THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

FAIR WORK AMENDMENT (REPEAL OF 4 YEARLY REVIEWS AND OTHER MEASURES) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Hon Michaelia Cash)
FAIR WORK AMENDMENT (REPEAL OF 4 YEARLY REVIEWS AND OTHER MEASURES) BILL 2017

OUTLINE

The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 (the Bill) amends the *Fair Work Act 2009* (the Act) to respond to two recommendations of the Productivity Commission’s Final Report into the Workplace Relations Framework (the PC Report) and to respond to two recommendations of the Hon Peter Heerey AM, QC in his Report of Inquiry into Complaints about the Honourable Vice President Michael Lawler of the Fair Work Commission (FWC) and Related Matters (the Heerey Report).

The Bill will amend the Act to:

- respond, in part, to the PC Report recommendation 8.1 by repealing the requirement for the FWC to conduct 4 yearly reviews of modern awards from the beginning of 1 January 2018. Further amendments will ensure that the residual framework for the making, varying and revoking of modern awards continues to provide a balanced, fair and sensible safety net of terms and conditions of employment. Reviews that have been commenced but not concluded under the current 4 yearly review will be able to be finalised under the existing process;

- respond to PC Report recommendation 20.1 by enabling the FWC to overlook minor procedural or technical errors when approving an enterprise agreement, where those errors were not likely to have disadvantaged employees. This includes errors concerning the requirements relating to the Notice of Employee Representational Rights;

- respond to Mr Heerey’s recommendations by:
  - applying the complaint-handling powers of the Minister for Employment and the President of the FWC to FWC Members who formerly held office in the Australian Industrial Relations Commission (AIRC); and
  - applying the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (JMIPC Act) in relation to FWC Members.
FINANCIAL IMPACT STATEMENT

Nil
REGULATION IMPACT STATEMENT

The implementation of the two PC Report recommendations were certified as part of an independent review process undertaken by the Department of Employment for the PC Report. The PC Report is at http://www.pc.gov.au/inquiries/completed/workplace-relations#report.

The implementation of the two Heerey Report recommendations have been assessed by the Office of Best Practice Regulation (OBPR) as being minor with any applicable regulatory costs associated with these proposals excluded as they relate to non-compliance or enforcement.

The OBPR IDs for this proposal are 20684 and 21879.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 (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.

Overview of the Bill

The object of the Fair Work Act 2009 (the Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

This Bill amends the Act to respond to two recommendations of the Productivity Commission’s Final Report into the Workplace Relations Framework (the PC Report); and amends the Act and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (the Transitional Act) in response to two recommendations in the Report of Inquiry into Complaints about the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters (Heerey Report) concerning conduct of Fair Work Commission (FWC) Members.

The Bill’s amendments:

- respond, in part, to the PC Report recommendation 8.1 by repealing the requirement for the FWC to conduct 4 yearly reviews of modern awards from the beginning of 1 January 2018. Further amendments will ensure that the residual framework for the making, varying and revoking of modern awards continues to provide a balanced, fair and sensible safety net of terms and conditions of employment. Reviews that have been commenced but not concluded under the current 4 yearly review will be able to finalised under the existing process;

- respond to PC Report recommendation 20.1 by enabling the FWC to overlook minor procedural or technical errors when approving an enterprise agreement, where those errors were not likely to have disadvantaged employees. This includes errors concerning the requirements relating to the Notice of Employee Representational Rights; and

- respond to Mr Heerey’s recommendations by:
  - applying the complaint-handling powers of the Minister for Employment and the President of the FWC to FWC Members who formerly held office in the Australian Industrial Relations Commission (AIRC); and
  - applying the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (JMIPC Act) in relation to FWC Members.
Schedule 1 - Four yearly reviews of modern awards

Under Division 4 of Part 2-3 of the Act, 4 yearly reviews of modern awards were intended to be the principal mechanism by which modern awards would be reviewed to maintain a fair and relevant safety net of terms and conditions.

Schedule 1 to the Bill repeals the requirement for the FWC to conduct 4 yearly reviews of modern awards from the beginning of 1 January 2018. Further amendments ensure that the residual framework for the FWC to make, vary and revoke modern awards maintain a fair and relevant safety net.

These amendments engage the right to work under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to just and favourable conditions of work under Article 7 of the ICESCR and the right to a fair hearing under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

Schedule 2 – Procedural requirements in enterprise bargaining

Schedule 2 to the Bill makes amendments to provide that an enterprise agreement may be approved despite minor procedural or technical errors. It engages the right to collectively bargain under Article 4 of the International Labour Organization (ILO) Right to Organise and Collective Bargaining Convention 1949 (No 98).

Schedule 3 – FWC Members

Item 1 of Schedule 3 to the Bill inserts new section 641B into the Act to provide for the modified application of the JMIPC Act to FWC Members. This will enable the Parliament to establish a Commission to investigate and report on alleged misbehaviour or incapacity of an FWC Member, with a view to consider whether to request the Governor-General to:

- remove a ‘transitioned FWC Member’ (i.e. an FWC Member formerly of the AIRC) from office under section 82 or 86 of the Workplace Relations Act 1996 (the WR Act), as continued in force by item 2 of Schedule 18 to the Transitional Act, or
- terminate the appointment of a ‘non-transitioned FWC Member’ under section 641 of the Act.

