



# **Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018**

**No. 170, 2018**

**An Act to amend the *Fair Work Act 2009*, and for  
related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation  
(<https://www.legislation.gov.au/>)



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# Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018

No. 170, 2018

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## An Act to amend the *Fair Work Act 2009*, and for related purposes

[Assented to 11 December 2018]

The Parliament of Australia enacts:

### 1 Short title

This Act is the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*.

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No. 170, 2018

*Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*

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## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	11 December 2018
2. Schedule 1	1 January 2018.	1 January 2018
3. Schedules 2, 3 and 4	The day after this Act receives the Royal Assent.	12 December 2018

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Four yearly reviews of modern awards**

### ***Fair Work Act 2009***

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

Repeal the definition.

**2 Section 12 (definition of work value reasons)**

Omit “156(4)”, substitute “157(2A)”.

**3 Section 132 (paragraph relating to Division 4)**

Repeal the paragraph.

**4 Section 132 (paragraph relating to Division 5)**

Omit “outside the system of 4 yearly reviews”.

**5 Paragraph 135(1)(a)**

Omit “subsections 156(3) and”, substitute “subsection”.

**6 Paragraph 141(2)(b)**

Omit “4 or”.

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

Omit “4 or”.

**8 Division 4 of Part 2-3**

Repeal the Division.

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

Repeal the heading, substitute:

### **Division 5—Exercising modern award powers**

**10 Subsection 157(1)**

Omit “outside the system of 4 yearly reviews of modern awards”.

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

Repeal the note, substitute:

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

**12 Paragraph 157(2)(b)**

Omit “and the system of 4 yearly reviews of modern awards”.

**13 After subsection 157(2)**

Insert:

- (2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
  - (b) the level of skill or responsibility involved in doing the work;
  - (c) the conditions under which the work is done.

**14 Paragraph 582(4)(a)**

Repeal the paragraph.

**15 After paragraph 582(4)(aa)**

Insert:

- (ab) a direction about the exercise of modern award powers in accordance with Division 5 of Part 2-3;

**16 At the end of subsection 582(4)**

Add:

- ; (e) a direction that a single FWC Member perform a function or exercise a power in relation to the variation of a modern award.

**17 Subsections 616(2) and (3)**

Repeal the subsections.

**18 After subsection 616(3A)**

Insert:

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- (3B) A determination that revokes a modern award under Division 5 of Part 2-3 must be made by a Full Bench.
- (3C) Subject to subsection (3D), a determination that varies a modern award under Division 5 of Part 2-3 (other than a determination varying the default fund term of a modern award under section 159A) must be made by a Full Bench.
- (3D) The President may direct a single FWC Member to perform a function or exercise a power:
- (a) under section 159, 160 or 161 (varying a modern award); or
  - (b) in relation to any other variation under section 157 that the President considers appropriate of:
    - (i) a modern award; or
    - (ii) if 2 or more modern awards relate to the same industry or occupation—those awards.

Note: The President may give directions as to the manner in which the FWC is to perform its functions or exercise its powers (see section 582).

## Schedule 2—Procedural requirements in enterprise bargaining

### *Fair Work Act 2009*

#### **1 Section 188**

Before “An enterprise”, insert “(1)”.

#### **2 At the end of section 188**

Add:

- (2) An enterprise agreement has also been *genuinely agreed* to by the employees covered by the agreement if the FWC is satisfied that:
  - (a) the agreement would have been *genuinely agreed* to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
  - (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

## Schedule 3—FWC Members

### *Fair Work Act 2009*

#### **1 After section 641A**

Insert:

#### **641B Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

- (1) The object of this section is to modify the application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (the **JMIPC Act**) so as to allow a Commission to be established by the Houses of Parliament to investigate and report on alleged misbehaviour or incapacity of an FWC Member, so the Houses can be well-informed to consider whether to pray for:
  - (a) the termination of the FWC Member’s appointment under section 641; or
  - (b) the removal of the FWC Member from office under section 82 or 86 of the WR Act (within the meaning of the Transitional Act), as those sections continue to apply because of the operation of item 2 of Schedule 18 to the Transitional Act.
- (2) The JMIPC Act applies, in addition to its general application, as if a provision of that Act referred to in an item in column 1 of the following table were amended as specified in column 2 of the item.

