Australian Government
Department of Employment

Senate Education and Employment Legislation Committee

Inquiry into the

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

Submission of the

Department of Employment

April 2017

Table of Contents

Introduction

1. The Department of Employment (the Department) welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 (the Bill).

2. The Bill makes the following three changes to the *Fair Work Act 2009* (Fair Work Act):

    - It removes the requirement for continued 4 yearly reviews of modern awards while ensuring the current 4 yearly review continues under the existing framework until finalised.

    - It allows the Fair Work Commission to overlook minor procedural or technical errors made during enterprise bargaining, which were not likely to have disadvantaged employees, when approving an enterprise agreement.

    - It enables the Parliament to quickly establish a Commission to investigate and report on alleged misbehaviour or incapacity of a Fair Work Commission Member, and clarifies that the complaint-handling powers of the Minister for Employment and the Fair Work Commission President apply to all Fair Work Commission Members regardless of when they were appointed.

3. These changes reflect two recommendations of the Productivity Commission inquiry into the workplace relations framework.[1] In the case of the third measure, it implements recommendations of the inquiry into matters concerning former Fair Work Commission Vice President Michael Lawler, conducted by the Hon Peter Heerey AM QC.

4 yearly reviews of modern awards

Overview

4. The Fair Work Act and the *Fair Work Regulations 2009* (Fair Work Regulations) provide the legislative framework underpinning the national workplace relations system, which covers the majority of Australian employers and employees. This includes the maintenance of modern awards.

5. Division 4 of Part 2-3 of the Fair Work Act provides for the review of all modern awards by a Full Bench every 4 years. These reviews were intended to be the principal mechanism by which the Fair Work Commission would ensure that modern awards, when taken with the

[1] Productivity Commission (2015) *Workplace Relations* Framework, Final Report, Canberra. Publicly released 21 December 2015.

National Employment Standards, continue to provide a fair and relevant minimum safety net of terms and conditions.

6. Subsection 157(1) of the Fair Work Act allows the Fair Work Commission to make, vary or revoke a modern award outside the 4 yearly review process on a case by case basis where the making, variation or revocation is necessary to achieve the modern awards objective.

7. Under subsection 157(2) of the Fair Work Act, the Fair Work Commission can also vary modern award minimum wages if:

- the variation is justified by work value reasons, and
- making the variation outside the system of annual wage reviews and 4 yearly reviews is necessary to achieve the modern awards objective.

8. A variation to a modern award under section 157 may be made on application by certain parties set out in section 158 or on the Fair Work Commission's own motion.

Case for change

9. The Productivity Commission inquiry into the workplace relations framework found that the 4 yearly review process is 'hugely resource intensive for all involved', and recommended that the 4 yearly review process be repealed. Recommendation 8.1 deals, in part, with this issue. The Bill does not implement aspects of Recommendation 8.1 which suggest a new requirement for the wage regulator to review and vary modern awards.

Productivity Commission Recommendation 8.1

The Australian Government should amend the *Fair Work Act 2009 (Cth)* to:

- remove the requirement for continued four yearly reviews of modern awards
- add the requirement that the wage regulator review and vary awards as necessary to achieve the revised modern awards objective specified in recommendation 8.3.

In undertaking this role the wage regulator should:

- use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains
- consult widely with the community on reform options.

10. In consultations the Minister for Employment held with employer and employee representatives following release of the Productivity Commission's final report, there was unanimous support for abolishing the 4 yearly reviews of modern awards.

11. The Department estimates that repeal of the 4 yearly reviews provisions will result in a regulatory saving of $87 million dollars over 10 years for employer groups and unions. These costings were agreed with the Office of Best Practice Regulation.

12. In November 2016, the Australian Chamber of Commerce and Industry, the Australian Industry Group and the Australian Council of Trade Unions jointly wrote to the Minister for Employment asking the Government to abolish 4 yearly reviews of modern awards.

13. The Government moved immediately to implement the joint request, so a fresh review cycle does not commence from 1 January 2018.

Operation of the Bill

14. Schedule 1 to the Bill repeals the requirement for the Fair Work Commission to conduct 4 yearly reviews of modern awards from 1 January 2018.

15. The Bill provides a default rule that a determination that varies or revokes a modern award under Division 5 of Part 2-3 must be made by a Full Bench (new subsections 616(3B) and (3C)). This is a change from the existing framework under Division 5 of Part 2-3 under which a single Fair Work Commission Member could vary or revoke a modern award outside of a 4 yearly review.

16. Because the number of awards reduced during the award modernisation process from over 3,000 awards and instruments to 122 modern awards, each individual modern award can now cover far more employees. As a consequence, changes to modern awards can have a more significant impact than previously. It is appropriate that a Full Bench should make significant determinations to vary modern awards.

