Law Council
OF AUSTRALIA

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

Senate Education and Employment Legislation Committee

11 November 2022

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council is grateful for the contributions of the following Constituent Bodies and committees in the preparation of this submission:

- Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section (**Industrial Law Committee**);
- Equal Opportunity Committee;
- Law Society of New South Wales; and
- Law Society of South Australia.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee in relation to its Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Bill**).

2. The Law Council notes that the Bill was referred to the Committee for inquiry on 27 October 2022. The Committee is due to report on or before 17 November 2022, and submissions were due on 11 November 2022. Additionally, a number of amendments, including extensive amendments introduced by the Government (**Government Amendments**), were passed by the House of Representatives on 10 November 2022.

3. Given the size and complexity of the Bill (and the amendments), this timetable has limited the ability for stakeholders, and the Parliament itself, to consider the Bill in detail. As a membership-based organisation, the Law Council has an obligation to consult with its Constituent Bodies, Sections, and expert Advisory Committees on matters of policy. The limited consultation period has constrained the Law Council's ability to engage at a detailed level with the legislative and explanatory materials. The Law Council's views on the contents of the reforms should therefore be considered preliminary. This is most unfortunate, given the significant proposals contained within the Bill. In the Law Council's view, this truncated process is highly problematic from the perspective of broader public scrutiny of the making of Australia's laws, as part of a democratic process.

4. Unless stated otherwise, throughout this submission references to legislative provisions (or proposed amendments under the Bill) are references to the provisions of the *Fair Work Act 2009* (Cth) (**FW Act**).

Part 1—Abolition of the Registered Organisations Commission

5. The Law Council notes that, while the proposed amendments in Part 1 abolish the Registered Organisations Commission (**ROC**), its functions will be retained and transferred to the General Manager of the Fair Work Commission (**FWC**). This reflects the regulatory arrangements prior to the establishment of the ROC. The Law Council supports the retention of these provisions and notes that it is a matter of policy where the functions should sit.

Part 2—Additional registered organisations enforcement options

6. The Law Council notes that the proposed amendments in Part 2 provide the regulator with the power to issue infringement notices and to enter into enforceable undertakings. These provisions, which are common in a range of legislation, may provide appropriate alternatives to civil penalty litigation in relevant cases.

Part 4—Objects of the Fair Work Act

7. The Law Council supports the proposed amendments set out in Part 4, which would amend FW Act to introduce job security and gender equity into the objects of the FW Act. The Law Council and its Constituent Bodies have long supported pay and opportunity equity, regardless of gender, as vital workplace considerations.[1]

Part 5—Equal remuneration

8. The Law Council supports, in principle, the proposed amendments contained in Part 5, which, reasonably reflect the policy objective of gender equity in accordance with the proposed amendments to the FW Act outlined in Part 4.

Proposed subsection 157(2B)

9. Section 157 of the FW Act provides the FWC with the power to make a modern award or to make a determination to vary or revoke a modern award.

10. Clause 352 of the Bill, sets out proposed subsection 157(2B) as follows:

> *2B The FWC's consideration of work value reasons must:*
>
> *(a) be free of assumptions based on gender; and*
>
> *(b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.*

11. While proposed paragraph 157(2B)(b) is, in the Law Council's view, consistent with the view expressed by the Full Bench of the FWC,[2] the consideration of whether historical underpayment is based on gender, itself, appears to require gender-based assumptions. Accordingly, further guidance may be necessary to clarify the nature of the FWC's consideration under proposed paragraph 157(2B)(b). Alternatively, the proposed paragraph might be clarified by amending it to read 'include consideration of whether historically the work has been undervalued for reasons that include gender.'

Proposed amendments to section 302

The proposed amendments in relation to gender equity considerations

The 'on the basis of gender' addition

12. Proposed subsection 302(3A) would further particularise the matters that the FWC may take into account in deciding whether there is 'equal remuneration for work of equal or comparable value' for the purpose of considering whether to make an equal remuneration order under subsection 302(1) of the FW Act.

13. The new provision would clarify that the FWC may take into account comparisons within and between industries or occupations 'to establish whether the work has been undervalued on the basis of gender'.

---

[1] See, eg, The Law Society of New South Wales, 'Charter for the Advancement of Women' (Web Page, 2016) <https://www.lawsociety.com.au/about-us/Law-Society-Initiatives/advancement-of-women/charter>.
[2] *Equal Remuneration Decision 2015* (2015) 256 IR 362, [292].

14. According to the Explanatory Memorandum for the Bill, the purpose of new subsection 302(3A) is to 'provide further guidance to' the FWC in assessing whether there is equal remuneration in circumstances where the FW Act is 'currently silent as to how equal remuneration should be assessed'.[3]

15. However, the suggestion in proposed paragraphs 302(3A)(a) and (b) that the FWC must establish that any undervaluation of work arose 'on the basis of gender' seems to add or assume a limb which does not exist within the test in subsection 302(1). It is also ostensibly inconsistent with proposed subsection 302(3C), which provides that the FWC is 'not required to find discrimination on the basis of gender to establish the work'.

16. Members of the Law Council's Industrial Law Committee note that, in their experience, it can be difficult to prove that gender is the reason why a predominantly female occupation or industry is undervalued.

17. Given the intent of the proposed amendments to section 302 appears to be to allow the FWC to alter rates for (a) female dominated occupations or industries that are (b) undervalued compared to other occupations or industries, the Law Council suggests that it should be sufficient to simply prove those two facts, without having to prove, in addition, that gender is the reason for that undervaluation.

The situation of individuals

18. Conversely, proposed paragraph 302(3A)(a) may suggest an assumption that an equal remuneration order made on gender equity terms should or would arise only as a result of a comparison between or within industries and occupations—for example, arising in the context of an award or enterprise agreement.

19. The current provision theoretically permits an order to be made in relation to one person. However, these amendments may suggest that the comparison should be between or within industries, and this may exclude comparisons between a female employee and male employee in the same workplace, occupation, or industry.

20. The Law Council accepts that proposed paragraph 302(3A)(a) is a permissive provision, which does not limit the matters which may be taken into account in making an equal remuneration order, as made clear by proposed subsection 302(4A). However, the Law Council suggests consideration be given to making amendments to paragraph 302(3A)(a) or the Explanatory Memorandum to make clear that the comparison may be made between individual workers in the same workplace, occupation, or industry.

