The Senate

Education and Employment Legislation Committee

Fair Work Amendment (Repeal of 4 Yearly Review and Other Measures) Bill 2017 [Provisions]

May 2017

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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.

Recommendation 2

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

Chapter 1

Introduction

Reference

1.1 The Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017 (the bill), was introduced into the House of Representatives on 1 March 2017 by the Hon. Mr Dutton MP, Minister for Immigration and Border Protection.[1]

1.2 On 23 March 2017, the provisions of the bill were referred to the Senate Education and Employment Legislation Committee (the committee) for inquiry and report by 22 May 2017.[2]

Conduct of the inquiry

1.3 Details of the inquiry were made available on the committee's website.[3] The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 14 organisations, as detailed at Appendix 1.

1.4 A public hearing was held on 12 April 2017. The witness list is included at Appendix 2.

Structure of the report

1.5 This introductory chapter sets out the background to the inquiry. Chapter 2 examines the background and detail of the bill.

1.6 Chapter 3 considers the key issues identified by submitters in relation to the bill, including:

- removing the requirement for four yearly reviews;
- allowing the Fair Work Commission to overlook minor procedural or technical errors; and
- applying the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* to all Fair Work Commission members and enabling

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1 *Votes and Proceedings*, No. 37, 1 March 2017, p. 587.

2 *Journals of the Senate*, No 34, 23 March 2017, p. 1147.

3 Senate Standing Committee on Education and Employment, Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Four-YearlyReviews, (accessed 27 April 2017).

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

Compatibility with human rights

1.7 The bill's Statement of Compatibility with Human Rights states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[4]

Scrutiny of Bills Committee

1.8 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has considered the bill.[5] The Scrutiny of Bills Committee directed the attention of Senators to previous comments on the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*.[6]

1.9 This Act enables parliamentary commissions to be established following a resolution by each House of the parliament to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer (including a Justice of the High Court of Australia).

1.10 The Scrutiny of Bills Committee's comments related to the potential for trespass on personal rights and liberties in the context of:

- the parliamentary commission issuing a search warrant;
- protecting the personal reputation of the judicial officer being investigated; and
- the judicial officer having to provide documents which may result in self-incrimination.[7]

Financial Impact Statement

1.11 A financial impact statement was not provided.

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4 Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, Statement of Compatibility with Human Rights, *Explanatory Memorandum*, p. i.

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2017*, 27 March 2017, pp. 23–24.

6 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 4/12*, 21 March 2012, p. 8.

7 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 4/12*, 21 March 2012, pp. 8–11.

Hansard transcripts

1.12 In this report, references to the most recent Committee Hansard are to the proof transcripts. Page numbers may vary between the transcripts of the Proof Hansard and the Official Hansard.

Acknowledgement

1.13 The committee thanks those organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

Chapter 2

Overview of the Bill

Introduction

2.1 This chapter sets out the background of the relevant workplace relations landscape and outlines the main provisions and aims of the bill.

Purpose of the bill

2.2 The bill's explanatory memorandum states that the bill seeks to amend the *Fair Work Act 2009* to:

- repeal the requirement for four yearly reviews of modern awards from 1 January 2018;
- enable the Fair Work Commission (FWC) to overlook minor procedural or technical errors when approving an enterprise agreement;
- apply the complaint-handling powers of the Minister for Employment and President of the FWC to all FWC Members; and
- apply the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (JMIPC Act) in relation to FWC Members.[1]

Background to the bill

Four yearly review scheme

2.3 Section 156 of the *Fair Work Act 2009* (Fair Work Act) provides for the review of all modern awards by the Full Bench of the Fair Work Commission every four years. As part of these reviews, the FWC can make determinations varying modern awards. This includes varying including modern award minimum wages if justified by work value reasons.[2]

2.4 The Department of Employment (the department) explains in their submission that

> these reviews were intended to be the principal mechanism by which the Fair Work Commission would ensure that modern awards, when taken with

1 Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, *Explanatory Memorandum*, p. i.

2 *Fair Work Act 2009,* ss. 156(3).

> the National Employment Standards, continue to provide a fair and relevant minimum safety net of terms and conditions.[3]

2.5 In addition to the automatic four yearly review process, a modern award can be varied through an application to the FWC.

