



## 1 Overview

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On 5 December 2018, the *Fair Work Amendment (Repeal Four Yearly Review and Other Measures) Bill 2017* was passed by both houses of Parliament, and is awaiting royal assent as at the date of publication.

The Bill focusses on three key areas that amend the *Fair Work Act 2009* (Cth) (**FW Act**):

- 1 providing the Fair Work Commission (**FWC**) with the ability to overlook certain minor procedural or technical errors when approving an enterprise agreement (**EA**);
- 2 the FWC's reviews of modern awards; and
- 3 other provisions that are intended to provide greater scrutiny of the performance and conduct of FWC members.

## 2 FWC's ability to overlook certain minor procedural or technical errors when approving an EA

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### 2.1 What are the amendments to the FW Act?

The Bill amends the FW Act to state that an EA will also have been "*genuinely agreed*" to by the employees covered by the EA if the FWC is satisfied of the following two elements:

- 1 The EA **would have been "genuinely agreed" but for "minor procedural or technical errors" made** in relation to the following requirements:
  - the pre-approval requirement to take all reasonable steps to provide a copy of the EA and any material incorporated by reference in the EA to employees (s.180(2));
  - the pre-approval requirement to take all reasonable steps to notify employees of the voting details (s.180(3));
  - the pre-approval requirement to take all reasonable steps to explain the terms of the EA and the effect of those terms (s.180(5));
  - the requirement that the vote not be held until at least 21 days after the day on which the last notice of employee representational rights (**NERR**) was given (s.181(2));
  - the requirement to give employees a NERR (including the timing, form, and other requirements in ss.173 and 174); **AND**
- 2 The employees covered by the EA **were not likely to have been disadvantaged by the errors**, in relation to the above requirements (e.g. considering the effect of the error, or the circumstances of the error).

Employers should be aware that even though this new provision enables the FWC to overlook errors made in the EA-approval process, these errors must meet both elements of the test set out above.

Examples of "*minor procedural or technical errors*" outlined in the Explanatory Memorandum include:

- employees being informed of the voting details after the start of the access period, rather than before the start of the access period;
- employees being requested to approve a proposed EA on the 21<sup>st</sup> day after the NERR was given, rather than at least 21 days after the date the NERR was given;
- inclusion of the Company logo or letterhead on the NERR;



- inclusion of additional material stapled with a NERR;
- minor changes to the text of the NERR which has no relevant effect on the information being communicated in it.

## 2.2 When do these new provisions apply?

These provisions are scheduled to commence the day after the Bill receives royal assent (**Commencement Date**). These provisions will apply to the following applications:

<b>Applications made on or after the Commencement Date:</b>	Applications for approval of EAs made to the FWC <u>on or after</u> the Commencement Date.
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<b>Applications made before the Commencement Date:</b>	Applications for approval of EAs made to the FWC <u>before</u> the Commencement Date where the FWC have not yet approved or dismissed the application on or before the Commencement Date.
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<b>Appeals not yet determined:</b>	Applications for approval of EAs made to the FWC <u>before</u> the Commencement Date that are approved or dismissed <u>before</u> the Commencement Date, where an application to appeal the decision has been made under section 604 <u>before</u> the Commencement Date, but the FWC has not yet made a final decision on the appeal <u>before</u> the Commencement Date.
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<b>Appeals not yet filed:</b>	Applications for approval of EAs made to the FWC <u>before</u> the Commencement Date that are approved or dismissed <u>within 21 days before</u> the Commencement Date, where an appeal under section 604 has not been made immediately <u>before</u> the Commencement Date, but where the appeal under section 604 is made <u>within 21 days</u> after the FWC's decision.
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## 3 Four Yearly Reviews of Modern Awards

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The Bill removes the requirement for the FWC to conduct 4 yearly reviews of modern awards, effective from 1 January 2018.

However, the FWC is still able to make a determination to vary a modern award if the FWC is satisfied that the determination is necessary to achieve the modern awards objective.<sup>1</sup> The Bill allows the President of the FWC to make a direction about the exercise of these modern awards powers. For example, this may be a direction that a single FWC Member (instead of a Full Bench) perform a function or exercise a power in relation to the variation of a modern award.

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<sup>1</sup> Section 157 (the objective of providing a fair and relevant minimum safety net of terms of conditions to employees).