

18 February 2020

Chair
Employee Relations Committee

Dear Chair

MODERN AWARD FOR EARLY CAREER LAWYERS (DRAFT ISSUES PAPER)

I write to thank the representatives of the Employee Relations Committee (Mark Hemery, Stephen Kemp and Giac Giorgi) for their contribution to the recent Law Council of Australia confidential draft issues paper “Modern Award for Early Career Lawyers” 14 January 2020.

Please find attached a copy of the letter that was sent to the Law Council of Australia for your Committees noting. Also attached is the background information relating to the Law Society’s submission to the Australian Industrial Relations Commission in 2009.

Yours sincerely



Nicholas van Hattem
President

14 February 2020

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
19 Torrens Street
BRADDON ACT 2612

Email: john.farrell@lawcouncil.asn.au

Dear Ms Nicoll

MODERN AWARD FOR EARLY CAREER LAWYERS (DRAFT ISSUES PAPER)

I refer to the memorandum from the Acting Chief Executive Officer on 14 January 2020 and thank Law Council Australia (LCA) for the opportunity for the Law Society of Western Australia to provide comments on the Draft Issues Papers. The following comments have only been considered by the Law Society Executive as the Law Society Council has not met within the limited time provided for responses.

The paper dated 14 January 2020 titled "*A Modern Award for Early Career Lawyers in Private Practice*" (Draft Issues Paper) which was in response to a discussion paper circulated by the LCA in August 2019 also titled "*A Modern Award for Early Career Lawyers in Private Practice*" is drafted from the perspective of States that have referred their industrial relations powers to the Commonwealth. This is not the case in Western Australia and is unlikely to occur (according to policy statements by both the Labor and Liberal parties) in the foreseeable future.

By way of background, the Law Society of Western Australia (LSWA) made a submission to the Australian Industrial Relations Commission (AIRC) on the exposure draft in 2009 (*Exposure Draft (September 2009) Legal Services Award 2010*) (copy attached) and took the following position:

- LSWA supported the exclusion of admitted legal practitioners from the scope of the exposure draft, noting that historically there had been no award coverage in Western Australia of these employees;
- LSWA opposed extending award coverage to articulated clerks and law graduates.

At the time the AIRC decided not to include admitted lawyers in the coverage of the Legal Services Award 2010 but confirmed its provisional position that articulated clerks and law graduates be covered. As at today articulated clerks and law graduates employed by partnerships remain award free in Western Australia.

The LSWA Young Lawyers Committee has considered the Draft Issues Paper and take a different position to what the Council adopted in 2009. The Committee's views are

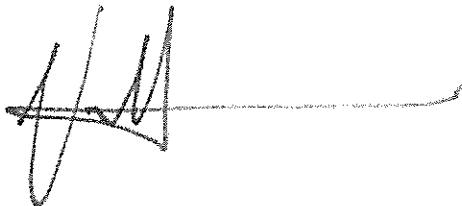
contained in the attached paper which is provided to LCA for information only and are not to be taken as the views of the Law Society Council or its Executive

Given the complexities of the issue including the divergent interests of our stakeholders, the Law Council should undertake further and broader research with a wider range of stakeholders to identify:

- a) The areas of exploitation;
- b) The implications for firms/practitioners in implementing the terms and conditions of a modern award for employees particularly administrative costs for small firms; and
- c) Other options that could be pursued to effectively address the concerns of early career lawyers.

If you have any queries in relation to the above please contact Mary Woodford, General Manager Advocacy on (08) 9324 8646.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N. van Hattem', followed by a long horizontal line extending to the right.

Nicholas van Hattem
President

**Submission to the Australian Industrial
Relations Commission**

Written Comments on

**Exposure Draft (September 2009)
Legal Services Award 2010**

*Workplace Relations Act 1996
(AM2008/86)*

Dated: 16 October 2009

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Submission to the Australian Industrial Relations Commission
Exposure Draft (September 2009) Legal Services Award 2010

1. Preamble

- 1.1 The Law Society of Western Australia (Society) is the representative body for the legal profession in Western Australia.
- 1.2 The Society has approximately 3,000 members. The membership comprises members of the judiciary, legal practitioners in all aspects of legal practice including practitioners in private practice, barristers, government lawyers and in-house corporate lawyers, academics, parliamentarians, articulated clerks/law graduates, law office managers and law students.
- 1.3 The Society makes this submission as the representative of both employers and employees in legal practices.
- 1.4 The Society supports the exclusion of admitted legal practitioners from the scope of the *Exposure Draft (September 2009) Legal Services Award 2010* (draft Award). Historically there has been no award coverage in Western Australia for admitted legal practitioners other than under more generic award classifications and public sector awards.
- 1.5 The Society's primary submission is that neither articulated clerks/law graduates nor senior legal administration employees should be subject to the draft Award.