2.6 The Productivity Commission's Final Report into the Workplace Relations Framework (PC Report) recommended the abolition of the four yearly review process.[4]

2.7 According to the department, 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 four yearly reviews of modern awards.[5]

Procedural requirements during bargaining

2.8 During the enterprise bargaining process, a number of procedural requirements have to be adhered to or satisfied.[6] Subsection 174(1A) of the Fair Work Act stipulates that a Notice of Employee Representation Rights (NERR) must be provided to employees, and that it must conform to the form and content prescribed in Schedule 2.1 of the Fair Work Regulations. If an invalid NERR is provided, an agreement cannot be approved by the Fair Work Commission.[7]

2.9 The validity of instances in which the NERR has been provided has been subject to various rulings by the FWC. A key decision is *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union*.[8] The Productivity Commission summarises this case in its Final Report:

> Peabody Moorvale Pty Ltd provided three pages — stapled together — to all of the employees to be covered by a proposed enterprise agreement. Some bargaining ensued, an agreement was struck and the agreement was lodged with the FWC. However, by attaching the three documents together, the employer contravened requirements about the form of notice to be given to employees. The FWC had no real discretion in the matter, and was

3 Department of Employment. *Submission 1*, pp. 3–4.

4 Productivity Commission, *Inquiry Report: Workplace Relations Framework—Overview*, no. 76, November 2015, p. 53.

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

6 Productivity Commission, *Inquiry Report: Workplace Relations Framework—Overview*, no. 76, November 2015, pp. 34–35; See Fair Work Act 2009, ss. 186, 187.

7 See Fair Work Commission, *Submission 14*, p. 2.

8 [2014] FWCFB 2042 (2 April 2014).

> obliged by the Fair Work Act to reject the agreement. So, absurdly, the employer had to recommence the agreement process.[9]

2.10 Recommendation 20.1 of the PC Report recommended that the 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; and
- 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.[10]

Investigating complaints against judicial officers and FWC members

2.11 There are three options currently available with regard to the negative performance of a FWC member.

2.12 Under s. 641 of the Fair Work Act, the Governor-General may terminate the appointment of a FWC Member on the grounds of proved misbehaviour or the Member being unable to perform the duties of his or her office because of physical or mental incapacity, if an address praying for the termination is presented by each House of the Parliament.

2.13 In addition, under section 641A the Minister of Employment (the Minister) has the power to handle a complaint about the performance of a FWC member. The Minister may consider whether the Houses of Parliament should make an address to the Governor-General as described above, or whether to advise the Governor General to suspend the FWC member.

2.14 Under section 581A of the Fair Work Act, the President of the FWC has the power to deal with a complaint about the performance of another FWC member by taking reasonable steps to maintain public confidence in the FWC. The President must also refer a complaint to the Minister if one or more grounds of the complaint have been substantiated.

2.15 These powers were discussed in the *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and*

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9 Productivity Commission, *Inquiry Report: Workplace Relations Framework—Overview*, no. 76, November 2015, p. 34.

10 Productivity Commission, *Inquiry Report: Workplace Relations Framework—Overview*, no. 76, November 2015, p. 58.

Related Matters, by the Honourable Peter Heerey AM QC (the Heerey Report), which was tabled in Parliament on 15 March 2016.[11]

2.16 The background to the FWC is central to his findings. The Australian Industrial Relations Commission (AIRC) was established in 1988. It later became known as Fair Work Australia after the introduction of the Fair Work Act, and was renamed the Fair Work Commission by the *Fair Work Amendment Act 2012*.

2.17 When Fair Work Australia (now the FWC) was established in 2009, members of the AIRC were deemed to have been appointed to it as 'transitioned FWC Members.' The Transitional Act preserved the sections of the Workplace Relations Act which governed their appointment and also their removal by the Governor-General on the grounds of proved misbehaviour or incapacity.

2.18 Members appointed from 26 May 2009 onwards are 'non-transitioned FWC Members'.

2.19 Mr Heerey expressed doubt about the applicability of section 581A to transitioned FWC members.[12] However, he found that the President could still receive a complaint about such a member, and

> would further be entitled to communicate an opinion to the Minister bearing upon whether the Houses of Parliament should consider petitioning the Governor-General for removal of the former AIRC Member under the preserved provisions of s. 82 of the Workplace Relations Act.[13]

2.20 Similarly, Mr Heerey found that section 641A did not apply to transitioned members, but that under sections 61 and 64 of the Constitution, the Minister has the power to receive a complaint, to make relevant enquiries about it with the former AIRC Member and from any other relevant person, and 'on that basis, to form opinions about the matter.'[14]

2.21 Thus, the FWC finds itself in a position where complaint-handling mechanisms do not apply equally to all its members, but are instead determined by the date of their appointment.

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11 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016.

12 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016, pp. 47–48.

13 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016, p. 48.

14 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016, p. 48.

