

The Fair Work Legislation

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On 1 July 2009 the bulk of the *Fair Work Act 2009* (FW Act) took effect, becoming the main federal statute on employment conditions and workplace relations. The new Act gives effect to the 'Forward with Fairness' policies that the ALP took to the last federal election.

The same day saw the commencement of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act), which deals with the transition from the old system to the new Fair Work regime. Among other things, it provides for the repeal of the *Workplace Relations Act 1996* (WR Act) and outlines what is to happen to 'old' awards and agreements.

Supporting these various Acts are a number of regulations, which deal with matters of detail. The most significant are the *Fair Work Regulations 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

This supplement summarises the major features of the new legislation, including the more important transitional arrangements in the TPCA Act. First, however, something is said about the 2008 amendments that preceded the main legislation in 2009.

The 2008 Transition Act

Before drafting its main Fair Work legislation, and in accordance with its 'Policy Implementation Plan', the Rudd Government secured the passage in March 2008 of a number of key amendments to the WR Act 1996.

Under the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, employers were precluded from offering any further Australian Workplace Agreements (AWAs). Those who had been using such agreements were permitted to offer Individual Transitional Employment Agreements (ITEAs) instead, but only until 31 December 2009. The Act also reintroduced a no-disadvantage test for all new agreements in place of the more limited 'fairness test', changed the rules as to the termination of expired agreements, and made it possible for certain pre-Work Choices agreements to be varied rather than replaced. The Australian Fair Pay Commission's powers were curtailed, leaving it only with the power to review existing wage rates; while the obligation on employers (introduced by the Howard Government in 2007) to give each employee a Workplace Relations Fact Sheet was

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removed. Last, but by no means least, the Transition Act initiated a process for the Australian Industrial Relations Commission (AIRC) to 'modernise' the award system by the end of 2009.

Structure and Coverage of the Fair Work Act

The FW Act is divided into six Chapters, each with several Parts. Although still lengthy, it has a far more simple and straightforward style than the WR Act. Outlines appear at the beginning of each main part and there are frequent 'signposts' to alert readers to other relevant provisions. Definitions of the various words and phrases used in the Act are conveniently listed in a Dictionary that appears in s 12.

At the beginning of each separate Part, there is a provision which explains the meaning of the terms 'employer' and 'employee', as used throughout that Part. In some instances, those terms are given their 'ordinary meanings'. But more commonly, they are taken to refer to a 'national system employer' or a 'national system employee'.

It is the term 'national system employer' that generally holds the key to the coverage of the new legislation. It is defined in s 14(1) to include the same types of employer as were listed in s 6 of the WR Act: that is, constitutional corporations, Commonwealth agencies and Territory employers, together with certain employers of flight crew officers, maritime employees and waterside workers.

This definition is separately extended by ss 30D and 30N to cover all other employers (such as sole traders and partnerships) in a *referring State*, subject to any limitations imposed by that State. A referring State is one that has legislated to refer certain powers to the Commonwealth.

Extension of Coverage Through State Referrals of Power

There are two categories of referring State. Division 2A of Part 1-3 of the Act covers States that referred the necessary powers prior to 1 July 2009. It applies only in Victoria, where all employers (private *and* public sector) have been covered by federal law since 1997.

Both Division 2A, and the *Fair Work (Commonwealth Powers) Act 2009* (Vic) that underpins it, have recently been amended to reflect a new model for the reference of State powers. That model is encapsulated in an Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector, which has been signed by the Commonwealth, the Territories and all States bar Western Australia.

The necessary amendments to the FW Act have been made by the *Fair Work Amendment (State Referrals and Other Measures) Act 2009*, which also added Division 2B to Part 1-3 of the FW Act, creating a second category of referring State.

This Division, which takes effect on 1 January 2010, applies to any State referring its powers during the second half of 2009. That covers New South Wales, Queensland, South Australia and Tasmania, thanks to the passage of the following laws:

- *Industrial Relations (Commonwealth Powers) Act 2009* (NSW)
- *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld)
- *Fair Work (Commonwealth Powers) Act 2009 and Statutes Amendment (National Industrial Relations System) Act 2009* (SA), and
- *Industrial Relations (Commonwealth Powers) Act 2009* (Tas).

The effect of these laws is that all private sector employers and employees will be covered by the FW Act from the beginning of 2010, subject to what is said later on about transitional arrangements.

But unlike the position in Victoria, this will *not* be the case for government employees in these four States, who will remain subject to each State's industrial legislation.

Under the FW Act, bodies established by a State for a public purpose can now be declared to be non-national system employers, with the federal Minister's consent (s 14(2)–(5)). In some cases, this means that statutory corporations that have previously operated under the federal system will now be switching to State coverage. But no such declaration can be made in relation to a supplier or distributor of electricity, gas or water, an operator of a port or a rail service, or a university (s 14(6)–(7)).

As for local government employers, it is only in Western Australia that their status will now depend on whether they can be regarded as trading corporations, an issue on which there has been conflicting case law. In Victoria and Tasmania they will be subject to the FW Act. But in New South Wales, Queensland and South Australia, from 2010 they will be covered by State industrial laws.

Exclusion of State and Territory Industrial Laws

Where the FW Act applies to a national system employer, it generally does so to the exclusion of State or Territory industrial laws (s 26). As with the WR Act, however, this is subject to certain exceptions (s 27). For example, State and Territory laws on 'non-excluded matters' can still apply to parties otherwise covered by the federal system.

One change is that where a State or Territory law deals with a non-excluded matter, that law now generally prevails over anything to the contrary in a federal award or enterprise agreement (s 29). Under s 17 of the WR Act, that was true of some but not all laws in the non-excluded category.

The Fair Work Institutions

Forward with Fairness envisaged the creation of Fair Work Australia (FWA) as a 'one-stop' agency that would take over the roles performed by the AIRC, the Australian Fair Pay Commission, the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission.

In the result, the FW Act has moved some way from the original vision. For one thing, Part 5-2 provides that the responsibility for compliance and enforcement rests with the Office of the Fair Work Ombudsman (FWO), as a successor to the Workplace Ombudsman. While the FWO is legally separate from FWA, however, the Rudd Government has made clear that it expects the two agencies to work closely together and to present a single 'shopfront' to the public.