2. Articled Clerks/Law Graduates

- 2.1 The Society's view is that articulated clerks/law graduates should not be subject to the draft Award for the following reasons:
 - 2.1.1 Articled clerks/law graduates are professionals undertaking practical legal training towards admission as legal practitioners. To include articulated clerks/law graduates would be to extend coverage to a class of persons not historically covered by awards in Western Australia, contrary to the intention disclosed in the Consolidated Request.

- 2.1.2 Including articulated clerks/law graduates would create inconsistencies and disparity between those persons employed by constitutional corporations and those employed by partnerships. In Western Australia, the majority of articulated clerks/law graduates are employed by partnerships and some are employed by contractors eg. barristers.
- 2.1.3 The effect of transitioning articulated clerks/law graduates into an award would cause detriment to those prospective employees who do not contemporaneously commence paid employment at law practices. For the 2010 intake of articulated clerks/law graduates in or about March 2010, this would arguably cause them detriment because their offer of employment and the terms and conditions of those offers would have been set in 2009 during the established recruitment period in Western Australia. This adverse impact would necessarily flow to employers.
- 2.2 If, contrary to the Society's primary submission, articulated clerks/law graduates are to be included in the coverage of the draft Award, the Society has concerns about the minimum wages and classification in paragraph 14 of the draft Award, as follows:
- 2.2.1 The Society is concerned about the effect that referencing law graduates/articled clerks against Level 5 (legal clerical and administrative employees) in the draft Award would have in relation to the availability of graduate positions within law practices. The Society is also concerned that the present referencing does not properly classify the work of an articulated clerk/law graduate.
- 2.2.2 The Society's 2009 Salary Survey (an annual survey of salaries paid by participating law practices to all levels of professional and support employees) demonstrates that whilst the lowest paid articulated clerks in Western Australia receive between \$20,000 -25,000 per annum in salary, the lowest median for firms of 1-10 fee earners is approximately \$41,000 per annum. This leaves a reasonable proportion of articulated clerks receiving salaries below the proposed rate under the draft Award of \$38,480 per annum plus overtime.

- 2.2.3 In the Society's view, 40 hours per week would be the minimum number of hours worked by articled clerks/law graduates, with a median towards 45 hours per week and an average closer to 50 hours per week. Once overtime is included, the modern award rate of pay for an articled clerk/law graduate would be between \$50,000 and \$60,000 per annum.
- 2.2.4 It is submitted that if articled clerks/law graduates were required to be paid pursuant to the draft Award, many law practices may cease to offer positions to articled clerks/law graduates thereby reducing the opportunities for graduates to gain employment and therefore admission to practice and more particularly expand opportunities to provide the wide range of legal services to the community.
- 2.2.5 Further, upon review of the proposed classifications for the draft Award, and acknowledging that articled clerks/law graduates require consistent supervision (being employed in the legal profession's equivalent of an apprenticeship) it is the Society's view that the characteristics of the position of articled clerk/law graduate are more closely aligned to that of a Level 1 employee under the draft Award:

Characteristics

Employees at this level may work under direct supervision with regular checking, but may take the form of less direct guidance and some autonomy where working in teams is required.

- 2.2.6 The Society acknowledges that this position is at odds with the Level 4 classification of the draft Miscellaneous Award 2010 which covers those not covered by another award nor in an industry covered by another award and have a three or four year tertiary qualification and is carrying out duties requiring such qualification and has an award wage of approximately \$38,000 per annum plus over time.

2.2.7 The Society submits that a distinction is to be drawn between an articulated clerk/law graduate and an employee covered by the Level 4 classification under the draft Miscellaneous Award 2010 who would be employed on a job ready basis, without necessarily having further promotional opportunities.

2.2.8 An articulated clerk/law graduate is in a training and developmental position with opportunity for 'promotion' ie. admission as a legal practitioner and therefore the capacity to earn a significantly increased income. This distinction is further enhanced by the inclusion in the draft Award of the requirement that articulated clerks/law graduates be paid at their usual hourly rate to attend training courses and examinations.