A further unaddressed issue

21. Additionally, there is an issue with the existing legislation that has been previously identified by the Full Bench of the FWC that is not addressed by the proposed amendments. Subsection 302(1) of the FW Act requires that any order, if made, must ensure that there is equal remuneration. This was described by the Full Bench in *Equal Remuneration Decision 2015* as an 'all or nothing' approach, that deprives the FWC of the discretion to choose anything other than either not making any order—subsection 302(1) confers a discretion—or ordering absolute equality.[4] The FWC is permitted to phase in increases (pursuant to section 304) but it cannot determine a higher rate to a level that is not 100 per cent 'equal' to another

[3] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) [354] ('Explanatory Memorandum').
[4] *Equal Remuneration Decision 2015* (2015) 256 IR 362, [229].

occupation, even where that other occupation is in fact overvalued (for example, for market reasons) or where such an order is simply unaffordable. At [230] the Full Bench said:

> *Such injustice could be mitigated by an amendment to s302(1), to replace the requirement to 'ensure' that there will be equal remuneration for work of equal or comparable value, with a requirement that the Commission 'address' any unequal remuneration, 'to the extent it considers appropriate in the circumstances'.*

22. The Law Council supports an amendment on these terms.

Recommendations

- **Proposed subsection 302(3A) should be amended to clarify that it is not necessary to prove that any undervaluation of work arose 'on the basis of gender' in order to make an equal remuneration order.**
- **Consideration be given to amending paragraph 302(3A)(a) or the Explanatory Memorandum to make clear that the comparison which informs an equal remuneration determination may be made between individual workers in the same workplace, occupation, or industry.**
- **The Bill should amend subsection 302(1) of the FW Act to replace the requirement to 'ensure' that there will be equal remuneration for work of equal or comparable value, with a requirement that the FWC address any unequal remuneration to the extent it considers appropriate in the circumstances.**

Part 6—Expert panels

23. The Law Council supports the constitution of the Expert Panels under Part 6 of the Bill, to enhance the FWC's expertise in assessing pay and conditions for workers in the Care and Community sector.

Part 7—Prohibiting pay secrecy

Proposed section 333B

24. Clause 383 of the Bill proposes to insert new section 333B in the FW Act which would effectively create 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 (proposed subsection 333B(1)); and
- to ask any other employee about this information (proposed subsection 333B(2)).

25. While clearly underpinned by the stated goal (reflected in the Objects) to improve gender equity, the Law Council notes that this new provision may have broader implications. The right of an employee to disclose his or her remuneration is unfettered, as is the right to request the information from another person. As such, that employee does not need to have gender equity as a stated purpose. The Explanatory Memorandum does not reflect the gender equity purpose, it simply says employees 'would be able to use this information to assess whether their

remuneration is fair and comparable to that of other employees in the same workplace or industry'.[5]

26. While the policy behind proposed subsection 333(B)(1) allowing employees to disclose their own remuneration if they wish is apparent, it is less clear why it is also necessary to create a workplace right to be able to request other employees disclose their remuneration. There is a risk that in some circumstances employees exercising such a right may place undue pressure on others to disclose information about their remuneration and other conditions. Under the proposed amendments, individuals in this situation would no longer be able to rely on the confidentiality provisions of their employment contracts to avoid making such disclosures. To reduce this risk, additional guidance for employees informing them of their right under proposed subsection 333B(1) *not to disclose* might be beneficial.

27. An additional potential consequence is that some employees who may have otherwise received benefits (such as bonuses, pay rises, and so on) may find it difficult to obtain such benefits because an employer will be concerned that acceding to such a request would then create disharmony in the workplace if known by others. This is particularly so as the term 'remuneration' is not defined and proposed paragraph 333B(1)(b) leaves open the prospect that the term refers broadly to all elements of an employee's package (for example, including bonuses, commissions, cars, housing). Specific incentive packages are often negotiated with senior employees on an individual basis. The scope of the clause would mean agreement as to these matters for executive employees could not be done on the basis that it was required to be kept confidential.

28. The Law Council considers that clarity on the elements of 'remuneration' and 'remuneration outcomes' as well as the types of information that may be 'reasonably necessary' to determine remuneration outcomes (beyond the note provided which only refers to hours worked) would be of great benefit to employers and employees in ensuring compliance, particularly given this is a civil penalty provision.

Proposed sections 333C and 333D

29. Proposed section 333C provides that terms of employment contracts or fair work instruments have no effect to the extent they are inconsistent with proposed section 333B. While secrecy provisions in new employment contracts and relevant instruments are prohibited under proposed section 333D, the Law Council suggests consideration be given to implementing a transitional period of six months following the commencement of this item, to allow employers to bring existing contracts, and variations of agreement entered into on and from the commencement date, into compliance with the new provisions.

[5] Explanatory Memorandum, [412].

Recommendations

- **The note to proposed subsection 333B(1) should be amended to provide clarity on the elements of 'remuneration' and 'remuneration outcomes' as well as the types of information that may be 'reasonably necessary' to determine remuneration outcomes.**
- **The Bill should be amended to provide a transitional period of six months following the commencement of Part 7, to allow employers time to ensure that existing contracts, and variations of agreement entered into on and from the commencement date, comply with the new provisions.**

Part 8—Prohibiting sexual harassment in connection with work

Consistency with the *Sex Discrimination Act 1984* (Cth)

30. Currently, the FW Act does not expressly prohibit sexual harassment, although it can be raised indirectly in matters brought to the FWC through a number of existing provisions, such as the anti-bullying provisions.[6]

31. In the report *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (**Respect@Work Report**), the Australian Human Rights Commission (**AHRC**) recommended that the Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the *Sex Discrimination Act 1984* (Cth) (**SD Act**), is expressly prohibited.[7]

32. The Law Council broadly supports the proposed amendments in Part 8 of Schedule 1 to the Bill, which would explicitly prohibit sexual harassment in connection with work under the FW Act, in accordance with recommendation 28 of the Respect@Work Report.

33. The Law Council appreciates the remedial options that the Bill would provide to people experiencing sexual harassment in the workplace, including prospective workers. These remedial options, such as stop sexual harassment orders, and dispute resolution facilitated by the FWC, would provide an external avenue for employees seeking to stop the sexual harassment continuing.

34. However, the Law Council has concerns about the complexity in the interaction between the SD Act scheme and proposed FW Act scheme.

35. The AHRC found that a consistent theme that emerged from submissions to, and consultations during, its inquiry was that the interaction between the schemes is complex and confusing for workers and employers to navigate.[8]

---

[6] *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Act) ('SD Act'), which commenced operation in September 2021, amended the *Fair Work Act 2009* (Cth) ('FW Act') to expand the FWC's anti-bullying jurisdiction to allow the FWC to stop sexual harassment in the workplace, including by making stop sexual harassment orders: see Part 6-4B of the FW Act.

[7] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 46 (Recommendation 28).

[8] Ibid 445.

36. The AHRC said that:

> *As each of the schemes offers specific and differing benefits to victims, the Commission has identified the benefits of each scheme and how to:*
>
> - *maximise and improve existing legislative frameworks*
> - *leverage, rather than duplicate, the expertise of existing regulators, in line with the Australian Government's Deregulation Agenda.*[9]

37. Notwithstanding this statement, the Law Council queries whether this is achieved through the Bill and is concerned that navigating the schemes will continue to be confusing for workers and employers.

38. The Law Council acknowledges that, with respect to the risk of multiple claims and actions, proposed section 734B would prevent a person from pursuing multiple remedies for sexual harassment under both the FW Act and anti-discrimination law, or under the AHRC Act. For example, a person must not seek a remedy for a contravention of the prohibition on sexual harassment in connection with work under both the FW Act and the SD Act.

