

An Overview of the *Fair Work Bill 2008*

Industrial Relations Society of WA



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Overview of Fair Work Bill

- Establishes **Fair Work Australia** which has greater powers than AIRC
- Establishes a **new agreement making regime** with enhanced union involvement in workplace
- **Expands compulsory arbitration** of bargaining disputes
- Establishes a **new set of key employment standards** beyond those that exist now



Overview of Fair Work Bill (*cont.*)

- **Continues the existing regime** governing the right to take **lawful industrial action** with **some notable changes**
- **Expands the right of entry** to workplaces for unions
- **Expands coverage of unfair dismissal** regime
 - removes the exclusion of 100 or less employees; and
 - diminishes the right of an employer to dismiss on operational grounds
- **Fundamentally alters the transfer of business rules** where employment conditions will permanently migrate to a new employer

The devil is in the detail



Overview of Fair Work Bill (*cont.*)



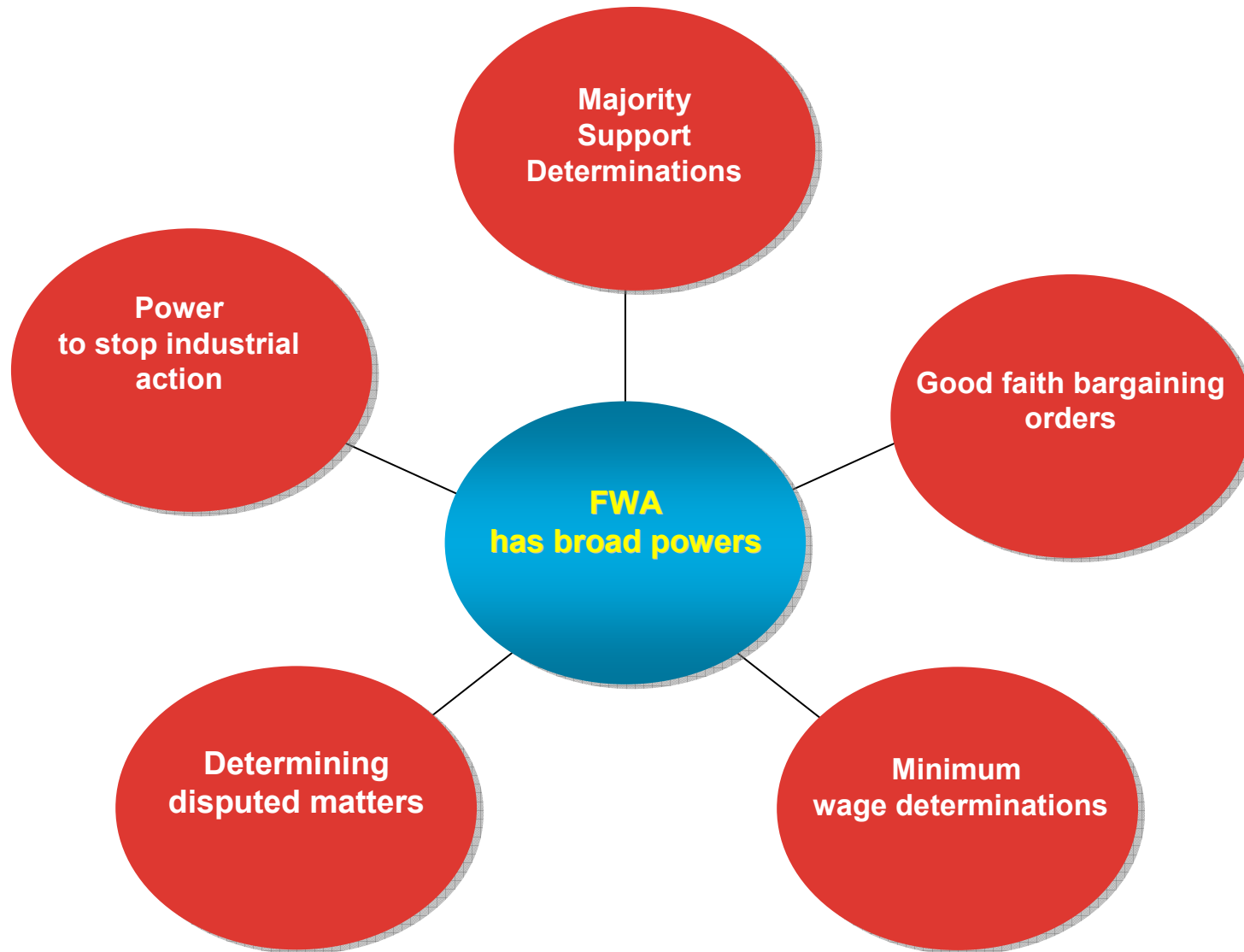
- Proposed **Building and Construction Specialist Division** of Fair Work Australia
- **ABCC to be replaced** from 31 January 2010.
- **Wilcox Consultation** – report due by end of March 2009?