As for FWA itself, the provisions in Part 5-1 of the FW Act suggest that in certain respects it is to operate in a manner similar to the (pre-Work Choices) AIRC. It continues to have a President, Deputy Presidents and Commissioners, and there are still Full Benches to hear appeals. Existing members of the AIRC have also been appointed to FWA, which is headed by the AIRC President, Justice Geoff Giudice.

But there are differences between the two bodies. For instance, s 593 emphasises that FWA is not always required to hold a hearing to discharge its functions, and there is provision in s 625 for any FWA staff member (not necessarily a Commissioner or Deputy President) to be given delegated authority to gather information or even conduct a conciliation conference.

There is also provision for a separate Minimum Wage Panel to conduct annual wage reviews. Although headed by the President, this seven person body must include at least three separately appointed Panel members (s 620). These specialist members are appointed on a part-time basis (s 628(3)). It seems evident that the Panel is intended to be a successor to the Fair Pay Commission, and to operate in a broadly similar fashion to that body.

As for the courts, specialist Fair Work divisions have been added to the Federal Court and the Federal Magistrates Court to handle workplace relations matters: see FW Act Pt 4-2; TPCA Act Sch 17. It is unclear whether new judges and magistrates with specialist credentials will ultimately be appointed to these divisions.

The Rudd Government has announced that it will seek to abolish the Federal Magistrates Court and transfer some of its magistrates to the Federal Court. When that happens, most cases under the FW Act will be heard by magistrates, with the judges dealing only with complex matters or appeals.

Minimum Employment Conditions under the Fair Work Act

Around half of the entire FW Act is contained in Chapter 2, dealing with 'Terms and conditions of employment'. Among other things, this Chapter deals with the National Employment Standards (NES), 'modern awards' and enterprise agreements.

Part 2-1 sets out certain 'core provisions' that apply to each of those laws or instruments. Section 44 provides that an employer must not contravene the NES, while there are also provisions prohibiting a person from contravening any modern award (s 45) or enterprise agreement (s 50) that applies to them.

The Part goes on to explain when an award or agreement 'covers' a person, when it 'applies' to them, and when it is 'in operation'. The distinction between these terms is important, because they are used throughout the legislation. In broad terms, an instrument *covers* a person if they are included within its scope. But an instrument only *applies* to that person when it actually has the effect of conferring rights or imposing obligations on them, and is not for instance excluded by another instrument.

There are provisions explaining the interaction between the NES, awards and enterprise agreements. Except where otherwise provided in the legislation, awards and agreements cannot exclude the NES, and will have no effect to the extent that they purport to do so. They can 'supplement' the NES, but only if their effect is 'not detrimental to an employee in any respect' when compared to the NES. An agreement may also mirror particular provisions in the NES (ss 55–56).

As under the WR Act, an award cannot generally apply to any employment relationship that is covered by an enterprise agreement (s 57), while only one agreement at a time can apply to an employee (s 58).

The National Employment Standards

Part 2-2 of the FW Act deals with the NES, the minimum entitlements that from 1 January 2010 will apply to all national system employees. They supposedly comprise 10 standards, though in fact some of the 10 cover more than one subject. In summary, the NES involve the following entitlements:

- *maximum working hours* – 38 hours per week, plus reasonable additional hours;
- *flexible work* – a right for certain parents to request flexible working hours;
- *parental leave* – up to 12 months' unpaid leave (and with a right to request a further 12 months), plus certain other forms of maternity, paternity or adoption-related leave;

- *annual leave* – four weeks’ paid leave per year, plus an additional week for certain shiftworkers;
- *personal leave* – 10 days’ paid personal/carer’s leave per year, two days’ unpaid carer’s leave as needed, and two days’ compassionate leave (unpaid for casuals) as needed;
- *community service leave* – unpaid leave for voluntary emergency management activities; and leave for jury service, plus a limited right to compensation for lost wages;
- *long service leave* – a limited entitlement for those who were subject to pre-Fair Work award provisions;
- *public holidays* – a paid day off on a public holiday, except where reasonably requested to work;
- *notice of termination and redundancy pay* – up to five weeks’ notice of termination, based on length of service; and up to 16 weeks’ severance pay on redundancy, again based on length of service, and subject to many exclusions (including casuals, workers on fixed term contracts, and employers with fewer than 15 employees);
- *Fair Work Information Statement* – a right to receive this statement on being employed.

As already noted, both modern awards and enterprise agreements must be consistent with the NES. They are allowed, however, to affect the operation of the NES in certain specified ways – for example, by specifying what constitutes an employee’s ‘ordinary hours of work’, defining a ‘shiftworker’, regulating the taking of annual leave, and so on. In certain instances, the terms of employment contracts may also affect the operation of the NES. But this is generally only for an ‘award/agreement free employee’.

The Modern Award System

Part 2-3 of the FW Act provides for the operation of ‘modern awards’. This Part will commence on 1 January 2010, now that the AIRC has completed the process of modernising existing federal awards and NAPSAs (notional agreements preserving State awards). More is said about that process later.

Modern awards are to be made and varied in accordance with the ‘modern awards objective’ set out in s 134. This requires FWA to ensure that such awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’. In relation to ‘modern enterprise awards’ (ie, awards applicable to a single enterprise), this general objective is also taken to include a need to recognise

that such awards may provide conditions tailored to reflect employment arrangements at the enterprise concerned (s 168B). For 'State reference public sector modern awards', for instance in Victoria, it is varied further to reflect the needs of 'effective administration of a State' (s 168F).

Section 156 provides that modern awards must be systematically reviewed by FWA every four years. Otherwise, they can only be varied by FWA on limited grounds. But employers and employees may themselves vary their operation in certain circumstances, by making an 'individual flexibility arrangement'. Each modern award must have a flexibility term that permits the making of such arrangements in relation to specified provisions in the award (s 144). The employer must ensure the arrangement leaves the employee better off overall than they would otherwise have been.

Section 47(2) provides that a modern award will not apply to a 'high income employee'. This term is defined by s 329 to mean an employee whose annual earnings exceed a 'high income threshold' (initially set at \$108,300 under reg 2.13 of the *Fair Work Regulations 2009*), and who has accepted a formal guarantee of those earnings.

Regulation of Wages

When modern awards take effect in January 2010, they will once again regulate minimum wages, displacing most of the current Australian Pay and Classification Scales (pay scales).