New subsection 641B(2) applies the JMIPC Act as if that Act were amended so that:

- references to ‘FWC Member’ were substituted for references to ‘Commonwealth judicial officer’ in relevant provisions of the JMIPC Act
- references to sections 82 or 86 of the WR Act or to section 641 of the Act were substituted for references to section 72(ii) of the Constitution (which deals with the removal of judges from office)
- certain terms (e.g. meanings of ‘proved misbehaviour’ or ‘incapacity’ and other relevant terms in the Fair Work legislation) were included in section 7 of the JMIPC Act (which provides defined terms for that Act), and
• a reference to an investigation of a complaint under the Act (e.g. if the Minister or the FWC President decides to handle a complaint about an FWC Member) were included in the types of investigation mentioned in section 19 of the JMIPC Act.

The modified application of the JMIPC Act to FWC Members effected by item 1 of Schedule 3 engages the right to a fair trial and the right to privacy and reputation under Articles 14 and 17 respectively of the ICCPR, and the right not to be unjustly deprived of work under Article 6 of the ICESCR.

Human rights implications

The Bill engages the following rights:

• the right to work and not to be unjustly deprived of work under Article 6(1) of the ICESCR;

• the right to just and favourable conditions of work under Article 7 of the ICESCR;

• the right to a fair trial and fair hearing under Article 14 of the ICCPR; and,

• the right to privacy and reputation under Article 17 of the ICCPR.

The definition of ‘human rights’ in the Human Rights (Parliamentary Scrutiny) Act 2011 relates to the core seven United Nations human rights treaties. However, the content of the rights to work and rights in work in the ICESCR can usefully be informed by specific obligations in treaties of the ILO, such as the Right to Organise and Collective Bargaining Convention 1949 (No. 98), that protects the right of employees to collectively bargain for terms and conditions of employment.

Right to work and rights in work

Article 6(1) of the ICESCR recognises the right to work and obliges States Parties to take appropriate steps to safeguard this right. The United Nations Committee on Economic Social and Cultural Rights has stated that the right to work in Article 6(1) of the ICESCR encompasses the need to provide the worker with just and favourable conditions of work.

Article 7 of the ICESCR requires that States Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Repeal of 4 yearly reviews of modern awards

Modern awards, in addition to the National Employment Standards under the Act, deal with a number of matters to provide a fair and relevant safety net of employment terms and conditions. Modern awards provide for a range of protections for employees, including:

• fair wages in modern award minimum wages;

• rest periods, leave, and arrangements for when work is performed;
• maximum work hours, as well as allowances, penalty rates and overtime; and

• the capacity for casual employees to convert to permanent status in specified circumstances.

Under Division 4 of Part 2-3 of the Act, 4 yearly reviews of modern awards were intended to be the principal mechanism by which modern awards would be reviewed to maintain a fair and relevant safety net of terms and conditions.

Recommendation 8.1 of the PC Report is, in part, to repeal the requirement for the FWC to conduct 4 yearly reviews. The PC Report notes that in practice the 4 yearly review placed substantial demands on parties and the process does not meet the Act’s objective to create a simple, easy to understand, sustainable award system. The 4 yearly review mechanism is too resource intensive for both the FWC as well as employer and employee organisations taking part in the review. The PC Report notes that while the FWC is streamlining the review process, reform is required.

Schedule 1 to the Bill repeals the requirement for the FWC to conduct 4 yearly reviews of modern awards from 1 January 2018. For a review of a modern award that has been commenced but not completed by that time, the Bill provides a transitional measure preserving the operation of the current provisions to enable the review to be finalised.

Outside of the 4 yearly review process, Division 5 of Part 2-3 of the Act currently provides that the FWC is able to make, vary and revoke modern awards under section 157. The effect of sections 134, 138 and 157 of the Act is that the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net or terms and conditions in accordance with the modern awards objective.

Relevantly, a modern award may include terms that it is permitted to include and must include terms that it is required to include, to the extent necessary to achieve the modern awards objective. The FWC must, among other considerations, relevantly take into account:

• relative living standards and the needs of the low paid;

• the need to promote social inclusion through increased workforce participation;

• the need to promote flexible work practices;

• the need to provide additional remuneration in specified circumstances, including for employees working public holidays;

• the principle of equal remuneration for work of equal or comparable value;

• the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia.

The amendments maintain this effective framework for meeting the modern awards objective.

After the repeal of the requirement to conduct 4 yearly reviews, the framework that remains for making, varying and revoking modern awards under Division 5 of Part 2-3 of the Act will continue to require that the FWC is satisfied that making a determination is necessary to achieve the modern awards objective. This allows the FWC to make a determination where
emerging social and economic matters demonstrate that change is necessary. For example, in exercising its functions under Part 2-3, the FWC is required to take into account a range of criteria, such as the need to promote social inclusion through increased workforce participation. This requires the FWC to consider the changing labour market and the manner in which work is evolving. It must also promote flexible modern work practices and the efficient and productive performance of work, which again requires the FWC to look beyond the way work has been performed historically and to make sure the safety net of terms and conditions continues to meet community expectations.

Importantly, the Bill retains the review mechanism for the FWC to vary modern awards under section 161 of the Act. Under this section, the FWC may vary a modern award on referral by the Australian Human Rights Commission under section 46PW of the *Australian Human Rights Commission Act 1986* (dealing with discriminatory industrial instruments). If the FWC is satisfied that a modern award reviewed requires a person to do an act that would be unlawful under Part 4 of the *Age Discrimination Act 2004*, Part 2 of the *Disability Discrimination Act 1992*, or Part II of the *Sex Discrimination Act 1984*; the FWC must make a determination to vary the modern award to remove the discriminatory term.

