Law Council
OF AUSTRALIA

Office of the President

6 December 2024

Secure Jobs, Better Pay Review Secretariat
Department of Employment and Workplace Relations
GPO Box 9828
CANBERRA ACT 2601

By email: SJBPReview@dewr.gov.au

Dear Review Secretariat

Secure Jobs, Better Pay Review

The Law Council welcomes the opportunity to provide input to the review of the operation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Secure Jobs, Better Pay Act**) and the amendments made by Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**Closing Loopholes Act**).

The Law Council has not received specific feedback in relation to Part 16A of the Closing Loopholes Act, therefore this submission is limited to the measures contained in the Secure Jobs, Better Pay Act. These comments should be read in conjunction with the Law Council's earlier submission to the Senate Education and Employment Legislation Committee's review of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Secure Jobs, Better Pay Bill**).[1]

This submission is informed by contributions from the Law Society of New South Wales and the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section.

Secure Jobs, Better Pay Act

Abolition of the Registered Organisations Commission – Part 1, Schedule 1

When first proposed by the Secure Jobs, Better Pay Bill, the Law Council supported the abolition of the Registered Organisations Commission, noting that its functions were to be retained and transferred to the General Manager of the Fair Work Commission (**Commission**).[2]

Feedback received from our membership is that this has been a positive operational change, and we welcome what appears to be an enhanced consultative approach by the Commission as a result.

[1] Law Council of Australia, *Submission to the Senate Education and Employment Legislation Committee on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (11 November 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-fair-work-legislation-amendment-secure-jobs-better-pay-bill-2022>.
[2] Ibid, 5.

Abolition of the Australian Building and Construction Commission – Part 3, Schedule 1

Feedback provided to the Law Council suggests that there is 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**). This has resulted 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 of Schedule 1 of the Secure Jobs, Better Pay Act 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 Council supported the constitution of these Expert Panels when first proposed, commenting that they are likely to enhance the Commission's expertise in assessing pay and conditions for workers in the Care and Community sector.[3]

We note that appointments to the Expert Panels were made on 6 March 2023,[4] and 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.[5] This review is currently ongoing.

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,[6] we believe it is too early to usefully comment on the operation of the Expert Panels.

Prohibiting pay secrecy – Part 7, Schedule 1

Reforms contained in Part 7 of Schedule 1 of the Secure Jobs, Better Pay Act inserted new section 333B in the FW Act which creates a new workplace right allowing employees:

- to disclose, or not disclose, their remuneration and any terms and conditions of their employment reasonably necessary to determine remuneration outcomes (subsection 333B(1)); and
- to ask any other employee about this information (subsection 333B(2)).

It is appreciated 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 understand that some private sector employers are concerned that disclosure by employees of pay rises or bonuses might create general disgruntlement among staff, thereby

[3] Ibid, 8.
[4] Minister for Employment and Workplace Relations, *Appointments to Fair Work Commission Expert Panels* (Media Release, 6 March 2023) <https://ministers.dewr.gov.au/burke/appointments-fair-work-commission-expert-panels>.
[5] Fair Work Commission, *Gender undervaluation – Expert Panel to review 5 priority awards* (Media Release, 7 June 2024) <https://www.fwc.gov.au/about-us/news-and-media/news/gender-undervaluation-expert-panel-review-5-priority-awards>.
[6] Fair Work Commission (7 June 2024) <www.fwc.gov.au/documents/decisionssigned/pdf/2024fwcfb280.pdf>.

hampering potential progression opportunities that may have otherwise assisted the goals of pay equity.

In our 11 November 2022 submission on the Secure Jobs, Better Pay Bill, we recommended 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.[7] We continue to hold this view.

We also suggest the need for guidance in relation to the types of incentive arrangements which 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 of Schedule 1 of the Secure Jobs, Better Pay Act 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,[8] the Australian Human Rights Commission,[9] and SafeWork NSW[10] 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

Use of temporary exceptions

The Law Council has received feedback that the use of temporary exceptions prescribed under the Fair Work Regulations 2009 (**FW Regulations**) does little to assist to promote effective compliance by employers. It is suggested that there needs to be better communication of the changes made under the FW Regulations.

[7] Law Council of Australia, *Submission to the Senate Education and Employment Legislation Committee on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (11 November 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-fair-work-legislation-amendment-secure-jobs-better-pay-bill-2022>.10.

[8] Fair Work Commission, *Sexual harassment resources* <www.fwc.gov.au/issues-we-help/sexual-harassment-work>.

[9] Australian Human Rights Commission, *Sex discrimination resources* <https://humanrights.gov.au/our-work/sex-discrimination>.

