Chapter 3

Key issues

Introduction

3.1 The committee received 14 submissions regarding the bill. There was broad agreement that the four yearly review scheme should be abolished, but conflicting views about allowing the Fair Work Commission (FWC) to overlook minor or technical errors, and about the new measures which would provide for the investigation of a FWC member.

Key Issues

Removing the requirement for four yearly reviews

3.2 There was agreement among most submitters and witnesses that the four yearly reviews scheme should be abolished,[1] as recommended by the Productivity Commission's Final Report into Australia's Workplace Relations framework.[2]

3.3 The main rationale for this view, as stated by Professor Andrew Stewart, an academic at the University of Adelaide specialising in employment law, is 'to spare both the Fair Work Commission (FWC) and major stakeholders the strain on their resources imposed by the need to hold regular four-yearly reviews of all modern awards.'[3] Similarly, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) submitted that the review process is a burden on the resources of employers and unions alike.[4] The Queensland Law Society submitted that '[r]emoving this requirement will result in significant savings to public and private entities and free up the Fair Work Commission for other matters.'[5]

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1 Australian Chamber of Commerce and Industry, *Submission 3*, p. 1; South Australian Wine Industry Association, *Submission 8*, p. 4; Australian Industry Group, *Submission 4*, p. 1; Pharmacy Guild of Australia, *Submission 7*, p. 1; National Road Transport Association, *Submission 11*, p. 1.

2 Productivity Commission, Inquiry Report: Workplace Relations Framework, no. 76, November 2015, www.pc.gov.au/inquiries/completed/workplace-relations/report, (accessed 1 May 2017).

3 Professor Andrew Stewart, *Submission 2*, p. 1.

4 Australian Council of Trade Unions, *Submission 5*, p. 4; see also Pharmacy Guild of Australia, *Submission 7*, p. 1; National Road Transport Association, *Submission 11*, p. 1; Ms Matheson, Deputy Director Workplace Relations, Australian Chamber of Commerce and Industry, *Committee Hansard*, 13 April 2017, p. 1.

5 Queensland Law Society, *Submission 12*, p. 1 ; see also Business Council of Australia, *Submission 13*, p. 2.

3.4 However, the Australian Manufacturing Workers Union (AMWU) was opposed to the abolition of the four yearly reviews because of concerns that the absence of an automatic review process would mean that the pay and conditions of modern awards would not keep up with community expectations.[6] Master Electricians Australia, while supportive of the proposal, also expressed concern that 'there will be no opportunities for parties to resolve ambiguities or interpretations surrounding a modern award.'[7]

3.5 The Department of Employment (the department) explained that awards can still be varied on a case by case basis under section 157 of the *Fair Work Act 2009*.[8] This was acknowledged in other evidence,[9] most notably by the National Road Transport Association who submitted that:

> [a]s sections 157 and 160 of the FW Act provide alternative mechanisms to vary the modern awards, amending the [Fair Work] Act to remove the requirement for the mandatory four yearly review would provide a sensible and cost-effective way forward. These sections would still provide an avenue to allow the maintenance and development of modern awards in a way which ensures they remain relevant and affordable to contemporary Australian workplaces and employers.[10]

3.6 In addition, the department's submission demonstrates that the process for varying or revoking an award outside the four yearly review process would be more robust, as it would require a full bench of the FWC to consider the application. The department stated:

> 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.[11]

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6 Australian Manufacturing Workers' Union, *Submission 9*, p. 1.

7 Master Electricians Australia, *Submission 6*, p. 1.

8 Department of Employment, *Submission 1*, p. 5.

9 Australian Chamber of Commerce and Industry, *Submission 3*, p. 3; Mr Smith, Head of National Workplace Relations Policy, Australian Industry Group, *Committee Hansard*, 13 April 2017, p10; Ms Matheson, *Committee Hansard*, 13 April 2017, p. 1.

10 National Road Transport Association, *Submission 11*, p. 2.

11 Department of Employment, *Submission 1*, p. 5.

Allowing the Fair Work Commission to overlook minor procedural or technical errors

3.7 The department explained that:

> [t]he 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.[12]

3.8 Professor Stewart, though supportive of this proposed reform, expressed concern about use of the term 'disadvantaged' in proposed new subsection 188(2). Professor Stewart argues that advantage is a question dealt with under the 'better off overall' test in section 189, and that the purpose of the procedural requirements are not to advantage employees under a proposed agreement, but to ensure that they genuinely agree to the terms proposed by their employer and that they have been informed of their right to be represented by a bargaining representative.[13]

3.9 The Australian Council of Trade Unions (ACTU) submitted that the test 'focusses on the wrong issue':

> If a relevant 'minor or technical error' is accepted to have occurred … the Commission need only be satisfied that the employees, as a group, were not likely to have been disadvantaged. This has the result that the impact, either real or likely, on individual employees is not the true focus of the inquiry. That being the case, a disadvantage in the bargaining process affecting a proportion of the group (for example those working night shift, those who speak a particular language or those who are union members), but not the whole of the group, is treated as insignificant. This detracts from the intended objective that all employees are permitted to participate in bargaining in an informed way and is in stark contrast to the requirement of the Better Off Overall test.[14]

3.10 The Queensland Law Society suggested that the bill should include examples of what may be regarded as minor procedural or technical errors.[15]

3.11 The AMWU regarded the procedural requirements as being in place 'for good reason – to ensure compliance by employers with fundamental pre-requisites to fair

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12 Department of Employment, *Submission 1*, p. 8.

