

# 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.<sup>1</sup>

### 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.<sup>2</sup>

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

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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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

### ***Procedural requirements during bargaining***

2.8 During the enterprise bargaining process, a number of procedural requirements have to be adhered to or satisfied.<sup>6</sup> 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.<sup>7</sup>

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*.<sup>8</sup> 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

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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).

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obliged by the Fair Work Act to reject the agreement. So, absurdly, the employer had to recommence the agreement process.<sup>9</sup>

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.<sup>10</sup>

### ***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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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.'<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

## **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.<sup>18</sup> 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.<sup>19</sup>

***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.<sup>20</sup>

***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.<sup>21</sup>

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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.