[10] SafeWork NSW, *Sexual harassment resources* <www.safework.nsw.gov.au/hazards-a-z/sexual-harassment>.

An example we have been made aware of relates to 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.[11] It is understood that many advisors and employers are unaware of these 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. 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.[12]

Effect of fixed or maximum term contracts on local governments

Concerns have been raised with the Law Council on the effect of reforms to the use of fixed or maximum term contracts, now to be found in Division 5 of Part 2-9 of the FW Act, especially for local governments seeking to provide services in reliance upon government-to-government funding.

Section 333E of the FW Act now prevents the use of fixed or maximum term contracts extending beyond 2 years, or more than two consecutive contracts. The relevant exception applies where the contract relates to a position for the performance of work that is funded in whole or in part by government funding and that funding is payable for a term of more than 2 years and there are 'no reasonable prospects' that the funding will be renewed after the end of that period.

This creates issues for local government councils. Whilst the policy objective of these measures to promote secure employment and ensure that jobs that are in truth permanent are not artificially sliced into an endless sequence of maximum term contracts may be applauded, the exception is ill-suited to the realities of government-to-government funded positions, particularly in the local government sector. One example relates to local government's provision of aged care services.

Until there is some judicial consideration of the phrase, it is unclear what 'no reasonable prospects' means.

What is clear, though, is that one level of government is not necessarily privy to the funding decisions that may need to be made at say a federal level, whether due to budgetary considerations, legislative or policy change, or even change of government. Based on past history, a council may have no reason to believe that funding will not be renewed, but cannot be sure that such a change will not occur. Funding is within the power and proper remit of the Federal Government in this instance. While a council will have budgeted for its continued provision of services, and is able to provide employment, on the basis that say a 3-year funding package is in place and may be hopeful that the funding will continue, it cannot be sure that

[11] Fair Work Ombudsman, *Additional fixed term contract exceptions*: <www.fairwork.gov.au/starting-employment/types-of-employees/fixed-term-contract-employees/additional-fixed-term-contract-exceptions>.
[12] We note that the Fixed Term Contract Information Statement contains one worked example of consecutive contracts: <www.fairwork.gov.au/sites/default/files/2023-12/is-fixed-term-contract-information-statement.pdf, as does some of the FWO guidance material>.

this will occur. So, prudently, it offers employment for a pre-agreed term that matches the period for which the role is funded.

However, if a council is to convert what have traditionally been contract roles for a period that matches the term of federal funding it receives, whether that be in 2-year blocks or otherwise, into ongoing positions, it will face a liability in the event that funding is withdrawn and redundancies ensue. This may render the ongoing involvement of the council in the provision of this service financially unviable. In one example a local council's exposure would approximate $10 million on current staffing numbers. That might mean that the council exits the service. It certainly means that is $10 million that is not available for delivery of other services to the community.

In recognition of the unique features of government-to-government funded positions, the exceptions set out in section 333F(1)(f) could be broadened to cover contracts that relate to a position for the performance of work that is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of that subparagraph, and that funding is provided to or through another level of government. The time and "no reasonable prospects" elements of the exception could be removed to avoid the above consequences. It would protect jobs that are funded by one level of government to another.

Alternatively it may be that a separate category of government-to-government funded positions could be specified in the regulations as an exception to the limitations set out in sub-section 333E(1), much as has recently occurred in respect of employees in the charities and not for profit sectors.

It is submitted that the 'no reasonable prospects' requirement at the very least should be removed as it is incapable of meaningful and practical application.

Flexible work – Part 11, Schedule 1

The Law Council continues to support measures to enable employees to enforce their rights to flexible work arrangements under the National Employment Standards. A positive change resulting from the operation of reforms contained at Part 11 of Schedule 1 of the Secure Jobs, Better Pay Act 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 little utilised 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.

Enhancing the small claims processes – Part 24, Schedule 1

The Law Council supported the measures contained in Part 24 of Schedule 1 of the Secure Jobs, Better Pay Act, noting that it introduced for the first time a right to costs, albeit very limited, to a successful claimant for a small claim and only in respect of filing fees (which for small claims are often waived).

We note, however, 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.

Paid family and domestic violence leave – Part 28, Schedule 1

The Law Council has received feedback 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 consideration being given to changing the default position to clearly be that notice is to be given within a reasonable time 'after the leave has started'.

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.

Future reviews

As a general comment, we consider that a future review of the measures introduced by the Secure Jobs, Better Pay Act may be warranted following this current review. As noted in this submission, 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.

Contact

If you wish to discuss these matters further, I invite you to contact Mr Nathan MacDonald, Deputy General Manager of Policy [redacted]

Yours sincerely



Greg McIntyre SC
President