2.2.9 For these reasons, the Society submits that the appropriate equivalency classification for an articulated clerk/law graduate is that of Level 1 – Year 1, resulting in an annual minimum wage of \$31,200 per annum or \$39,821 per annum with overtime based on 45 hours week.

3. Law Clerks

3.1 The Society is also concerned about the inclusion of one only law clerk level in the classification system under the draft Award, thereby failing to recognise the existence of junior and senior law clerk roles within law practices.

3.2 The Society submits that a separate stream of classifications should be developed and included in any Legal Services Award for law clerks based on the same levels as outlined for legal clerical and administrative employees, but targeted at legally related work rather than clerical and administrative work.

3.3 The Society also submits that the existing law clerk classification in the draft Award be retained to recognise the ability of law clerks and that the work done by them is of a higher skill level than that performed in the clerical and administrative stream.


- 3.4 With specific reference to clause B.7.2 of the draft Award, the Society submits that the words "Victorian Legal System" should be replaced with "Australian Legal System" or "Legal System in the appropriate jurisdiction".
- 3.5 The Society submits that the following would provide a more appropriate classification structure, in light of the above submissions and should be adopted by the Commission in the Legal Services Award 2010:

14. Minimum wages

Classification	Per week
<i>Clerical & Administrative</i>	\$
Level 1 – Year 1	600.00
Level 1 – Year 2	610.00
Level 1 – Year 3	630.00
Level 2 – Year 1	637.00
Level 2 – Year 2	650.00
Level 3	675.00
Level 4	710.00
Level 5	740.00
<i>Law Clerks</i>	
Level 1 – Articled Clerk/Law Graduate	600.00
Level 1 – Year 1	600.00
Level 1 – Year 2	610.00
Level 1 – Year 3	630.00
Level 2 – Year 1	637.00
Level 2 – Year 2	650.00
Level 3	675.00
Level 4	710.00
Level 5	740.00
Level 6	786.00

4. Senior Legal Administration Employees

- 4.1 As stated in paragraph 1.5, the Society's view is that senior legal administration employees should not be covered by the draft Award. Based on the classification description provided for Level 7 senior legal administrative employees, the classification is for persons in management level at law practices such as an office/practice manager. Historically persons in this classification have not been covered by awards. Therefore it is not within the scope of the Consolidated Request to include them in the draft Award.


David Price
Executive Director

Submission to the Law Council of Australia in relation to its Issues Paper on a modern award for early career lawyers in private practice

*Law Society of Western Australia's Young Lawyers Committee*¹

1. INTRODUCTION

- 1 The Young Lawyers Committee supports the proposal for the Legal Services Award 2010 (**Legal Services Award**) to be extended to early career lawyers, or for a new award covering early career lawyers to be introduced. We do not have a strong view as to which option would be preferable, however, extending an existing award may be more streamlined and reduce any complexity arising out of multiple awards being applicable to private practice in the legal sector.
- 2 This submission focuses on whether such award coverage should be introduced, and not on the appropriate terms of such an award. However, generally speaking, we are of the view that the award should deal with both minimum wages and minimum working conditions (e.g. working hours).
- 3 The answers to the questions in Annexure A to the Law Council of Australia's Draft Issues Paper dated 14 January 2020 (**Issues Paper**) are located at the end of this submission.

2. BENEFITS OF AWARD COVERAGE FOR EARLY CAREER LAWYERS

A. Summary

- 4 It is our view that including early career lawyers in the Legal Services Award or creating a new award applicable to early career lawyers would bring a number of benefits to early career lawyers, their employers, the broader legal profession and the community as a whole.
- 5 We consider the main benefits of award coverage for early career lawyers are:
 - (a) the creation of a safety net and benchmark for pay and conditions, thereby helping ensure that early career lawyers employed by federal system employers are being paid fairly and are being afforded fair and reasonable working conditions by the setting of minimum standards;
 - (b) improving early career lawyers' ability to negotiate fair and reasonable terms and conditions of employment; and
 - (c) improving job satisfaction and mental health outcomes.
- 6 We consider the benefits to the broader legal profession and community as a whole include:
 - (a) reducing the number of early career lawyers leaving the profession;
 - (b) improving mental health outcomes in the legal profession;

¹ The views expressed in this Submission are those of the Young Lawyers Committee and are not endorsed by the Law Society of Western Australia as a whole.

