Law Council
OF AUSTRALIA

Office of the President

13 March 2024

The Hon. Justice A Hatcher
President
Fair Work Commission
Level 11, Terrace Tower
80 William Street
EAST SYDNEY NSW 2011

By email: awards@fwc.gov.au

Dear President

Modern Awards Review 2023–24—Discussion Paper on Work and Care

1. The Law Council of Australia is pleased to provide this submission to the Fair Work Commission (**FWC**) in response to its Discussion Paper on Work and Care, as part of the Modern **Awards Review** 2023–24.

2. The Law Council acknowledges the contributions of the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section, and the Law Society of New South Wales, in the preparation of this submission.

3. The Law Council notes that the questions in the Discussion Paper are relevant to a variety of recommendations made in the Interim and Final Reports of the Senate **Select Committee** on Work and Care, released in October 2022 and March 2023, respectively. The Law Council made a submission to that inquiry in September 2022, focusing on item (c) of the Select Committee's Terms of Reference—the adequacy of workplace laws in relation to work and care, and proposals for reform.[1]

4. In its submission to the Select Committee, the Law Council:

   - supported the Commonwealth examining the potential impact of amending the National Employment Standards under Part 2-2 of the *Fair Work Act 2009* (Cth) to provide for an additional entitlement to unpaid carer's leave; and

   - supported the unification of the definition of 'carer' across legislation and across jurisdictions.

5. Whilst the Law Council welcomes ongoing efforts to consider the impact of workplace relations settings on work and care, the Law Council is of the view that it is more appropriate for the relevant industry or employer bodies to respond to the individual Discussion Questions posed in respect of particular awards. Nonetheless, the Law Council would appreciate the opportunity to comment on the detail of any legislative or

[1] Law Council of Australia, *Inquiry of the Select Committee on Work and Care* (Submission, 14 September 2022) <https://lawcouncil.au/resources/submissions/inquiry-of-the-select-committee-on-work-and-care>.

procedural reforms formally proposed by the Commonwealth to give effect to any of the Select Committee's recommendations.

Context of the Discussion Paper

6. When requesting the FWC to initiate the Awards Review, the Minister for Employment and Workplace Relations, the Hon. Tony Burke MP, noted that:

> *The desirability of a review and possible areas for focus arise from outcomes of the Jobs and Skills Summit, changes to the objects, objectives and gender equality provisions of the Fair Work Act 2009 made by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022, workplace recommendations of the National Cultural Policy,* Revive*, and the Final Report of the Senate Select Committee on Work and Care*.[2]

7. The 19 Discussion Questions ask whether any variations are necessary to 25 modern awards to ensure they continue to meet the modern awards objective in subsection 134(1) of the Fair Work Act. The Discussion Questions appear to reflect the FWC's jurisdiction to make, or vary, modern awards, as provided in sections 134 and 136 of the Fair Work Act.

8. The Law Council notes that the modern awards objective in subsection 134(1) of the Fair Work Act requires the FWC to ensure that modern awards, together with the National Employment Standards, 'provide a fair and relevant minimum safety net of terms and conditions', taking into account a range of factors, such as relative living standards and the needs of the low paid.[3] Since the commencement of the amendments introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), these factors include:

   - the need to improve access to secure work across the economy;[4] and
   - the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, and providing workplace conditions that facilitate women's full economic participation.[5]

Select Committee recommendations and recent reforms

9. The Discussion Paper identifies that 10 recommendations of the Select Committee are potentially relevant,[6] and a significant emphasis is placed on these recommendations throughout. The Law Council notes that some of these recommendations have already been enacted through legislation, such as the right to disconnect.[7] Other recommendations, such as the right to request a four-day week, remain live policy questions.

10. To the extent that the recommendations of the Select Committee (and other materials, as noted by the Minister) concern factors that are set out in the modern awards objective, they are properly considered as a point of reference—although not binding—in assessing whether each of the modern awards continues to 'provide a fair and relevant

[2] The Hon Tony Burke MP, Letter to the Hon Justice A Hatcher (12 September 2023) <https://www.fwc.gov.au/documents/consultation/letter-from-minister-2023-09-12.pdf>.
[3] *Fair Work Act 2009* (Cth) s 134(1)(a).
[4] Ibid s 134(1)(aa).
[5] Ibid s 134(1)(ab).
[6] Fair Work Commission, Modern Awards Review 2023-24, Discussion Paper—Work and Care, 13.
[7] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) Sch 1, Pt 8.

minimum safety net of terms and conditions'.[8] From this perspective, it is difficult to provide a definitive answer as to whether specific variations are necessary, as is posed in each Discussion Question.

Variations to modern awards

11. Where the recommendations of the Select Committee are agreed to by the Commonwealth and become law, the resulting legislative changes may mandate variations to the awards.[9] If not, a separate question arises as to whether variations to awards are necessary.

12. Each Discussion Question may require separate responses regarding some or all of the 25 modern awards to be considered. While it may be possible to develop certain model terms, the need for variations to a modern award is likely to differ, depending on the award.

13. In each case, the decision may require balancing competing considerations: for example, making secure and predictable part-time work more available against improving flexibility for workers and employers more generally. As a result, the changes to some awards may be substantial, as the award may not have been originally drafted with these considerations in mind, while changes to other awards may be minor.

14. Determining what is required, and striking an appropriate balance between competing factors, should be considered in the context of the terms and conditions and overall industry context of the award.

15. For these reasons, the Law Council considers that industry and employer organisations are better placed to advise on potential changes in relation to specific modern awards, as requested in the Discussion Paper. Nonetheless, the Law Council reiterates that it would welcome the opportunity to comment on any legislative and procedural reforms proposed by the Commonwealth to give effect to the recommendations of the Select Committee.

Contact

16. If the FWC requires further information or clarification, please contact Mr Nathan MacDonald, Deputy General Manager, Policy, at nathan.macdonald@lawcouncil.au or on (02) 6246 3721.

Yours sincerely



Greg McIntyre SC
President

[8] *Fair Work Act 2009* (Cth) s 134(1).
[9] E.g., s 95 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) provides that a modern award must include a right to disconnect term.