22 April 2014

Law Council
OF AUSTRALIA

Ms Julie Agostino
Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: eec.sen@aph.gov.au

Dear Ms Agostino

Fair Work Amendment Bill 2014

The Law Council of Australia welcomes the opportunity to respond to the Committee's inquiry into the Fair Work Amendment Bill 2014.

I am pleased to enclose a submission drafted for the Law Council by the Industrial Law Committee in the Federal Litigation and Dispute Resolution Section.

The submission has been developed in consultation with several counterpart committees within the state and territory law societies and bar associations – the Constituent Bodies of the Law Council.

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact the Chair of the Industrial Law Committee, Mr Ingmar Taylor SC on (02) 9223 1522 or Ingmar.Taylor@statechanbers.net, alternatively Ms Hanna Jaireth at the Law Council Secretariat on (02) 6246 3722 or lps@lawcouncil.asn.au

Yours sincerely

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Fair Work Amendment Bill 2014

Senate Education and Employment Legislation Committee

17 April 2014

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Executive summary

The Law Council of Australia welcomes the opportunity to respond to the Committee's inquiry into the Fair Work Amendment Bill 2014 (Cth) ("the Bill").

This submission does not comment on the policy underpinning the changes proposed by the Bill. It identifies some legislative drafting issues. One key concern relates to the proposed amendments to s 311 which deal with the definition of "transfer of business". The proposed change is drafted in a manner that is likely to mean employees will be deprived of existing entitlements in a circumstance that the explanatory memorandum states is not intended, namely where they apply for a position with the new employer after being told their existing position will be made redundant.

This submission recommends that:

- substantive changes be made to the text of the legislation rather than by way of a legislative note, such as is proposed to be added after s 203(4);
- the meaning of the expression "prevailing pay and conditions" in proposed s 187(6) be defined;
- that in respect of a transfer of business the intention expressed in the Explanatory Memorandum at [140] be expressed clearly in the text of the Act;
- that the Bill be amended to clarify what would be sufficient to demonstrate that a member or prospective member has invited the organisation to send a representative to the premises for the purposes of s 484(2)(e); and
- regulatory impact statements that contain arguments for and against proposed amendments be published separately from explanatory memoranda.

Introduction

1. This submission was drafted for the Law Council by the Industrial Law Committee of the Federal Litigation and Dispute Resolution Section, in consultation with several counterpart committees within the state and territory law societies and bar associations – the "Constituent Bodies" of the Law Council.

Comment on the Bill

Items 6–10: Individual flexibility arrangements

2. Subsection 203(4) currently requires that the mandatory term in an enterprise agreement that permits an individual flexibility arrangement must require the employer to ensure the employee is "better off overall" under the arrangement. The section is silent as to whether that comparison is required to be undertaken only on a monetary basis, or on some other basis.

3. The Bill seeks to resolve that uncertainty. However, rather than amending the section to clarify the position, the proposed change is to add a legislative note which states:

> *Benefits other than an entitlement to a payment of money may be taken into account for the purposes of this subsection.*

4. It is a relatively new approach to legislative drafting to alter the meaning of a provision by way of a legislative note rather than making an amendment to the legislation itself.

5. Such an approach is available given amendments to s 13 of the *Acts Interpretation Act 1901* (Cth) in 2011. As a consequence of those amendments a legislative note now forms part of the Act.[1]

6. While the provision of a legislative note may assist to inform readers including legal practitioners, staff in human resources areas and employee associations, it is better and clearer to include essential definitions or content within the main statutory provisions rather than by way of a legislative note. Such an approach also removes the potential for a Court to find some tension between the meaning of the legislative provision and the legislative note.

Recommendation

7. It is recommended that substantive changes such as that proposed here be made to the text of the legislation rather than by way of a legislative note, such as is proposed to be added after s 203(4).

Items 19–52: Greenfields agreements

8. The Bill proposes changes to make it easier and quicker for an employer to have a Greenfields Enterprise Agreement approved. The amendments achieve this by:

[1] 2010–2011 *Parliament of the Commonwealth of Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum: Acts Interpretation Amendment Bill 2011* <www.austlii.edu.au/au/legis/cth/bill_em/aiab2011320/memo_0.html>, [92]–[97].

