Explaining aspects of the *Fair Work Act 2009*

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INTRODUCTION

1. This paper explores specific aspects of the *Fair Work Act 2009* (Cth),[1] including

   - The scope of its coverage: who is and is not covered by the *FW Act*.
   - The National Employment Standards:[2] what are they, and to whom do they apply?
   - Termination and redundancy: potential actions against employers on termination of an employee's employment.
   - Union right of entry into the workplace.
   - The making of enterprise agreements: who may make enterprise agreements, what terms can they include and how are they approved?

COVERAGE OF THE FAIR WORK ACT

2. The object of the *FW Act* is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.[3]

3. The *FW Act* provides for the following:

   (a) terms and conditions of employment;

   (b) setting out rights and responsibilities of employees, employers and organisations in relation to employment;

   (c) compliance with, and enforcement of, the *FW Act*; and

   (d) by establishing Fair Work Australia[4] and the Office of the Fair Work Ombudsman, [5] the administration of the *FW Act*.[6]

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[1] "*FW Act*".
[2] "NES".
[3] Section 3 *FW Act*.
[4] "FWA".
[5] "FWO". Section 4 *FW Act.*
[6] Section 4 *FW Act.*

4. The coverage of the *FW Act* is extended to employees and employers. These terms are defined in the first Division of each part of the *FW Act*.[7] The terms "employee" and "employer" will generally either be defined as national system employees/employers, or as having their ordinary meaning.[8] It is therefore necessary when reading and dealing with the terms "employee" and "employer" to check which definition applies.

5. A national system employer is:

   (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

   (b) the Commonwealth, so far as it employs, or usually employs, an individual; or

   (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

   (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

      (i) a flight crew officer; or

      (ii) a maritime employee; or

      (iii) a waterside worker; or

   (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

   (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.[9]

6. A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer, by a national system employer, except on a vocational placement.[10]

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[7] Other than Part 1-1 of the *FW Act*: s.12 *FW Act*.
[8] Section 12 *FW Act*.
[9] Section 14 *FW Act*.
[10] Section 13 *FW Act*.

7. A reference in the *FW Act* to an employee with its ordinary meaning includes a reference to a person who is usually such an employee and does not include a person on a vocational placement.[11]

8. A reference in the FW Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer.[12]

9. Determining whether someone is "usually" an "employer" or "employee" is not necessarily an easy task. The appropriate test for determining whether there is an employment relationship entails the application of a multi-factor test.[13]

Constitutional Corporations

10. A constitutional corporation is "a corporation to which paragraph 51(xx) of the *Constitution* applies".[14] These include foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.[15]

Trading Corporations

11. The principles used in determining whether a corporation is a trading corporation were set out by Steytler P in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No.2)*:

> *68. The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:*
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> *(1) A corporation may be a trading corporation even though trading is not its predominant activity: Adamson (239); State Superannuation Board (303-304); Tasmanian Dam case (156, 240, 293); Quickenden [49]-[51], [101]; Hardeman [18].*
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> *(2) However, trading must be a substantial and not merely a peripheral activity: Adamson (208, 234, 239); State Superannuation Board (303-304); Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10 at 20; Fencott (622); Tasmanian Dam case (156,240, 293); Mid Density (584); Hardeman [22].*

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[11] Section 15(1) *FW Act*.
[12] Section 15(2) *FW Act*.
[13] *Hollis v Vabu* (2001) 207 CLR 21; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. For an outline and more detailed explanation of the factors see *Sappideen & Ors, Macken's Law of Employment* (6th Edn) (Sydney: Thomson Reuters, 2008) pages 51-65.
[14] Section 12 *FW Act*.
[15] Section 51(xx) *Constitution*.

(3) In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: Ku-ring-gai (139,159-160); Adamson (235); Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169 at 184-185, 203; 1 IR 397; Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325 at 330; Quickenden [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: St George County Council (539, 563, 569); Ku-ring-gai (140, 167); Adamson (219); E (343, 345); Pellow [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: St George County Council (543, 569); Ku-ring-gai (160); State Superannuation Board (304-306); E (343). Consequently, the fact that the trading activities are conducted is (sic) the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as "trade": St George County Council (543) (Barwick CJ); Tasmanian Dam case (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a "trading corporation" is a question of fact and degree: Adamson (234) (Mason J); State Superannuation Board (304); Fencott (589); Quickenden [52], [101]; Mid Density (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: State Superannuation Board (294-295, 304-305); Fencott (588-589, 602, 611, 622-624); Hughes (20); Quickenden [101]; E (344); Hardeman [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: Adamson (209, 211); Ku-ring-gai (139, 142, 160, 167); Bevanere (330); Hughes (19-20); E (343); Fowler; Hardeman [26].[16]