Finally, in effect, the Bill reduces the regulatory burden for the FWC, as well as employer and employee organisations, as there will no longer be a requirement for regular, systematic and prolonged reviews. The residual framework for the making, varying and revoking of modern award will not reduce the requirements for modern awards to provide a sensible, fair and relevant safety net.

**FWC Members**

The UN Committee on Economic Social and Cultural Rights has stated that the right under Article 6(1) of ICESCR encompasses the right not to be unjustly deprived of work, requiring security against unfair dismissal.

The modified application of the JMIPC Act to FWC Members does not enable a Commission to remove or dismiss an FWC Member. FWC Members have security of tenure. Relevant provisions of the Fair Work legislation provide that FWC Members may only be removed by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

A Commission’s role is limited to inquiring into allegations specified in a resolution of the Houses of the Parliament and gathering information and evidence so the Parliament can be well informed in its consideration of the removal of an FWC Member. The modified application of the JMIPC Act would enable this process to occur in accordance with clear and transparent processes.

**Right to a fair hearing and fair trial**

Article 14 of the ICCPR states that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

**Dismissing modern award applications**

The FWC is an independent tribunal, which exercises its powers in a fair and just manner, including by applying the principles of procedural fairness.
Currently, section 587 of the Act provides the FWC with a general discretion to dismiss an application if it is not made in accordance with the Act; is frivolous or vexatious; or has no reasonable prospects of success. However, it is intended that the residual model for making, varying and revoking modern awards should not result in multiple applications that relate to the specific matters that the FWC may have recently dealt through the current 4 yearly review process.

New clause 27 of Part 5 of Schedule 1 to the Act inserts a temporary and limited transitional dismissal power to complement the existing section 587 mechanism. This new provision provides the FWC with flexibility to dismiss modern award applications under section 158, where the FWC is satisfied that the specific matters in relation to which the application was made, were or are being dealt with in the 4 yearly review. This limited dismissal power will sunset two years after the commencement of Schedule 1.

The circumstances in which the discretionary power would be available are proportionate as they deal with situations where the specific matters of the application were or are being specifically dealt with in the 4 yearly review.

In the context of the recent protracted and comprehensive 4 yearly review of modern awards by the FWC, it would be contrary to the objectives of a simple, easy to understand, stable and sustainable modern awards system to allow parties to re-apply for determinations in regards to matters recently dealt with by the FWC in that review.

It should further be noted that appeal rights are not impacted by these amendments.

FWC Members

Article 14 of the ICCPR protects the right to a fair trial and fair hearing. The main factor when considering ‘fairness’ is whether both parties have been afforded a reasonable opportunity to present their case, including the presentation of evidence, under conditions that do not put either party at a substantial disadvantage.

A Parliamentary Commission may be established under the JMIPC Act (in its modified application to FWC Members) to investigate specified allegations of misbehaviour or incapacity of a specified FWC Member so the Parliament can be well informed when considering whether to request the Governor-General to terminate the Member’s appointment or remove him or her from office. The character of a Commission’s role would be investigative, rather than adjudicative. A Commission would not determine whether facts are proved or make recommendations to the Parliament about the removal of an FWC Member from office. Under relevant provisions of the Fair Work legislation, it is for the Houses of Parliament to consider whether conduct of an FWC Member amounts to proved misbehaviour or incapacity.

The JMIPC Act positively advances the right to a fair hearing by a competent, independent and impartial body established by law. As modified in its application to FWC Members, the JMIPC Act:

- provides for public hearings, while allowing a Commission to balance public interests with the privacy and reputation of an FWC Member on a case by case basis; and
enables an FWC Member who is the subject of an investigation to attend and participate in hearings.

The JMIPC Act provides appropriate protections for those who are connected with a Commission (such as Members of the Commission, and witnesses and lawyers who appear at a hearing of a Commission) similar to those applying to other Parliamentary committees so that information provided to a Commission would not prejudice a person’s right to a fair trial in any subsequent criminal proceedings.

In particular, subsection 16(3) of the Parliamentary Privileges Act 1987 is taken to apply to the proceedings, report and evidence of a Commission. The application of subsection 16(3) of the Parliamentary Privileges Act 1987 would operate to prevent reliance on any conclusions in a Commission report in any subsequent criminal proceedings. This provides adequate protection for FWC Members who may be liable to prosecution based on the findings in a Commission report. It upholds the right to be presumed innocent until proved guilty according to law.

The JMIPC Act provides that a person is not excused from producing documents or answering questions relevant to a Commission’s investigation on the ground that it might tend to incriminate them. While this might limit rights of a person under Article 14(3)(g) of the ICCPR not to be compelled to testify against himself or herself or to confess guilt, the limitation is reasonable, necessary and proportionate. The Parliament’s consideration of whether an FWC Member’s tenure should be ended for proved misbehaviour or incapacity supports public confidence in the independence and impartiality of the FWC.

The treatment of self-incrimination is appropriate to facilitate the ability of a Commission to obtain relevant evidence for the investigation, so that it may provide a comprehensive report and assist the Parliament in its consideration of removal of an FWC Member. The JMIPC Act provides for use and derivative use protections where self-incriminatory information is provided to a Commission. These protections restrict the use of self-incriminatory information in later court proceedings or to gather evidence against a person who has disclosed self-incriminatory information.