Scope of the Bill

Who does the Bill cover?

State system?





Bargaining process



Stage one (a) – Employer initiated bargaining



Bargaining process *(cont.)*



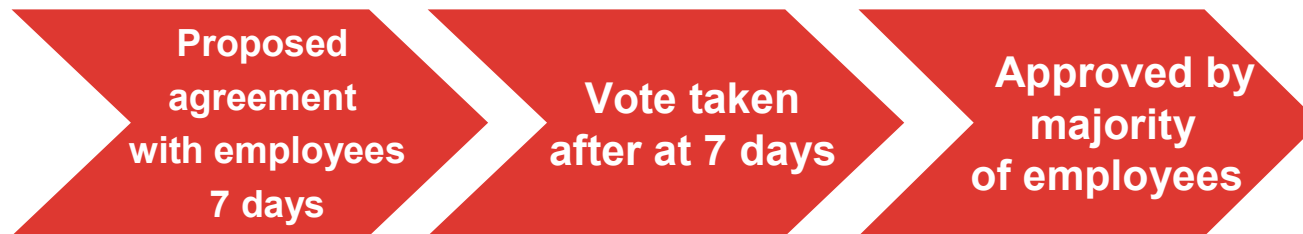
Stage one (b) – Union initiated bargaining



Bargaining process *(cont.)*



Stage two – the vote



Bargaining process *(cont.)*



Stage three – Approval by FWA



Bargaining

CURRENT

Union Collective Agreement

Employee Collective Agreement

Union Greenfields Agreement

Employer Greenfields Agreement

Multi-employer agreement only permitted if approved by Workplace Authority

No obligation to bargain



FUTURE

Enterprise Agreements

Union Greenfields Agreements

If genuine bargaining

Compulsory GFB

Bargaining *(cont.)*



CURRENT

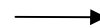
Right to take lawful industrial action after a secret ballot

No Commission role

Employer decides scope of agreement

Termination of a bargaining period & arbitration very limited

NDT



FUTURE

Includes employees covered by agreement

FWA can conciliate

FWA can set scope

Termination of industrial action & arbitration less limited

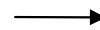
BOOT

Bargaining *(cont.)*

CURRENT

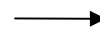
FUTURE

Approval by majority vote



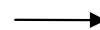
Same

No obligation to bargain in good faith



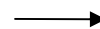
5 obligations to bargain in good faith

Maximum 5 year term



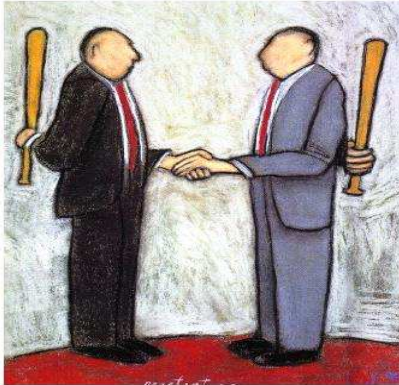
4 years

Union appointed as bargaining agent or
Union collective agreement

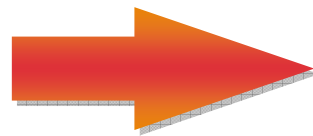


Union becomes default bargaining rep
Apply to FWA to be covered by agreement

Good faith bargaining



What does bargaining in good faith involve?