- (c) reducing the gender pay gap; and
 - (d) creating transparency as to expected starting salaries for lawyers.
- 7 We consider the benefits to employers of early career lawyers include:
- (a) increasing productivity as a result of improved employee satisfaction and mental wellbeing; and
 - (b) improved staff retention.

B. Benefits to early career lawyers

Safety net and benchmark

- 8 An award applicable to early career lawyers would set a benchmark as to minimum pay and conditions, and would operate as a safety net. In our view, there is a demonstrated need for such a benchmark both in Western Australia and in the other States and Territories.
- 9 The Issues Paper includes both survey and anecdotal evidence as to the concerning low pay being offered to some early career lawyers. The 2019/20 Hays Salary Guide states that the average pay for lawyers in their first year of practice at small firms is \$49,000,² and a South Australia survey found that 13% of respondents were being paid less than \$50,000.³ Some lawyers who completed this survey were practising for three years and were being paid a full time salary between \$30,000 and \$40,000.⁴ Over 20% of respondents to an ACT survey who were 1 – 2 years PAE had an income below \$50,000.⁵ Salaries below \$50,000, and even below \$40,000 were likewise reported in Queensland,⁶ and Tasmania.⁷ These rates of pay are on par with the minimum wages applicable to employees in industries where a lengthy university degree or traineeship is not required, such as the fast food industry.⁸
- 10 Further, in 2018 the WA Law Society’s Mental Health and Wellbeing Committee conducted a survey of 84 graduates and lawyers, most of whom were early career lawyers. The results of this survey were recently analysed by the Young Lawyers Committee (see **Attachment 1**). Concerningly, 38% of participants reported being unsatisfied with their pay. The survey showed a large variation in early career lawyers’ pay. A not insignificant proportion of participants were being paid below \$50,000, including two participants being paid a full-time salary around the national minimum wage (approximately \$38,500).
- 11 In our view, a full-time salary below \$50,000 is not fair and reasonable remuneration for an early career lawyer. The minimum award wage for graduates under the Legal Services Award is \$51,766 (not including super). Lawyers’ salaries should be

² Hays 2019/20 Salary Guide [83].

³ Issues Paper [90].

⁴ Issues Paper [91].

⁵ Issues Paper [101].

⁶ Issues Paper [105], [109].

⁷ Issues Paper [114].

⁸ See, *Fast Food Industry Award 2010*.

commensurate with the amount of time, effort and expense (including, for some graduates, large study debts) required to complete a law degree, and the skills and expertise gained through that process.

- 12 The 2018 Mental Health and Wellbeing survey also showed a large variation in the working hours reported by participants, with some reporting their usual working hours to be as high as 80 hours per week. We agree that an award covering early career lawyers should set standards as to appropriate working conditions.⁹

Improved ability to negotiate

- 13 An award may assist early career lawyers' ability to negotiate fair and reasonable working conditions. It may provide benchmarks for pay at various experience levels, to which early career lawyers could point in negotiations, as well as benchmarks in respect of working conditions and entitlements. Anecdotally, there is limited if any opportunity for early career lawyers to negotiate their pay and conditions.
- 14 The Issues Paper discusses a current lack of transparency regarding remuneration in the private sector.¹⁰ We are of the view that an award would increase transparency and that this can assist building early career lawyers' capacity to negotiate their pay.
- 15 The Issues Paper also refers to the view that solicitors are not a vulnerable group, but are instead adequately equipped to negotiate terms and conditions of their employment with their current or prospective employers. In our view, that is not the case for early career lawyers. It is unlikely that many early career lawyers, especially lawyers in their early 20s who have recently completed university, feel willing, able or confident to negotiate the terms of their employment, regardless of their skill level in relation to negotiation on behalf of clients. That is particularly so in the current job market, where there are far more graduates and job applicants than available positions. This exacerbates the power imbalance between employer and employee/prospective employee. We agree with the comments of other law societies and young lawyers committees on this issue.¹¹
- 16 The ability of awards to rectify the imbalance of bargaining power between employees and employers is discussed in the Issues Paper, with which analysis we agree.¹²
- 17 Separately, we note that a number of firms have recently undertaken an audit to assess whether they have underpaid their law graduates as a result of graduates working excessive overtime without remuneration, with some firms making back-payments.¹³
- 18 An award could at least provide a safety net for early career lawyers, protecting their entitlements and providing an appropriate minimum wage against which underpayments could be measured.