**Right to privacy and reputation**

*FWC Members*

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence, and protects a person’s honour and reputation from unlawful attacks. While the JMIPC Act, as applied to FWC Members, may limit aspects of these rights in certain circumstances, the limitations are reasonable, necessary and proportionate.

A Commission established pursuant to the application of the JMIPC Act to FWC Members may deal with personal or sensitive information for the purposes of investigating specified allegations of misbehaviour or incapacity of an FWC Member. The right to privacy and reputation is important for two classes of people affected by the JMIPC Act:

- the FWC Member who is the subject of a Commission’s investigation, and
• a person who may give evidence or otherwise be involved in a Commission’s investigation.

The JMIPC Act as applied to FWC Members provides for clear and transparent powers and processes for investigation by a Commission, enabling it to appropriately assess rights to privacy and reputation on a case by case basis, and balance competing public interests in the removal of unfit FWC Members where necessary. Specific protections contained in the JMIPC Act include the ability of a Commission to hold hearings in private, offences for unauthorised publication of information, and restrictions on publication of private information in a Commission’s report.

The JMIPC Act empowers a Commission, or authorised Member of a Commission, to issue a search warrant in circumstances where:

• a Commission has reasonable grounds for suspecting that there may be, within 24 hours, documents or things connected with the matter a Commission is investigating, and

• that if a notice were given for the documents or things, the documents or things might be concealed, lost, mutilated or destroyed.

It is appropriate to confer investigative and administrative functions associated with a Commission on the Commission, rather than serving judges, given the special nature of its role investigating allegations about judicial misbehaviour or incapacity (in addition to the investigation of allegations about FWC Members under the amendments made by this Bill).

A Commission’s role is limited to investigating an allegation of misbehaviour or incapacity against an FWC Member specified through a resolution of the Parliament. This limits the scope of the issue and execution of search warrants on a person’s family or home.

A Commission is required to keep a written record of the reasons for issuing a search warrant. This promotes transparency and accountability in the process of issuing search warrants. These reasons will become part of the records of a Commission, which will be given to a House of the Parliament where no longer needed.

Right to organise and collective bargaining

Article 4 of the ILO Right to Organise and Collective Bargaining Convention 1949 (No 98) protects the right of employees to collectively bargain for terms and conditions of employment. It requires States Parties to (among other things) take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Procedural requirements in enterprise bargaining

The amendments made by Schedule 2 to the Bill engage the right to collectively bargain by providing that an enterprise agreement may be approved despite minor procedural or technical errors in relation to certain procedural requirements in enterprise bargaining. The FWC must be satisfied that the employees covered by the agreement were not likely to have been disadvantaged by the errors.
The PC Report noted that ‘[w]hile there are often good reasons for having procedural requirements (for example, to prevent a party engaging in potentially misleading conduct during the approval process) substance rather than form should prevail’ (p 663).

This measure promotes collective bargaining because it enables the FWC to approve enterprise agreements that it would previously have been required to reject simply because of a minor procedural or technical error.

**Conclusion**

The amendments to the Act are compatible with human rights because they advance the protection of human rights. To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.

The JMIPC Act, as extended in its application to FWC Members by Schedule 3 to the Bill, is compatible with human rights because it advances the protection of human rights, in particular for right to a fair trial, the right to privacy and reputation, and the right not to be unjustly deprived of work. To the extent that it may also limit human rights, those limitations are reasonable and proportionate.

**Minister for Employment, Senator the Hon Michaelia Cash**
NOTES ON CLAUSES

In these notes on clauses, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>Act</td>
<td>Fair Work Act 2009</td>
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<tr>
<td>AIRC</td>
<td>Australian Industrial Relations Commission</td>
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<tr>
<td>Bill</td>
<td>Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017</td>
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<tr>
<td>FWC</td>
<td>Fair Work Commission</td>
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<tr>
<td>Heerey Report</td>
<td>Hon Peter Heerey AM QC’s Report of Inquiry into Complaints about the Honourable Vice President Michael Lawler of the Fair Work Commission and Related Matters</td>
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<tr>
<td>JMIPC Act</td>
<td>Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012</td>
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<tr>
<td>Notice</td>
<td>Notice of Employee Representational Rights</td>
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<tr>
<td>PC Report</td>
<td>Productivity Commission’s Final Report into the Workplace Relations Framework</td>
</tr>
<tr>
<td>WR Act</td>
<td>Workplace Relations Act 1996</td>
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Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence.

Clause 3 – Schedules

3. Clause 3 of the Bill provides that legislation that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.
SCHEDULE 1 – FOUR YEARLY REVIEWS OF MODERN AWARDS

Overview

4. Under Division 4 of Part 2-3 of the Act, 4 yearly reviews of modern awards were the principal mechanism by which modern awards would be reviewed to maintain a fair and relevant safety net of terms and conditions.

5. Recommendation 8.1 of the PC Report is, in part, to repeal the requirement for the FWC to conduct 4 yearly reviews. The PC Report notes that in practice, the 4 yearly reviews placed substantial demands on parties and the process does not meet the Act’s objective to create a simple, easy to understand and sustainable award system. The 4 yearly review mechanism is too resource intensive for both the FWC as well as employer and employee organisations taking part in the review. The PC Report notes that while the FWC is streamlining the review process, reform is required.