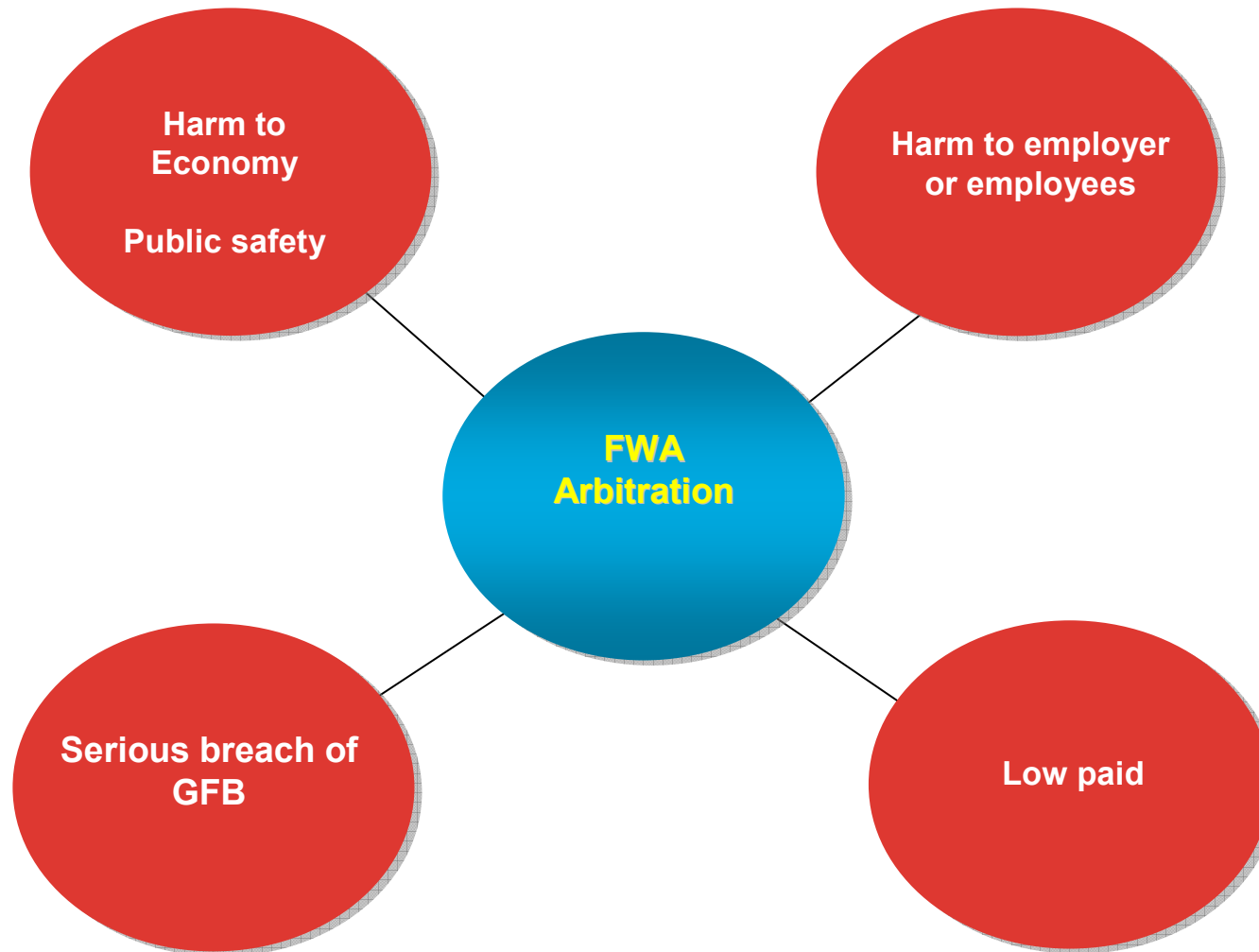


FWA can make orders to enforce good faith bargaining

FWA can make scope orders

- ✓ **attend and participate in meetings at reasonable times**
- ✓ **Disclose relevant (not confidential) information in a timely manner**
- ✓ **Respond to proposals in a timely manner**
- ✓ **Genuine consideration of the other parties' proposals and providing reasons for responses**
- ✓ **Refrain from capricious or unfair conduct that undermines collective bargaining and freedom of association**

