FWA: what were they thinking?

The reasoning behind Fair Work Australia's decision to terminate action at Qantas is unclear and out of step with the act, writes **Adam Bisits**.

The recent Qantas decision at Fair Work Australia has led to unchallenged criticism of the Fair Work Act for encouraging the Qantas dispute. The review of the act next January can take it as a given that the act is not to protect disputes on management and other non-wage claims, at the heart of the Qantas dispute.

But so significant a decision warrants analysis. Fair Work Australia terminated the transport, engineers' and pilots' unions stoppages and the lockout by Qantas using section 424(1) of the Fair Work Act.

This section provides that, "FWA must make an order suspending or terminating protected industrial action ... if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten ... to cause significant damage to the Australian economy or an important part of it."

So industrial action can be stopped if it threatens to cause significant economic damage. Without this threat, nothing can be ordered.

In the Qantas decision, Fair Work Australia said that it "is unlikely that the protected industrial action taken by the unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries".

But Qantas's lockout was said to threaten "to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services".

The evidence for this conclusion was not given. Fair Work Australia then said, without explaining, that it found that the requirements in s 424(1) were made out. It ordered the protected industrial action to be terminated immediately.

To make this order, Fair Work Australia had to find that the industrial action threatened to cause significant economic damage. It found that the action of the unions was not causing significant damage to the economy or an important part of it.

Fair Work Australia went so far as to say such a result was unlikely. Yet it made an order terminating the unions' industrial action. How this was achieved in accordance with s 424(1) is not apparent.

As to Qantas, its protected lockout was said to threaten to cause significant damage to the tourism and air transport industries. The decision gave the value of inbound tourism as $24 billion. But that sector of the economy is served by many airlines, many able to substitute for Qantas, including Qantas's subsidiaries unaffected by the dispute.

If that sector of the economy was on Fair Work Australia's mind, a conclusion of significant damage would have required some evidence and explanation.

Even if the Qantas lockout did threaten significant damage to the economy, that would only have justified an order against Qantas.

It could not have permitted a termination order against the unions. Thus the decision is not one that accords with s 424.

A better reasoned and perhaps different decision may have been given had the bench slept on what it had heard.

It is impossible to see how it could have been made under the section. What are the possible explanations for this result? It was about 2am when the decision was given after a trying day. A better reasoned and perhaps different decision may have been given had the bench slept on what it had heard.

It may have been thought that a remedy had to be given because other remedies were denied by the incredible requirement of another full bench that a $3.5 million-a-day loss from industrial action was not significant enough to order the action suspended (in the Pluto decision of August 6 last year).

The informality allowed Fair Work Australia may have justified its action, but it has now had two weeks to better explain the result it came to, or correct its decision – as it can. This has not happened.

An embarrassing point has been reached. Not to have granted a remedy would have left Qantas closed, but this would have been the right decision, at least for the unions.

If the decision was mistaken it could have been corrected. That alternative remedies were closed to Qantas, by the ruinous loss it has first to suffer before it might qualify for an order, shows a bad regime.

The episode is an example of the poorly thought through regulation in the Fair Work Act, to use the Business Council of Australia's euphemism. It is a regime where you can't get a termination order yourself and to get the government to get one for you, you have to first close down your business.

This is not "robust" as the Workplace Relations Minister says; it is anti-employment. Thus another requirement for the review of the act next January is to put forward the changes to prevent a repeat of this episode.

■ *Adam Bisits is president of the H. R. Nicholls Society.*

Asia must prepare for disasters

Anthony Bergin

The East Asia Summit in Bali endorsed a regional disaster response plan advanced by Australia and Indonesia to better cope with natural disasters.

The plan involves countries sharing satellite images and damage reports, and relaxing border controls that impede delivering support. It includes waiving visa restrictions on overseas emergency workers, along with quarantine and customs barriers. This is a sensible approach. Many of the world's deadliest catastrophes in the past two years occurred in Asia.

This has been a dreadful year in developed states: floods in Brisbane, the devastating earthquake in Christchurch, and Japan's triple whammy of earthquake, tsunami and nuclear accident. Natural disasters will result in higher loss of life in developing countries, but greater economic damage in urban areas in developed countries

Governments are often weakened by disasters and lack capacity to respond effectively. And there's now increased political pressure by the media for rapid response; governments perceived as