2.22 In addition to the problems identified above, there is currently no provision for an independent commission to investigate complaints against FWC members. This hampers the ability of the Houses of Parliament to gain the information needed to inform their decision about relaying a recommended course of action to the Governor-General. Conversely, with regard to Commonwealth judicial officers appointed under Chapter III of the Constitution, the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (Cth)* allows for the establishment of such a committee.[15]

2.23 To rectify this situation, Mr Heerey recommended that:

> the provisions of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (Cth)* should be extended to apply to termination proceedings against persons who are not judges but hold office subject only to termination by the Governor-General on addresses of both Houses of Parliament.[16]

2.24 Mr Heerey also recommended that:

> because of the uncertainty surrounding the applicability of sections 581A and 641A to former AIRC Members, there would be some utility in amending the present legislation to ensure (so far as is constitutionally possible) that these provisions apply to all Members of the FWC, irrespective of when they were appointed.[17]

Main provisions of the bill

Schedule 1 – repeal of four yearly reviews

2.25 Schedule 1 of the Bill would repeal the requirement for the FWC to conduct 4 yearly reviews of modern awards from the beginning of 1 January 2018. New clause 26 of Part 5 of Schedule 1 to the Fair Work Act would also provide for the finalisation of the current 4 yearly review process so that all modern awards will have been reviewed under the existing framework before the transition to the new process.

2.26 Section 157 of the Fair Work Act will be modified so that determinations to vary awards must be made by a Full Bench.[18] According to the Explanatory

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15 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016, p. 50.

16 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016, pp. 10–11; see also p. 50.

17 The Honourable Peter Heerey AM QC, *Report of Inquiry into Complaints About the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters*, March 2016, p. 5.

18 Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, Notes on Clauses, *Explanatory Memorandum*, p. 3.

Memorandum, retaining the review process under section 157 provides a residual framework for the FWC to make, vary and revoke modern awards to maintain a fair and relevant safety net.[19]

Schedule 2 – procedural requirements in enterprise bargaining

2.27 Schedule 2 to the Bill would make amendments to provide that an enterprise agreement may be approved despite minor procedural or technical errors, including in relation to the NERR. This amendment responds to recommendation 20.1 of the PC Report.[20]

Schedule 3 – processing complaints against FWC Members

2.28 Amendments made by Schedule 3 would implement the two recommendations of the Heerey Report discussed above. This would result in the ability to establish a parliamentary commission to investigate complaints against FWC members, and would ensure the powers of the minister and the Governor-General apply to all FWC members.[21]

19 Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, Statement of Compatibility with Human Rights, *Explanatory Memorandum*, p. ii.

20 Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, Notes on Clauses, *Explanatory Memorandum*, pp. 7–8.

21 Fair Work Amendment (Repeal of 4 Yearly Reviews and other Measures) Bill 2017, Notes on Clauses, *Explanatory Memorandum*, p. 9.

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

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

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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 Stewarts 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

Appendix 1

Submissions and additional information

Submissions

Submission Number	Submitter
1	Department of Employment
2	Professor Andrew Stewart
3	Australian Chamber of Commerce and Industry
4	Ai Group
5	Australian Council of Trade Unions
6	Master Electricians Australia
7	Pharmacy Guild of Australia
8	South Australian Wine Industry Association
9	Australian Manufacturing Workers' Union
10	National Farmers' Federation
11	National Road Transport Association
12	Queensland Law Society
13	Business Council of Australia
14	Fair Work Commission

Appendix 2

Public hearings

Parliament House, Canberra, 12 April 2017

Committee members in attendance: Senators McKenzie, Marshall and Cameron.

Witnesses

Council of Small Business Australia
Mr Peter Strong, Chief Executive Officer

Professor Andrew Stewart, private capacity

Australian Council of Trade Unions
Mr Trevor Clarke, Director, Legal and Industrial

Shop, Distributive and Allied Employees Association
Mr Gerard Dwyer, National Secretary

Franchise Council of Australia
The Hon Bruce Billson, Executive Chair
Mr Damian Paull, Chief Executive Officer
Mr Stephen Giles, Director

National Retailers Association
Ms Dominique Lamb, Chief Executive Officer

WEstjustice
Ms Tarni Perkal, Senior Solicitor Employment Project

Department of Employment
Ms Kelly Hoffmeister, A/g Chief Counsel, Workplace Relations Legal Group
Dr Alison Morehead, Group Manager, Workplace Relations Policy Group
Ms Jody Anderson, Branch Manager
Ms Rachel Volzke, Senior Executive Lawyer

Fair Work Ombudsman
Ms Natalie James, Fair Work Ombudsman
Mr Michael Campbell, Deputy Fair Work Ombudsman

Fair Work Commission
Ms Ailsa Carruthers, Acting General Manager
Mr Murray Furlong, Director Tribunal Services
Mr Brendan Hower, Manager, Member Support Team Tribunal Services

Sydney, New South Wales, 13 April 2017

Committee members in attendance: Senators McKenzie, Marshall, Cameron and Rhiannon.

Witnesses

Australian Chamber of Commerce and Industry
Ms Alana Matheson, Deputy Director Workplace Policy
Mr Dick Grozier, Associate Director Workplace Policy

Ai Group
Mr Stephen Smith, Head of National Workplace Relations Policy
Mr Brent Ferguson, National Manager, Workplace Relations Advocacy and Policy

Mr Gerard de Valence, private capacity

Australian Federation of Employers and Industries
Mr Garry Brack, Chief Executive Officer