6. Schedule 1 to the Bill repeals the requirement for the FWC to conduct 4 yearly reviews of modern awards from the beginning of 1 January 2018. Further amendments ensure that the residual framework for the making, varying and revoking of modern awards under Division 5 of Part 2-3 of the Act continues to require that the FWC is satisfied that making a determination is necessary to achieve the modern awards objective.

7. This framework allows changes to a modern award where emerging social and economic matters demonstrate that change is necessary. For example, in exercising its modern award functions, the FWC is required to take into account a range of criteria, such as the need to promote social inclusion through increased workforce participation. This requires the FWC to consider the changing labour market and the manner in which work is evolving. It must also promote flexible modern work practices and the efficient and productive performance of work, which again requires the FWC to look beyond the way work has been performed historically and to make sure the safety net of terms and conditions continues to meet community expectations.

Fair Work Act 2009

Item 1 – Section 12 (definition of 4 yearly review of modern awards)

8. Item 1 repeals the definition of 4 yearly review of modern awards in section 12 of the Act. This is consequential to the repeal of Division 4 of Part 2-3 of the Act in item 8.

Item 2 – Section 12 (definition of work value reasons)

9. Item 2 amends the definition of work value reasons in section 12 of the Act. This is consequential to the repeal of Division 4 of Part 2-3 of the Act and the amendment to section 157 (see items 8 and 13).

Item 3 – Section 132 (paragraph relating to Division 4)

Item 4 – Section 132 (paragraph relating to Division 5)

10. Section 132 of the Act provides a guide to the operation of Part 2-3 of the Act to aid the reader. Item 3 amends section 132 to remove the reference to the operation of 4 yearly reviews of modern awards under Division 4 of Part 2-3.
11. Item 4 amends section 132 to remove a reference to FWC’s modern award powers outside of the operation of 4 yearly reviews of modern awards.

12. These items are consequential to the repeal of Division 4 of Part 2-3 of the Act in item 8.

**Item 5 – Paragraph 135(1)(a)**

13. Item 5 makes an amendment to paragraph 135(1)(a) to remove a reference to subsection 156(3) and is consequential to the repeal of Division 4 of Part 2-3 of the Act in item 8.

**Item 6 – Paragraph 141(2)(b)**

**Item 7 – Subsections 141(3) and (5)**

14. Items 6 and 7 make amendments to section 141 and are consequential to the repeal of Division 4 of Part 2-3 of the Act in item 8.

**Item 8 – Division 4 of Part 2-3**

15. Division 4 of Part 2-3 (i.e. section 156 of the Act) provides for the FWC to conduct 4 yearly reviews of modern awards. Item 8 repeals the Division.

**Item 9 – Division 5 of Part 2-3 (heading)**

16. Division 5 of Part 2-3 provides for the FWC to exercise modern award powers outside of 4 yearly reviews and annual wage reviews. Item 9 amends this heading, consequential to the repeal of the operation of the 4 yearly reviews of modern awards in item 8.

**Item 10 – Subsection 157(1)**

17. Item 10 amends subsection 157(1), to remove the reference to the operation of 4 yearly reviews of modern awards, consequential to item 8.

**Item 11 – Subsection 157(1) (note 1)**

18. Item 11 repeals Note 1 of subsection 157(1) and substitutes a new Note 1 which provides that generally the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. New Note 1 is consequential to the amendments to section 616 in items 17 and 18.

19. Section 158 sets out who may apply to the FWC to make, vary or revoke a modern award under section 157. The FWC also has a broad power to inform itself in relation to modern award matters under section 590, including by inviting submissions from any persons likely to be interested or affected by a proposed determination under section 157. In practice, the FWC has invited submissions from all parties interested in the matter in the conduct of 4 yearly reviews under section 156. It is expected that under amended section 157, the FWC will similarly continue to invite such submissions.
Item 12 – Paragraph 157(2)(b)

20. Subsection 157(2) provides for the varying of modern award minimum wages outside of 4 yearly reviews of modern awards and annual wage reviews. Item 12 amends paragraph 157(2)(b) to remove a reference to the operation of 4 yearly reviews of modern awards. This is consequential to item 8.

Item 13 – After subsection 157(2)

21. Item 13 inserts a new subsection 157(2A) providing a definition of work value reasons. This definition is identical to that which was contained in current subsection 156(4), which by operation of the definition in section 12 applies to other provisions in the Act. As subsection 156(4) is to be repealed by item 8, this consequential change is required.

Item 14 – Paragraph 582(4)(a)

Item 15 – After paragraph 582(4)(aa)

Item 16 – At the end of subsection 582(4)

22. Section 582 provides that the President is able to give directions in specified circumstances. Paragraph 582(4)(a) relates to the President’s power to give directions about the conduct of 4 yearly reviews of modern awards under Division 4 of Part 2-3. Item 14 makes a consequential amendment to repeal paragraph 582(4)(a), given the repeal of Division 4 of Part 2-3 by item 8.

23. Item 15 inserts a new paragraph 582(4)(ab) into the Act. It provides that the President may give directions about the exercise of modern award powers under Division 5 of Part 2-3.

24. Item 16 inserts a new paragraph 582(4)(e) into the Act. It provides that the President may direct a single FWC Member to perform a function or exercise a power in relation to the variation of a modern award. This provision should be read in conjunction with section 616, as amended by items 17 and 18.