12. Trading and financial corporations have been described as two distinct but not mutually exclusive classes.[17] In *State Superannuation Board v Trade Practices Commission*[18] it was suggested that the approach to the characterisation of a financial

[16] (2008) 178 IR 168 at 186 per Steytler P; [2008] WASCA 254 at para.68 per Steytler P.
[17] In the *State Government Insurance Corporation v GIO (NSW)* (1991) 28 FCR 511, a government insurance office was held to be both a trading and financial corporation.
[18] (1982) 150 CLR 282. ("*State Superannuation Board*").

corporation should be the same as the approach to the characterisation of a trading corporation, and that the two classes were not exclusive.[19]

13. The High Court has held a State Superannuation Board, was a statutory corporation under State legislation[20]. The Federal Court held a government insurance office to be a trading corporation and a financial corporation.[21] The Federal Court held that a credit union, incorporated under the *Co-Operation Act 1923 (NSW)* was a financial corporation.[22]

14. For a recent case where a local government council in Queensland was held not to be a trading or financial corporation see *AWU v Etheridge Shire Council*,[23] where the Council was held not to be a trading or financial corporation because that Council's trading activities:

    (a) lacked the essential quality of trade;

    (b) were almost all run at a loss;

    (c) were all directed to public benefit objectives within the shire; and

    (d) were, in their scale in monetary terms, "so inconsequential and incidental to the primary activity and function of the Council as to deny the Council the characterisation of a trading or financial corporation."

15. For a more straightforward case where a person trading as an architect as a sole trader was not found to be a corporation see *Ibrahim v Considine Architects.*[24]

Foreign Corporations

16. Foreign corporations refer to those incorporated outside Australia which carry on business in Australia.[25]

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[19] *State Superannuation Board* at 303-305 per Mason, Murphy and Deane JJ.
[20] *State Superannuation Board.*
[21] *State Government Insurance Corp v GIO (NSW)* (1991) 28 FCR 511.
[22] *Parramatta Tourist Services Pty Ltd v SWB Family Credit Union Limited* (1979) 24 ALR 273.
[23] (2008) 171 FCR 102 at 130 per Spender J; [2008] FCA 1268 at para.151.
[24] [2008] FMCA 1148 at paras.23-29 per Lucev FM. An appeal against the judgment was dismissed by the Federal Court: *Ibrahim v Considine Architect* [2008] FCA 1819.
[25] See *New South Wales v Commonwealth* (1990) 169 CLR 482 at 497-8 per Mason CJ, Brennan, Dawson, Toohey, Gaudron, McHugh JJ; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 365 per Gaudron J.

THE NATIONAL EMPLOYMENT STANDARDS

A fresh set of key employment standards

17. The NES are intended to provide a safety net of minimum employment standards to apply to all employees covered by the Federal workplace relations system with effect from 1 January 2010. Minimum wages are not included. It is intended that minimum wages will be provided for in modern awards.

18. There are ten NES. They are:

    (a) maximum weekly hours of work;

    (b) requests for flexible working arrangements;

    (c) parental leave and related entitlements;

    (d) annual leave;

    (e) personal/carer's leave and compassionate leave;

    (f) community service leave;

    (g) long service leave;

    (h) public holidays; and

    (i) notice of termination and redundancy pay; and

    (j) fair work information statement.[26]

Maximum weekly hours of work

19. The maximum weekly hours of work remain the same for full-time employees: that is 38 ordinary hours of work.[27] An employer "must not request or require" an employee to work more than 38 hours a week, or for a part-time employee, their ordinary hours per week, "unless the additional hours are reasonable",[28] and an employee may refuse to work additional hours "if they are unreasonable".[29] For employees under a modern award or enterprise agreement these hours may be averaged.[30] An employee not

[26] Part 2-2, Divisions 3-12 *FW Act*.
[27] Section 62 *FW Act.*
[28] Section 62(1), ss.63-64 *FW Act*.
[29] Section 62(2) *FW Act*.
[30] Section 63 *FW Act.*

covered by a modern award or enterprise agreement may agree in writing to average hours but only a period of not more than 26 weeks or less.[31]

20. The major change is where additional hours worked are averaged they will be subject to mandatory reasonableness factors, which will include the averaging provision or arrangement itself.[32]

Requests for flexible working arrangements

21. This is a new legislated entitlement. Parents who are employees (with at least 12 months service or a long term casual) with, or having responsibility for the care of, a child under school age, or a child that is under 18 with a disability, will be able to request a change in working arrangements to assist with the care of the child.[33] The only basis on which an employer may refuse this request is on reasonable business grounds.[34] The request by the employee must be in writing and set out details of the change sought and the reasons for the change.[35] The employer must respond in writing, within 21 days, and state whether the request is granted or refused,[36] and where refused include written details of the refusal.[37]

Parental leave and related entitlements[38]

22. The entitlements provided for are maternity, paternity and adoption leave. The existing standard provisions will be expanded by the NES providing for:

    (a) both parents being given the right to separate periods of up to 12 months unpaid parental leave;

    (b) alternatively, one parent having the right to request an additional 12 months leave, with employers only able to refuse on reasonable business grounds.