39. However, subclause 734B(1) includes a carve out for applications for stop sexual harassment orders. This means that a person who has made an application for a stop sexual harassment order under the FW Act could also pursue a remedy in relation to the same conduct under an anti-discrimination law or under the AHRC Act. While the Law Council supports this carve out, the provision demonstrates the complexity of the legislation.

40. In relation to the remedial pathways for sexual harassment, a person will have to inform themselves early in the process about both schemes in order to avoid inadvertently limiting their options.

41. For example, the Law Council notes the differing approaches to costs under the FW Act and the SD Act. The FW Act adopts a 'no costs' approach and the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (**Respect at Work Bill**), before Parliament at the time of writing, would insert a 'costs neutrality' provision into the SD Act.

42. Another example is the issue of the forum in which dispute resolution is commenced. The Respect at Work Bill would provide for unions and other representative bodies to commence representative proceedings in federal courts under the SD Act, but only after conciliation by the AHRC has been terminated. If mediation were commenced in the AHRC under the proposed amendments in the Respect at Work Bill, that would preclude conciliation by the AHRC and therefore preclude a representative action under the SD Act. Similarly, a person would have limited ability to make a sexual harassment court application under the FW Act unless the FWC has first dealt with the dispute by mediation, conciliation, or recommendation.

[9] Ibid.

43. The Law Council suggests that guidance material on the various pathways under the SD Act and FW Act will be necessary to assist people to navigate the systems and make informed choices.[10]

44. The Law Council notes that the Government has moved an amendment to explicitly provide that Part 8 of the Bill does not exclude or limit the concurrent operation of a law of a state or territory to the extent that the law allows an application to be made to a person, court or body (proposed subsection 527CA(3)—see Government Amendments):

> *(a) for an order or other direction (however described) to prevent a person from being sexually harassed; or*
>
> *(b) to deal with a dispute relating to an allegation that a person has been sexually harassed (whether or not by arbitration).*
>
> *Note 1: An order made under this Part, or under Division 2 of Part 4-1 in relation to a contravention of this Part, will prevail over any order or other direction made by a person, court or body under a law of a State or Territory, to the extent of any inconsistency.*
>
> *Note 2: Generally, section 734B prevents multiple applications or complaints under both this Act and State and Territory anti-discrimination laws in relation to the same conduct.*

Additional suggestion

45. The Law Council suggests that it might be useful to a future reader of the FW Act to see (as part of the Guide to this Part in proposed section 527A) an explicit reference to the application of the provisions throughout Australia, including non-national system employers, given stop sexual harassment orders were previously linked to constitutionally covered businesses.

Recommendations

- **Guidance material be produced on the various pathways for bringing sexual harassment complaints under the SD Act and FW Act to assist people to navigate the systems and make informed choices, by an entity or entities with relevant functions.**
- **The Guide to Part 3-5A (Prohibiting sexual harassment in connection with work) provided in proposed section 527A should be amended to include an explicit reference to application of the provisions throughout Australia including non-national system employers.**

[10] By way of example, the Fair Work Ombudsman produces best practice guides, including, for example, a gender pay equity guide, apparently under its functions in subsection 682(1) of the FW Act: Fair Work Ombudsman, Best practice guides (Web page) <https://www.fairwork.gov.au/tools-and-resources/best-practice-guides>. The AHRC has a general function to prepare and to publish guidelines for the avoidance of acts inconsistent with human rights: *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(n) ('AHRC Act'). By way of comparative example, the AHRC would be given a function to prepare and to publish guidelines for complying with the positive duty in relation to sex discrimination under proposed section 35A which would be inserted into the AHRC Act by item 16 of Schedule 2 to the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Cth).

Part 9—Anti-discrimination and special measures

46. The amendments proposed to be made by this Part would serve two main functions.

47. Firstly, they would:

- expand the terms which are 'discriminatory' in a modern award[11] or an enterprise agreement[12] to include terms which discriminate against an employee because of breastfeeding, gender identity or intersex status; and
- expand the attributes in relation to which an employer must not take an adverse action to include breastfeeding, gender identity or intersex status .[13]

48. The latter two terms would be expressly given the same meaning as they have in the SD Act, and 'breastfeeding' would be implicitly given the same meaning given the way that term is defined in the SD Act.[14]

49. Secondly, they would expressly provide that an enterprise agreement may be made in relation to a special measure to achieve equality.[15] A term is a 'special measure to achieve equality' if it has the 'purpose of achieving substantive equality for employees or prospective employees who have a particular attribute or a particular kind of attribute' and 'a reasonable person would consider that the term is necessary in order to achieve substantive equality'.[16]

Anti-discrimination provisions

50. The Law Council supports the inclusion of 'breastfeeding', 'gender identity' and 'intersex status', as defined in the Bill, in the anti-discrimination provisions of the FW Act, which promotes harmonisation of the FW Act and other Commonwealth anti-discrimination laws, including the SD Act.

51. However, the Law Council considers that protected characteristics in the FW Act should closely align with those in the SD Act. That means extending the provisions beyond discrimination because of the attribute itself (such as the person's 'breastfeeding', 'gender identity' and 'intersex status') to characteristics which appertain generally to, or are generally imputed to, such persons.

Special measures

52. Insofar as the special measures provisions are concerned, they address issues of ensuring equality going forward, but do not give consideration to provisions currently in agreements that inhibit equality, and which will continue to do so into the future because they are indirectly discriminatory. Examples of such provisions are:

(a) provisions requiring particular employees to be full-time employees; or

(b) requiring part-time shifts to be a minimum of 8 hours

[11] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) sch 1, cl 427.
[12] Ibid sch 1, cl 429.
[13] Ibid sch 1, cl 432.
[14] Ibid sch 1, cl 429; and SD Act s 4(1) ('definition of breastfeeding').
[15] Ibid ch 1, cl 428, 430 and 430.
[16] Ibid sch 1 cl 431.

53. These types of provisions are indirectly discriminatory. However, there are conflicting Federal Court of Australia decisions as to whether discrimination under the FW Act is limited to direct discrimination.

54. In *Shop, Distributive and Allied Employees' Association v National Retailers Association (No 2)* (***SDA***), Tracey J concluded that, in respect of section 195 of the FW Act, discrimination was limited to direct discrimination.[17] However, in *Klein v Metropolitan Fire and Emergency Services Board* (***MFB***), Gordon J considered the meaning of discrimination in item d of Section 342 of the FW and declined to follow Tracey J in *SDA*, noting that in respect of section 342 discrimination includes indirect discrimination.[18] Thus there is a conflict between single judge decisions in the Federal Court, which leaves the general issue of what 'discrimination' means in the FW Act, unresolved.

55. In a decision dealing with the approval of the then MFB agreement containing a number of provisions that the Minister (intervening in the case) contended were indirectly discriminatory, Gostenick DP expressed the view that he felt bound by the decision of Tracey J in SDA. However, he then went on to state that, if he was not bound by that decision, he considered that discrimination in the FW Act encompassed indirect discrimination and indicated that a number of the provisions in the proposed MFB agreement were indirectly discriminatory.[19] A Full Bench, on appeal of the decision at first instance, did not address the issue of whether discrimination in the FW Act meant indirect as well as direct discrimination, thus shutting the door on judicial review by a Full Court of the Federal Court in order to determine this issue definitively.[20]

56. If it were expressly made clear by the Bill that discrimination provisions in the FW Act covered both direct and indirect discrimination, then provisions in agreements such as those referred to above would be seen as clearly discriminatory and unable to be in an agreement. That would remove a significant obstacle, in particular for women and people with carer responsibilities, from more fully participating in working life. This would then enable the special measures provisions proposed to operate in a more extensive manner, and both sides of the equation of achieving equality would be addressed.

