THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELC:BMml221124

22 November 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

Secure Jobs, Better Pay Review

Thank you for the opportunity to contribute to a submission by the Law Council of Australia in response to the *Secure Jobs, Better Pay Review* by the Department of Employment and Workplace Relations. The Law Society's Employment Law Committee contributed to this submission.

Our comments addressing whether the operation of the amending legislation is appropriate and effective are set out below.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

Abolition of the Registered Organisations Commission – Part 1, Schedule 1
We note that the abolishment of the Registered Organisations Commission and the transfer of its functions to the General Manager of the Fair Work Commission (**Commission**) has been a positive operational change and we welcome what appears to be an enhanced consultative approach by the Commission as a result.

Abolition of the Australian Building and Construction Commission – Part 3, Schedule 1
Our members note that there appears to be a general lack of awareness by stakeholders that the functions of the Australian Building and Construction Commission (**ABCC**) have been transferred to the Fair Work Ombudsman (**Ombudsman**), resulting in a perception that the abolition of the ABCC has created a dearth in the regulation of the building and construction industry. We suggest that there is the opportunity for the Ombudsman to raise awareness of its functions in this area.

Expert panels – Part 6, Schedule 1
Part 6 provides for the constitution, reconstitution and functions of new Expert Panels to perform the following functions:

- Expert Panel for pay equity;
- Expert Panel for the Care and Community Sector; and
- Expert Panel for pay equity in the Care and Community Sector.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Law Council OF AUSTRALIA
CONSTITUENT BODY

We note that the two Expert Panels for pay equity and for the Care and Community Sector were established on 6 March 2023.[1] The Expert Panel for pay equity in the Care and Community Sector began the process of reviewing gender undervaluation issues in five priority modern awards on 7 June 2024[2] and the review is currently ongoing.[3]

Given the recent constitution of the Expert Panels and the current proceedings pursuant to section 157(3)(a) of the *Fair Work Act 2009* (**FW Act**) to consider variations to various modern award classifications and minimum wage rates on work value grounds to remedy potential gender undervaluation,[4] we believe it is too early to usefully comment on the operation of the Expert Panels.

Prohibiting pay secrecy – Part 7, Schedule 1
We understand that one of the main purposes of the amending provisions in Part 7 is to enhance transparency and foster conversations in relation to pay equity. However, in practice, we observe some private sector employers are concerned that disclosure by employees of pay rises or bonuses might create general disgruntlement among staff, thereby hampering potential progression opportunities that may have otherwise assisted the goals of pay equity.

We suggest that further guidance may be necessary to clarify the meaning of "remuneration outcomes" under section 333B of the FW Act, as well as the types of information that may be "reasonably necessary" to determine remuneration, in addition to the number of hours worked.

We also suggest the need for guidance in relation to which types of incentive arrangements may be captured by the provisions under Part 7, and whether it is simply the outcome and/or the underlying structure that is covered by those provisions and can be prevented from being disclosed. Incentive arrangements operated by private sector employers may involve innovative or differentiating structures and may also involve reference to or contain proprietary or confidential information, which in the general course would not be public information and would not be potentially known to their competitors.

Prohibiting sexual harassment in connection with work – Part 8, Schedule 1
We consider the provisions under Part 8 have been effective in heightening awareness of the obligations relating to the prevention of sexual harassment in the workplace, evidenced by increased training and more robust procedures in responding to claims of sexual harassment.

In our view, however, the multi-jurisdictional (and in some cases overlapping) options available for sexual harassment claims create complexity for applicant clients and protract the work required of their advisors, giving rise to increased costs which, in turn, may affect an applicant's ability to pursue a claim. Factors for consideration, such as process, remedies, any time delay currently operating within a jurisdiction, the likelihood of the matter eventuating in court proceedings, and costs (including potential for cost recoverability), affect an applicant client's decision of which pathway to take. The Commission,[5] the Australian Human Rights