Part 2-6 of the FW Act obliges FWA to conduct an annual review of modern award wage rates. As part of this process, FWA must also make a 'national minimum wage order' for all award/agreement free employees. Besides setting a general minimum pay rate and a casual loading, this order must specify special minimum rates for juniors, trainees and employees with a disability (s 294). As with award rates, any adjustment is to take effect on 1 July each year (s 287).

Part 2-7 of the Act permits FWA to make 'equal remuneration orders' that are designed to secure equal remuneration for male and female workers for work that is of 'equal or comparable value'. The power is expressed in slightly broader terms than the equivalent provisions in the WR Act. The federal government has announced that it will support a test case, to be initiated by the Australian Services Union, seeking an equal remuneration order for the social and community services sector.

Division 2 of Part 2-9 contains general rules as to the method and frequency of payment of wages to national system employees. The new rules include a prohibition on unreasonable deductions from wages for the benefit of the employer (s 326). The regulation of such matters had previously been left to State laws, which can no longer apply to national system employers.

Enterprise Agreements

Under Part 2-4 of the FW Act, the collective and individual workplace agreements allowed by the WR Act are replaced by a new system of 'enterprise agreements'. An enterprise agreement is a collective agreement that covers one or more employers and whichever of their employees are specified in the agreement.

There is no formal distinction under the new system between union and non-union agreements. A union can only become covered by an agreement if it gives a formal notice to FWA to that effect (s 183). The exception is a greenfields agreement, which under s 172 can only be made with one or more unions, in relation to a 'genuine new enterprise', or a number of such enterprises. The unions involved must be entitled to represent a majority of the employees to be covered by the agreement (s 187(5)).

Section 172 does, on the other hand, distinguish between single- and multi-enterprise agreements. There is no longer any requirement to obtain special permission to register a multi-enterprise agreement. But it remains the case that protected industrial action may not be taken in support of such an agreement.

In relation to the permissible content of enterprise agreements, there are still restrictions, but they are not as severe as under the Work Choices regime. Certain terms are still treated as 'unlawful' (s 194). In addition, an agreement can only deal with certain 'permitted matters'. The definition of that phrase in s 172(1) means that it remains necessary to refer to the complex and often confusing body of case law on what constitutes a 'matter pertaining' to employment.

Both unlawful terms and any terms dealing with a non-permitted matter are unenforceable, as is any term in an agreement that is inconsistent with the NES (s 253). But whereas FWA cannot approve an agreement unless satisfied that it contains no unlawful terms (s 186(4)), there is no equivalent obligation for it to look for, or do anything about, non-permitted content. In effect, therefore, the Act allows non-permitted terms to be included in enterprise agreements with impunity — they simply cannot be enforced.

There are also certain terms which *must* be included in an enterprise agreement. There must be a nominal expiry date, which can be up to 4 years from the date of approval, and a dispute resolution clause (s 186(5),(6)). In addition, there must be a 'flexibility term' that allows for individual flexibility arrangements (much as with modern awards), and a term requiring each employer to consult with its employees over any major workplace changes that are likely to have a significant effect on them (ss 202–205). Section 206 further provides that the base rate of pay for each employee covered by an enterprise agreement can never fall below the minimum rate set by any relevant award or national minimum wage order.

An agreement cannot take effect until at least 7 days after being approved by FWA (s 54). Among other things, FWA must be satisfied under s 186 that the group of

employees covered by the agreement has been 'fairly chosen', and that (in the case of a non-greenfields agreement) they 'genuinely agreed' to its terms.

Section 188 makes it clear that for there to be genuine agreement, the necessary pre-approval steps must have been taken. These include the employer notifying the employees of their representational rights (ss 173-174), and making all reasonable efforts to explain the effect of the agreement to them (s 180). The agreement must also be voted up by a majority of those employees, which for a multi-enterprise agreement requires a separate vote at each enterprise. Where approval is not given by the employees at any one enterprise, that enterprise will drop out of the agreement (s 182).

FWA must also be satisfied that an agreement passes a new 'better off overall test'. This requires *each* award covered employee to be better off overall under the agreement than they would be if an award applied; although where a particular class of employees would appear to be better off, FWA can assume that this would be true of each employee in that class, in the absence of evidence to the contrary (s 193). An agreement that would otherwise fail the better off overall test can still be approved on public interest grounds, but can then have a nominal term of no more than two years (s 189).

Regulation of Enterprise Bargaining

The FW Act is notable for introducing a new obligation to bargain in good faith. This applies to any 'bargaining representative', a term defined in s 176 to include an employer, a union, and anyone else an employer or employee may select to represent them.

The good faith bargaining requirements in s 228 oblige each representative to attend and participate in meetings, disclose relevant (but non-confidential) information, give genuine consideration to proposals from other representatives, and refrain from 'capricious or unfair conduct that undermines freedom of association or collective bargaining'. But no bargaining representative is required to make concessions or reach agreement on proposed terms.

A failure to bargain in good faith does not carry any automatic consequences. But it opens the way for a bargaining representative to seek a 'bargaining order' from FWA. Such an order may also be sought where the bargaining process is 'not proceeding efficiently or fairly because there are multiple bargaining representatives' (s 230). According to s 231, a bargaining order must specify the actions that must be taken by the representatives concerned to remedy the problem in question.

Bargaining orders are not available in relation to a greenfields agreement, nor (generally) a multi-enterprise agreement. Nor can they be sought against an employer that has simply refused to bargain, at least as a first response. Instead, a

bargaining representative for an employee can apply to FWA for a 'majority support determination'. Such a determination may be made where FWA is satisfied (by any means it chooses) that a majority of employees in an enterprise wish to bargain, but their employer does not (s 237). The effect of such an order is that it triggers the obligation to notify employees of their representation rights, and also leaves the way open for bargaining orders to be sought.

A bargaining representative may also seek a 'scope order' from FWA that resolves concerns about the proposed coverage of a single-enterprise agreement, in terms of the employees it does or does not cover (s 238).

A further type of order that FWA can be asked to make under Division 9 of Part 2-4 is a 'low-paid authorisation', in relation to a proposed multi-enterprise agreement. FWA must decide whether it is in the public interest to grant the authorisation, by reference to a lengthy checklist of factors in s 243. These factors include whether the authorisation will assist 'low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level', the history of bargaining in the industry, current terms and conditions, and the degree of commonality between the enterprises concerned. Once again, such an authorisation opens the way for a representative to seek bargaining orders from FWA.