⁹ Issues Paper [196] – [206].

¹⁰ Issues Paper [125] – [129].

¹¹ Issues Paper [130] – [136].

¹² Issues Paper [154] – [155].

¹³ See eg Wootton & Marin-Guzman, 'Woolies' law firm underpaid its own staff', Australian Financial Review, 20 January 2020 <<https://www.afr.com/companies/professional-services/woolies-law-firm-underpaid-its-own-staff-20200119-p53sok>> (accessed 24 January 2020).

Improved job satisfaction and mental health among early career lawyers

- 19 As noted above, a significant portion of respondents to the 2018 Mental Health and Wellbeing Survey reported being unsatisfied with their pay. Accordingly, to the extent that an award succeeds in lifting early career lawyers' pay and improving their conditions, this is likely to result in improved job satisfaction among early career lawyers.
- 20 Further, over the last few years poor mental health has been highlighted as a particular problem within the legal profession. We agree with the suggestion that an award can help improve mental health outcomes in the profession.¹⁴ That is, an award could help regulate excessive working hours. While the literature acknowledges that more research is required to resolve inconsistent findings, a number of studies have found that long working hours are associated with poorer mental health, including increased depressive and anxiety symptoms.¹⁵ For example, one study conducted on business school alumni in Portugal found that participants working more than 48 hours a week had significantly higher anxiety and depression symptoms as compared to participants working less than 48 hours a week.¹⁶ The majority of respondents to the 2018 Mental Health and Wellbeing Survey reported usually working more than 50 hours a week.

C. BENEFITS TO THE BROADER LEGAL PROFESSION AND COMMUNITY

Leaving the legal profession

- 21 The Issues Paper provides evidence that unsatisfactory pay is a key reason underlying early career lawyers' decision to leave the legal profession.¹⁷ In our view, an award is likely to result in improved pay and conditions for early career lawyers, especially those employed at workplaces offering unsatisfactory pay. This is likely to, in turn, reduce the numbers of early career lawyers leaving the profession as a result of dissatisfaction with their pay. Accordingly, an award can assist in talent retention within the legal profession.

Mental health

- 22 As noted above, a number of studies have found that long working hours are associated with poorer mental health, including increased depressive and anxiety symptoms.
- 23 We are aware of statistics from legalsuper that the second most frequent category of claims on its death/total and permanent disability policies relate to mental health issues.

¹⁴ Issues Paper [209].

¹⁵ See, eg, Wong, K., Chan, A. H., & Ngan, S. C. (2019). The effect of long working hours and overtime on occupational health: a meta-analysis of evidence from 1998 to 2018. *International journal of environmental research and public health*, 16(12), 2102; P. Afonso, M. Fonseca, J. F. Pires, Impact of working hours on sleep and mental health, *Occupational Medicine*, Volume 67, Issue 5, July 2017, Pages 377–382; Weston, G., Zilanawala, A., Webb, E., Carvalho, L. A., & McMunn, A. (2019). Long work hours, weekend working and depressive symptoms in men and women: findings from a UK population-based study. *J Epidemiol Community Health*, 73(5), 465-474.

¹⁶ P. Afonso, M. Fonseca, J. F. Pires, Impact of working hours on sleep and mental health, *Occupational Medicine*, Volume 67, Issue 5, July 2017, Pages 377–382.

¹⁷ Issues Paper [139] – [143].

- 24 While long working hours in the legal profession is a complex issue, in our view, an award applicable to early career lawyers has the potential to help regulate excessive hours. This in turn has the potential to improve mental health outcomes in the legal profession.

Gender pay equity

- 25 We agree with the suggestion in the Issues Paper that an award covering early career lawyers can help reduce the gender pay gap in the legal profession.¹⁸ According to the Workplace Gender Equality Agency, Australia's current gender pay gap is 14%. To the extent that one of the factors contributing to the gender pay gap may be female lawyers being offered salaries lower than their male counterparts, or female lawyers asking for lower salaries when negotiating terms and conditions of employment, an award can ameliorate those outcomes by setting clear salary benchmarks for lawyers at particular levels of experience applicable to both men and women. We agree with the submission made by the ASU (SA + NT) in this regard.¹⁹

Transparency as to pay

- 26 We agree that an award can assist in setting and managing salary expectations for those commencing law degrees, graduates and the general public with respect to the starting salaries of lawyers.²⁰ In our view, this would benefit the legal professional and the broader community.