23. There are two other significant changes:

    (a) the NES increases the amount of concurrent leave able to be taken by both parents from one to three weeks; and

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[31] Section 64 *FW Act*.
[32] Section 62(3) *FW Act*.
[33] Section 65(1)-(2) *FW Act*.
[34] Section 65(5) *FW Act*.
[35] Section 65(3) *FW Act*.
[36] Section 65(4) *FW Act*.
[37] Section 65(6) *FW Act*.
[38] Sections 67-85 *FW Act*.

(b) extends parental leave entitlements to same sex couples for the first time.

Annual leave

24. The coverage and quantum (4 weeks a year; 5 weeks a year for shift workers) of annual leave entitlement does not change under the NES.[39] The NES provides for modern awards and enterprise agreements to supplement the NES in a non-detrimental way. This includes allowing employees to cash out annual leave, subject to a remaining entitlement balance of four weeks,[40] and a general provision for a modern award or enterprise agreement to "include terms otherwise dealing with the taking of paid annual leave."[41]

25. The NES also proposes a simplified system of accrual and credit for payment of annual leave, namely that paid annual leave accrues and is taken on the basis of an employee's ordinary hours of work.

26. Employees may be required to take paid annual leave, but only if the requirement is reasonable.[42]

27. Similar provisions apply to employees not covered by modern awards or agreements, but for those employees agreement between employer and employee is required.[43]

Personal/carer's leave and compassionate leave

28. There is no change to the quantum of entitlement to personal/carer's leave and compassionate leave under the NES.

29. The NES does however:

    (a) extend unpaid compassionate leave to casual employees;[44] and

    (b) allow employees (other than those not covered by modern awards or enterprise agreements) to cash out personal/carer's leave and compassionate leave, provided a balance of at least 15 days is maintained.[45]

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[39] Section 87(1) *FW Act*.
[40] Section 93(2) *FW Act*.
[41] Section 93(4) *FW Act*.
[42] Section 93(3) and 94(5) *FW Act*.
[43] Section 94(6) *FW Act*.
[44] Sections 104-106 *FW Act*.
[45] Section 101 *FW Act*.

30. The NES also simplifies the rules for the provision of notice and giving of evidence for taking personal/carer's leave and compassionate leave.[46]

Community service leave

31. There is no current minimum national standard entitlement to community service leave.

32. The NES will enable employees to take unpaid leave for community service such as jury service or voluntary emergency management.[47]

33. For full and part-time employees undertaking jury service for a period of up to 10 days the NES contains provisions for employers to provide make-up payments at the base rate of pay for ordinary hours of work.[48]

34. This is an area where currently payment for jury service is regulated by State or Territory legislation, or by Federal or State awards and agreements. However, only Victoria and Queensland currently require employers to pay a make-up payment to employees for jury service.

Long service leave

35. There will be no change to long service leave entitlements because under the NES long service leave entitlements will be determined by current State and Territory arrangements. However, the Federal Government intends to work with State and Territory Governments to develop nationally consistent long service leave entitlements, presumably under the NES.

Public holidays

36. The NES continues the entitlement of an employee to be absent on prescribed public holidays. The NES prescribes an additional public holiday, namely the Queen's birthday holiday.[49]

37. The NES provides for payment of public holiday absences at the base rate of pay for ordinary hours.[50]

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[46] Section 107 *FW Act*.
[47] Sections 108-109 *FW Act*.
[48] Section 111 *FW Act*.
[49] Section 114 *FW Act*.
[50] Section 116 *FW Act*.

38. Under the NES an employer may make a reasonable request to an employee to work on a public holiday, but an employee may refuse to work if the employee has reasonable grounds.[51]

Notice of termination and redundancy pay

39. Under the NES an employer must now provide written notice of termination and redundancy pay.[52] The notice period is on a sliding scale of one to four weeks for employees with a period of continuous service of not more than 1 year to more than 5 years, plus an extra week if the employee is over 45 with more than two years service.[53] There is also a new entitlement to redundancy pay, depending on the level of continuous service by an employee. Redundancy pay does not apply to employees of a small business employer (one employing less than 15 employees), or employees with less than twelve months service.[54] A small business employer is defined as:

> *23 Meaning of small business employer*
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> *(1) A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.*
>
> *(2) For the purpose of calculating the number of employees employed by the employer at a particular time:*
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> *(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and*
>
> *(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.*
>
> *(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.*
>
> *(4) To avoid doubt, in determining whether a national system*

[51] Section 114(2)-(4) *FW Act*.
[52] Section 117(1) *FW Act*.
[53] Section 117(2) *FW Act*.
[54] Section 121 *FW Act*.

employer is a small business employer at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):

(a) the employee who is being dismissed or whose employment is being terminated; and

(b) any other employee of the employer who is also being dismissed or whose employment is also being terminated. [55]

40. The entitlement to redundancy pay is on a sliding scale from a minimum of four weeks for an employee with at least one year's service to a maximum of 12 weeks for at least 10 years service.[56] NES redundancy entitlements may be increased under the provisions of modern awards.

