

Ai GROUP SUBMISSION

Senate Education and Employment
Legislation Committee

**Fair Work Amendment
(Repeal of 4 Yearly Reviews
and Other Measures) Bill 2017**

10 April 2017



Ai Group Submission to Senate Education and Employment Legislation Committee

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

Stephen Smith, Head of National Workplace Relations Policy

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Introduction

The Australian Industry Group (**Ai Group**) supports the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 (Bill)*. The Bill contains important reforms that would make Australia's workplace relations system more productive and workable.

The Bill would:

- Abolish 4 Yearly Reviews of Awards;
- Redress the current overly technical approach of the Fair Work Commission (**Commission**) in assessing enterprise agreements for approval by amending the *Fair Work Act 2009 (Cth)* (**FW Act**) to enable the Commission to overlook minor procedural or technical errors in the enterprise agreement-making process, provided that employees are not likely to be disadvantaged; and
- Improve powers and procedures in relation to the handling of complaints against Commission Members.

We urge the Committee to recommend that the Bill is passed by Parliament without delay.

Schedule 1 – 4 Yearly Reviews of Modern Awards

Ai Group has played, and is continuing to play, a leading role in the ongoing evolution of the award system in Australia, including in:

- The award modernisation process between 2008 and 2010;
- The Modern Awards Review 2012 which was conducted throughout 2012 and 2013;
- The 4 Yearly Review of Awards which commenced in early 2014,

The 4 Yearly Review of Awards involves individually reviewing each of the 122 modern industry and occupational awards, as well as providing the vehicle for a large number of major cases (common issues cases) dealing with entitlements across the award system.

The 4 Yearly Review of Awards has continued throughout 2014, 2015 and 2016, and is set to continue throughout 2017 and 2018. The Review is placing major strains on the resources of representative bodies.

The modern awards objective requires that modern awards be stable.¹ In conflict with this objective, since 2008 the award system has been in a constant state of review with no end in sight.

¹ See FW Act, s 134(1)(g).

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Sections 157 and 160 of the FW Act permit parties to seek a variation to awards at any time provided that the variation is necessary to meet the modern awards objective or the variation is to remove an ambiguity or uncertainty or to correct an error. These provisions provide the necessary flexibility to keep awards up to date.

Section 156 (4 Yearly Review of Modern Awards to be Conducted) of the FW Act should be repealed. Ongoing 4 Yearly Reviews of Awards are not necessary or in the public interest. The requirements under s.157 for varying awards are very similar to the requirements under s.156.

During the recent Productivity Commission (**PC**) Inquiry into the Workplace Relations Framework, Ai Group argued that 4 Yearly Reviews of Awards should be abolished. In its final report, the PC recommended the abolition of 4 Yearly Reviews.

The Bill would abolish 4 Yearly Reviews of Awards. This would be widely welcomed by employer representatives and union representatives, and their members.

The introduction of the Bill into Parliament followed a letter and draft Bill sent jointly by Ai Group, ACCI and the ACTU to Employment Minister, Senator the Hon Michaelia Cash (**Annexure A**). The parties worked together to jointly develop the draft Bill that was attached to the letter.

Similar to the draft Bill prepared by Ai Group, ACCI and the ACTU, the Bill introduced into Parliament would come into operation on 1 January 2018 – the day when the next 4 Yearly Review of Awards is set to commence under s.156 of the FW Act.

The transitional arrangement in Item 26 in Schedule 4 of the Bill would allow the FWC to continue to deal with 4 Yearly Review matters that are underway on 31 December 2017. This is consistent with the approach in the draft Bill prepared by Ai Group, ACCI and the ACTU.

Ai Group strongly supports Schedule 1 of the Bill.

Schedule 2 – Procedural Requirements in Enterprise Bargaining

There is currently an undue emphasis placed on procedural requirements when the Commission is determining whether to approve an enterprise agreement. In Ai Group's view, this is partly because of problems with the drafting of the FW Act and partly because of the overly technical manner in which the Commission is approaching its task of assessing enterprise agreements which are lodged for approval.

Because of these problems, enterprise bargaining has become a minefield for employers, employees and bargaining representatives. There is no doubt that all of the problems are discouraging parties from participating in enterprise agreement making.

Numerous enterprise agreements which benefit all parties are being routinely rejected by the Commission because of very minor alleged deficiencies in procedural requirements, such as:

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- Very minor variations in the content of Notices of Employee Representational Rights (**NERR**);
- Distributing the NERR on employer letterhead, rather than on a blank piece of paper;
- Stapling the NERR to another document when it is distributed;
- Distributing the NERR more than 14 days after the employer agreed to bargain. (This was the issue in contention in *Uniline Australia Limited* [2016] FWCFB 4969, an appeal case in which Ai Group represented the employer).