Aside from making these various orders, FWA has a general power under s 240 to deal with any type of dispute in relation to a proposed enterprise agreement. In relation to a single-enterprise agreement, or a multi-enterprise agreement for which there is a low-paid authorisation, it is open to any bargaining representative to seek FWA's assistance in resolving the dispute. While FWA cannot arbitrate, unless all bargaining representatives agree, it may use its general powers under s 595 to conduct compulsory conciliation or mediation, or to make recommendations to the parties.

There is also a specific power under s 246 for FWA to act on its own initiative to 'facilitate bargaining', or to provide other assistance to the parties, where there is a low-paid authorisation in force. This may include requiring the attendance at a conference of any person (such as a head contractor or funding body) who has 'a degree of control' over the employment conditions of the workers to be covered by the agreement.

In addition, there are four situations in which FWA may resolve a bargaining dispute by making a binding workplace determination under Part 2-5 of the Act. In effect, FWA is exercising a power of 'last resort' arbitration in these cases. FWA may arbitrate where:

- either FWA or the Minister determines that protected industrial action is threatening public health and safety, or the economy (ss 424, 431);

- the taking of protected industrial action has resulted in ‘significant economic harm’ to an employer and a group of employees – or just the employees, if there has been a lockout (s 423);
- FWA has made a ‘serious breach declaration’ under s 235, on the basis that serious and sustained breaches of bargaining orders by one or more bargaining representatives have significantly undermined bargaining; or
- a low-paid authorisation is in operation, but the parties concerned are genuinely unable to reach agreement over the proposed multi-enterprise agreement (s 262).

This last can generally only apply in a ‘first contract’ situation: that is, where no employer to be covered by the determination has previously been covered by a registered agreement (s 263). But FWA may choose to disregard old agreements that are no longer in force (TPCA Act Sch 7 cl 22). A ‘low-paid workplace determination’ may also be made by consent, where this is sought by one or more employers and the bargaining representatives of their employees (s 261).

As was the case under the WR Act, workplace determinations essentially have effect as if they were enterprise agreements (s 279).

Transfer of Employment

The FW Act has introduced important changes in relation to the treatment of employees who move from one employer to another.

Part 2-8 deals with the situation where there is a ‘transfer of business’ from one employer to another. This is defined by s 311 to occur in a much broader range of situations than under the WR Act. The established terminology, which speaks of one employer being a ‘successor, assignee or transmittee’ of all or part of another employer’s business, has been discarded.

For a transfer of business to exist, it is enough that an employee has become employed by a new employer within three months of having left an old employer, that the work they are performing for the new employer is substantially the same, and that one of four types of connection exists between the two employers. Those connections must involve:

- an arrangement between the old employer and the new employer to transfer assets that relate to the work in question;
- the outsourcing of the work from the old employer to the new employer;
- the insourcing of work previously outsourced from the new employer to the old employer; or

- the new and old employers being associated entities.

The most significant effect of s 311 is that a transfer of business is taken to occur where businesses enter into outsourcing arrangements of a type that, under the WR Act, would not have been treated as a 'transmission' of business.

Where a transfer of business occurs, any enterprise agreement or workplace determination that previously covered the employee at the old employer transmits to cover that employee at the new employer. The same applies to any modern award that covered the old employer as a named respondent. An instrument that transfers in this way displaces any enterprise agreement or modern award that would otherwise apply to the transferring employee (s 313). Unlike the WR Act provisions, there is no 12-month limit on this.

A transferable instrument may also apply to new, non-transferring employees hired by the new employer to do the same type of work, but only where there is no other agreement or award that would otherwise cover them (s 314).

Importantly, FWA is given various discretionary powers under Division 3 of Part 2-8 to vary the effect of a transferable instrument, so as to deal with any difficulties confronting the new employer in applying that instrument.

Besides these transfer of business rules, there are also provisions relating to transfer of employment in s 22, which defines the meaning of the terms 'service' and 'continuous service' for the purpose of the Act. These provisions apply where an employee moves from one employer to another within three months, and either there is a transfer of business involved, or the two employers are simply associated entities. If these conditions are satisfied, the employee generally carries their accumulated service with them to the new employer, for the purpose of entitlements under the legislation.

However, there are exceptions to this principle. A new employer that is not an associated entity of the old employer has the option not to recognise the previous service for the purpose of NES entitlements to either annual leave or redundancy pay (ss 91, 122). In the case of annual leave, this would generally mean that the old employer must pay out any accrued entitlements.

A new employer (again, if not an associated entity) may also refuse to recognise a transferring employee's accumulated service for the purpose of the employee serving the minimum period necessary to qualify for unfair dismissal protection, though this must be made clear in writing before the new employment starts (s 384).

Other Aspects of the Fair Work Act

The General Protections

Part 3-1 of the FW Act contains a radically streamlined set of 'general protections' against discriminatory or wrongful treatment. It replaces not just the freedom of association provisions in Part 16 of the WR Act, but the separate remedies scattered around that Act for coercion, misrepresentation, unlawful termination and more besides.

Among other things, there are prohibitions on:

- taking adverse action against a person because of some 'workplace right' that they have, or because of the exercise or non-exercise of such a right (s 340);
- coercing another person as to the exercise or non-exercise of a workplace right (s 343);
- an employer exerting undue influence or pressure on an employee to make various agreements or arrangements (s 344);
- knowingly or recklessly making a false or misleading representation about another person's workplace rights, or their exercise (s 345);
- taking adverse action against a person because of their membership or non-membership of an association, or their engagement or non-engagement in various 'industrial activities' (s 346);
- an employer discriminating against an employee or prospective employee because of their race, sex, age, disability, etc (s 351);
- dismissing an employee because of temporary absence from work through illness or injury (s 352);
- demanding payment of a bargaining services fee (s 353);
- discriminating against an employer because it is either covered or not covered by a particular instrument (s 354); and
- various conduct relating to 'sham' contracting arrangements (ss 357–359).

Each of these prohibitions is a civil remedy provision that may be enforced in court under the general compliance provisions in Part 4-1 (see below).

In addition, FWA may be asked under Division 8 to convene a private conference to deal with a dispute over a contravention of Part 3-1. Where a dismissal is involved, this step is effectively compulsory, and any application to FWA must generally be made within 60 days of the dismissal. Unless this is done, and FWA certifies that all

reasonable attempts to resolve the dispute have failed, no court action can be taken in relation to the alleged contravention, other than to seek an interim injunction to restrain a proposed dismissal (s 371).

