



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Dr Popple,

### **Modern Awards Review 2023-24: Discussion Paper - Work and Care**

Thank you for the opportunity to comment on the Fair Work Commission's (FWC) Discussion Paper: Work and Care. The Law Society's Employment Law Committee contributed to this submission. At the outset, it is useful to note that the Law Society considers it more appropriate for the relevant industry or employer organisations to respond to the Discussion Questions posed in respect of particular awards. In this submission we provide context for our position, and note we continue to be ready to assist in commenting on the detail of any legislative reforms formally proposed by the Government in response to the recommendations of the Senate Select Committee on Work and Care's final report.

#### **General comments**

The Law Society notes that the Discussion Questions reflect a number of the recommendations made in the Final Report<sup>1</sup> of the Senate Select Committee on Work and Care (**Senate Committee**). While some of these recommendations have already been made law, others remain live policy issues.

We suggest that whether the Senate Committee recommendations and/or any resulting legislative changes require variations to modern awards is a question that should be considered in respect of each of the 25 modern awards referred to in the Discussion Paper. As noted above, the Law Society considers it is not best placed to respond to the individual Discussion Questions.

#### **Context of the Discussion Paper**

By way of context, when requesting the FWC to initiate its Modern Awards Review 2023-2024, the Minister for Employment and Workplace Relations noted that "the desirability of a review and possible areas of focus" arise from:

"... the Fair Work Commission initiating a targeted review of modern awards. The desirability of a review and possible areas for focus arise from outcomes of the Jobs and

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<sup>1</sup> Senate Select Committee on Work and Care, Final Report (March 2023), p. xiii, [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024994/toc\\_pdf/FinalReport.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024994/toc_pdf/FinalReport.pdf;fileType=application%2Fpdf).

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.”<sup>2</sup>

The Discussion Paper on Work and Care includes 19 Discussion Questions, which ask whether any variations are necessary to 25 modern awards in order to ensure the awards continue to meet the modern awards objective set out in s 134(1) of the *Fair Work Act 2009* (Cth) (**FW Act**). It would appear that this wording of the Discussion Questions is a reflection of the FWC’s jurisdiction to make or vary modern awards, set out in s 134 (setting out the modern awards objective) and s 136 (setting out what is permitted and not permitted to be included in awards).

We note that under s 134(1), the modern awards objective 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. Since the commencement of the amendments introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**), these factors include:

- (aa) the need to improve access to secure work across the economy; and
- (ab) 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.

### **Senate Committee recommendations and recent amendments**

The Discussion Paper places considerable emphasis on the relevant recommendations of the Senate Committee and refers to them many times throughout.

Some of these Senate Committee recommendations have been agreed to by the Government and incorporated into legislative amendments. For example, the right to disconnect has been enacted through the second raft of Closing Loopholes reforms.<sup>3</sup> Others, such as the right to request a four day week, remain live policy questions.

To the extent that the Senate Committee recommendations (and other materials noted by the Minister) concern factors set out in the modern awards objective, in our view, 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 minimum safety net of terms and conditions”. From this perspective, it is difficult to provide a definitive answer as to whether “specific variations” are “necessary”.

### **Variations to modern awards**

Where Senate Committee recommendations are agreed to by the Government and become law, the resulting legislative changes may mandate variations to the awards.<sup>4</sup> If not, a separate question arises as to whether variations to awards are necessary.

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 be different for different awards.

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<sup>2</sup> Letter from the Hon Tony Burke, Minister for Employment and Workplace Relations and Minister for the Arts to Hatcher J, President of the Fair Work Commission, 12 September 2023, 1, <https://www.fwc.gov.au/documents/consultation/letter-from-minister-2023-09-12.pdf>.

<sup>3</sup> *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) Sch 1, Pt 8.

<sup>4</sup> For example, 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.

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. The changes to some awards may be substantial, as the award may not have been originally drafted with these considerations in mind. Changes to other awards may be minor. 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.

For these reasons, the Law Society considers that industry and employer organisations are far better placed to advise on potential changes in relation to specific modern awards.

**Further consultation**

The Law Society would welcome the opportunity to comment on the detail of any legislative reforms formally proposed by the Government in response to the recommendations of the Senate Select Committee on Work and Care's final report.

Any questions in relation to this letter should be directed to Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: [sue.hunt@lawsociety.com.au](mailto:sue.hunt@lawsociety.com.au).

Yours sincerely,



**Brett McGrath**  
**President**