Recommendations

- **Protected characteristics in the FW Act should more closely align with those in the SD Act by extending the provisions beyond discrimination because of the attribute itself to characteristics which appertain generally to, or are generally imputed to, such persons.**
- **The Bill should amend the FW Act to expressly make clear that discrimination provisions in the FW Act cover both direct and indirect discrimination.**

[17] [2012] FCA 480.
[18] [2012] FCA 1402.
[19] *Application by Metropolitan Fire and Emergency Services Board* [2019] FWC 106.
[20] See *Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia* [2019] FWCFB 6255.

Part 10—Fixed term contracts

Proposed section 333E

57. Proposed section 333E (subject to Government Amendments) would limit the use of fixed-term contracts in a number of circumstances (other than for casual employees).

58. The Law Council supports in principle measures to limit the use of fixed-term contracts so that they are not used for employees who are subject to consecutive renewals over extended periods in roles that are ongoing or substantially similar.

Length of identifiable period

59. The two-year limit under proposed section 333E, is, in the Law Council's view, somewhat arbitrary and not adequately justified in the Explanatory Memorandum. In this regard, and by way of example, it is noted that longer term fixed contracts of between three and five years are common for public sector employees. Accordingly, consideration could be given to increasing the 'identifiable period' set out in proposed section 333E.

60. Additionally, the Law Council suggests that, if a maximum term is to be implemented under proposed section 333E, the ability to renew or extend a contract should be up to the maximum term, regardless of how many times the extension is exercised.

Drafting clarity

61. It is not clear from the text of the Bill, or the Explanatory Memorandum, whether 'an identifiable period' is intended to refer only to an identified specified period of time or whether it is also intended to capture a contract that says it terminates at the end of an identifiable period set by reference to an event. For example, it is unclear whether a contract that states that a person is employed for the life of a project, or until the end of an event, is one that is for an identifiable period.

62. It appears that the section is intended to apply only in respect of an identified period of time—noting that proposed subsection 333E(2) refers to a specified period of time, namely two years. If this is the intended operation of the term 'identifiable period', then the Law Council suggests that this be made clear.

63. Alternatively, if the proposed provision it is intended to prohibit a fixed-term contract that is fixed referable to an event that is expected to, or in fact is, more than two years away (for example, the period during which the employer has a contract to supply a service) that also should be made clear.

Proposed section 333F

64. The Law Council supports the exceptions to limitations set out in proposed section 333F, which appear to protect reasonably the use of fixed-term contracts where there is a justifiable short-term need.

65. However, the Law Council suggests that consideration be given to including an additional exception where fixed-term contracts may be required for employees with visas restricting employment rights for four years, including partner visas and skills shortage visas. Following the expiry of such visas, a bridging visa is often also 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.

Proposed section 333L

66. In relation to proposed section 333L, the Law Council reiterates its longstanding position, discussed further at paragraphs [146]–[148] below, that section 596 of the FW Act should be repealed or amended so that those who come before the FWC have a right to legal representation. Access to legal representation assists with the efficiency of proceedings and is consistent with the proper administration of justice.

Recommendations

- **Consideration should be given to increasing the 'identifiable period' set out in proposed section 333E. Additionally, under proposed section 333E, the ability to renew or extend a contract should be up to the maximum term, regardless of how many times the extension is exercised.**
- **Proposed section 333E should be amended to clarify whether 'an identifiable period' is intended to refer only to an identified specified period of time, or whether it is also intended to capture a contract that says it terminates at the end of an identifiable period set by reference to an event.**
- **An additional exception should be added to proposed section 333F to provide for circumstances where an employee holds a visa restricting their employment rights.**

Part 11—Flexible work

67. The Law Council supports measures to enable employees to enforce their rights to flexible work arrangements under the National Employment Standards. The policy reasons behind extending the 'circumstances' under which an employee may request flexible work arrangements are clear. The proposed amendments are also consistent with other proposed amendments to the Act to allow employees facing domestic violence, or caring for a household member facing domestic violence, to have a right to request flexible work arrangements.

21-day time limit

68. Proposed subsection 65A(1) would require an employer to respond (in writing) to a request for flexible work arrangements within 21 days.

69. In the Law Council's view, flexibility is needed on the timeframe as it can take time to consider a request for flexible work arrangements and any relevant reasonable business grounds to refuse it, and to provide the detailed response now required by proposed subsections 65A(2) and (6). The written response to a flexible work arrangements request can be onerous. For example, it may be necessary to gain agreement with affected employees to change their working hours which, in itself, could take several weeks. It is possible that some employers, such as those without human resource staff or ready access to legal advice, would rush towards a solution and end up (inadvertently) unilaterally varying other employees' contracts based on the fear of not meeting the 21-day requirement.

70. The Law Council suggests that consideration be given to the following amendments (indicated in underline):

Amend proposed subsection 65A(1) as follows:

> *If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days (or such longer period as agreed between the employer and the employee with such agreement not being unreasonably withheld).*

And amend proposed paragraph 65B(1)(b) as follows:

> *(1) This section applies to a dispute between an employer and an employee about the operation of this Division if:*
>
> *(a) the dispute relates to a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee; and*
>
> *(b) either:*
>
> *(i) the employer has refused the request; or*
>
> *(ii) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A or sought an extension of time in which to do so (such extension having been agreed to by the employee).*

Reasonable business grounds

71. Proposed subsection 65A(5) provides a non-exhaustive list of 'reasonable business grounds' for refusing a request for flexible work arrangements. The Law Council suggests the following amendment to paragraph 65A(5)(c) (indicated in underline):

> *(c) that it would be impractical or significantly disruptive to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;*

Recommendations

- **Proposed subsection 65A(1) be amended to provide that the 21-day limit for an employer to respond to a request for flexible work arrangements can be extended for a longer period if agreed between the employer and the employee with such agreement not being unreasonably withheld.**
- **The non-exhaustive list of 'reasonable business grounds' for refusing a request for flexible work arrangements proposed subsection 65A(5) should be amended at paragraph (c) to include a situation where it would be 'impractical or significantly disruptive' to accommodate the new working arrangements requested.**

Part 12—Termination of enterprise agreements after nominal expiry date

72. The Law Council suggests that the clarity of proposed section 226 may be aided by inclusion of a definition of what factors should be considered in relation to the 'viability of a business'.

73. The Law Council notes that the proposed amendments in this Part do not include protection to prevent the practice of 'phoenixing'—that is, employers deliberately winding one entity up for the purpose of escaping an enterprise agreement. Consideration could be given to addressing this issue. However, the Law Council notes that this would require consideration of associated amendments to transfer of business provisions, and potentially to section 550 to ensure individual liability.