41. Various groups are "specifically excluded" from:

    (a) both termination and redundancy, namely those employees:

        (i) employed for a specified period of time, specific task or the duration of a specified season;

        (ii) terminated because of serious misconduct;

        (iii) who are casuals;

        (iv) who are not apprentices to whom a training scheme applies and whose employment is for a specified period of time or limited to the duration of the training arrangement,

    provided that they are not prevented from applying if a "substantial reason" for employing the employee as described was to avoid the application of the termination and redundancy provisions;[57]

    (b) notice of termination provisions, namely those employees who are:

        (i) daily hire employees in the building and construction industry; or

[55] Section 23 *FW Act*.
[56] Section 119 *FW Act*.
[57] Section 123(1) *FW Act*.

(ii) daily hire employees in the meat industry employed in connection with the slaughter of livestock; or

(iii) weekly hire employees working in connection with the meat industry whose termination of employment is determined solely by seasonal factors;[58] and

(c) redundancy provisions, namely those employees who:

(i) are apprentices; or

(ii) to whom an industry-specific redundancy scheme in a modern award applies; or

(iii) to whom an industry-specific redundancy scheme in an enterprises agreement applies, if:

(1) the scheme is an industry specific redundancy scheme incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation; and

(2) the employee is covered by the industry-specific redundancy scheme in the modern award.[59]

Fair work information statement

42. Employers will be required from 1 January 2010 to give all new employees the Fair Work Australia Information Statement.

43. The Statement must contain information about the following:

(a) the NES;

(b) modern awards;

(c) agreement making;

(d) the right to freedom of association;

(e) the role of FWA and the Fair Work Ombudsman[60];

[58] Section 123(3) *FW Act*.
[59] Section 134(4) *FW Act*.
[60] "FWO".

(f) termination of employment;

(g) individual flexibility arrangements; and

(h) right of entry (including the protection of personal information by privacy laws).[61]

Reasonable business grounds

44. What constitutes "reasonable business grounds" for the refusal of a request under the NES? No definition or guideline is provided in the Act. Reasonableness is left to the assessment of the employer in the circumstances of each case.

45. The explanatory memorandum to the *Fair Work Bill 2008*[62] does however provide some examples of what are said to be, or might comprise, "reasonable business grounds". These are:

- *the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;*

- *the inability to organise work amongst existing staff; or*

- *the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.*[63]

TERMINATION AND REDUNDANCY

Expanded unfair dismissal

46. One of the objects of the new unfair dismissal laws in the *FW Act* is to ensure a "fair go all round" for employers and employees.[64]

47. New qualifying periods have been introduced which must be met before an unfair dismissal claim can be made. For employees of businesses with fewer than 15 employees the employee must have been employed for 12 months before an unfair dismissal claim can be made. For employees in businesses with 15 or more employees

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[61] Section 124 *FW Act*.
[62] "*FW Bill*".
[63] Explanatory Memorandum to *FW Bill*, page xii.
[64] Section 381(2) *FW Act*.

the employee must have been employed for 6 months before an unfair dismissal claim can be made.[65]

48. Casual employees may also make unfair dismissal claims, but on the basis of the same qualifying period as permanent employees, provided they have been employed on a regular and systematic basis for the requisite period and had a reasonable expectation of continuing employment by the employer.[66]

49. Certain employees will be excluded from making an unfair dismissal claim, namely:

    (a) employees not covered by a modern award or employed under collective agreements whose remuneration exceeds the high income threshold of $100,000 for a full-time employee, indexed from 27 August 2007, and adjusted in July each year in line with annual growth in average weekly ordinary time earnings for full-time adult employees;

    (b) employees dismissed due to genuine redundancy;[67]

    (c) employees employed under a contract of employment for a specified period of time, for a specified task or for a specified season, where their employment depends on the completion of the specified period, task or season;[68] and

    (d) an employee to whom a training arrangement applies and whose employment is limited to the duration of that training arrangement where the employment ends on completion of the training arrangement.[69]

50. Applications alleging termination was harsh, unjust or unreasonable must be lodged with FWA within 14 days of the termination, although FWA will have a discretion to accept late applications in exceptional circumstances.[70]

51. For small businesses there will be a Small Business Fair Dismissal Code, compliance with which will render a dismissal fair.[71]