---

[1] Appointments to Fair Work Commission Expert Panels, Media Release, Minister for Employment and Workplace Relations: https://ministers.dewr.gov.au/burke/appointments-fair-work-commission-expert-panels.
[2] Gender undervaluation – Expert Panel to review 5 priority awards, Media Release, Fair Work Commission: https://www.fwc.gov.au/about-us/news-and-media/news/gender-undervaluation-expert-panel-review-5-priority-awards.
[3] We note that the Directions hearing takes place on 19 November 2024. Fair Work Commission Statement: https://www.fwc.gov.au/documents/decisionssigned/pdf/2024fwcfb280.pdf.
[4] Fair Work Commission Statement: https://www.fwc.gov.au/documents/decisionssigned/pdf/2024fwcfb280.pdf.
[5] Sexual harassment resources, Fair Work Commission: https://www.fwc.gov.au/issues-we-help/sexual-harassment-work.

Commission,[6] and SafeWork NSW[7] have each produced guidance for their own jurisdiction relating to sexual harassment, but there does not appear to be a comprehensive, overarching guide for all jurisdictions. It is suggested that a guide of this type would assist towards addressing the issues identified and assist applicant clients (and where represented, their advisors) to more easily determine the appropriate avenue for redress.

Fixed term contracts – Part 10, Schedule 1
In our view, the use of temporary exceptions prescribed under the *Fair Work Regulations 2009* (**Regulation**) does not assist to promote effective compliance by employers. We suggest that there needs to be better communication of the changes made under the Regulation. An example we have observed includes the recent changes made in November 2024 prescribing new temporary exceptions for different sectors, including charities and the not-for-profit sector, medical or health research, and public hospitals. In the Committee's experience many advisors and employers are unaware of those changes and could be acting in breach of the fixed term contract limitations as a result.

We also suggest consideration be given to including an additional exception where fixed term contracts may be properly used for employees with visas allowing employment rights for a limited period (such as up to four years), including partner visas and skills shortage visas. We note that, following the expiry of such visas, a bridging visa is typically issued, requiring a further fixed term contract, which is often extended a number of times while the Department of Home Affairs makes a determination to grant a new visa or permanent residency status.

In addition, we believe annotations of the provisions would be helpful to clarify, for example, that 'maximum term' contracts are clearly captured under the provisions of Part 10.

We also believe it would be useful for further guidance in the form of practical worked examples to be published, for example, scenarios constituting consecutive contracts.[8]

Flexible work – Part 11, Schedule 1
We believe a positive change resulting from the operation of the amending provisions in Part 11 is the more robust documentation of an employer's response to requests for flexible working arrangements, pursuant to section 65A of the FW Act. However, we query whether section 65A has resulted in an increase in the number of flexible working arrangements being granted in practice, with employers who would have likely refused a request prior to the commencement of the Part 11 amendments continuing to do so, while being mindful of the requirements to explain the business grounds for refusing the request in more detail.

We observe that the Commission's jurisdiction to hear matters under the Part 11 provisions appears to be underutilised in practice. Since the commencement of these provisions on 6 June 2023, 15 disputes relating to flexible work arrangements have been brought to the Commission under section 65B.[9] This might reflect the current economic climate, where

---

[6] Sex discrimination resources, Australian Human Rights Commission: https://humanrights.gov.au/our-work/sex-discrimination.
[7] Sexual harassment resources, SafeWork NSW: https://www.safework.nsw.gov.au/hazards-a-z/sexual-harassment.
[8] We note that the Fixed Term Contract Information Statement contains one worked example of consecutive contracts: https://www.fairwork.gov.au/sites/default/files/2023-12/is-fixed-term-contract-information-statement.pdf, as does some of the FWO guidance material.
[9] List of matters brought under s. 65B of the *Fair Work Act 2009*: https://www.fwc.gov.au/document-search?options=SearchType_1%2CSortOrder_decision-date-desc%2CDocToDate_14%2F11%2F2024%2CDocFromDate_06%2F06%2F2023&q=*&facets=CaseType_S.65B+%28None%29.

employees likely feel less bargaining power and consider that bringing such a dispute before the Commission is unlikely to have a positive effect on their overall employment position.

Enterprise agreement approval – Part 14, Schedule 1
We note that the amending provisions set out in Part 14 enable a bargaining representative who will be covered by a proposed single-enterprise agreement to give an employer a written request to bargain, without having to obtain a majority support determination from the Commission. We suggest that these provisions have not been utilised in practice at the level expected.

