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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Fair Work Amendment (Protecting Take Home Pay) Bill 2017

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of

Hon Bill Shorten MP

Fair Work Amendment (Protecting Take Home Pay) Bill 2017

OUTLINE

The Fair Work Amendment (Protecting Take Home Pay) Bill 2017 will ensure that modern awards can not be varied to reduce the take home pay of an employee. This includes any reduction in take home pay as a result of a reduction in penalty rates or the hours to which penalty rates apply. It will also prevent decision AM2014/305 of the Fair Work Commission from taking effect. The Bill preserves the independence of the Fair Work Commission but appropriately guides the exercise of its discretion to ensure wages are not cut.

FINANCIAL IMPACT

The Bill will have no financial impact.

NOTES ON CLAUSES

Clause 1 – Short title

This clause provides for the Act, when enacted, to be cited as the *Fair Work Amendment (Protecting Take Home Pay) Act 2017*.

Clause 2 – Commencement

This clause provides for the commencement of the whole of the Act on the day after the Act receives the Royal Assent.

Clause 3 – Schedules

This clause provides that the legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms.

Schedule 1

The Fair Work Commission's power to vary modern awards is found in section 157 of the Fair Work Act 2009 (Fair Work Act). See generally Part 2.3 of Chapter 2 of the Fair Work Act in relation to modern awards.

Item 1 and 2 - Section 12

Item 1 amends the definitions of **reduction in take-home pay** and **take-home pay** in the Fair Work Act by reference to the new section 135A(4).

Item 2 – Section 135A

inserts a new subsection 135A in Div 2 of Part 2-3 which requires that, in exercising its powers under this Part, the Fair Work Commission cannot vary a modern award such that an employee's, or prospective employee's, take-home pay is reduced.

The effect of the amendment is to prevent a variation of a modern award that would, or would be likely to, reduce the take home pay of any employee. This includes any reduction as a result of changes to penalty rates or to the hours to which penalty rates apply.

It does not require individual employees to provide evidence to the Fair Work Commission of actual loss of take-home pay.

Subsection 135A(3) provides that any determination of the Fair Work Commission made on or after 22 February 2017 that would result, or would be likely to result, in a cut to take-home pay under the Award, is of no effect.

At the date of the introduction of the Bill, no determination has been issued arising from decision AM2014/305 in the Commission. The effect of this amendment is to invalidate any determination which may be issued by the Fair Work Commission, arising from decision AM2014/305 in the Commission, prior to the enactment of the Bill.

Subsection 135A(4) defines take-home pay as the pay an employee actually receives, or would receive if increases in the modern award minimum wage were included in the employee's pay:

- (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
- (b) disregarding the effect of any deductions that are made as permitted by section 324 of the Fair Work Act.

This amendment ensures that modern awards are a safety net for the take-home pay of employees currently under the award and of prospective employees under the award. For the avoidance of doubt, the definition of take-home pay makes it clear that all employees under modern awards are to receive the full benefit in their take home pay of any increase to the modern award minimum wage. For example, the Fair Work Commission may not vary a modern award so as to phase in a cut to penalty rates by offsetting that cut against any annual increases in the modern award minimum wage.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Fair Work Amendment (Protecting Take Home Pay) Bill 2017

This 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 Fair Work Amendment (Protecting Take Home Pay) Bill 2017 will ensure that modern awards can not be varied to reduce penalty rates or the hours to which penalty rates apply if the variation is likely to result in a reduction in the take home pay of an employee. It will also prevent decision AM2014/305 of the Fair Work Commission from taking effect.

Human rights implications

The bill is not detrimental to any applicable rights or freedoms.

The bill positively engages with the Article 7 of the ICESCR. Article 7 requires that State 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.

Under the Fair Work Act, the Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions. In making or varying modern awards, the Fair Work Commission must take into account the modern awards objective (see subsection 134(1) of the Fair Work Act).

Item 1 of Schedule 1 to the Bill amends the Fair Work Act to include a new requirement that variation of modern awards can not reduce penalty rates or the hours to which penalty rates apply if this would result in a reduction in the take home pay of an employee. This amendment promotes the right to fair wages and in particular recognises the need, as provided for in the modern awards objective, to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.

Conclusion

This bill is compatible with human rights because it advances the protection of human rights.

Hon Bill Shorten MP