52. The FWA will act in an informal and inquisitorial manner in determining issues such as whether the employee has completed the minimum qualifying period or whether the

[65] Section 383 *FW Act*.
[66] Section 384(2)(a) *FW Act*.
[67] Sections 385(d) and 389 *FW Act*. Section 389 defines what is and is not a genuine redundancy.
[68] Section 386(2)(a) *FW Act*.
[69] Section 386(2)(b) *FW Act*.
[70] Section 394 *FW Act*.
[71] Sections 388 and 396(c) *FW Act*.

employer has complied with the Small Business Fair Dismissal Code.[72] If there are contested facts then the FWA will be required to either hold a conference or conduct a hearing.[73] Conferences will be informal without necessarily requiring formal written submissions or cross-examination. The FWA will only have full public hearings where it is considered appropriate, and in determining whether it is appropriate will have regard to:

(a) the views of the parties; and

(b) whether a hearing would be the most efficient and effective way to resolve the application.[74]

53. Representation by a lawyer or a paid agent will only be allowed where:

(a) FWA grants permission where:

(i) it would enable the FWA to deal more efficiently with the matter taking into account its complexity; or

(ii) it would be unfair not to allow the person to be represented because the person is unable to represent themselves effectively; or

(iii) it would be unfair not to allow the person to be represented taking into account fairness between the person and persons in the same manner.

Circumstances in which the FWA might grant permission for a person to be represented by a lawyer include where a person is from a non-English speaking background or has difficulty reading or writing, or where a small business is a party to a matter and has no specialist human resources staff whilst the other party is an employer organisation or union represented by an officer or employee who has experience in workplace relations advocacy.[75]

54. FWA's permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or Part 2-6, which deal with modern awards and minimum wages.[76]

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[72] Section 590 *FW Act* sets out the non-exhaustive list of powers available to the FWA to inform itself.
[73] Section 397 *FW Act*.
[74] Section 399(1) *FW Act*.
[75] Section 596 *FW Act*.
[76] Section 596(3) *FW Act*.

55. A person is not taken to be represented by a lawyer or paid agent if the lawyer or paid agent is an employee or officer of the person, or is an employee or officer of a union or employer organisation or a bargaining representative.[77]

56. The preferred remedy where a dismissal is unfair will be reinstatement. Pay lost may also be ordered to be repaid where the employee is reinstated. Compensation may be ordered in lieu of reinstatement where it is not in the interests of the employee or the employer's business to reinstate the employee. Compensation will be capped at the lesser of 6 months pay or half the high income threshold.[78]

57. The factors for determining compensation are specified, as follows:

    (a) the effect of the order on the viability of the employer's enterprise;

    (b) the length of the person's service with the employer;

    (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed;

    (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal;

    (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation;

    (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

    (g) any other matter that FWA considers relevant.[79]

58. The 14 day time limit for applications was originally proposed as seven days, designed to promote quick resolution of claims and to increase the feasibility of reinstatement as an option. This is consistent with the intention that the new unfair dismissal scheme be simpler and easier for all parties to use, and that the FWA be able to make binding decisions following conferences, without the need for a formal, public hearing. The government was persuaded to change the time limit to 14 days.

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[77] Section 596(4) *FW Act*.
[78] Sections 390-393 *FW Act*.
[79] Section 392(2) *FW Act*.

59. It must be borne in mind, in any event, that under the pre *Work Choices* unfair dismissal provisions approximately four in 20 applications were withdrawn, 15 in 20 settled, and only one in 20 reached a full hearing.

60. If the new unfair dismissal provisions work as intended it will result in a scheme which is less adversarial and speedier in its resolution of claims.

61. Unlawful termination provisions are retained providing that employment must not be terminated on certain grounds, namely:

> *(1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:*
>
> *(a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;*
>
> *(b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;*
>
> *(c) non-membership of a trade union;*
>
> *(d) seeking office as, or acting or having acted in the capacity of, a representative of employees;*
>
> *(e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*
>
> *(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
>
> *(g) absence from work during maternity leave or other parental leave;*
>
> *(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.*
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> *Note: This subsection is a civil remedy provision (see Part 4-1).*[80]

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[80] Section 772(1) *FW Act*.