Part 13—Sunsetting of 'zombie' agreements etc

74. The Law Council supports the proposed amendments in Part 13, which would effectively sunset all remaining transitional instruments currently preserved by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

Part 14—Enterprise agreement approval

Coverage and genuine agreement

75. The Law Council suggests that the proposed amendments outlined in Part 14 raise a concern about certainty. As a result of the inherently 'flexible' terms used in the proposed section 188 this is likely to be an area of contestability and litigation. The FWC is required to be satisfied that the employees requested to vote on the agreement have a 'sufficient' interest and are 'sufficiently' representative of the employees to be covered. Although it would be open to the FWC to develop some principles about these criteria in the statement of principles contemplated by the proposed section 188B, this point is still likely to be tested through litigation.

76. The process followed by the FWC to consult on and develop the Statement of General Principles will be key to the clarity of this Part. If the FWC is required to issue reasons and guidance on the contents of the Statement of General Principles, then this will be highly beneficial and reduce potential litigation.

Additional suggestions

77. The Law Council notes that the proposed amendments in Part 13 seek to simplify the procedural requirements for approval of enterprise agreements by the FWC. However, the Law Council suggests that consideration be given to replacing references to 'a reasonable time' in the proposed amendments to paragraphs 180(4B)(a) and (b) with specific timeframes, to reduce uncertainty and avoid potential disputation.

78. The Law Council also supports the development of the 'statement of principles' under proposed new section 188 of the FW Act.

Recommendation

- **Consideration should be given to replacing references to 'a reasonable time' in the proposed amendments to paragraphs 180(4B)(a) and (b) with specific timeframes, to reduce uncertainty and avoid potential disputation.**

Part 15—Initiating bargaining

79. The summary of the consequences of the giving of the written request under proposed subsection 173(2A) is that it commences the bargaining process (so the employer must take all reasonable steps to issue a notice of employee representational rights (**NERR**) to each employee who will be covered by the agreement) and the FWC can make a bargaining order (provided the other requirements are met).

80. A potential complication is the reference in proposed paragraph 173(2A)(d) to 'or substantially the same' group of employees as the earlier agreement. This imprecision may lead to disputes about whether the request satisfies the requirements of 173(2A). The current process, especially the majority support determination process, has provided greater clarity as to which employees are intended to be covered before the bargaining process (with its concomitant obligations) commences.

Recommendation

- **The reference in proposed paragraph 173(2A)(d) to 'or substantially the same' group of employees as the earlier agreement should be reconsidered to provide greater clarity as to which employees are intended to be covered before the bargaining process commences.**

Part 16—Better off overall test

81. Part 16 of the Bill makes three fundamental changes to the way the better off overall test (**BOOT**) applies to the approval of, and approval of variations of, enterprise agreements, including by:

    (a) making provision for the FWC to amend an enterprise agreement to address a concern as to whether the agreement satisfies the BOOT (which supplements, and is intended largely to replace, the existing capacity to accept undertakings from the employer);

    (b) simplifying the application of the BOOT to non-greenfields agreements, in four principle ways:

        (i) clarifying that a global assessment is required;

        (ii) confining the consideration to existing employees;

        (iii) giving primacy to common views of the agreement parties; and

        (iv) confining the patterns or kinds of work or types of employment to those reasonably foreseeable at the time of application; and

(c) providing a safeguard for the simplification of the application of the BOOT by enabling application to be made to reconsider approval by reference to patterns or kinds of work or types of employment to which the FWC did not have regard at the time of approval.

The new power to amend

82. The Bill proposes new sections 191A and 191B to enable the FWC to amend an enterprise agreement to address a concern as to whether the agreement satisfies the BOOT. Subsections 191A(1) and (2) provide that if the FWC has a concern that the agreement does not satisfy the BOOT, it may approve the agreement if it is satisfied that an amendment specified by it addresses the concern. Subsection 191A(3) provides that if the FWC intends to specify an amendment it may seek the views of the agreement parties. Section 191B provides that if an amendment is specified by the FWC the agreement is taken to be amended by the amendment as the agreement applies to the employer, or each employer where the agreement is a multi-party agreement.

83. The Law Council notes that the provisions are intended to replicate the existing provisions allowing for the acceptance of undertakings by the employer but add greater certainty in future interpretation.

84. However, there is something qualitatively different between amending an agreement made by others, and accepting an undertaking made by an employer. This observation gives rise to two concerns: (i) whether the FWC and the parties will be as prepared to amend the agreement as they would be to accept an undertaking; and (ii) whether it is appropriate for subsection 191A(3) to permit the FWC to specify an amendment without seeking the views of the agreement parties (noting that the FWC 'may seek' the views of the parties).

85. The Law Council suggests that consideration be given to amending proposed subsection 191A(3) to require the FWC to seek the views of the agreement parties where it intends to specify an amendment. While this runs counter to the attempts to reduce delays in the approval process, it will ensure that the agreement parties views are taken into account in the terms of their agreement and may reduce concerns that the FWC and parties otherwise might have about the FWC amending the agreement which they have negotiated.

86. Further to the above, the Law Council notes that there is no limitation on the amendment that the FWC could make to an agreement to have it pass the test. For example, as presently drafted, it would allow the FWC to increase wages unilaterally in order for an agreement to pass. Given this would have a significant impact on the cost of the bargain struck and agreed to by the parties, clarity should be provided on whether this is possible or provide the ability for the application to be withdrawn and bargaining to recommence as an alternative to submitting to such an order.

The more flexible application of the BOOT

87. The Bill addresses a perceived concern that the application of the BOOT under the existing provisions is too complex and inflexible. It addresses this concern primarily through four mechanisms, one of which involves amending section 193, with the other three effected by inserting a new section 193A:

(a) amending section 193 of the FW Act by deleting the requirement, for agreements other than greenfields agreements, that the FWC consider prospective employees when considering approval;

(b) clarifying that the FWC must undertake a global assessment as to whether each employee covered by the agreement would be better off overall (proposed subsection 193A(2));

(c) requiring the FWC to give primary consideration to a common view, if any, of the bargaining representatives relating to whether the agreement passes the BOOT (proposed subsection 193A(4))—this does not apply to greenfields agreements; and

(d) limiting the patterns or kinds of work or types of employment to which the FWC is to have regard to those which are reasonably foreseeable at the time of the application (subsection 193A(6)).

88. The Law Council agrees that the changes will more readily facilitate the approval of agreements, particularly those where the additional benefits to employees provided by the agreement compared with the relevant award are marginal. However, the Law Council does not seek to take a position as to whether that is a desirable policy end.

The safeguard mechanism

89. The Bill proposes new sections 227A and 227B which provide a safeguard given the simplification of the application of the BOOT. These provisions provide for a scheme for reconsideration whether the agreement passes the BOOT.

90. Proposed subsection 227A(1) enables any person covered by the agreement to apply for reconsideration of its approval. The consideration upon which an application can be made is two-fold:

(a) the FWC has had regard, in approving the agreement, to patterns or kinds of work or types of employment engaged in or to be engaged in by employees covered by the agreement (proposed paragraph 227A(2)(a)); and

(b) at or after the application for reconsideration, employees covered by the agreement engaged in other patterns or kinds of work or types of employment to which the FWC did not have regard.

