



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 Fair Work Commission
12 May 2017

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

The Commission is Australia's national workplace relations tribunal. It is an independent body with the power to carry out a range of functions including:

- providing a safety net of minimum conditions, including minimum wages in awards;
- facilitating good faith bargaining and making enterprise agreements;
- dealing with applications in relation to unfair dismissal;
- regulating how industrial action is taken;
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases public tribunal hearings; and
- functions in connection with workplace determinations, equal remuneration, transfer of business, general workplace protections, right of entry and stand down.

The work of the Commission is carried out by Commission Members, overseen by the President, with the support of administrative staff in accordance with the *Fair Work Act 2009* (FW Act).

The Commission's role is to administer its jurisdiction in accordance with statute. The Commission does not enter the legal policy debate other than where technical changes may make the administration of the law simpler.

The Commission would like to bring to the Committee's attention the requirement for strict compliance by an employer with the prescribed form and content of the 'notice of employee representational rights' (NERR) issued pursuant to s.173 of the FW Act (see *Peabody* ([2014] FWCFB 2042), *Uniline Australia* ([2016] FWCFB 4969, *Shop, Distributive & Allied Employees Association v ALDI Foods Pty Limited* [2016] FCAFC 161). In essence, Members of the Commission cannot approve enterprise agreements if the NERR issued to employees by the employer did not exactly comply with the form and content set out in Schedule 2.1 to the *Fair Work Regulations 2009*.

The amendment in Schedule 2 of the Bill would provide Members of the Commission with some discretion to approve enterprise agreements despite minor or technical errors in relation to certain procedural requirements, including errors in relation the content or form of the NERR.

Fair Work Amendment (Notice of Employee Representational Rights) Regulations 2017

Commencing on 3 April 2017, the *Fair Work Amendment (Notice of Employee Representational Rights) Regulations 2017* (amending regulations) introduced changes to the prescribed content of the NERR. From 3 April 2017, all NERRs issued to employees are required to exactly comply with these new content requirements.

Prior to the commencement of the amending regulations, the Commission took the following steps to inform the public of the changes to the NERR:

- correspondence was sent to all federally registered organisations;
- two emails were sent to approximately 4,000 subscribers. The first was sent to inform subscribers that the changes were coming (sent 24 March 2017) and the second was sent to notify subscribers that the change had occurred (sent 3 April 2017);
- an email was sent to regular lodgers of enterprise agreement applications;
- a 'latest news item' and note were posted on the Commission's homepage of its website; and
- the Commission's Step-by-Step Guide and Notice of Employee Representational Rights Guide were updated.

Operational impact of the amending regulations

Enterprise agreement approval applications involving non-compliant NERRs have been an element of the system for some time, however, the incidence of non-compliant NERRs has increased since the commencement of the changes to the prescribed content made by the amending regulations.

The FW Act requires employers to issue a NERR a minimum of 21 days before a vote of employees covered by a proposed enterprise agreement can take place. As a result, the first date that the Commission could start receiving applications that required the NERR to comply with the new content requirements was on 25 April 2017 [21 clear days after 3 April 2017]. Of the applications received by the Commission where the NERR was issued on or after 3 April 2017, 31% contain a deficient NERR.

It is important to note that this analysis is based on a small population (5 out of 16 matters) given the short period of time that has elapsed since the amending regulations commenced. By way of context, of all applications received between 3 April 2017 - 11 May 2017 (which includes NERRs issued prior to and post 3 April 2017), 18% contain non-compliant NERRs.

In 2015-16, the Commission received 5,529 enterprise agreement applications.

Schedule 4 of the Bill provides that the new discretion to approve enterprise agreements despite minor or technical errors will only apply to applications made after the commencement of Schedule 2 to the Bill. This means that it is likely that all applications involving non-compliant NERRs made before the commencement date, including those referred to above, 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.

If the Bill instead provided for the new approval discretion to apply to applications made prior to the commencement of Schedule 2 to the Bill, this delay, inconvenience and expense might be avoided. Consequently, the Commission will hold applications that contain non-compliant NERRs in abeyance until Thursday 22 June 2017. If Schedule 2 of the Bill does not extend to current applications before the Commission that have deficient NERRs, the Commission will be required to apply strict compliance with the form and content of the NERR prescribed by the amending regulations.

It should be noted that holding these matters in abeyance will affect the Commission's timeliness for approving enterprise agreement applications.

The Commission appreciates the opportunity to provide a submission to this inquiry.