17. However, some modern award variations may relate to routine matters where it may be appropriate for a single Fair Work Commission Member to perform that function. Therefore, the President will have discretion to direct a single Fair Work Commission Member under new paragraph 616(3D)(a) to perform a function or exercise a power under:
    - section 159 (variation to update or omit name of employer, organisation or outworker entity);
    - section 160 (variation to remove ambiguity, uncertainty or correct error); or
    - section 161 (variation on referral by Australian Human Rights Commission).

18. Under new paragraph 616(3D)(b) the President may also direct a single Fair Work Commission Member to perform a function or exercise a power relating to a variation where the President considers it appropriate to do so in specified circumstances. The President may exercise this discretion in relation to:
    - a single award; or
    - two or more awards relating to the same industry or occupation.

19. New clause 27 of Part 5 of Schedule 1 to the Fair Work Act will allow the Fair Work Commission to dismiss an application that deals with a matter that was dealt with or is being dealt with during the current 4 yearly review (Schedule 4 to the Bill). This

transitional arrangement operates for two years from 1 January 2018. This will prevent parties re-agitating matters already dealt with through the existing review process.

20. New clause 26 of Part 5 of Schedule 1 to the Fair Work Act also allows the current 4 yearly review to conclude under the existing framework. This will ensure all modern awards have been reviewed in the same manner before the transition to the new process for reviewing awards, primarily under section 157.

Procedural requirements in enterprise bargaining

Overview

21. The Fair Work Act provides for the making of enterprise agreements through collective bargaining, particularly at the enterprise level. Part 2-4 of the Act sets out the framework for the making of enterprise agreements, including requirements that the Fair Work Commission must be satisfied about before it can approve an enterprise agreement. This includes the issuing of the Notice of Employee Representation Rights as set out in subsections 173 and 174 of the Act.

The case for change

22. The Productivity Commission inquiry into the workplace relations framework (the Report) found that there are cases where a minor procedural or technical error made during the bargaining process could not be addressed by an undertaking made by the employer and that the Fair Work Commission is left with no choice but to reject the application to approve an enterprise agreement.

23. It highlighted a number of particular cases which encapsulated this issue. For example, in *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 (Peabody), the Fair Work Commission found that a Notice of Employee Representational Rights that the employer issued did not comply with the form and content prescribed in the Fair Work Regulations because it had additional material stapled to it and was therefore invalid. As a consequence, the Fair Work Commission could not be satisfied that employees covered by the agreement had genuinely agreed to the agreement and refused the application to approve the agreement.

24. The Productivity Commission noted that '[w]hile there are often good reasons for having procedural requirements (for example, to prevent a party engaging in potentially misleading conduct during the approval process) substance over form should prevail' (p. 663). The Report provided a number of reasons that overly strict procedural requirements should be avoided, including that (p. 664):
    - rejection of enterprise agreements for purely technical reasons delays the commencement of new agreements, which can delay new benefits for employees;

- pedantic, legalistic technicalities that prevent agreements from being approved can increase the perceived cost and complexity of bargaining, which discourages businesses and employees from pursuing enterprise agreements; and,
- despite education and guidelines provided by the Fair Work Commission on these requirements, parties will still make inadvertent errors that ultimately prevent an enterprise agreement from being approved.

25. The Productivity Commission therefore recommended that the Fair Work Commission should be able to overlook minor procedural or technical errors when approving an enterprise agreement. In doing so it argued that the 'key test for exercising discretion could be that the Fair Work Commission is satisfied that employees were not likely to have been placed at a disadvantage during bargaining or the pre-approval process because of the unmet procedural requirement' (p. 665). The Productivity Commission also recommended that this be extended to the requirements relating to the Notice.

Productivity Commission recommendation 20.1

The Australian Government should amend the *Fair Work Act 2009 (Cth)* to:

- allow the Fair Work Commission 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.

26. The Bill responds to this recommendation.

Operation of the Bill

27. Schedule 2 to the Bill makes amendments to section 188 of the Act to provide that an enterprise agreement may be approved despite minor procedural or technical errors made during the bargaining process as long as employees were not likely to have been disadvantaged by the errors.

28. Section 188 sets out a list of matters for the Fair Work Commission to consider when determining whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

29. The Bill inserts new subsection 188(2), which provides that an enterprise agreement will have been genuinely agreed to by the employees covered by it if the Fair Work Commission is satisfied that the agreement would have been genuinely agreed to under subsection 188(1), but for any minor procedural or technical errors made in relation to:
    - the requirements referred to in paragraph 188(1)(a) or (b), or
    - the requirements in relation to the Notice of Employee Representation Rights set out in sections 173 and 174.