91. On application the FWC applies the same considerations as it does under sections 193 and 193A for approval of an agreement (proposed subsections 227B(1) and (2)).

92. If the FWC has a concern that the agreement does not pass the BOOT, it may accept an undertaking from one or more of the employer parties to the agreement, or amend the agreement if satisfied that the amendment addresses the concern (proposed subsection 227B(3)).

93. If the FWC accepts an undertaking then the undertaking is taken to be a term of the agreement, as the agreement applies to the employer(s) giving the undertaking (proposed subsections 227C(1) and (2)). If the FWC makes an amendment to an agreement covering a single employer, the agreement is taken to be amended by the amendment as it applies to the employer (proposed subsection 227D(1)). If the amendment is to an agreement covering two or more employers, then, curiously, the

agreement is taken to be amended by the amendment as the agreement applies to each employer that gave the undertaking (proposed subsection 227D(2)).

94. The Law Council notes that proposed subsection 227D(2) may involve a drafting error, and assumes that the provision is intended to be drafted in terms similar to proposed subsection 191B(2). Otherwise, the Law Council is unsure how the provision could work in practice.

95. The Law Council refers to its earlier comments regarding the qualitative difference between acceptance of an employer's undertaking and the making of an amendment to an agreement made by others. It notes that under proposed section 227B, the FWC may amend the agreement without even considering whether to seek the views of the agreement parties. The Law Council considers that it is appropriate to make express provision for the FWC to seek those views.

96. The Law Council notes that the two-fold consideration upon which an application can be made assumes that at approval time the FWC has considered particular patterns or types of work or kinds of employment. In theory it may be possible for the FWC to approve an agreement without having regard to any particular such patterns, etc. In that situation application for reconsideration would not seem to be available. While perhaps unlikely, this circumstance could be avoided by conditioning the entitlement to make a reconsideration application to the engagement by employees in patterns, etc, to which regard was not had by the FWC at approval time, regardless of whether the FWC had considered particular other patterns, etc, at approval time.

Other matters

97. The Law Council notes that Part 16 would make other minor amendments relating to the application of the BOOT, including by applying the changes to the application of the BOOT to variations of agreements, and some mechanical-type changes. The Law Council does not comment on those specifically.

Recommendations

- **Proposed subsection 191A(3) should be amended to require (rather than merely permit) the FWC to seek the views of the agreement parties where it intends to specify an amendment to an enterprise agreement.**
- **Proposed section 227B should be amended to require the FWC to seek the views of the agreement parties as part of its reconsideration of whether an enterprise agreement passes the BOOT.**
- **Consideration should be given to the drafting of subsection 227D(2) to confirm that it is intended to operate as drafted.**

Part 17—Dealing with errors in enterprise agreements

98. The purpose of the new provisions in Part 17 is twofold:

    (a) to allow for amendments to the contents of an enterprise agreement to correct obvious errors or defects in the contents of an enterprise agreement (see proposed section 218A); and

    (b) to allow validation of the approval (inadvertently) of a draft enterprise agreement rather than the actual enterprise agreement (see proposed sections 602A and 602B).

99. The Law Council considers it appropriate that the FWC's powers under these provisions are discretionary.[21] However, the Law Council considers that the provisions as drafted give rise to a number of uncertainties.

100. For example, proposed section 218A does not expressly address the time when the FWC may exercise the new power. At a general level, this section is presumably intended to be exercised at the time of approval or subsequently. However, the Law Council notes that it could be argued that the first set of provisions are only capable on their proper construction of being exercised subsequently as:

    (a) the applicant must be 'covered' by an agreement (see proposed paragraph 218A(2(b)); and

    (b) the result of the exercise of the power is a 'variation' to the enterprise agreement (see proposed subsection 218(3)).

101. It is not clear whether the arguable position is intended. Alternatively, it might be intended that errors in the enterprise agreement identified at the time of approval are to be rectified by reliance on section 586 rather than the proposed section 218A. If the alternative position applies, the Explanatory Memorandum could make the position plain.

102. Proposed subsection 218A(3) also does not address expressly the ability of the FWC to vary an enterprise agreement only prospectively or both retrospectively and prospectively. The Law Council notes that a similarly worded provision relating to section 227 was argued to be capable of applying retrospectively on at least two occasions.[22] Proposed subsection 218A(3) should be clarified.

Recommendations

- **Proposed section 218A, which allows the FWC to correct obvious errors or defects in the contents of an enterprise agreement should be amended to clarify the time when the FWC may exercise this power (i.e. only at the time of approval, or at the time of approval and/or subsequently).**
- **Proposed section 218A should also be amended to clarify whether the FWC has the power to vary an enterprise agreement only prospectively, or both retrospectively and prospectively.**

[21] See especially, Explanatory Memorandum, [775].
[22] See *Re McDonald's Australia Enterprise Agreement* [2019] FWC 8563, [2] (Colman DP); *Australian Concert & Entertainment Security Pty Limited v Mapledoram* [2020] FWCFB 7032, [17] (Catanzariti VP, Clancy DP and Lee C).

Part 18—Bargaining disputes

103. The proposed amendments in Part 18 substantially increase the power and functions of the FWC with a significant increase in the circumstances in which it can arbitrate a bargaining dispute.

104. The Law Council notes that resourcing of the legal system (including of the FWC) is perennially neglected by Governments when changes like these are proposed. The Law Council considers that significant additional resourcing is necessary to ensure that the FWC can manage the jurisdiction and increased access without impacting on other areas of the FWC's work.

105. The increased access to arbitration, raises again the issue of legal representation in circumstances where the disputes process is complex and the potential implications for employers (arguably effectively an employer Award) are significant. The Law Council again submits, as discussed further at paragraphs [146]-[148] below, that section 596 of the FW Act should be repealed (or substantially amended) so that those who come before the FWC have a right to legal representation.

Intractable bargaining declarations

106. Item 543 of the Bill would remove the current provisions of the FW Act relating to serious breach declarations and replace those provisions with a new Subdivision B of Division 8 of Part 2-4 relating to 'intractable bargaining disputes'.

107. The Law Council notes that, with the removal of the provisions relating to serious breach declarations, there is a reduction in the consequences for a party breaching good faith bargaining orders, and the like.

108. While the jurisdiction is not often used, the potential to obtain a serious breach declaration incentivises parties to comply with their good faith bargaining obligations and with FWC bargaining orders. The amendments may therefore unintentionally increase non-compliance with FWC orders.

Proposed subsection 234(2)

109. Proposed subsection 234(2) provides that an application for an intractable bargaining declaration must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation is in operation in relation to the agreement.

110. The Law Council suggests that this provision could be simplified by stating that an intractable bargaining declaration must not be made in relation to a proposed co-operative enterprise agreement (as is stated in the Explanatory Memorandum).

