspectors or a person affected by a breach (and, if they were a member of a union, their union). Bargaining representatives have standing to enforce the part of the Act dealing with bargaining, and a union covered by an agreement has a direct right to enforce the agreement (whether or not it has an affected member).

The penalty for breach of any provision is \$33,000 for a body corporate, and \$6,600 for an individual.

17 JURISDICTION OF COURTS

This Part of the Act is mostly technical. The Federal Court Act and the Federal Magistrates Court Act will also need to be amended to set up the Fair Work Divisions of those courts. The Regulations and court rules will need to be amended to set up the small claims system, and to ensure that there are no fees for proceedings in the Division.

Note that the Attorney-General is currently reviewing the role of the Federal Magistrates Court; the arrangements in the Act may change depending on the outcome of the review.

18 FAIR WORK AUSTRALIA

While FWA will be a one-stop shop for users, in fact the work of FWA will be conducted by two separate organisations- FWA and the Fair Work Inspectorate. The Fair Work Divisions of the Courts are separate again.

FWA will be comprised of President, Deputy Presidents, and Commissioners, all appointed to age 65. As noted above, there will also be specialist Minimum Wage Panel.

A General Manager will report to the President and perform the roles currently performed by the Registrar.

While FWA will be a new institution, the Deputy Prime Minister has announced that all current appointments to the AIRC will be offered appointment to FWA.

19 FAIR WORK OMBUDSMAN

Part 5, Division 3 of the Act establishes the Office of the Fair Work Ombudsman, responsible for promoting and monitoring compliance with the Act and with instruments made under the Act. It provides for 'Fair Work Inspectors' to investigate whether provisions of the Act or instruments under the Act are being complied with, and sets out their compliance powers (including to enter premises, to inspect documents; interview any person etc). The Act provides that Fair Work Inspectors can also exercise powers in relation to 'safety net contractual entitlements'. These are entitlements in a contract of employment about any of the subjects that are covered by the NES or modern awards (e.g. wages in a contract of employment that are higher than those in the relevant modern award). Fair Work Inspectors can issue 'enforceable undertakings', compliance notices or bring an action under Chapter 4 (compliance and enforcement) in the Federal Court, Federal Magistrates Court or in eligible State or Territory Courts.

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