62. Termination is not unlawful under the provisions of s.772 of the *FW Act* if it is based on the inherent requirements of the particular provision concerned or if the employment is terminated in good faith and to avoid injury to the religious susceptibilities of adherence of a particular religion or creed where the person is a member of the staff of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.[81]

63. A significant new provision in the *FW Act* is the protection of an employee from unlawful dismissal (as opposed to unfair dismissal and unlawful termination) where an employer takes "adverse action" against the employee because the employee has a "workplace right", or has, or has not, exercised a workplace right, or proposes or proposes not to, exercise a workplace right, or to prevent the exercise or workplace right by the employee.[82] A workplace right includes entitlement to the benefit of a workplace law or workplace instrument or order made by an industrial body, the ability to initiate or participate in a process or proceedings under workplace law or workplace instrument or the ability to make a complaint or enquiry in relation to employment, either by the employee or to a person or body having the capacity under workplace law to seek compliance with that law or workplace instrument.[83] An employer taking adverse action against an employee in relation to a workplace right, including dismissal of the employee, contravenes a civil remedy provision and is liable to fines of up to $33,000 if a corporation,[84] or $6,600 if an individual.[85]

UNION RIGHT OF ENTRY INTO THE WORKPLACE

64. Union officials with a right of entry permit will be able to visit employees in workplaces.

65. Entry may take place to investigate suspected breaches of industrial laws and fair work instruments affecting union members (including TCF outworkers) on the premises sought to be entered.[86]

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[81] Section 772(2) *FW Act*.
[82] Section 340(1) *FW Act*.
[83] Section 341(1) *FW Act*.
[84] Section 539(2), Item 10 and s.546(2)(b) *FW Act*.
[85] Section 539(2), Item 10 and s.546(2)(a) *FW Act*.
[86] Sections 481 and 483A *FW Act*.

66. In relation to entry to investigate suspected breaches a permit holder may:

(a) inspect work, processes or objects;

(b) interview people who agree to be interviewed;

(c) require the occupier or affected employer to allow the inspection and copying of any record or document (other than a non-member record or document) directly relevant to the suspected breach, kept on, or accessible from the premises.[87]

67. A non-member record or document is a record or document that relates to the employment of a person who is not a member of the union, and does not also substantially relate to the employment of a person who is a member of the union.[88]

68. If the permit holder wants access to, or wants to inspect and make copies of, non-member records, they must make an application to FWA. FWA may make the order if it is satisfied that the order is necessary to investigate the suspected contravention.[89] A non-member may consent in writing to the record or document being inspected or copied by the permit holder, in which case an application to FWA is unnecessary.[90]

69. The inspection and copying of records or documents must be relevant to the suspected breach that the permit holder is investigating. Further, there is a new prohibition introduced which prohibits the use or disclosure of employee records obtained by permit holders for a purpose other than a primary purpose of their collection.[91] This prohibition applies not only to the permit holder obtaining the record but any person who receives information as a result of the permit holder acquiring it (for example, a union organiser or industrial advocate). Breach of the prohibition incurs a maximum penalty of $6,600 for an individual and $33,000 for a union.[92]

70. In relation to TCF outworkers, permit holders are also allowed access to "other premises" to access records and documents, if the permit holder reasonably suspects

[87] Sections 482(1) and 483B *FW Act*.
[88] Section 482(2A) *FW Act*.
[89] Section 483AA *FW Act*.
[90] Section 482(2A) *FW Act*.
[91] Section 504 *FW Act*; also regulated under the *Privacy Act 1988* (Cth).
[92] Section 539 *FW Act*.

that records or documents that are directly relevant to the suspected contravention are kept, or accessible from those premises.[93]

71. Permit holders may also enter a workplace to hold discussions with employees or TCF outworkers who are, or are eligible to be, members of their union. A union permit holder can therefore enter a workplace to hold those discussions provided one or more employees whose industrial interests the union is entitled to represent are in that workplace.[94]

72. A permit holder may also enter premises to investigate breaches of State occupational health and safety laws.[95]

73. The right of entry provisions apply to all employers and employees in the workplace. In this respect, these provisions are different to the majority of other provisions of the *FW Act* which apply to employees of national system employers.

74. In order to obtain entry additional content requirements have been included for entry notices. Thus there must be a declaration in respect of a suspected breach that the permit holder's union is entitled to represent the industrial interests of an affected member.[96] Where discussions are to be held there will have to be a declaration that the permit holder's union is entitled to represent the industrial interests of a person who performs work on the premises. The entry notice will have to refer to the relevant provision in the union rules.[97]

75. Many of the current requirements relating to entry permits for union officials have been maintained. Thus:

   (a) entry permits must still be produced on entering premises;[98]

   (b) entry permits can only be issued to "fit and proper persons" by the FWA;[99]

   (c) at least 24 hours, but not more than 14 days, notice must be given to the occupier of premises before entry, which must be during working hours (except in the case of entry onto premises in relation to a TCF worker, in

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[93] Section 483D *FW Act*.
[94] Section 484 *FW Act*.
[95] Sections 494-499 *FW Act*.
[96] Section 518(2)(c) *FW Act*.
[97] Section 518(3) *FW Act*. Advice on the interpretation of union rules, on both the employer and employee side, is likely to be a mini growth area for all workplace relations lawyers!
[98] Section 489 *FW Act*.
[99] Section 512 *FW Act*.

which case an entry notice must be given either before, or as soon as practicable after entering the premises);[100]