The problems that are occurring are very widely recognised and are frustrating all parties, including Members of the Commission who consider that they have no option other than to follow the reasoning in various Full Bench decisions that have adopted a very literal and strict interpretation of the wording in the FW Act. Not all Commission Members have agreed with this view. For example, in his dissenting decision in the *Uniline* case, Vice President Watson stated:

[46] In my view, the issue involved in this case cries out for a common sense approach. The legislation encourages enterprise bargaining and agreement making. It is intended to provide a simple, flexible and fair framework for agreement making and the facilitation of enterprise agreements. The proposition that a notice issued more than 14 days after the commencement of bargaining advising employees of their representation rights renders an agreement, otherwise genuinely agreed, to be incapable of approval is demonstrably inconsistent with the statutory scheme. Indeed such a conclusion in my view is the very antithesis of a simple, flexible and fair framework. The employees may already know of their representation rights and may already have made decisions in accordance with their rights. They may have expended much time and resources to agreeing on the content of an agreement. A common sense interpretation gives weight to such considerations. A conclusion of automatic failure of a test based on a technicality fails the legal test and produces a nonsensical outcome."

The decision of the Majority in the *Uniline* case (Deputy President Gostenknic and Commissioner Riordan) took the view that it is up to Parliament to address the overly technical approach mandated by the FW Act. They said:

[120] We would observe in passing that we are not unsympathetic to the position in which an employer or indeed other bargaining representatives might find themselves upon discovering that a Notice is not valid. If the legislative provisions provided some discretion about this and other pre-approval technical requirements then an examination of the actual impact of any deficiency upon the bargaining process and its outcome might result in the deficiency being disregarded. But that is not the legislative scheme the Commission is required to administer. It is a matter for Parliament to make such amendments to the scheme of the Act as it sees fit.

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The proposed amendments in Schedule 2 of the Bill have obvious merit for employers, employees and the Commission.

The Commission would only be able to overlook minor procedural or technical errors in the enterprise agreement-making process, and only in circumstances where the employees are not likely to be disadvantaged.

The provisions of Schedule 2 of the Bill are consistent with recommendation 20.1 of the PC Report which provided:

“The Australian Government should amend the Fair Work Act to:

- *Allow the FWC wider discretion to overlook minor procedural or technical errors when approving an agreement, as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of an unmet procedural requirement.*
- *Extend the scope of this discretion to include minor errors or defects relating to the issuing or content of a notice of employee representational rights.*

Ai Group strongly supports Schedule 2 of the Bill.

Schedule 3 – FWC Members

The provisions in Schedule 3 of the Bill would improve powers and procedures in relation to the handling of complaints against Commission Members. Ai Group has not identified any problems with these provisions.

Schedule 4 – Application and Transitional Provisions

Schedule 4 of the Bill includes application and transitional provisions relating to the provisions in Schedules 1, 2 and 3 of the Bill. Ai Group has not identified any problems with these provisions.

Conclusion

The Bill contains vital reforms of benefit to employers, employees and the whole community. We urge the Committee to recommend that the Bill is passed by Parliament without delay.



17 November 2016

Senator the Hon Michaelia Cash
Minister for Employment
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

Dear Minister

Re. Four yearly reviews of modern awards

We refer to recent discussions between your office and Mr Willox of Ai Group.

In the consultation processes associated with the Productivity Commission's Review of the Workplace Relations Framework, a clear position was stated by employer associations and the union movement that four yearly reviews of modern awards ought not continue to be a feature of that framework.

The current review has been continuing for nearly three years and there are matters programmed to continue well into 2017. The next review is scheduled to commence in 2018. The cycle of almost continuous review sits uncomfortably with the stated objective in the Act of a modern awards system that is "simple, easy to understand, stable and sustainable". In addition, the resource demands upon the Commission and the parties have been substantial.

We have collaborated in drafting a proposed Bill that, in our view, would remove four yearly reviews of modern awards from the framework while still permitting the modern award safety net to evolve where necessary according to the social and economic environment and the regulatory objectives. The proposed Bill (enclosed) has been drafted in a manner which is intended to be very straightforward and non-controversial, and which protects the interests of all parties. The key elements of the Bill we propose are as follows:

- Repeal of section 156 from 31 December 2017 (i.e. the day before the next 4 Yearly Review is scheduled to commence);
- Consequential amendments to a few other sections;

- The inclusion of the definition of “work value reasons” in section 157 (currently this phrase is used in sections 156 and 157 but the definition appears in section 156); and
- An amendment to the Application, Saving and Transitional provisions in Schedule 1 of the Fair Work Act, to ensure that the Commission can continue to hear and determine four yearly review matters which commence prior to 31 December 2017 but have not been determined.