FWA may also be asked to deal with non-dismissal disputes as well, but this is optional and a conference will only be held if all parties agree (ss 372, 374).

Unfair Dismissal

Part 3-2 of the FW Act has restored many of the unfair dismissal rights taken away by Work Choices. In particular, there is no longer a general exemption for employers with 100 or fewer employees.

Under s 382, a national system employee is 'protected from unfair dismissal' if they have completed the minimum employment period and, in the case of an award/agreement free employee, they earn less than the 'high income threshold' mentioned earlier.

The minimum employment period is six months, or twelve months in the case of a 'small business employer' (s 383). The latter is generally defined in s 23 to mean an employer with less than 15 employees at the relevant time, including employees at any 'associated entity'. However, for the first 18 months of the new system, Schedule 12A to the TPCA Act alters this definition for unfair dismissal purposes to fewer than 15 *full-time equivalent* positions. The calculation is determined by totalling the number of ordinary weekly hours worked in the business (averaged over the four weeks preceding the dismissal), then dividing that total by 38. After 1 January 2011, however, the definition will revert to the simple headcount provided by s 23.

There is no longer any general exclusion for employees on a fixed term, fixed task or seasonal contract. However if such employees are not re-hired at the end of their engagement, they will not have been 'dismissed' within the meaning of s 386 and hence will not be eligible to seek relief. The exclusion relating to probationary employees has also been removed. Furthermore, casuals working at larger employers can now qualify for protection after just six months' regular and systematic employment, rather than twelve as had previously been the case.

Section 385 treats a dismissal as unfair when it is harsh, unjust or unreasonable, measured by reference to similar factors as under the WR Act (see s 387). But unfairness cannot be found if a small business employer has complied with the Small Business Fair Dismissal Code declared by the Minister under s 388.

Section 385 also precludes a dismissal from being treated as unfair where it was a case of 'genuine redundancy'. This effectively replaces the 'operational reasons' defence in the WR Act. But an employer can only rely on this exception if it has complied with any consultation obligations in an applicable award or enterprise

agreement, and if there was no reasonable opportunity for the employee to be redeployed (s 389).

Unfair dismissal claims must generally be lodged within 14 days of dismissal, although FWA can grant an extension of time (s 394). FWA also has a general discretion to decide whether to resolve a claim by private conference or by way of a formal hearing (ss 398–399). Any decision given can be appealed to a Full Bench, although to the extent any question of fact is involved, an appeal can only succeed if there has been a ‘significant error’ at first instance (s 400).

Where FWA finds an employee to have been unfairly dismissed, the remedies available under Division 4 of Part 3-2 are the same as under the WR Act: that is, reinstatement or compensation of up to six months’ remuneration.

Industrial Action

The rules about industrial action in Part 3-3 of the FW Act are largely similar to those that previously appeared in Part 9 of the WR Act. But key changes include:

- the abolition of the concept of a formal ‘bargaining period’ (though FWA can still suspend or terminate the taking of protected action);
- the removal of the right of an employer to take protected action by way of a lockout, except in response to action already taken by employees (s 411);
- while protected action may not be taken in support of a claim to include unlawful terms in an agreement, it is otherwise sufficient that a party taking action reasonably believes that its claims relate to permitted matters (s 409(1)(a));
- the ‘four-hour rule’ for deducting pay in relation to a period of industrial action does not now apply to protected action, for which any deduction is limited to the period of the action (s 470);
- for protected action that takes the form of a partial work ban, the employer may choose to make a proportionate deduction (the scope of which may be reviewed by FWA), or no deduction at all (s 471).

Right of Entry

Part 3-4 of the FW Act regulates the right of officials of registered unions to enter workplaces, either for the purpose of investigating suspected contraventions of the Act or of instruments that have effect under it, or for holding certain discussions.

The new provisions retain many of the restrictions imposed by the WR Act, including the need for an official to obtain a permit, to maintain certain standards of conduct

to retain that permit, to give notice of entry in most cases, to comply with various employer directions while on its premises, and not to make unauthorised use of any information they obtain. It also continues to impose conditions on officials seeking to exercise entry rights under a State or Territory occupational health and safety law.

The most significant change is to the right to enter for discussion purposes, which is no longer limited to discussions with a member who is covered by an award or agreement binding on the union. It is enough that there are persons on the premises who are eligible to belong to the union, whether members or not, and who wish to participate in discussions (s 484).

Compliance and Enforcement

The FW Act adopts a new and far more standardised approach to the enforcement of obligations. Virtually every provision in the Act that imposes an obligation is expressed to be a 'civil remedy provision'. The procedures for enforcing those provisions are found in Part 4-1 of the Act. This generally makes the same remedies available, regardless of the type of contravention.

The key provision is s 539, which has a lengthy table identifying who can seek a remedy in relation to each civil remedy provision, in what court they may institute proceedings, and the maximum penalty for any contravention.

Besides imposing a pecuniary penalty, any prescribed court may order an employer to pay an amount owing to, or on behalf of, an employee. The Federal Court or Federal Magistrates Court, but *not* a State court, may also grant any other appropriate order in relation to a contravention, including an injunction, the payment of compensation, or the reinstatement of a person (s 545). This significantly broadens the remedies available for breaches of awards or agreements, compared to the WR Act.

'Safety net contractual entitlements' may also be enforced in the Federal Court or Federal Magistrates Court, as if they were statutory entitlements (ss 541–543). These are defined in s 12 to mean entitlements under an employment contract that relate to any matter also covered by the NES or by a modern award. They might include over-award wages, or entitlements to annual leave or long service leave that are more favourable than those mandated by the safety net.

Dispute Settlement Procedures

Part 6-2 of the FW Act contains provisions that apply where either FWA or some other person is authorised to resolve a dispute under a dispute settlement procedure in a modern award or an enterprise agreement. They also apply where an employment contract authorises FWA or another person to resolve a dispute in relation to the NES, or a 'safety net contractual entitlement' (see above).

In each of these instances, a dispute may be arbitrated where the parties concerned have agreed that such a power should exist. This provides a means for many disputes over matters covered by the NES, or by awards or agreements, to be resolved without the need to go to court.

But there are two important limitations. One is that no such process can authorise arbitration over whether an employer had 'reasonable business grounds' for refusing a request for flexible work arrangements or additional parental leave under the NES provisions, unless the employer has specifically consented in an enterprise or other agreement (ss 739(2), 740(2)).