However, we note that the Commission's power to make an intractable bargaining declaration under the Part 18 provisions are being utilised, with the Commission already having considered several applications since the intractable bargaining regime commenced in June 2024.

Enhancing the small claims processes – Part 24, Schedule 1
We note that the small claims division might not be achieving enhanced access to justice in practice and appears to be under-utilised, as many clients remain unwilling to commence such claims given the attendant costs involved in doing so. We consider that greater use of the jurisdiction may be obtained if it became open to applicants to seek to have penalties issued against an employer, with the ability to seek to have those amounts paid to themselves.

We suggest consideration be given to enabling penalties to be sought and/or including an equal cost access model for small claims proceedings, to increase use of this jurisdiction.

Unpaid parental leave – Part 25B, Schedule 1
We believe that in a similar way to flexible work arrangement requests, the Part 25B amendments have resulted in more detailed documentation of an employer's reason to vary or refuse requests for extension of unpaid parental leave on reasonable business grounds pursuant to section 76A of the FW Act but may not have overall materially changed the number of requests that employers have granted. It also appears that very few disputes about unpaid parental leave requests are referred to the Commission under section 76B.[10] We observe that this, too, might be reflective of the current economic climate, where employees are perhaps less likely to seek additional unpaid leave and/or likely feel they have less bargaining power to do so.

Paid family and domestic violence leave – Part 28, Schedule 1
We observe that the notice and evidence requirements under section 107 of the FW Act may be unduly onerous for some employees experiencing family and domestic violence. Given the often-distressing situation that family and domestic violence can put an employee in, having to prove that the employee has satisfied the purpose and requirements under subsections 106B(1)(a), 106B(1)(b) and 106B(1)(c) of the FW Act risks exacerbating the burden already placed on the employee.

We suggest consideration be given to relaxing the notice and evidence requirements under section 107, with perhaps the default position changed to clearly be that notice is to be given within a reasonable time 'after the leave has started'.

[10] It appears that Marion Rogerson v ATCO Gas Australia Pty Ltd (C2023/7855) is the only order made pursuant to section 76B of the *Fair Work Act 2009*: https://www.fwc.gov.au/document-search?options=SearchType_1%2CSortOrder_decision-relevance&q=s+76b&facets=CaseType_S.76B+%28None%29.

The requirement to provide evidence is subject to the discretion of the employer under subsection 107(3) of the FW Act, but in our view, consideration could be given to changing the position so that an employer should not be able to require evidence if the leave period does not exceed a certain number of days (such as 7 days) and be able to exercise its discretion to require such evidence only if the leave period exceeds that 7-day period.

Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*

Our members have not had experience of this amendment being utilised in practice.

Future reviews

As a general comment, we believe a future review of the *Secure Jobs, Better Pay* changes may be warranted following this current review. Some amendments did not come into effect until 2023 or 2024, and in some areas a small and/or insufficient number of matters have been brought to the Commission for determination, limiting the scope for practical insights into the operational impacts of the changes.

In our view, the recent pace, degree, and volume of changes to the FW Act and in the employment area more generally have created difficulty in raising awareness among employers on what is required for effective compliance with the result that many employers are inadvertently failing to comply. We suggest for the Government consider postponing further changes in the short term to allow for that initial compliance burden to be met, particularly for small businesses. This would also have the benefit of creating a further period of operation and compliance to enable the Government to better determine whether the intended outcomes have been achieved and any other practical impacts of the *Secure Jobs, Better Pay* changes.

We note the expansion of the Commission's jurisdictions as a result of those changes, creates the perception of additional 'micro-jurisdictions', which must be complemented with commensurate resourcing for the Commission in order to be effective. We suggest specific consideration be given to how effectively the Commission's micro-jurisdictions – for example, in determining disputes on flexible work arrangement requests and unpaid parental leave requests, are being utilised in practice by employees and employers.

We hope this input is of assistance. Please contact Mimi Lee, Policy Lawyer, on (02) 9926 0174 or mimi.lee@lawsociety.com.au in the first instance if you have any queries.

Yours sincerely,

Brett McGrath
President