Law Council
OF AUSTRALIA

31 August 2026

Dr Carina Garland MP
Chair
Standing Committee on Employment,
Workplace Relations, Skills and Training
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: employment.reps@aph.gov.au

Dear Chair

Response to Questions on Notice—Inquiry into the operation and adequacy of the National Employment Standards

1. On 30 July 2026, representatives of the Law Council of Australia appeared before the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training in relation to the Inquiry into the operation and adequacy of the National Employment Standards (**NES**).

2. The Law Council took two questions on notice during the hearing.

Question 1

Ms LAWRENCE: Yes—closing loopholes. The recent reforms are obviously aimed at ensuring a safety net of fair and relevant minimum standards and conditions for regulated workers through enforceable minimum standard orders. It's just a question of whether there's a view that more needs to be done to ensure enforceability, not only around things such as the payment of superannuation for regulated workers but other entitlements as well. So, yes, if you're happy to take that on notice, that would be fantastic. I then have a broader question. Given that you've raised the complexity and the number of court cases that are being heard to look at where the flaws within the legislation are—or perhaps it's the clarification that's required under the NES that the courts are providing—do you have a view on how employers are keeping up with changes in industrial law, particularly with the changes that these court decisions can lead to?

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3. The Fair Work Commission recently made its first minimum (interim) standards order.[1] The Law Council is aware that there are several other minimum standards order applications currently before the Fair Work Commission. Given the recency of these developments, the Law Council's view is that it is too early to comment on the effectiveness of the relevant provisions. However, we would welcome the ability to do so once the Fair Work Commission has further progressed its work on applications made under Part 3A of the *Fair Work Act 2009* (Cth) (the **Act**).

Question 2

CHAIR (Dr Garland): Is there a broader reflection that you might be able to offer—and, again, I'm happy to put this on notice to you as well, if that's easier—around whether there are some outstanding areas where the intent and the interpretation have created some issues and how we might better align intent and interpretation when it comes to provisions and definitions?

4. During the public hearing, Mr Pawel Zielinski (Chair of the Industrial Relations Committee within the Law Council's Federal Disputes Resolution Section) referred to two matters as potentially deserving further consideration: payment in lieu of notice, and the meaning of 'shift worker'. We briefly elaborate on these matters below.

5. First, paragraph 117(1)(b) of the Act provides that, where a person's employment is to be terminated upon the payment in lieu of notice owed to them under the NES, that payment must occur before the termination takes effect. Mr Zielinski noted that, anecdotally, many employers routinely make that payment immediately after the effective date of termination meaning that they are technically non-compliant with that provision. The Law Council's considered position is that the payment timing requirement enshrined in section 117 is the result of a deliberate policy decision to ensure the prompt payment by employers of NES termination entitlements. The non-compliance of employers is not itself an ambiguity but may be due to a lack of education and enforcement.

6. Second, Mr Zielinski referred to the fact that the meaning of 'shift worker' is variable (by reference to the meaning of that term ascribed within modern award, enterprise agreements or subsection 87(3) of the Act in respect of award/agreement free employees). Again, the Law Council's considered view is that this does not give rise to any ambiguity within the NES. To the extent that there are ambiguities within any awards or enterprise agreements as to whether a person is a shift worker, those are matters that may properly be addressed by the Fair Work Commission and parties to relevant enterprise agreements.

[1] *Application by the Transport Workers' Union of Australia* [2026] FWCFB 211.

Contact

7. The Law Council thanks the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section for its contribution to the preparation of this submission.

8. If you would like to discuss this submission further, please contact John Farrell, Executive Policy Lawyer [redacted].

Yours sincerely



Tania Wolff
President