Compulsory arbitration



Greenfields Agreements



➤ **When available?**

➤ **Potential “turf wars”**

➤ **Employer must notify all relevant Unions**

Industrial Action

- **Industrial action** is:
 - A strike by employees
 - A ban or limitation on work
 - A “go slow”
 - A refusal of duties
 - A lock out by an employer
- A picket **is not** industrial action



Industrial action (*cont.*)

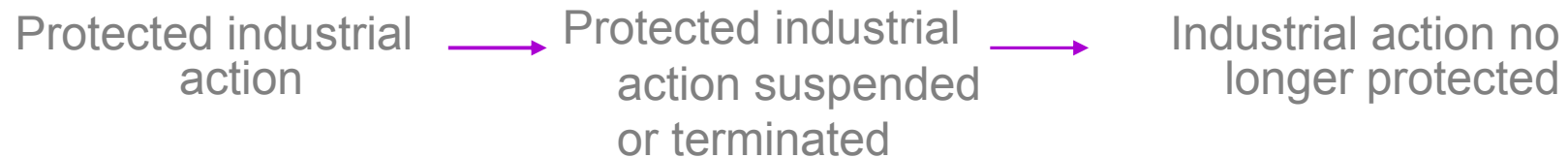
Protected industrial action

Secret ballots retained



Strike pay unlawful
but only for the
actual period of time
the employee
stopped work

Industrial action (*cont.*)



- Cooling off
- 3rd party harm
- Significant economic harm
- Other grounds

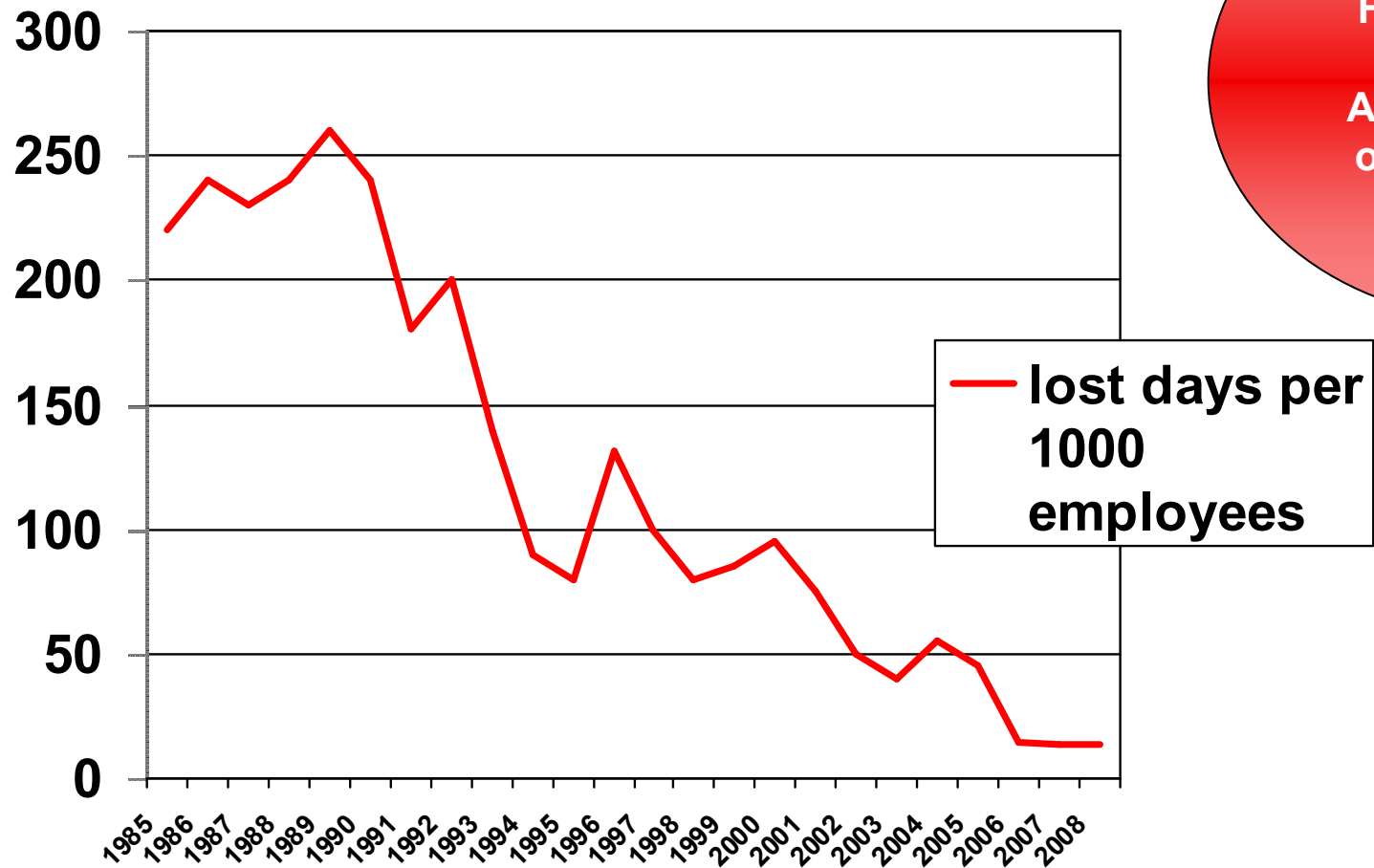
Pattern Bargaining?