Proposed paragraph 235(2)(a)

111. One of the criteria of which the FWC must be satisfied when granting an intractable bargaining declaration is that the FWC 'has dealt with the dispute about the agreement under section 240' and the applicant participated in the FWC's processes to deal with the dispute. However, the Explanatory Memorandum states that the FWC 'is also required to have first exercised its powers under existing section 240 to attempt to resolve the dispute'.[23]

[23] Explanatory Memorandum, [808].

112. The Law Council notes that the Bill and Explanatory Memorandum are therefore inconsistent, as to 'exercise powers' is different to 'deal with' (which may, for example, only mean that an application was made). This inconsistency should be addressed.

Proposed paragraph 235(2)(b)

113. Additionally, the FWC must be satisfied that there 'is no reasonable prospect of an agreement being reached' if the FWC does not make the declaration.

114. The Law Council notes that no guidance is provided as to how the FWC would determine that there is no reasonable prospect of an agreement being reached. Given the serious consequences of a declaration being made, the Law Council is of the view that consideration should be given to identifying relevant criteria in the Explanatory Memorandum. The current discussion in paragraph 808 of the Explanatory Memorandum is broad and, in the Law Council's view, insufficient.

Proposed section 235—other suggestions

115. The Law Council suggests that, in order to provide additional clarity, a note should be included in relation to proposed new section 235, explaining that powers under current section 240 can or should be exercised during the post-declaration negotiation period.

116. Section 235 does not require the FWC or the parties to identify the matters that were in issue during bargaining other than that the FWC has 'dealt with the dispute' under section 240 (and subject to the intractable bargaining declaration). The Law Council suggests that consideration be given to whether an intractable bargaining declaration should identify the matters in issue for which the parties have not reached agreement.

Proposed section 269

117. The proposed new section 269 states that, if an intractable bargaining declaration has been made, the FWC must make an intractable bargaining workplace determination 'as quickly as possible'.

118. The Law Council notes that the term is vague and that there would be benefit in providing additional guidance.

Subsection 270(3)

119. Noting amendments to related subsections, current subsection 207(3) provides the determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-declaration negotiating period. In the Law Council's view, this section should be amended to clarify that 270(3) only applies if a post declaration negotiating period is specified under proposed section 235A.

Section 275

120. Section 275 currently lists the factors that the FWC must take into account in deciding terms of a workplace determination. The Law Council suggests that this section should be amended to include reference to the objectives of the Act (as amended by the Bill).

121. Paragraph 275(f) provides that the FWC must consider 'the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement'; paragraph 275(g) provides that the FWC must consider 'the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements'. The Law Council suggests that consideration be given as to whether these remain necessary given that the determination does not arise because of a serious breach.

Recommendations

- **Proposed subsection 234(2) could be simplified by stating that an intractable bargaining declaration must not be made in relation to a proposed co-operative enterprise agreement (as is stated in the Explanatory Memorandum).**
- **To address a discrepancy between proposed paragraph 235(2)(a) and the Explanatory Memorandum—amendments should be made to clarify whether the FWC must be satisfied when granting an intractable bargaining declaration that it has 'dealt with' the dispute about the agreement under section 240 or whether it must have 'exercised its powers' under section 240.**
- **A note should be added to proposed section 235, explaining that powers under current section 240 can or should be exercised during the post-declaration negotiation period.**
- **FW Act subsection 270(3) should be amended to clarify that it only applies if a post declaration negotiating period is specified under proposed section 235A.**
- **Section 275, which currently lists the factors that the FWC must take into account in deciding terms of a workplace determination, should be amended to include reference to the objectives of the Act (as amended by the Bill).**
- **Consideration should be given as to whether paragraphs 275(f) and (g) remain necessary given that the determination does not arise because of a serious breach.**

Part 19—Industrial action

Proposed section 448A—FWC must conduct conferences

122. Proposed section 448A appears to be consistent with the Bill's approach to increasing the supervisory activity of the FWC and provides an opportunity for all bargaining representatives to seek resolution with the assistance of the FWC before all of the costs and consequences of protected industrial action are incurred once the action commences after voting closes. To that extent, this is a pro-active measure.

123. The Law Council also notes that there is one slight disconnect in the wording: the conference is 'for the purposes of mediation or conciliation in relation to the agreement'. This is much broader than, for example, in relation to the industrial action proposed in the questions set out in the Protected Action Ballot Order (**PABO**). It is inserted in the part of the FW Act that is focussed entirely upon protected action ballots, and so is slightly jarring in that sense.

124. The amendments propose that conferences should be able to be conducted by a 'delegate' of the FWC. When matters have reached the stage of a PABO, they are usually complex, and the Law Council considers that the expertise of a Member is required. This is particularly so given that the section allows for a recommendation or opinion to be issued—this should only be done by a Member.

Recommendation

- **Conferences under proposed section 448A should be conducted by a Member of the FWC rather than by a 'delegate'.**

Part 20—Supported bargaining

125. The Law Council considers that this Part reflects the stated intention of the Bill to provide a mechanism for low paid sectors to bargain on a multi-employer basis.

126. While the Law Council understands the purpose of the 'anti-avoidance' provision at section 243A(3), it notes that, if an enterprise agreement is in place and within its nominal term, a majority of the employees employed by the employer must have voted to approve that agreement and it must have satisfied the requirements of the Act for approval by the FWC. In those circumstances, evidence of the considerations that may have been in the mind of one of the parties to that agreement should not render that agreement void when genuinely agreed and otherwise lawful.

Part 21—Single interest employer authorisations

127. The proposed amendments to the current single interest employer authorisations are significant. There are several elements of the proposed amendments that are concerning to the Law Council.

128. Whilst the current legislation allows for a level of co-opting into agreeing to bargain if a majority support determination is made by the FWC, proposed section 216DB would allow an employee organisation to apply to the FWC for something agreed to by others to apply to an employer and its employees. The Law Council notes that this is not being co-opted into bargaining and, in fact, is not bargaining at all. Additionally, to describe the document which can be made to cover an employer and its employees as an 'agreement' is also a misnomer. In those circumstances an employer has neither bargained for anything, nor agreed to anything.

129. The substantive basis upon which the employee organisation can apply for an employer and its employees to be covered by a document is whether those employers covered by the agreement and those proposed to be covered by 'the agreement' have clearly identifiable common interests, as well as whether it is not contrary to the public interest. What may constitute common interests is set out at proposed section 216DC as follows:

> *(2) For the purposes of subparagraph (1)(b)(i), matters that may be relevant to determining whether the employers have a common interest include the following:*
>
> *(a) geographical location;*
>
> *(b) regulatory regime;*

> *(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.*

130. The Law Council considers that this provision has been drafted too broadly. To illustrate the breadth of this provision, it provides the following example:

> Many hundreds of manufacturers in metropolitan Melbourne are in the same broad geographical location, covered by the same regulatory regime (i.e. the FW Act) and those without an enterprise agreement are covered by the same set of minimum wages and conditions in the manufacturing award.

131. A current key criterion applicable to the current single interest employer provisions is that the businesses in question do not compete. That criterion is removed by the proposed amendments.