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#### **Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

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<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
1	Subsection 3(1)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
2	Subsection 3(1)	Omit all the words after “whether to”,

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Schedule 3 FWC Members

**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
		substitute: “pray for: (a) for a non-transitioned FWC Member—the termination of the FWC Member’s appointment under section 641 of the FW Act; or (b) for a transitioned FWC Member—the removal of the FWC Member from office under section 82 or 86 of the WR Act (as those sections continue to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act).”
3	Paragraph 3(2)(b)	Omit “removal of a Commonwealth judicial officer under paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of an FWC Member under the relevant provisions referred to in subsection (1)”.
4	Section 4	Omit “a Commonwealth judicial officer (that is, a High Court judge or a judge of the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia)”, substitute “an FWC Member”.
5	Section 4	Omit “removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of the FWC Member, the FWC Member’s appointment may be terminated, or the FWC Member may be removed from office, by the Governor-General in Council under the applicable provisions of the FW Act or the WR Act”.

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
6	Section 7	<p>Insert:</p> <p><b><i>FW Act</i></b> means the <i>Fair Work Act 2009</i>.</p> <p><b><i>FWC Member</i></b> has the same meaning as in the FW Act and includes a transitioned FWC Member.</p> <p><b><i>FW Transitional Act</i></b> means the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>.</p>
7	Section 7 (definition of <b><i>incapacity</i></b> )	<p>Omit the definition (including the note), substitute:</p> <p><b><i>incapacity</i></b>:</p> <p>(a) in relation to the termination of appointment of a non-transitioned FWC Member under section 641 of the FW Act—has the same meaning as in that section; and</p> <p>(b) in relation to the removal of a transitioned FWC Member from office under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(c) in relation to the removal of a transitioned FWC Member from office under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(d) in relation to the termination of appointment of a member of the Commission under section 73 of this Act—has its ordinary meaning.</p>
8	Section 7 (definition of	Omit the definition (including the note),

Schedule 3 FWC Members

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

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Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
	<i>misbehaviour</i> )	substitute: <b><i>misbehaviour</i></b> : (a) in relation to the termination of appointment of a non-transitioned FWC Member under section 641 of the FW Act—has the same meaning as in that section; and (b) in relation to the removal of a transitioned FWC Member from office under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and (c) in relation to the removal of a transitioned FWC Member from office under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and (d) in relation to the termination of appointment of a member of the Commission under section 73 of this Act—has its ordinary meaning.
9	Section 7	Insert: <b><i>non-transitioned FWC Member</i></b> means an FWC Member who is not a transitioned FWC Member.
10	Section 7 (definition of <b><i>proved</i></b> )	Omit the definition, substitute: <b><i>proved</i></b> : (a) in relation to the termination of appointment of a non-transitioned FWC Member for misbehaviour under paragraph 641(a) of the FW Act—has the

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

Item	Column 1	Column 2
	Provision of the JMIPC Act	Amendment
		<p>same meaning as in that paragraph; and</p> <p>(b) in relation to the termination of appointment of a non-transitioned FWC Member for incapacity under paragraph 641(b) of the FW Act—means the grounds referred to in that paragraph are established; and</p> <p>(c) in relation to the removal of a transitioned FWC Member from office for misbehaviour or incapacity under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(d) in relation to the removal of a transitioned FWC Member from office for misbehaviour or incapacity under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section.</p>
11	Section 7	<p>Insert:</p> <p><b>transitioned FWC Member</b> means a person who is taken to be appointed as an FWA Member under item 1 of Schedule 18 to the FW Transitional Act.</p> <p><b>WR Act</b> has the same meaning as in the FW Transitional Act.</p> <p><b>WR Act repeal day</b> has the same meaning as in the FW Transitional Act.</p>
12	Section 8	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
13	Section 8	Omit “removal of the judicial officer, the