Secondly, and more generally, no decision can be made, whether by FWA or any other arbitrator, that is inconsistent with the legislation itself, or with a 'fair work instrument' (an award, agreement, workplace determination or FWA order) that applies to the parties (ss 739(5), 740(4)).

Other Provisions

Besides those matters already described, the Act also contains provisions dealing with:

- the stand down of employees (Part 3-5);
- notification and consultation obligations where 15 or more employees are retrenched (Part 3-6 Division 2);
- obligations concerning record-keeping and payslips (Division 3 of Part 3-6; and see *Fair Work Regulations* 2009 Part 3-6 Division 3);
- preventing multiple actions to enforce similar rights (Part 6-1).

In addition, Part 6-3 draws on the Commonwealth's 'external affairs' power to extend the parental leave and notice of termination provisions in the NES so that they apply to non-national system employees. Part 6-4 likewise ensures that such employees retain the protections they enjoyed against unlawful termination under s 659 of the WR Act, and may take the benefit of the notification and consultation provisions in relation to 15 or more redundancies.

Transitional Arrangements

As previously mentioned, the TPCA Act deals with the many issues that arise in relation to the shift from the WR Act to the FW Act. That transition is complicated by two factors in particular.

The first is the multiplicity of old agreements, awards and other determinations that are still in force, originally made under different versions of the WR Act, the

Industrial Relations Act 1988, or indeed State industrial laws. These are collectively referred to in the TPCA Act as *transitional instruments*.

The second complication is that there are really two start dates for the new system: 1 July 2009, when the bulk of the FW Act took effect; and 1 January 2010, when the NES and modern awards will commence. Particular rules are needed for the *bridging period* between those two dates.

Accordingly, it is not a simple matter of repealing and replacing the WR Act. As explained below, parts of that Act have survived as a new statute on registered organisations. Other parts have continued in operation through the bridging period, or are preserved through the rules on transitional instruments.

Before getting to those matters, it is convenient to outline what has happened to the institutions that either have been, or ultimately will be, replaced by FWA. A general timetable is set out in cl 7 of Schedule 18 of the TPCA Act.

Institutional Arrangements

The most straightforward transition is that the FWO has taken over from the Workplace Ombudsman, as of 1 July 2009. Any investigations or proceedings on foot at that date became the responsibility of the FWO, whose inspectors can exercise the powers granted to them under the FW Act (TPCA Act Sch 18 Pt 3).

The Workplace Authority, by contrast, has continued in operation to complete the processing of any workplace agreements made or varied before 1 July 2009, as well as any ITEAs lodged during the bridging period (Sch 8). It does not, however, have responsibility for enterprise agreements made under the new system, which are handled by FWA. Its functions of providing education and advice on workplace laws have passed to the FWO.

The AIRC has worked alongside FWA for the second half of 2009, while completing the process of award modernisation (Sch 5 Pt 2). It has also been finalising certain proceedings initiated before 1 July 2009, such as unfair dismissal claims.

The Australian Fair Pay Commission has completed its last annual wage review, and ceased to exist at the end of July 2009.

Conduct Before 1 July 2009

As a general rule, anything done by or in relation to a federal system employer or employee before the commencement date of the FW Act remains subject to the WR Act as it stood immediately before that date (TPCA Act Sch 2 cl 11). So, for example, any dismissal that occurred before 1 July 2009 could only be the subject of an unfair dismissal or unlawful termination claim if the WR Act allowed that.

On the other hand, if an application is made after 1 July, but in relation to pre-commencement conduct, the general rule is that if the application would have gone to the AIRC under the WR Act, it must now be made to FWA instead. The same applies to an appeal made after that date in relation to a pre-commencement decision by the AIRC. It must be dealt with by a Full Bench of FWA, although still applying the relevant WR Act rules and principles (Sch 2 cl 12).

As noted above, where a workplace agreement has been made or varied before 1 July, the Workplace Authority is to deal with that matter under a slightly modified version of the WR Act rules (Sch 8 Divs 1–5). With bargaining and industrial action, on the other hand, it is a different story. The general approach under Schedule 13 of the TPCA Act is that where bargaining was not completed before 1 July, the parties were required to start again under the new provisions of the FW Act.

Transitional Rules for the NES

When the NES come into effect on 1 January 2010, a term in a transitional instrument will be of no effect to the extent that it is 'detrimental' to a national system employee (TPCA Act Sch 3 cl 23(1), Sch 3A cl 37). Hence employers will need to ensure that they are fully compliant with the NES from that date, regardless of any previous agreements or arrangements.

But old awards and agreements will still be able to affect the operation of the NES in certain ways – for example in specifying an employee's ordinary hours of work, or allowing cashing out of annual leave, or stipulating the evidence required to substantiate a request for personal/carer's leave (Sch 3 cl 24, Sch 3A cl 38).

Where an uncertainty or difficulty arises as to the interaction of a transitional instrument with the NES, FWA will be able to vary the instrument to resolve the problem (Sch 3 cl 26, Sch 3A cl 40).

A further provision in the TPCA Act concerns pre-NES commencement service. Generally speaking, any service with an employer prior to 1 January 2010 will count in determining NES entitlements; although where an employee has already had the benefit of a particular entitlement, they cannot 'double count' the service in question (Sch 4 cl 5, 16).

There are two major exceptions to this general rule. The first is that for paid annual leave or paid personal/carer's leave, an employee simply carries over whatever entitlement they have accrued prior to the NES. But the NES rules will subsequently apply to any taking or cashing out of that leave, regardless of the original source of the entitlement (Sch 4 cl 6, 17).

Secondly, pre-NES service will only count for the purpose of accruing the new entitlement to redundancy pay, if at the date of commencement the employee's 'terms and conditions of employment' (whether under an award, agreement or

employment contract, or in some cases State legislation) provide an entitlement to redundancy pay (cII 5(4), 16(4)–(5)).

There are also rules that determine what happens if an employee is in the middle of a period of leave when the NES commence (cII 7–8, 18).

Status of Old Agreements

Any ‘agreement-based transitional instrument’ that was in operation under the WR Act when the FW Act commenced continues in force under Schedule 3 to the TPCA Act, until terminated or replaced. This covers a collective agreement, certified agreement, workplace determination, s 170MX award, AWA or ITEA made under the WR Act, as well as a preserved State agreement or an old IR agreement.