Item 17 – Subsections 616(2) and (3)

Item 18 – After subsection 616(3A)

25. Section 612 provides that a function or power of the FWC may be exercised by a single FWC Member, as directed by the President, except as provided for in Subdivision A of Division 4 of Part 5-1 of the Act. Currently, section 616 (within this Subdivision) sets out certain functions of the FWC that must be performed by a Full Bench.

26. Existing subsection 616(1) provides that a modern award under Part 2-3 must be made by a Full Bench. The Bill makes no change to this provision.

27. A 4 yearly review of modern awards must be conducted by a Full Bench under subsection 616(2); and a determination that varies or revokes a modern award in a 4 yearly review must be made by a Full Bench under subsection 616(3).
28. Item 17 repeals subsections 616(2) and (3), and are consequential to the repeal of Division 4 of Part 2-3 of the Act in item 8.

29. Item 18 inserts new subsections 616(3B), (3C) and (3D) into the Act.

30. New subsection 616(3B) provides that any determination that revokes a modern award under Division 5 of Part 2-3 of the Act must be made by a Full Bench. This is a change from the existing framework under which a single FWC Member could revoke a modern award and reflects the fact that the residual framework under Division 5 of Part 2-3 of the Act will now be the principal mechanism for the making, varying and revoking modern awards.

31. New subsection 616(3C) provides a default rule that a determination that varies a modern award under Division 5 of Part 2-3 must be made by a Full Bench. This is a change from the existing framework under Division 5 of Part 2-3 under which a single FWC Member could vary a modern award. In the absence of the 4 yearly review mechanism, where reviews were conducted by a Full Bench, it is appropriate for a Full Bench to consider such matters before making any determinations to vary modern awards.

32. However, some modern award variations may relate to routine matters where it would be appropriate for a single FWC Member to perform that function. Therefore, the President will have discretion to direct a single FWC Member to conduct a variation matter for a modern award in the following circumstances.

33. First, consistent with the current framework, under new paragraph 616(3D)(a) the President may direct a single FWC Member to perform a function or exercise a power relating to a determination under:

- section 159 (variation to update or omit name of employer, organisation or outworker entity);
- section 160 (variation to remove ambiguity, uncertainty or correct error); or
- section 161 (variation on referral by Australian Human Rights Commission).

34. Second, under new paragraph 616(3D)(b) the President may direct a single FWC Member to perform a function or exercise a power relating to a variation under new section 157 where the President considers it appropriate to do so in specified circumstances. The President may exercise this discretion in relation to:

- a single award; or
- 2 or more awards relating to the same industry or occupation.

35. For example, an application may be made with the support of all stakeholders to repeal redundant references from a single modern award. The President may consider it appropriate in those circumstances to direct a single FWC Member to deal with the matter.

36. By way of further example, an application may be made to amend a term in one or more modern awards relating to the building and construction industry, but not other
industries. Again, the President may consider it appropriate to direct a single FWC Member to deal with this industry-specific matter.

37. Where applications to vary modern awards may relate to more significant or contentious matters, or may potentially present a ‘test case’ that could emerge as a common issue across awards, the default position for Full Bench consideration will prevail.

38. Where the President directs a single FWC Member to deal with a variation matter for a modern award, appeal and review rights from the single Member decision to the Full Bench will continue to be available in the usual manner.
Amendments ~ Schedule 2

SCHEDULE 2 – PROCEDURAL REQUIREMENTS IN ENTERPRISE BARGAINING

Overview

39. Part 2-4 of the Act sets out the framework for the making of enterprise agreements. The PC Report considered the operation of the enterprise bargaining framework and, relevantly, the purpose and effect of the statutory requirements that must be met before the FWC can approve an enterprise agreement.

40. The PC Report recommended that the FWC should be able to overlook minor procedural or technical errors when approving an enterprise agreement, if it is satisfied that employees were not likely to have been disadvantaged by those errors. The PC Report also recommended that this be extended to the requirements relating to the Notice given under subsection 173(1) (Recommendation 20.1).

41. Schedule 2 to the Bill responds to Recommendation 20.1.

Fair Work Act 2009

Item 1 – Section 188

42. This item amends section 188 by inserting new subsection 188(1), consequential on the amendment in item 2 of Schedule 2. This is a technical amendment to number the subsection.

Item 2 – At the end of section 188

43. Section 188 sets out a list of matters for the FWC to consider when determining whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

44. This item inserts new subsection 188(2), which provides that an enterprise agreement will also have been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that the agreement would have been genuinely agreed to under subsection 188(1), but for any minor procedural or technical errors made in relation to:

- the requirements referred to in paragraph 188(1)(a) or (b), or
- the Notice.

45. The FWC must also be satisfied that the employees covered by the agreement were not likely to have been disadvantaged by the errors (paragraph 188(2)(b)).

46. The effect of this amendment is that an enterprise agreement will have been genuinely agreed to despite any minor procedural or technical error if the employees (as a whole) were not likely to have been disadvantaged by those errors.

47. Examples of minor procedural or technical errors could include (without limitation):

- employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just
after the start of the access period rather than by the start of the access period (subsection 180(3));

- employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice was given, rather than at least 21 days after the day on which the last Notice was given (subsection 181(2));

- the inclusion of the employer’s company logo or letterhead on a Notice;

- the inclusion of additional materials that are stapled with a Notice; or

- minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than ‘contact your employer’).