13 Professor Andrew Stewart, *Submission 2*, p. 2.

14 Australian Council of Trade Unions, *Submission 5*, pp. 7–8.

15 Queensland Law Society, *Submission 12*, p. 1.

agreement making,' and thus considered that allowing errors to be overlooked would impinge on the fairness of the process.[16]

3.12 The FWC suggested an amendment regarding the commencement of bill's provisions. Schedule 4 of the bill provides that the new discretion to approve enterprise agreements, despite minor or technical errors, will only apply to agreements when the application for their approval is made after the commencement of Schedule 2.

3.13 However, the FWC will continue to receive applications from employers to approve agreements that entail NERRs that don't strictly comply with requirements up until the commencement date. According to the FWC:

> [t]his means that it is likely that all applications involving non-compliant NERRs made before the commencement date…will either need to be withdrawn by the applicant or dismissed by the Commission. This may result in delay, inconvenience and expense for the employers involved.[17]

3.14 The FWC submission stated that between 25 April 2017 and 11 May 2017, 31 per cent of applications for approval contained non-compliant NERRs. The FWC stated that it received 5529 applications in 2015-16, meaning that overall the number of applications with non-compliant NERRs has the potential to be very high.[18]

3.15 Consequently, the FWC suggested amending the bill so that the new approval discretion apply to applications made before the commencement of Schedule 2.[19]

3.16 A number of submitters expressed the view that empowering the Commission to overlook minor procedural or technical errors in approving an enterprise agreement was a 'common sense approach.'[20]

3.17 For example, the National Farmers Federation (NFF) 'welcomes the common-sense approach to approval of enterprise agreements in the bill. Simplifying the approval process for enterprise agreements and creating certainty for business that negotiated agreements will be approved, and valid for their life, is vital to restoring confidence in enterprise bargaining more broadly.'[21]

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16 Australian Manufacturing Workers' Union, *Submission 9*, p. 1; see also Australian Council of Trade Unions, *Submission 5*, p. 3.

17 Fair Work Commission, *Submission 14*, p. 3.

18 Fair Work Commission, *Submission 14*, p. 3.

19 Fair Work Commission, *Submission 14*, p. 3.

20 National Farmers Federation, *Submission 10*, p. 1; see also South Australian Wine Industry Association, *Submission 8*, p. 3.

21 National Farmers Federation, *Submission 10*, p. 1.

Enabling a Commission to be established to investigate a Fair Work Commission member

3.18 Many submitters were silent on this matter. The Australian Industry Group expressed support for '[improved] powers and procedures in relation to the handling of complaints against Commission Members.'[22]

3.19 Likewise, ACCI supported 'the proposed approach that Parliament would appoint persons to conduct an inquiry, which would then proceed independent of both Parliament and the tribunal.'[23]

3.20 The ACTU also expressed support for 'a more structured process for investigation of allegations of misconduct against Commission members, as well as investigative powers for doing so.'[24]

3.21 The Queensland Law Society, conversely, expressed concern about the approach taken to modifying the application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (JMIPC Act); namely, that the JMIPC Act was not being amended directly, and that the approach taken 'generally complicates the statute book.'[25]

3.22 The department, however, clarified that the bill 'adapts the JMIPC Act so that it operates effectively in relation to Fair Work Commission Members' and 'also amends the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (which preserves former [Australian Industrial Relations Commission] 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.'[26]

Committee view

3.23 The committee considers that this bill responds to recommendations put forward by eminent authorities, the Productivity Commission and the Hon. Peter Heerey AM QC. It represents a considered and informed approach to law reform, and is a reflection of the government's willingness to take advice and enact change where it is needed.

3.24 The committee regards the abolition of four yearly reviews as a sensible way forward for all parties involved in enterprise bargaining. As detailed in many submissions, the review process is arduous and expensive, and seems an unnecessary

22 Australian Industry Group, *Submission 4*, p. 5.

23 Australian Chamber of Commerce and Industry, *Submission 3*, p. 13.

24 Australian Council of Trade Unions, *Submission 5*, p. 9.

25 Queensland Law Society, *Submission 12*, p. 2.

26 Department of Employment, *Submission 1*, p. 9.

burden on the resources of small businesses and large companies, not to mention the expenditure of tax-payer dollars, when modern awards can be amended through alternative processes under the Fair Work Act. Furthermore, as noted in Chapter 2, there is support for this change across both employer groups and unions. On that basis, the committee supports the proposal.

3.25 Similarly, allowing the FWC to overlook minor technical or procedural issues, especially in relation to the Notice of Employee Representation Rights (NERR), when approving agreements is a win for productivity and harmony in the workplace. It is truly a ridiculous state of affairs when a staple can send parties back to the negotiating table, as pointed out in the Productivity Commission's Final Report into the Workplace Relations Framework (PC Report). The committee is satisfied that the fairness of the outcomes for employees won't be negatively impacted by this provision.

3.26 The committee acknowledges the point raised by the FWC that the new discretion to approve applications, despite minor or technical errors will only apply when the application is made after the commencement of Schedule 2. So as to avoid agreements from being unnecessarily rejected, the committee agrees that the bill should be amended to provide for the new approval discretion to apply to applications made prior to the commencement of Schedule 2.

Recommendation 1

3.27 The committee recommends that the bill be amended to provide for the new approval discretion to apply to applications made prior to the commencement of Schedule 2.

3.28 The proposed amendments in relation to the application of the JMIPC Act also represent a common-sense approach to reform. It is undesirable for transitioned and non-transitioned members of the FWC to have inconsistent terms and conditions of employment, and on that basis the committee supports the provision.

Recommendation 2

3.29 The committee recommends that subject to Recommendation 1 the bill be passed by the Senate.

Senator Bridget McKenzie
Chair