There is no sunset or ‘drop dead’ date for agreement-based transitional instruments – except those involving a non-national system employer, which cannot operate beyond 27 March 2011 (Sch 3 cl 20).

The permissible content of any old agreement is generally determined by whatever ‘content rules’ applied immediately before the commencement of the FW Act (Sch 3 cl 4). Hence, for example, any workplace agreement made between 27 March 2006 and 30 June 2009 remains subject to the ‘prohibited content’ rules in s 356 of the WR Act.

However, where an agreement confers any function or power on the AIRC, for example in relation to dispute resolution, the agreement is now taken to refer to FWA instead (cl 6).

Old agreements are generally also subject to whatever ‘interaction rules’ applied before the commencement of the FW Act, in determining whether they prevail or have priority over some other transitional instrument, or over State or Territory laws (Sch 3 cII 5, 5A). Under the WR Act, for example, a pre-reform certified agreement could operate alongside a pre-reform award, whereas an AWA or a post-Work Choices collective agreement would exclude that award. That will continue to be the case.

Modern awards will generally be inapplicable while an old agreement remains in force. Again, however, a pre-reform certified agreement can operate alongside a modern award, though it will prevail over the award to the extent of any inconsistency (Sch 3 cl 28).

As with enterprise agreements, the basic rates of pay set by an old agreement cannot be less than the minimum rates set by a modern award or a national minimum wage order (Sch 9 cl 13). If that requires a significant wage increase as from 1 January 2010 that would threaten the viability of a business, the employer can apply to FWA to phase in the increase (cl 14).

Old agreements, like other transitional instruments, can generally be enforced under the compliance provisions in Part 4-1 of the FW Act (Sch 16 cl 2(2), 16). But no injunction can be granted by a court to restrain a breach of a transitional instrument (cl 17).

There is now a separate set of transitional provisions in Schedule 3A of the TPCA Act for what are called 'Division 2B State employment agreements'. These are agreements made under State law that, immediately before 1 January 2010, applied to a 'referred employer' in New South Wales, Queensland, South Australia or Tasmania. They are subject to broadly the same rules as those described above for agreement-based transitional instruments, with the exception that a dispute resolution clause may continue to nominate a State industrial body, rather than FWA, if the parties so choose.

Variation, Termination and Replacement of Old Agreements

Agreement-based transitional instruments cannot be varied by consent after the FW Act takes effect, with one exception. In 2008 the WR Act was amended to allow certain pre-Work Choices collective agreements to be varied and extended. The TPCA Act specifically permits such variations to be made during the bridging period (ie, the second half of 2009), though not thereafter (Sch 3 cl 13–14).

As for termination, there is a standardised approach. For all 'collective agreement-based' instruments, the rules in the FW Act as to enterprise agreements apply (Sch 3 cl 15–16). Hence they can be terminated either with the agreement of a majority of employees, or (but only after the nominal expiry date) by application to FWA, and subject to a public interest test.

Old collective agreements can also be replaced *at any time* by a new enterprise agreement under the FW Act, regardless of whether their nominal expiry date has passed (Sch 3 cl 30(2)). But until that date, no protected industrial action can be taken in support of the new agreement (Sch 13 cl 4).

In the case of old individual agreements, principally AWAs and ITEAs, termination may occur at any time by mutual consent. Once the agreement has passed its nominal expiry date, either party is also free to terminate on giving 90 days' notice (Sch 3 cl 17, 19).

Where an employee is covered by an old individual agreement that has passed its nominal expiry date but remains in operation, they are entitled to participate in bargaining for a new enterprise agreement, including taking industrial action and voting on the new agreement (Sch 13 cl 2(2)(a)). But if the enterprise agreement is made, it will not apply to them while the old individual agreement remains (Sch 3 cl 30(1)).

One option in this situation is a 'conditional termination' of an expired individual agreement (Sch 3 cl 18). If made by either the employer or employee, any new enterprise agreement that is voted up will automatically replace the individual agreement. A conditional termination may also be made for an unexpired individual agreement, but only with the consent of both employer and employee. It has the additional effect of allowing the employee to participate in bargaining and industrial action regarding a proposed new enterprise agreement, including any vote, something they would ordinarily be unable to do (Sch 13 cl 2(2)(b)).

Once again, similar rules apply under Schedule 3A to the variation, termination and replacement of Division 2B State employment agreements.

Award Modernisation and the Status of Old Awards

Once the modern awards formulated by the AIRC take effect on 1 January 2010, they replace all old awards (other than enterprise awards and State awards previously applicable to referred employers, as to which see below).

Prior to that, all pre-reform federal awards and NAPSAs have continued in force as 'award-based transitional instruments' under Schedule 3 of the TPCA Act. In the case of NAPSAs, there is a sunset date of 1 January 2014 (cl 20(1)). Any pay scales derived from those instruments also continue in effect, for employees not yet covered by a modern award (Sch 9 Pt 3).

Award-based transitional instruments have the same status as modern awards under the FW Act, for example in determining whether an employee is 'award/agreement free' (Sch 3 cl 32). As with old agreements, they remain subject to whatever interaction or content rules applied immediately before the commencement of the FW Act (cII 4–5A). Once again, however, any reference to the AIRC having certain functions is taken to be a reference to FWA instead (cl 6).

The TPCA Act requires FWA to conduct a review of the modern award system after its first two years in operation, to determine whether the new instruments are operating effectively and without anomalies (Sch 5 cl 6). This will occur ahead of the regular four-yearly review envisaged by the FW Act.

Importantly, Part 3 of Schedule 5 to the TPCA Act guarantees that when a modern award takes effect, no existing employee will suffer any reduction in their take-home pay (for working the same hours or performing the same quantity of work) by reason of the new award. FWA is empowered to make 'take-home pay orders' to remedy any reduction in pay.

There is no comparable guarantee as to new employees hired after the award commences, or indeed as to any increase in business costs for employers. However, most modern awards have transitional provisions that are designed to phase in any

cost increases, or indeed reductions in entitlements: see *Award Modernisation* [2009] AIRCFB 943.

Enterprise Awards

Schedule 6 to the TPCA Act establishes a process for the modernisation of 'enterprise instruments'. These include enterprise-based federal awards and NAPSAs, together with any preserved State agreements (especially in New South Wales) that were derived from enterprise awards.