48. When considering whether the employees were not likely to have been disadvantaged by an error, the FWC could take into account, for example, the effect of the error and the circumstances of the error.

49. This amendment responds to PC Report recommendation 20.1.
SCHEDULE 3 – FWC MEMBERS

Overview

50. The JMIPC Act enables the Parliament to establish commissions of inquiry to inform its consideration of any case for the removal from office of Commonwealth judges by investigating and reporting on allegations of misbehaviour or incapacity. Like Commonwealth judges, the tenure of FWC Members can only be ended because of proved misbehaviour or incapacity by the Governor-General at the request of both Houses of Parliament. However, the JMIPC Act presently only operates in relation to Commonwealth judicial officers, so there is no formal mechanism to inform the Parliament’s consideration of allegations of misbehaviour or incapacity against FWC Members. Additionally, there is some doubt about whether the complaint handling powers of the Minister and the FWC President in the Fair Work Act apply to FWC Members who formerly held office in the AIRC.

51. Amendments made by Schedule 3 to the Bill implement recommendations in the Heerey Report to:

- apply the JMIPC Act in relation to termination proceedings against FWC Members, and
- ensure that the powers of the Minister for Employment and the FWC President to handle complaints apply to all FWC Members, irrespective of when they were appointed.

Fair Work Act 2009

Item 1 – After section 641A

52. Item 1 of Schedule 3 to the Bill inserts new section 641B to provide for the modified application of the JMIPC Act to FWC Members.

53. The JMIPC Act enables the Parliament to establish commissions of inquiry comprised of members nominated by the Prime Minister and appointed by both Houses of Parliament. The JMIPC Act establishes a framework for the conduct of investigations by a Commission, with powers to hold hearings and take evidence on oath, require the production of documents, obligations to observe natural justice requirements and with the privileges and immunities of the Crown.

54. A Commission does not determine whether facts are proved or make recommendations to the Parliament about the removal of a judge. A Commission only considers the threshold question of whether there is evidence of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity, and reports on these matters to the Parliament. It is for the Houses of Parliament to determine whether they regard particular conduct as proved misbehaviour or incapacity.

55. New section 641B modifies the JMIPC Act so the Parliament can establish a Commission to investigate and report on alleged misbehaviour or incapacity of an FWC Member, with a view to consider whether to request the Governor-General to:
- remove a ‘transitioned FWC Member’ from office under section 82 (in the case of a Presidential Member) or section 86 (in the case of a Commissioner) of the WR Act, as continued in force by item 2 of Schedule 18 to the Transitional Act, or

- terminate the appointment of a ‘non-transitioned FWC Member’ under section 641 of the Act.

56. Legislative provisions governing the circumstances in which appointments of FWC Members may come to an end are different, depending on the time of the Member’s appointment. When Fair Work Australia (now the FWC) was established by the Act in 2009, Members of the AIRC were deemed to have been appointed to the new institution (see item 1 of Schedule 18 to the Transitional Act). These are ‘transitioned FWC Members’, described in table item 11 of new subsection 641B(2)). Their terms and conditions of appointment, including in relation to removal from office for proved misbehaviour or incapacity under sections 82 or 86 of the WR Act, were preserved by item 2 of Schedule 18 to the Transitional Act. By contrast, section 641 of the Act governs the termination of appointment of FWC Members appointed from 26 May 2009 onwards (‘non-transitioned FWC Members’ – see table item 9 of new subsection 641B(2)) on the basis of proved misbehaviour or inability to perform duties because of physical or mental incapacity.

57. New subsection 641B(2) applies the JMIPC Act as if that Act were amended so that:

- references to ‘FWC Member’ were substituted for references to ‘Commonwealth judicial officer’ in relevant provisions of the JMIPC Act;

- references to sections 82 or 86 of the WR Act (as the case may be) or to section 641 of the Act were substituted for references to section 72(ii) of the Constitution (which deals with the removal of judges from office for proved misbehaviour or incapacity);

- certain terms (e.g. meanings of ‘proved misbehaviour’ or ‘incapacity’ and other relevant terms in the Fair Work Act or WR Act) were included in section 7 of the JMIPC Act (which provides defined terms for that Act); and

- a reference to an investigation of a complaint under the Act (e.g. if the Minister or the FWC President decides to handle a complaint about an FWC Member) were included in the types of investigation mentioned in section 19 of the JMIPC Act.

58. Certain provisions of the JMIPC Act exempt Commonwealth judicial officers from requirements to attend hearings of a Commission, give evidence under oath, produce documents or comply with search warrants. These immunities are consistent with requirements for the independence of judges under Chapter III of the Constitution. While those immunities operate in relation to an FWC Member who is also a Commonwealth judicial officer (such as the FWC President, who holds a concurrent appointment as a Justice of the Federal Court of Australia), they do not operate in relation to other FWC Members.

59. Further detail about the provisions of the JMIPC Act can be found in the Explanatory Memorandum to the Bill for that Act on the Federal Register of Legislation.