30. The Fair Work Commission must also be satisfied that the employees were not likely to have been disadvantaged by the errors (new paragraph 188(2)(b)).

31. The effect of these amendments is that if a minor procedural or technical error is made in relation to these steps, including the Notice of Employee Representation Rights, the Fair Work Commission can approve an enterprise agreement if it is satisfied that the agreement would have been genuinely agreed to by employees but for that error, and that employees covered by the agreement were not likely to have been disadvantaged by the error.

Fair Work Commission Members

Overview

32. The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (JMIPC Act) enables the Parliament to establish commissions of inquiry to inform its consideration of any case for the removal from office of Commonwealth judges by investigating and reporting on allegations of misbehaviour or incapacity. However, there is currently no formal process for Parliament to be informed about allegations of misbehaviour or incapacity against Fair Work Commission Members before considering whether to request the Governor-General to terminate their appointment or remove them from office.

33. The terms and conditions of former Australian Industrial Relations Commission (AIRC) Members under the old *Workplace Relations Act 1996* were preserved when they transferred to the Fair Work Commission. Those conditions included provision for their removal from office by the Governor-General on the grounds of proved misbehaviour or incapacity.

34. Equivalent Fair Work Act rules for 'new' Fair Work Commission Members (those first appointed from 26 May 2009) provide for the termination or suspension of their appointments. The Fair Work Act complaint-handling provisions (sections 581A and 641A) refer to these later provisions and this creates some doubt about their application to former AIRC Members.

The case for change

35. In October 2015 former Federal Court judge the Hon Peter Heerey AM QC was appointed by the Minister for Employment, Senator the Hon Michaelia Cash, to conduct an independent investigation on complaints about former Fair Work Commission Vice President Michael Lawler, and related matters. The report of his independent investigation was finalised in February 2016.

36. Following his inquiry, Mr Heerey made two recommendations to improve oversight of the conduct of Fair Work Commission Members and clarify the way complaints about their performance are handled.

37. Given the similarity of tenure arrangements for judges and Fair Work Commission Members, Mr Heerey considered it would be logical to extend the provisions of the JMIPC Act to cover termination proceedings against Fair Work Commission Members.

38. Applying the JMIPC Act to Fair Work Commission Members will enable parliamentary commissions to investigate and report on allegations of misbehaviour or incapacity against Fair Work Commission Members with built-in compulsory investigative powers and natural justice protections, enabling the Parliament to be well-informed about any case for termination of the appointment of a Fair Work Commission Member by the Governor-General.

39. Mr Heerey also found that the current complaint handling powers of the Fair Work Commission President and the Minister for Employment probably do not apply to Fair Work Commission Members who transferred from the AIRC (although there is capacity for both the Minister for Employment and the President to deal with complaints in reliance on their general powers). Mr Heerey considered it would be useful to ensure that the specific complaint handling powers apply consistently to all Fair Work Commission Members, regardless of when they were appointed.

40. Accordingly the Bill seeks to align the complaint-handling procedure for former AIRC members with those applying to current Fair Work Commission members.

Operation of the Bill

41. The Bill provides for the modified application of the JMIPC Act to Fair Work Commission Members (new section 641B). It adapts the JMIPC Act so that it operates effectively in relation to Fair Work Commission Members. It does so by substituting defined terms and statutory provisions relating to such Members (where appropriate) for existing JMIPC Act references relating to Commonwealth judges.

42. This will enable the Parliament to quickly establish a Commission to investigate and report on alleged misbehaviour or incapacity of an Fair Work Commission Member, with a view to considering whether to request the Governor-General to:
    - remove from office a Fair Work Commission Member who formerly held office in the AIRC, or
    - terminate the appointment of a 'new' Fair Work Commission Member.

43. The Bill also amends the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (which preserves former AIRC Members' terms and conditions of appointment) to ensure the application of the complaint handling powers of the Minister for Employment and the Fair Work Commission President to those Members.

Consultation

44. The Productivity Commission undertook extensive consultations in the course of its inquiry. More than 350 submissions were made to the review. More than 500 individuals participated in the review by sharing their views on the workplace relations system with the Productivity Commission, as well as employers, employer groups and more than 20 unions. The Productivity Commission also held numerous public hearings and released a draft report, including draft recommendations, for consultation before releasing its final report.

45. Major employer groups and unions were consulted on an exposure draft of the Bill through the Committee on Industrial Legislation (a sub-committee of the National Workplace Relations Consultative Council) via a confidential teleconference facilitated by the Department in February 2017. This covered all three elements of the Bill.

46. State and territory senior officials with responsibility for workplace relations were also consulted in a teleconference through a similar process.

Conclusion

47. The Department appreciates the opportunity to provide a submission to this inquiry and is available to discuss the submission at a hearing of the Committee.