132. Additionally, and concerningly, the Explanatory Memorandum, in explaining how the public interest test would be intended to apply, says the following:

> *The requirement for the FWC to consider whether it would not be contrary to the public interest to approve the variation would provide the FWC with an opportunity to consider all the circumstances of the application for approval of the variation and whether the approval of the variation might adversely affect the public interest in some way. For example, the FWC could consider the broader economic ramifications of including the new employer in the single interest employer agreement. The public interest would be likely to favour the approval of variations that inhibit a 'race to the bottom' on wages and conditions while discouraging the approval of variations that could adversely affect competition on the basis of quality (including service levels) and innovation.*[24]

133. Thus, at least part of the intention of the public interest test, in determining whether an employer and its employees be covered by the document called an agreement, is to limit competition upon 'the basis of price' and to allow competition only on the basis of quality, innovation and service. That suggests the intention of these provisions is that they cover employers and their employees as broadly as possible so as to inhibit price competition and to enhance competition only on the basis of quality, innovation and service. There might be a question as to whether that in itself is in the public interest.

134. Once the FWC decides to apply a document to employers and their employees in the circumstances described above, the only way an employer and its employees can become uncoupled from the document is if the employer and its employees want that to be so, and each union covered by the document agrees. Therefore, a union can compel an employer to be covered by the document, but a union covered by the document has to agree in order for an employer and its employees who otherwise agree, to be uncoupled from the document (see proposed section 216EB).

135. The policy rationale for all of the above, and its misdescription as bargaining and agreement making, is not well explained.

[24] Explanatory Memorandum, [993].

Part 22—Varying enterprise agreements to remove employers and their employees

136. The Law Council notes that proposed section 216EB requires the FWC to vary single interest employer agreements and multi-employer agreement where:

    (a) the employer has provided employees with information and a reasonable opportunity to make a decision as to whether the employer should be removed; and

    (b) the affected employees have voted to approve the variation; and

    (c) there are no other reasonable grounds for believing that the majority of affected employees who voted to approve the variation did not approve the variation; and

    (d) each employee organisation entitled to represent the industrial interests of one or more of the employees agrees to the variation.

137. In circumstances where the tests in (a)–(c) above have been met, there does not appear to be any policy or legal reason for the inclusion of the test in (d). For example, this could result in an employee organisation, without any members within the affected employees' workplace, vetoing the variation contrary to the wishes of each of the affected employees (noting that the test is that the employee organisation need only be entitled to represent the industrial interests of one or more employees not to have any members). Further, in many workplaces multiple employee organisations may have coverage; the inclusion of (d) may result in the unintended consequence of one employee organisation vetoing a variation which may be supported by the other employee organisations in the workplace. This could be remedied with the FWC having to take into account the 'views' of any employee organisation when making its decision, rather than requiring agreement.

Recommendation

- **Proposed paragraph 216EB(d) should be removed and replaced with a provision that allows the FWC to take into account the 'views' of any employee organisation entitled to represent the industrial interests of one or more of the employees agrees to the variation when making its decision, rather than requiring agreement by such an organisation.**

Part 23—Cooperative workplaces

Proposed subsection 176C(5)

138. Item 643A of the Bill inserts a new subsection 176C(5) which states that a person subject to a 178C order cannot be a bargaining representative. The Law Council notes that this could include an employer and queries how the provisions could work if an employer is excluded from being a bargaining representative for the agreement.

Proposed section 178C

139. Proposed subsection 178C(5) and states that the FWC must make the order excluding a person for the purposes of an enterprise agreement if the FWC is satisfied that the person has a record of repeatedly not complying with the FW Act. Proposed subsection 178C(6) then lists a set of factors the FWC must consider.

140. The Law Council notes the following potential issues created by these provisions:

    (a) proposed subsection 178C(5) is expressed in mandatory terms and yet proposed subsection 178C(6) is subjective;

    (b) 18 months is a short period to provide effective deterrence;

    (c) the provisions do not capture findings of representatives of employee organisations that are not made against an employee organisation; and

    (d) similarly, if an order is made against an employee organisation it does not stop officers of employee organisations being appointed bargaining representatives as individuals and making intractable bargaining applications and seeking interest authorisations in their own right.

Proposed section 183A

141. Proposed subsection 183A(2) provides that, before a bargaining representative applies under section 185 for approval of the agreement, the bargaining representative must vary the agreement so that it is not expressed to cover the excluded person. It is not clear how the bargaining representative can vary the Agreement after it is put to a vote without complying with the Variation Provisions or otherwise impacting the approval process (as the Agreement as varied was not otherwise approved). The Law Council suggests that this provision could be improved by stating that the FWC varies the agreement on approval or can only approve as varied.

Recommendation

- **Proposed subsection 183A(2) could be improved by stating that the FWC 'varies the agreement on approval' or can only approve as varied.**

Part 24—Enhancing the small claims processes

142. Proposed subsection 653(10) introduces 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). The Law Council supports this amendment.

143. In addition to the provisions of Part 24 of the Bill, the Law Council is of the view that an express provision in respect of small claims is required to make clear that an accessorial liability claim can be brought as a small claim. A great number of small claims are against companies that have been liquidated or 'phoenixed' and there

remains some uncertainty as to the capacity to seek compensation from the sole director which could be cleared up by an express provision.[25]

144. More fundamentally, the Law Council is also of the view that, in respect of small claims (and potentially wage claims generally), a new court is required. This court could be made up of members of the FWC who are legally qualified, who can sit as a judge to determine such claims. These members could also hear and determine cases to determine award coverage. Presently the only means to obtain a decision on award coverage is via the Federal Court. If implemented, there ought to be a right to representation before such a court and an expanded capacity to obtain costs that would otherwise swallow the value of such claims.

Recommendation

- **An express provision in respect of small claims should be inserted in the FW Act to make clear that an accessorial liability claim can be brought as a small claim.**

Part 25—Prohibiting employment advertisements with pay rate that would contravene the Act

145. The Law Council supports the proposed amendments in Part 25.

Other matters—Right to representation in the FWC

146. Proposed subsections 65B(5) (regarding representation for disputes about flexible work arrangements) and 333L(5) (regarding representation for disputes about fixed-term contracts) include a note which identifies that as a result of section 596 a person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC.

147. As flagged earlier, the Law Council's longstanding position is that section 596 of the FW Act should be repealed. The Law Council suggests that this should occur during the current industrial relations reform process, to provide parties appearing before the FWC in all matters, including small claims proceedings, with an automatic right to legal representation.

148. The Law Council's experience is that, rather than acting as an impediment to the swift and efficient resolution of employment related claims, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined, which supports the proper administration of justice. Self-represented parties often arrive underprepared and overwhelmed. This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement discussions. For these reasons, the Law Council does not agree that lawyers should be excluded from proceedings before the FWC or have their involvement limited.

[25] See, eg, *Nino v Kukoski* [2022] FedCFamC2G 401 and the contrasting approach in *Beer v Kim* [2012] FMCA 524.

Recommendation

- **Section 596 of the FW Act should be repealed (or significantly amended) to provide parties appearing before the FWC in all matters, including small claims proceedings, with the right to legal representation without seeking the permission of the FWC.**