Unlawful industrial action – unprotected industrial action



- FWA orders
 - 2 days
 - Interim orders
 - Enforcement of breach
- Immediate access to the Supreme Court without need for a certificate
- Access to the Federal Court or FMC under section 417 of FWB and generally under section 39B (1A) of the *Judiciary Act 1903*
- No strike pay

Lost days – level of industrial action



What will be the impact of the Fair Work Bill?

A major marker of the success or failure of the Bill

Union rights



Right of entry

- Enter workplaces with a permit wherever work is performed which is covered by the union's rules
- Increased recruiting opportunities

Right of entry

- Inspect pay records of non-members if the union suspects there is a breach of the workplace agreement/award
- Improved entry provisions
- Leverage

Transfer of business (work?)

CURRENT

Awards/agreements of the old employer only transmitted to a new employer for up to 12 months if:

- a business or part of business transmitted to the new employer and
- transferring employees move to the new employer

FUTURE

If:

- an employee transfers from an old to a new employer;
- the work they perform is substantially the same; and
- there is a transfer of any asset that relates to the work or the 2 employers are associated entities,

there is a transfer.

Effect of a transfer of business

Agreement/award becomes **binding on the new employer** in relation to the transferring employees to the exclusion of that employer's awards/agreements

Any new employee who becomes employed in that part of the business that has transferred across

will be indefinitely bound

by the old award/agreement **and not** the new employer's industrial instruments

Workplace rights

The general protections

Unlawful termination

Freedom of association

Coercion

Discrimination

False or misleading statements

Protection against **'adverse action'** –

dismissal, injury in employment, altering position to prejudice, discriminating between employees, refusing to employ

Broad grounds of discrimination – sex, race, political opinion, carer's responsibilities, pregnancy...

FCA, FMCA can make **orders to compensate**

Effectively a **no costs jurisdiction**

FCA, FMCA can grant **injunctions**

FCA, FMCA can order **reinstatement**

Workplace Ombudsman



- Workplace Ombudsman becomes the Fair Work Ombudsman
- Additional powers to issue **compliance notices** requiring a person to remedy a contravention (like PIN notices in OH&S)
- Australian Building and Construction Commission (from January 2010) – FWA Ombudsman likely to take over inspectorate functions

The future Fair Work Bill



FWB heralds a return to Union power

A return to a highly regulated centralised IR system

FWB although subtle in form – dramatic in its effect

A real sea change in IR in Australia