(a) deeming as "bargaining representatives" the employer and any industrial organisation that has coverage and with which the employer agrees to bargain;

(b) permitting the employer to notify the bargaining agents that there will be a three month negotiation period;

(c) providing that at the end of that three month negotiation period the good faith bargaining provisions cease to have any application (ending the effect of any good faith bargaining orders and bringing to an end proceedings that had commenced and are part-heard seeking bargaining orders or a determination) and permitting the employer to then apply to have its proposed agreement approved;

(d) permitting the "agreement" to be approved even though it has not been agreed; and

(e) thereafter the process proceeds as if it was agreed but with an additional requirement that the Fair Work Commission (FWC) must be satisfied that the agreement, considered on an overall basis, "provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work": see proposed s 187(6).

9. The provisions will significantly alter the negotiating position of both parties. An employer cannot propose an agreement that is less than the "prevailing" conditions, nor can unions hold out for improved conditions since the employer can seek approval for an agreement that reflects "prevailing" conditions.

10. The phrase "prevailing" pay and conditions has no established meaning in industrial law, and is not defined by the proposed provisions.

11. There is a legislative note after proposed s 187(6) which states that when considering prevailing pay and conditions within the relevant industry for equivalent work

    the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

12. Again, the Bill attempts, by way of a legislative note, to affect the application of the provision without including the amending words in the subsection itself.

13. Even with that legislative note, the Bill does not make clear how the task required by s 187(6) will be carried out.

14. Unless clarified, there is the real potential for uncertainty, at least for such time as it takes for courts to resolve that uncertainty. Such uncertainty (and the delay it will cause) is contrary to the stated intention underpinning these particular changes, which are said to be being made to ensure that Greenfields Agreements can be made quickly so as to not delay major projects.[2]

15. The uncertainty can be demonstrated by the following potential questions about how the provision is to be applied in practice:

[2] 2013–2014 *Parliament of the Commonwealth of Australia, House of Representatives, Fair Work Amendment Bill 2014 Explanatory Memorandum, "*Regulation Impact Statement", ix–x.

(a) Is the prevailing rate of pay that which is established by extant industrial instruments, or is it the actual rate of pay (including above agreement rates) paid at that time in the industry?

(b) In either case, assuming there is a range of pay and conditions, is the "prevailing pay and conditions" determined by taking the average, the median or on some other basis?

(c) In what circumstances will the prevailing pay and conditions in a geographic area be or not be "relevant"?

(d) If the industry in question is a national industry, what weight should be given to the average rate of pay across the country as paid in that industry, compared with the weight to be given to rates in the particular "geographical area"? What if the rates paid in the particular geographic locale are low and out of step with the rest of the country?

Recommendation

16. It is recommended that the meaning of "prevailing pay and conditions" in proposed s 187(6) be defined more clearly by reference to a test to be applied.

Items 53–55: Transfer of business

17. Part 6 of the Act has provisions that ensure that an employee retains their enterprise agreement conditions of employment on a transfer of business.

18. Currently, pursuant to s 311(1), a transfer of business occurs where, within three months after the termination, an employee becomes employed by the new employer and the other requirements of the subsection are satisfied.

19. The Bill proposes to add a provision which states that there is not a transfer of business if, before the termination of the employee's employment:

> *the employee sought to become employed by the new employer at the employee's initiative.*[3]

20. The Explanatory Memorandum to the Bill (the "EM") states that this is a change that is intended to only apply where an employee has sought an opportunity to advance their own career or for their own lifestyle reasons.[4] That might be, for example, where the employee decides to move from one subsidiary of a corporate group (covered by one enterprise agreement) to take up a job offer with another subsidiary (covered by a different enterprise agreement). No concern is raised by that intent.

21. The EM goes on at [140] to state that it is *"not intended"* that the exception would apply where the move from one employer to another arose from an operational decision made by the employer, such as a decision to make the employee redundant.[5]

22. There is, however, nothing in the text of the Act (as against the EM) which states that the exception will *not* apply in a circumstance where an employee who has been told

[3] Fair Work Amendment Bill 2014 First Reading, cl 54–55.
[4] *Explanatory Memorandum* , above n `2 [139].
[5] *Explanatory Memorandum* , above n `2, [140].

that they will be made redundant is invited, if they are interested, to apply for employment with the new employer, and does so.

23. The expression *"at the employee's initiative"* is wide enough and sufficiently ambiguous that it may be interpreted as contemplating any situation where the employee approaches a new employer. This might include a circumstance where the employee knows that their employment with their current employer is about to end.

24. If not amended, the Bill in its current form may well be interpreted in a manner contrary to the intent expressed in the EM at [140]. That is, in circumstances where an employee is about to be made redundant and told they can apply for a job with a new employer, there is a likelihood that such conduct will result in the employee not being able to retain their enterprise agreement conditions of employment, contrary to what is intended.

