

Labor Senators' Additional Comments

1.1 While expressing in-principle support for improvements to the enterprise bargaining process, Labor senators also have reservations about aspects of some of the proposed reforms.

1.2 Labor Senators are concerned that aspects of the provisions concerning the abolition of the four yearly reviews may be misconstrued. The terms of the transitional provision in Item 26(1) of Schedule 4 reads:

26 Incomplete review of modern award

Scope

(1) This clause applies in relation to a review of a modern award conducted as part of a 4 yearly review of modern awards if:

(a) the review of the modern award commenced before the Schedule 1 commencement day; and

(b) immediately before that day, the review of the modern award had not been completed.

1.3 The purpose of this provision is to allow incomplete four yearly reviews to be completed if they are still on foot at the time the abolition comes into effect.

1.4 However, the provision might be misconstrued as referring only to what the Fair Work Commission has described as the 'award stage' of the Review, where modern awards are reviewed individually. There is also the 'common issues' stage of the 4 yearly review, where multiple awards are reviewed in relation to a particular issue. For example, in March 2017 the FWC handed down a decision on whether a clause for domestic violence leave should be inserted into modern awards.¹

1.5 In common issues matters, the number and identity of awards that will be affected by a decision of the Fair Work Commission are not known until the conclusion of the proceedings. Multiple awards may be reviewed at the same time, and each award may be reviewed more than once for different purposes.

1.6 Labor Senators note the concern raised by the ACTU that the transitional provisions may not apply to the 'common issues' stage of the 4 yearly review.² This could result in consideration of common issues being terminated prematurely when the abolition of the four yearly reviews comes into effect.

1.7 We are concerned to ensure that Item 26 does not limit the breadth of issues considered during the common issues stage. We would prefer that the bill be redrafted

1 [2017] FWCWF 1133.

2 Australian Council of Trade Unions, *Submission 5*, p. 5.

to make it clear that this stage falls within the transitional provisions allowing for the completion of reviews on foot at the time the abolition comes into effect.

1.8 In addition, Labor Senators are also of the opinion that the requirement for a Full Bench of the Fair Work Commission to be constituted to make, vary or revoke a modern award is unnecessarily cumbersome. Given the government's enthusiasm for reducing the burden on resources of the FWC and bargaining parties, this provision should be amended so that only a single member is required.

1.9 Regarding the provisions allowing the FWC to disregard minor technical or procedural issues when approving enterprise agreements, Labor Senators agree with Professor's Stewart's concern about the use of the term 'disadvantaged' in subsection 118(2). As Professor Stewart details, this expression does not reflect the intent of the procedural requirements, which is to ensure the enterprise agreement is genuinely agreed to.

Recommendation 1

1.10 Labor Senators recommend that the Senate amend the Bill to address the issues identified above.

**Senator Gavin Marshall
Deputy Chair**