**Schedule 3 FWC Members**

**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
		judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of the FWC Member, the FWC Member’s appointment may be terminated, or the FWC Member may be removed from office, by the Governor-General in Council under the applicable provisions of the FW Act or the WR Act”.
14	Subsection 9(1)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
15	Subsection 9(1) (note 2)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
16	Paragraph 16(1)(b)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
17	Subsection 19(6)	After paragraph 19(6)(c), insert: (ca) an investigation into a complaint about an FWC Member; and
18	Subsection 20(2)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
19	Subsection 20(2)	Omit “the Commonwealth judicial officer” (wherever occurring), substitute “the FWC Member”.
20	Section 21	Omit “a Commonwealth judicial officer” (wherever occurring), substitute “an FWC Member”.
21	Paragraph 23(3)(a)	Omit “Commonwealth judicial officer to whom the investigation relates to perform his or her duties as such an officer”, substitute “FWC Member to whom the investigation relates to perform his or her duties as an FWC Member”.

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***


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<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
22	Paragraph 23(3)(b) and subparagraph 23(3)(c)(i)	Omit “judiciary”, substitute “Fair Work Commission”.
23	Subparagraph 23(3)(c)(ii)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
24	Subsection 24(4) (heading)	Omit “ <i>Commonwealth judicial officer</i> ”, substitute “ <i>FWC Member</i> ”.
25	Subsections 24(4) and (5)	Omit “Commonwealth judicial officer” (wherever occurring), substitute “FWC Member”.
26	Paragraph 24(7)(c)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
27	Subdivision D of Division 2 of Part 3 (heading)	Omit “ <b>Commonwealth judicial officer</b> ”, substitute “ <b>FWC Member</b> ”.
28	Section 45 (heading)	Omit “ <b>Commonwealth judicial officer</b> ”, substitute “ <b>FWC Member</b> ”.
29	Subsections 45(1) and 46(2)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.

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***Fair Work (Transitional Provisions and Consequential Amendments) Act 2009***
**2 At the end of Part 1 of Schedule 18**

Add:

**6A Dealing with a complaint about an FWC Member**

- (1) This item applies in relation to an FWC member who is a person taken to have been appointed as an FWA Member under item 1 of this Schedule.

- (2) Section 581A of the FW Act (which deals with the President handling complaints about FWC Members) applies after the commencement of this item in relation to a complaint made about the performance of the FWC Member as if the following amendments were made:
- (a) paragraph (4)(b) of that section—omit “termination of the appointment of the FWC Member”, substitute “removal of the FWC Member from office”;
  - (b) the note to subsection (4) of that section—omit “The appointment of an FWC Member may be terminated under section 641”, substitute “An FWC Member may be removed from office under section 82 or 86 of the WR Act (within the meaning of the Transitional Act), as those sections continue to apply because of the operation of item 2 of Schedule 18 to the Transitional Act.”;
  - (c) subparagraph (a)(i) of the definition of *relevant belief* in section 12 of the FW Act—omit “terminating the appointment of the FWC Member in accordance with section 641”, substitute “removing the FWC Member from office in accordance with section 82 or 86 of the WR Act (within the meaning of the Transitional Act), as those sections continue to apply because of the operation of item 2 of Schedule 18 to the Transitional Act”.

Note: Paragraph (2)(c) alters the meaning of *relevant belief* in subparagraphs 581A(2)(a)(ii) and (iii) of the FW Act.

- (3) Section 641A of the FW Act (which deals with the Minister handling complaints about FWC Members) applies after the commencement of this item in relation to a complaint made about the performance of the FWC Member as if the following amendments were made:
- (a) paragraph (a) of that section—omit “termination of the appointment of the FWC Member; and”, substitute “removal of the FWC Member from office.”;
  - (b) paragraph (b) of that section—omit the paragraph;
  - (c) note 1 to that section—omit “The appointment of an FWC Member may be terminated under section 641”, substitute “An FWC Member may be removed from office under section 82 or 86 of the WR Act (within the meaning of the Transitional Act), as those sections continue to apply because of the operation of item 2 of Schedule 18 to the Transitional Act.”;

- (d) note 2 to that section—omit the note.
- (4) For the purposes of subitems (2) and (3), it does not matter whether:
- (a) the complaint is made before or after the commencement of this item; or
  - (b) the complaint relates to the performance of the FWC Member before or after the commencement of this item.
- (5) In this item:  
***FWC Member*** has the same meaning as in the FW Act.