Recommendation:

25. It is recommended that the intention expressed in the Explanatory Memorandum at [140] be expressed clearly in the text of the Act.

Items 57–71 Right of entry

26. There are two principal changes to the right of entry provisions. The first is to repeal the amendments made by the *Fair Work Amendment Act 2013*.

27. The second is to alter the basis upon which a permit holder can enter premises for the purposes of holding discussions. Currently it is sufficient for the permit holder to demonstrate there are one or more employees at the work site that the permit holder's organisation represents who wish to participate in discussions. The amendments require that in addition to those requirements, the permit holder's organisation either:

    - is covered by an enterprise agreement that applies at the work site: see proposed s 484(2)(d); or

    - has been invited by a member or prospective member working at the site: see proposed s 484(2)(e).

28. In respect of the latter provision, there are no provisions that spell out how an employer is to be told or may satisfy itself that the permit holder "has been invited" by a member or prospective member.

29. In the absence of provisions indicating whether oral advice will suffice, or whether proof in writing is required, there is the potential for confusion.

30. While there is to be a new provision (s 520A) that permits the FWC to issue a certificate certifying that an organisation has been invited, it is not necessary to have such a certificate.

31. It is noted that the EM states that it is intended that, "for example", a letter or voluntary statement regarding the issuing of an invitation will be sufficient to demonstrate that the invitation requirement has been satisfied.[6] That intention however is not expressed in the Act itself. For practitioners, HR officers and union officials who are working with the legislation "on the ground" on a daily basis, it is preferable if matters

[6] Ibid, [159].

of this nature are expressed in the Act rather than having to refer to explanatory memoranda to discern what might be sufficient to constitute an invitation of the requisite type. Further, the mechanism adopted of setting out legislative intent in an explanatory memorandum creates the risk that the courts will interpret the provision in a manner different from that that intended by the legislature. It is also noted that the EM's "example" appears limited to examples of written evidence from an employee, leaving unclear whether oral confirmation will be sufficient, and whether the confirmation must be from the relevant employee or prospective employee directly or whether it will be sufficient if the permit holder informs the employer of the invitation.

32. As Legislative note 3 to s 484 records, an employer that fails to grant entry in circumstances where the organisation has a right to enter commits a civil penalty offence. Delay and disputation may result in circumstances where what is required to provide for entry is not clearly spelled out. It is in the interests of both employers and organisations for the legislation to be clear as to what (other than a certificate under s 520A) is required to demonstrate that the organisation has met the requirements of s 484(2)(e).

33. It is suggested that it be made clear that oral confirmation provided by an employee or prospective employee will suffice, since to impose the burden on workers to proffer written proof may be cumbersome. Further, it should be made explicit that a permit-holder can provide confirmation of the invitation to the employer without requiring the employee or prospective employee to be present to confirm the invitation.

Recommendation

34. It is recommended that the Bill be amended to clarify what is regarded as sufficient to demonstrate that a member or prospective member has invited the organisation to send a representative to the premises for the purposes of s 484(2)(e).

The Explanatory Memorandum

35. The Law Council notes that the EM contains (or perhaps, is preceded by) a very extensive "regulatory impact statement". It commences with an "outline" and includes extensive arguments for and against each of the provisions in the Bill, much as a departmental submission to a Minister or Cabinet might contain. It ends with a "conclusion" which commences with the words:

> *The Department recommends implementing the Government's workplace relations election commitments outlined in this document.*

36. The format of the impact statement means that it contains arguments both for and against each provision. There are accordingly aspects of the document that are (by its nature) contradictory, or at least that point in different directions.

37. Courts when interpreting legislation commonly rely upon explanatory memoranda when seeking to understand the intent of a provision. Setting out extensive argument for and against a provision has the potential to create misunderstanding and debate rather than clarity as to the true intent of the legislation. It also adds significantly to the length and complexity of the document. It is true that the material in question appears in that part of the document titled 'regulatory impact statement' and on pages numbered by roman numerals, suggesting that it does not form strictly part of the EM itself. However it nevertheless appears behind a title page bearing the title 'Explanatory Memorandum', which suggests it is part of the EM.

38. It is unclear why it is considered necessary to include matters including internal departmental views in the EM, notwithstanding the requirements of the Office of Best Practice Regulation and the *Best Practice Regulation Handbook (2013)*. It would be better if such statements, arguments and conclusions were published separately to the EM itself, to avoid confusion.

Recommendation

39. It is recommended that regulatory impact statements that contain arguments for and against particular amendments be published separately from explanatory memoranda.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.