(d) conditions may be imposed on entry permits by the FWA;[101]

(e) FWA may revoke and suspend entry permits, and issue bans for specified periods in relation to the issue of entry permits;[102]

(f) civil penalties for contravention of provisions concerning right of entry remain the same; and

(g) entry will be unauthorised if the permit holder does not comply with reasonable requests of an occupier or affected employer to produce documents evidencing authority to enter, and to observe a specified route upon entry, if directed to do so.[103]

THE MAKING OF ENTERPRISE AGREEMENTS

A New Agreement making regime

76. Significant changes are made to the collective bargaining framework on the premise that it will be simpler than the current system. The changes include:

(a) the introduction of good faith bargaining;

(b) regulation concerning agreement content;

(c) a single stream of agreement making;

(d) streamlined processes for agreement approval; and

(e) facilitated bargaining for the low paid.

77. The provisions with respect to enterprise bargaining reflect the fact that collective bargaining at an enterprise level is at the heart of the new workplace relations system.

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[100] Section 487 FW Act.
[101] Section 515 *FW Act*.
[102] Section 517 *FW Act*.
[103] Sections 489 and 492 *FW Act*.

Types of Agreement

78. There will be a single stream of collective enterprise agreements able to be made between an employer or employers and employees, with no distinction between union and non-union agreements.

79. A union entitled to represent an employee's industrial interests and which was a bargaining representative for a proposed agreement may give written notification to FWA that it wants to be covered by the agreement. This will give it additional entitlements, including the ability to enforce the agreement.

80. Collective agreements may be made as either single-enterprise agreements, multi-enterprise agreements or greenfields agreements if the greenfields agreement relates to a genuine new enterprise. The enterprise must be new and not an existing enterprise acquired as a going concern.[104] Greenfields agreements must be made with one or more unions that would be eligible to represent employees employed in the enterprise.

Who may bargain – representatives

81. Employees may appoint a bargaining agent, and where no appointment is made and the employee is a member of a union, that union automatically becomes the bargaining agent.[105] An employer may appoint a person as a bargaining agent.[106] Agents may not be appointed in negotiations of a greenfields agreement.[107]

82. Bargaining representatives must be recognised by other bargaining representatives.[108]

The content of agreements

83. Enterprise agreements can be made about any one or more of the following:

    (a) matters pertaining to the relationship between an employer or employers and employees covered by the agreement;

    (b) matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations covered by the agreement.

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[104] Section 172 *FW Act*.
[105] Section 176(1)(b) and (c) *FW Act*.
[106] Section 176(1)(d) *FW Act*.
[107] Section 176(1) *FW Act*.
[108] Section 228(1)(f) *FW Act*.

(c) deductions from salary for any purpose authorised by an employee covered by the agreement; and

(d) how the agreement will operate.[109]

84. The intention appears to be that, by use of the "matters pertaining" formulation, matters that clearly fall within managerial prerogative, but are outside the employer's control or unrelated to employment arrangements, are not subject to bargaining (or industrial action). It is also clear that the formulation means to include (where agreed to) matters such as:

(a) union consultation clauses;

(b) leave to attend union training clauses; and

(c) payroll deductions, including deductions for union fees.

85. Whilst there will be no concept of prohibited content there will be unlawful terms, the inclusion of which will preclude the approval of enterprise agreements by the FWA.[110] Unlawful terms will include provisions inconsistent with or which seek to override legislative provisions related to freedom of association, unfair dismissal and industrial action. Hence, matters such as:

(a) payment of union bargaining fees;

(b) contracting out of unfair dismissal protection; and

(c) provisions purporting to allow industrial action during the currency of an enterprise agreement,

will be unlawful terms precluding approval of the agreement.[111]

86. In addition, enterprise agreements must include:

(a) individual flexibility arrangements;[112]

(b) consultation clauses in relation to major change;[113] and

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[109] Section 171(1) *FW Act*.
[110] Section 186(4) *FW Act*.
[111] Section 194 *FW Act*.
[112] Section 202(2) and (3) *FW Act*.
[113] Section 205 *FW Act*.

(c) a procedure for the FWA or another independent person to settle disputes about matters arising under the agreement, and in relation to the NES.[114]

Approval of agreements

87. Enterprise agreements must be lodged with FWA for approval prior to their commencing operation.[115] Once an agreement has received employee approval the role of the FWA is to ensure that:

(a) there is genuine agreement;

(b) the group of employees covered by the agreement was fairly chosen;

(c) the agreement passes the "Better Offer Overall Test";[116]

(d) the agreement contains a nominal expiry date (no later than four years after the date of operation) and a dispute settlement clause;

(e) there are no terms contravening the NES; and

(f) there are no terms containing unlawful terms.[117]

88. BOOT is satisfied if each award-covered employee (and prospective award-covered employee) would be better off overall if the agreement applied than if the applicable modern award applied to the employee. The test time is the time the application for approval of an agreement is made.[118]

Good faith bargaining

89. Where there is a refusal by an employer to bargain collectively with employees the FWA will have power to issue bargaining orders requiring representatives to bargain in good faith.[119]

90. FWA bargaining orders cannot be made in relation to the content of the agreement. Bargaining orders will relate to procedural matters only. These are specifically listed as:

(a) requiring attendance and participation in meetings at reasonable times;

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[114] Section 186(6) *FW Act*.
[115] Section 185 *FW Act*.
[116] "BOOT".
[117]Section 186 *FW Act*.
[118] Section 193 *FW Act*.
[119] Section 230 *FW Act*.