A person covered by such an instrument may apply to have it modernised, though this must be done by the end of 2013, otherwise the instrument will cease to have effect (Sch 6 cl 9(4)). It is up to FWA to decide whether to accede to the application, and if so what terms to include (cl 4). This will require a comparison with any modern award that would otherwise apply.

If a modern enterprise award is made as a result of this process, it generally has the same effect as any other type of modern award (cl 17). But as a general rule, no new enterprise awards can be created in the future (FW Act s 168C(1)).

Schedule 6A to the TPCA Act provides separately for the modernisation of federal awards that cover public sector agencies in a referring State (currently only Victoria). The major difference from the treatment of enterprise instruments is that FWA must create a 'State reference public sector modern award' if the employer and any union included in a modernisation application agree (cl 4(4)). Furthermore, if any existing awards in this category have not been modernised by the end of 2013, FWA must of its own motion ensure that the employers and employees concerned are brought within the scope of a State reference public sector modern award, either by making a new one or by varying an existing one (cl 6). Even where there is no pre-existing award, FWA can also create new awards of this type on application from an employer or organisation (FW Act s 168G).

Division 2B State Awards

Under Schedule 3A in the TPCA Act, any State award applicable to a referred employer in New South Wales, Queensland, South Australia or Tasmania as at 31 December 2009 will become a federal instrument known as a 'Division 2B State award'.

Such an award will generally operate until the end of 2010 (Sch 3A cl 21). After that it will in most cases be replaced by a modern award, although FWA will be required during 2010 to consider varying modern awards to include transitional arrangements for affected employers and employees (cl 29).

If it is an enterprise award, it is treated as an 'enterprise instrument' for the purpose of Schedule 6 of the TPCA Act. As such it may operate for up to four years, unless and until modernised or terminated by FWA.

In other respects, Division 2B State awards are subject to similar rules as to those outlined above for award-based transitional instruments.

Transitional Awards

As a result of the Work Choices reforms, Schedule 6 was added to the WR Act to deal with employers who were going to fall outside the new federal system, but who were bound at the time by federal awards or agreements. Schedule 20 of the TPCA Act ensures that the old Schedule 6 can continue to operate, with some modifications, until 27 March 2011.

In relation to a referred employer, however, such an award is now classed as a 'State reference transitional award'. In theory, it can have effect under Schedule 3 of the TPCA Act as an award-based transitional instrument. But in practice, unless it is an enterprise award it will be displaced by any applicable modern award as from 1 January 2010.

The Bridging Period

During the second half of 2009, the Australian Fair Pay and Conditions Standard (AFPCS) in Part 7 of the WR Act has continued to set minimum standards as to wages, hours of work, annual leave, personal leave and parental leave (TPCA Act Sch 4 cl 2, Sch 9 cl 5). A term in any enterprise agreement made during this period is therefore of no effect to the extent that it provides a less favourable outcome for an employee compared to the AFPCS.

Other WR Act standards on matters such as public holidays, rest breaks and notice of termination have likewise remained in operation (TPCA Act Sch 4 cl 3–4).

Enterprise agreements made during the bridging period are not subject to the new 'better off overall test'. Instead a version of the previous no-disadvantage test has continued to apply, with agreements tested primarily against existing awards (TPCA Act Sch 7 Pt 2).

Minimum Wage Adjustments

Even after the AFPCS is replaced by the NES at the beginning of 2010, as noted earlier, existing pay scales will remain in operation for any workers not yet covered by a modern award. The TPCA Act also provides for the continuation, at least until July 2010, of the standard federal minimum wage, the special federal minimum wage

for workers with disabilities, and the default casual loading of 20% set by the WR Act (Sch 9 Pt 3).

By July 2010, FWA will be expected to have completed its first annual wage review (Sch 9 cl 2). Besides adjusting modern award rates and any remaining pay scales, FWA must also make a national minimum wage order. This need not in the first instance set special minimum wages for award-free juniors or trainees (Sch 9 cl 4); but that will need to be done by July 2011 at the latest.

Transfer of Employment

The existing transmission of business rules in the WR Act continue to apply to any transmission that was completed before the FW Act commenced, even if any transferring employees were not engaged by the new employer until after that date (TPCA Act Sch 11 Pt 2). Those rules include the provision, introduced by Work Choices, that limits the transmission of any award or agreement to a maximum of 12 months.

On the other hand, if the requirements for a 'transfer of business' (within the meaning of s 311 of the FW Act) were satisfied after 1 July 2009, it is the new rules that apply – even if any transfer of employment had already happened (TPCA Act Sch 11 Pt 3).

Registered Organisations

The repeal of the WR Act has not affected Schedule 1, the Registration and Accountability of Organisations Schedule. By virtue of Schedule 22 of the TPCA Act, this has continued in effect in amended form as a separate statute, named the *Fair Work (Registered Organisations) Act 2009*.

The new Act has two Schedules of its own, the first of which is an amended version of Schedule 10 of the WR Act, dealing with transitionally recognised State associations.

A second schedule allows State-registered associations of employees or employers to apply to be recognised as a federal organisation for the purpose of the FW Act on an ongoing basis. But this can only happen where the association has no federal counterpart, and where the State in question is prescribed by regulation.

The *Fair Work (Registered Organisations) Act 2009* also contains expanded powers for FWA to make orders to resolve disputes over representation rights. In particular, a representation order may be made under s 137A that specifies that a union has the exclusive right to represent the employees in a particular 'workplace group', or conversely that a particular union does not have that right. Such an order can be

sought where there is merely a 'threatened, impending or probable' dispute about union coverage at the workplace in question.

The making of such an order may, among other things, affect a union's capacity to be a bargaining agent, to organise protected industrial action, to make a greenfields agreement, or to exercise a right of entry.

In determining whether to make such an order, FWA must consider factors such as the history of award coverage and agreement-making for the group, the wishes of the employees concerned, and the extent to which a union has previously acted on their behalf.

Further information

For employers and workers covered by the federal system, information and advice can be obtained from the Fair Work Infoline on 13 13 94. The Fair Work Online website at <www.fairwork.gov.au> also has a wealth of information, including searchable databases of awards and registered agreements.

More detailed analysis of the Fair Work legislation can be found in A Stewart, *Stewart's Guide to Employment Law*, Federation Press, Sydney, 2nd ed, 2009 and A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney, 2009.