## **Schedule 4—Application and transitional provisions**

### ***Fair Work Act 2009***

#### **1 In the appropriate position in Schedule 1**

Insert:

### **Part 5—Amendments made by the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018**

#### **Division 1—General**

##### **25 Definitions**

In this Part:

*4 yearly review of modern awards* has the meaning given by this Act, as in force immediately before the commencement of Schedule 1 to the amending Act.

*amended Act* means this Act as amended by the amending Act.

*amending Act* means the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*.

*Schedule 1 commencement day* means the day on which Schedule 1 to the amending Act commences.

*Schedule 2 commencement day* means the day on which Schedule 2 to the amending Act commences.

## **Division 2—Amendments made by Schedule 1 to the amending Act**

### **26 Incomplete review of modern award**

#### *Scope*

- (1) This clause applies in relation to a review of a modern award conducted as part of a 4 yearly review of modern awards if:
  - (a) the review of the modern award commenced before the Schedule 1 commencement day; and
  - (b) immediately before that day, the review of the modern award had not been completed.

#### *Saving*

- (2) Despite the repeal of:
  - (a) Division 4 of Part 2-3 (which deals with 4 yearly reviews of modern awards); and
  - (b) paragraph 582(4)(a) (which deals with directions by the President); and
  - (c) subsections 616(2) and (3) (which deal with the FWC's functions etc. that must be performed by a Full Bench);by the amending Act, those provisions continue to apply, in relation to the review of the modern award, as if those repeals had not happened.
- (3) Despite the repeal of paragraph 582(4)(a) (which deals with directions by the President) by the amending Act, a direction given by the President to an FWC Member under that paragraph that was in force immediately before the Schedule 1 commencement day continues to have effect, in relation to the review of the modern award, as if that repeal had not happened.

#### *Common issues*

- (4) For the purposes of this clause, it is immaterial whether the review of the modern award is conducted in relation to an issue that the modern award has in common with another modern award.

## **27 Dismissing applications**

- (1) On or after the Schedule 1 commencement day, the FWC may dismiss an application under section 158 to vary, revoke or make a modern award if the FWC is satisfied that the specific matters in relation to which the application is made were dealt with, or are being dealt with, in a 4 yearly review of modern awards.

Note: For another power of the FWC to dismiss applications under section 158, see section 587.

- (2) This clause does not limit when the FWC may dismiss an application under section 158.

*Sunset provision*

- (3) This clause ceases to have effect at the end of 2 years after the Schedule 1 commencement day.

## **Division 3—Amendments made by Schedule 2 to the amending Act**

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

- (1) The amendments of section 188 of this Act made by Schedule 2 to the amending Act apply in relation to an application made under section 185 of this Act for approval of an enterprise agreement if the application is made:
  - (a) on or after the Schedule 2 commencement day; or
  - (b) before the Schedule 2 commencement day, if circumstances covered by subclause (2) apply.
- (2) The circumstances covered by this subclause are:
  - (a) on or before the Schedule 2 commencement day, the FWC had neither approved, nor refused to approve, the enterprise agreement; or
  - (b) before the Schedule 2 commencement day:
    - (i) the FWC approved, or refused to approve, the enterprise agreement; and

- (ii) an application was made under section 604 for an appeal against the decision to approve, or refuse to approve, the enterprise agreement; and
  - (iii) the FWC had not yet made a final decision on the appeal; or
- (c) all of the following apply:
- (i) within 21 days before the Schedule 2 commencement day, the FWC approved, or refused to approve, the enterprise agreement;
  - (ii) immediately before the Schedule 2 commencement day, an application had not been made under section 604 for an appeal against the decision to approve, or refuse to approve, the enterprise agreement;
  - (iii) within 21 days after the FWC approved, or refused to approve, the enterprise agreement, an application is made under section 604 for an appeal against that decision.

## **Division 4—Amendments made by Schedule 3 to the amending Act**

### **29 Application of section 641B of the amended Act**

Section 641B of the amended Act applies in relation to alleged misbehaviour or incapacity of an FWC Member occurring before or after the commencement of Schedule 3 to the amending Act.

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*[Minister's second reading speech made in—  
House of Representatives on 1 March 2017  
Senate on 22 June 2017]*

(18/17)

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