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and

(f) recognising and bargaining with the other bargaining representatives for the agreement.[120]

91. These provisions are designed to improve communication, and therefore reduce the likelihood of industrial action and protracted disputes concerning enterprise bargaining.

92. Bargaining representatives who believe that other bargaining representatives are not negotiating in good faith must give notification to the alleged offender and give a reasonable time for a response.[121] FWA will not be able to make bargaining orders unless this notification process has been complied with.

93. Where FWA considers there have been serious and sustained breaches of bargaining orders by a bargaining representative and those breaches have significantly undermined bargaining for the agreement FWA will be able to make a workplace determination, provided it is satisfied that all other reasonable alternatives to reach agreement have been exhausted and that no agreement would be able to be reached in the foreseeable future.[122]

94. Where bargaining representatives cannot agree regarding agreement content the choices are:

(a) to jointly abandon the bargaining process;

(b) to take protected industrial action; or

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[120] Section 228 *FW Act.*
[121] Section 229(4) *FW Act.*
[122] Section 235 *FW Act.*

(c) jointly seek FWA's assistance in determining a settlement, or assistance through mediation or conciliation.

Facilitated bargaining for the low paid

95. Multi-employer bargaining for low paid employees will be able to be facilitated by the FWA. This is an endeavour to overcome the lack of access to the benefits of collective bargaining for various groups of low paid employees.

96. The FWA will have the ability to:

(a) call compulsory conferences of parties;

(b) require third party attendance at conferences (including the attendance of head contractors who sometimes determine the terms and conditions of employment to apply).[123]

97. Bargaining representatives may also apply on behalf of employers or employees for a low paid authorisation which will allow the FWA to facilitate bargaining for a specified list of employers.[124]

98. In determining if the proposed bargaining is in the public interest the FWA will consider a range of factors including:

(a) the history of bargaining in the industry concerned;

(b) whether bargaining authorisation will assist in identifying improvements to productivity and service delivery;

(c) the view of employers and employees to be covered by the agreement; and

(d) the extent to which the applicant is prepared to respond reasonably to the needs of an individual employer.[125]

99. The FWA will also be able to make good faith bargaining orders in low paid bargaining negotiations. Protected industrial action will not be available.

100. In the event that the parties are unable to reach agreement a workplace determination may be sought by the consent of employee representatives and one or more employers. The FWA will also have the capacity to make a workplace determination on the

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[123] Section 246 *FW Act.*
[124] Section 242(1)(a) *FW Act.*
[125] Sections 243(2) and (3) *FW Act.*

application of only one party. In such cases, the FWA will have to determine whether the arbitration should proceed by having regard to criteria including:

(a) whether the parties have genuinely tried to reach agreement; and

(b) whether making a workplace determination will promote productivity and efficiency in the enterprises concerned.

CONCLUSION

Observations

101. The provisions of the *FW Act* represent a further expansion of federal jurisdiction over workplace relations. Conceptually the constitutional and legislative basis for the *FW Act* is the same as that underpinning the *Work Choices Act*. However, the thrust of the *FW Act* is altogether different: moving the system from a focus on individual statutory employment contracts to collective bargaining and collective enterprise agreements. Moreover, the *FW Act* establishes minimum safety net of standards for all employees of national system employers, together with facilitated bargaining for the low paid who otherwise might not be able to avail themselves of enterprise bargaining. The *FW Act* maintains many of the provisions introduced under *Work Choices* in relation to industrial action, and whilst it expands the circumstances under which right of entry may be obtained by union officials (and in that respect largely represents a return to the position pre *Work Choices*) it maintains many of the conditions imposed upon right of entry under *Work Choices*, and adds some new content requirements for entry notices.

102. The new institutional framework provides a simpler and more streamlined organisational model than that which presently exists. For many practitioners (both legal and lay) however, the real change in this area will occur in appearances before FWA. If the legislative intent is fulfilled the simpler, more informal and less adversarial process in FWA will result in the speedier resolution of disputes particularly unfair dismissals. In that regard, the case management skills and culture of FWA will go a long way towards determining whether parliamentary intention becomes practical reality.