We commend our proposal to you and look forward to the opportunity to progress it as a priority in this term of Government.

Yours sincerely

Innes Willox
Chief Executive
Australian Industry Group

James Pearson
Chief Executive Officer
Australian Chamber of
Commerce and Industry

Dave Oliver
Secretary
Australian Council of Trade
Unions

2016

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Fair Work Amendment (Abolition of 4
Yearly Reviews of Modern Awards) Bill
2016**

No. , 2016

(Employment)

**A Bill for an Act to amend the *Fair Work Act 2009*,
and for related purposes**

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	<i>Fair Work Act 2009</i>	2

1 **A Bill for an Act to amend the *Fair Work Act 2009*,**
2 **and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act is the *Fair Work Amendment (Abolition of 4 Yearly Reviews of*
6 *Modern Awards) Act 2016*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3	The day after this Act receives the Royal Assent.	
2. Schedule 1	31 December 2017	

13 Note: This table relates only to the provisions of this Act as originally
14 enacted. It will not be amended to deal with any later amendments of
15 this Act.

16 (2) Any information in column 3 of the table is not part of this Act.
17 Information may be inserted in this column, or information in it
18 may be edited, in any published version of this Act.

19 **3 Schedules**

20 Legislation that is specified in a Schedule to this Act is amended or
21 repealed as set out in the applicable items in the Schedule concerned,
22 and any other item in a Schedule to this Act has effect according to its
23 terms.

Schedule 1 Amendments

1
2

Schedule 1—Amendments

3

Fair Work Act 2009

4

1 Section 12

5

Repeal:

6

4 yearly review of modern awards: see subsection 156(1).

7

2 Section 132

8

Repeal the paragraph relating to Division 4.

9

Repeal the paragraph relating to Division 5, substitute:

10
11

Division 5 provides for the FWC to exercise modern award powers in certain circumstances.

12

3 Section 156

13

Repeal the section.

14

Repeal Note 1.

15

Repeal Note 2.

16

4 Heading of Division 5 of Part 2-3

17

Repeal, substitute:

18

**Division 5 – Exercising modern award powers outside
annual wage reviews**

19

20

5 Subsection 157(1)

21

Repeal the subsection, substitute:

22

(1) The FWC may:

23

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or

24

25

26

(b) make a modern award; or

1 (c) make a determination revoking a modern award;
2 if the FWC is satisfied that making the determination or modern
3 award is necessary to achieve the modern awards objective.

4 Note 1: The FWC must be constituted by a Full Bench to make a
5 modern award (see subsection 616(1)).

6 Note 2: Special criteria apply to changing coverage of modern awards
7 or revoking modern awards (see sections 163 and 164).

8 Note 3: If the FWC is setting modern award minimum wages, the
9 minimum wages objective also applies (see section 284).

10 **6 Paragraph 157(2)(b)**

11 Repeal the paragraph, substitute:

12 (b) making the determination outside the system of annual wage
13 reviews is necessary to achieve the modern awards objective.

14 **7 After subsection 157(2)**

15 Insert:

16 (2A) *Work value reasons* are reasons justifying the amount that
17 employees should be paid for doing a particular kind of work,
18 being reasons related to any of the following:

19 (a) the nature of the work;

20 (b) the level of skill or responsibility involved in doing the work;

21 (c) the conditions under which the work is done.

22 **8 Paragraph 582(4)(a)**

23 Repeal the paragraph.

24 **9 Section 616**

25 Repeal subsections (2) and (3).

26

27

Schedule 1 Amendments

1 **10 In the appropriate position in Schedule 1**

2 Insert:

3 **Part 4—Amendments made by the Fair Work**
4 **Amendment (Abolition of 4 Yearly Reviews**
5 **of Modern Awards) Act 2016**
6

7 **15 Definitions**

8 In this Part:

9 *amended Act* means this Act as amended by the *Fair Work Amendment*
10 *(Abolition of 4 Yearly Reviews of Modern Awards) Act 2016*.

11 **16 Application of amendments**

12 *Application of amendments*

13 (1) Section 156 of the Act, as in force immediately before its repeal,
14 continues to apply in relation to proceedings under section 156 that
15 had commenced but were not determined prior to the
16 commencement of this Part.

17 (2) Sections 582 and 616 of the Act, as in force immediately before
18 their amendment, continue to apply in relation to proceedings
19 under section 156 that had commenced but were not determined
20 prior to the commencement of this Part.