Item 2 – At the end of Part 1 of Schedule 18

60. Under Part 5-1 of the Act:

- the FWC President may handle a complaint about an FWC Member’s performance of their duties and take measures the President believes are reasonably necessary to maintain public confidence in the FWC (subsection 581A(1)), and may refer a substantiated complaint to the Minister if the President thinks it warrants Parliament’s consideration (subsection 581A(4)), and

- the Minister may handle a complaint about an FWC Member’s performance of their duties for the purpose of considering whether each House of Parliament should consider asking the Governor-General to terminate the Member’s appointment for proved misbehaviour or incapacity, or to advise the Governor-General to suspend the Member (other than the President) for misbehaviour or incapacity (section 641A).

61. The Heerey Report noted that there was some uncertainty about whether these complaint handling provisions applied to FWC Members who formerly held office in the AIRC (essentially because of their interaction with the preservation of WR Act terms and conditions of appointment in respect of those Members by item 2 of Schedule 18 to the Transitional Act). Mr Heerey recommended amendments to ensure the application of these provisions to all FWC Members.

62. Item 2 of Schedule 3 to the Bill inserts new item 6A to Schedule 18 to the Transitional Act. This provision ensures that the powers of the FWC President and the Minister under sections 581A and 641A of the Act (respectively) apply in relation to a complaint made about an FWC Member who formerly held office in the AIRC.

63. Sections 581A and s 641A both concern circumstances in which a complaint may raise questions about whether an FWC Member’s appointment may be terminated under section 641 because of proved misbehaviour or inability to perform duties because of physical or mental incapacity. By contrast, sections 82 and 86 of the WR Act (preserved by item 2 of Schedule 18 to the Transitional Act in relation to AIRC Members who transferred to the FWC) provide for the ‘removal from office’ of such Members on the grounds of proved misbehaviour or incapacity. This difference in terminology raises some doubt about the applicability of the Minister’s and President’s formal complaint-handling powers to those Members.

64. New item 6A of Schedule 18 to the Transitional Act applies sections 581A and 641A as if they were amended to refer to provisions of the WR Act (preserved by item 2 of Schedule 18 to the Transitional Act in relation to AIRC Members who transferred to the FWC) that govern the removal from office of a Presidential Member (section 82) or a Commissioner (section 86). Amending Schedule 18 in this way ensures that the terms and conditions of appointment for and other arrangements pertaining to former AIRC Members are dealt with together.

65. A complaint may be made before or after the commencement of the provision, in relation to a Member’s performance before or after the commencement date (new subitem 6A(4)).
SCHEDULE 4 – APPLICATION AND TRANSITIONAL PROVISIONS

Overview

66. Schedule 4 to the Bill provides for application and transitional provisions in relation to the amendments made by Schedules 1 to 3 to the Bill.

Fair Work Act 2009

Item 1 – In the appropriate position in Schedule 1

67. Item 1 inserts a Part 5 into Schedule 1 to the Act.

Part 5 – Amendments made by the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2017

Division 1 - General

25 - Definitions

68. New clause 25 of Division 1 of Part 5 of Schedule 1 provides for definitions for the purposes of the amendments made by Schedule 1 to this Bill. New clause 25 inserts four definitions.

69. The term 4 yearly review of modern awards is defined by its current meaning, immediately before the commencement of Schedule 1 to the amending Act.

70. The term amended Act refers to the Act, as amended by the amending Act.

71. The term amending Act refers to the Bill, once passed.

72. The term Schedule 1 commencement day is defined as day on which Schedule 1 to the amending Act (i.e. 1 January 2018) commences.

Division 2 – Amendments made by Schedule 1 to the amending Act

26 – Incomplete 4 yearly review of modern award

73. The 4 yearly review of modern awards mechanism in Division 4 of Part 2-3 will be repealed from the start of 1 January 2018 by item 8 of Schedule 1 to the Bill. This will ensure that the next phase of the 4 yearly review, currently scheduled to commence on 1 January 2018 will not commence.

74. New clause 26 provides a transitional provision in the event that the FWC has active 4 yearly review matters on foot as at the end of 31 December 2017 (i.e. matters that have commenced but have not yet been concluded). This clause provides that Division 4 of Part 2-3 and necessary consequential provisions as in force at the repeal time (i.e. 1 January 2018) will continue to apply in relation to matters commenced but not yet determined at that time.
27 – Dismissing applications

75. Under section 587 of the Act, the FWC has discretion to dismiss an application if it is not made in accordance with the Act; is frivolous or vexatious; or has no reasonable prospects of success.

76. New clause 27 inserts a limited transitional dismissal power in addition to the existing section 587 mechanism. This new provision allows the FWC to dismiss modern award applications under section 158, where it is satisfied that the specific matters in relation to which the application was made, were or are being dealt with in the 4 yearly review. This power will sunset two years after the commencement of Schedule 1.

Division 3 – Amendments made by Schedule 2 to the amending Act

28 – Application of amendments—when employees have genuinely agreed to an enterprise agreement

77. New clause 28 relates to the application of amendments where employees have genuinely agreed to an enterprise agreement.

78. The amendments to section 188 made by Schedule 2 to the Bill will apply to applications to approve enterprise agreements made under section 185 after the amendments commence. This means that minor procedural or technical errors that occurred before commencement could be considered in an application to approve the enterprise agreement made after commencement.

Division 4 – Amendments made by Schedule 3 to the amending Act

29 – Application of section 641B of the amended Act

79. Item 1 of Schedule 3 inserts new section 641B into the Act, which applies the JMIPC Act in relation to FWC Members. New clause 29 applies new section 641B in relation to alleged misbehaviour or incapacity of an FWC Member occurring before or after the commencement of Schedule 3.