D. BENEFITS TO EMPLOYERS

- 27 An award covering early career lawyers would also benefit their employers. Accordingly, it is not correct to adopt a strictly employee vs. employer approach in considering the question whether an award covering early career lawyers should be introduced.
- 28 Numerous academic studies have linked employee satisfaction with improved job performance and/or increased productivity.²¹ General psychological wellbeing of employees has also been linked with increased productivity and business profits.²²

¹⁸ Issues Paper [209] – [211].

¹⁹ Issues Paper [210].

²⁰ Issues Paper [188].

²¹ See, eg, Böckerman, P., & Ilmakunnas, P. (2012). The job satisfaction-productivity nexus: A study using matched survey and register data. *ILR Review*, 65(2), 244-262; Harter, James K., Frank L. Schmidt, and Emily A. Killham. "Employee engagement, satisfaction, and business-unit-level outcomes: A meta-analysis." *Princeton, NJ: Gallup Organization* (2003); Westover, J. H., Westover, A. R., & Westover, L. A. (2010). Enhancing long-term worker productivity and performance. *International Journal of Productivity and Performance Management*, 372-387; Zelenski, J. M., Murphy, S. A., & Jenkins, D. A. (2008). The happy-productive worker thesis revisited. *Journal of Happiness Studies*, 9(4), 521-537; De Neve, J. E., Krekel, C., & Ward, G. (2019). Employee Wellbeing, Productivity and Firm Performance (No. dp1605). Centre for Economic Performance, LSE.

²² See, eg, Zelenski, J. M., Murphy, S. A., & Jenkins, D. A. (2008). The happy-productive worker thesis revisited. *Journal of Happiness Studies*, 9(4), 521-537; Robertson, I., Jansen Birch, A. and Cooper, C. (2012), "Job and work attitudes, engagement and employee performance: Where does psychological well-being fit in?", *Leadership & Organization Development Journal*, Vol. 33 No. 3, pp. 224-232; Jan-Emmanuel De Neve & Christian Krekel & George Ward, 2019. "Employee Wellbeing, Productivity and Firm Performance," CEP Discussion Papers dp1605, Centre for Economic Performance, LSE.

Workplaces are also less likely to experience high staff turnover when the wellbeing of their employees is better.²³

- 29 As noted above, some studies have found that long working hours are linked to poorer mental health. The link between employee mental health and productivity is also discussed in a recent report to the Productivity Commission, in the context of the concept of a 'psychological safety climate' (which includes length of working hours as well as other workplace stressors).²⁴ The report concluded that workplaces with poor 'psychological safety climates' (including long hours) are more likely to experience increased absences for sickness, more presentee-ism, and higher staff turnover — all of which affect the productivity of the business.

3. THE POSITION IN WESTERN AUSTRALIA

- 30 In Western Australia, employer law firms may fall within the national system, as national system employers, and be subject to the *Fair Work Act 2009* (Cth) and any applicable modern award. Or they may fall within the State system, and be subject to the *Industrial Relations Act 1979* (WA). Accordingly, in the event that a modern award is introduced or extended to include early career lawyers, it would only apply to those employed by national system employers in WA. This issue is unique to Western Australian lawyers. All other States and Territories have referred their industrial relations powers to the Commonwealth.
- 31 Incorporated legal practices (such as Pty Ltd or Ltd entities) are National System Employers, and are subject to the *Legal Services Award 2010*, which applies to administrative staff, paralegals and law graduates. Subject to a few exceptions, most unincorporated employer law firms (for example, partnerships or sole traders) are subject to the State industrial relations system, including the *Minimum Conditions of Employment Act 1993* (WA).
- 32 One criticism associated with the above discussed in the Issues Paper is that a modern award, which would only apply to National System Employers, would result in a difference between the terms and conditions required to be afforded to lawyers performing the same or similar work because of the entity structure of their employer in Western Australia.²⁵
- 33 In our view, this is not a sufficient concern so as to justify opposing including early career lawyers in the Legal Services Award, for the following reasons:
- (a) Only a portion of Western Australian early career lawyers will be impacted by this peculiarity, namely those employed by a State-based private employer;
 - (b) there is already significant inconsistency in the standards that apply to lawyers practicing in WA, with employers ranging from the State and Commonwealth

²³ See, eg, Jan-Emmanuel De Neve & Christian Krekel & George Ward, 2019. "Employee Wellbeing, Productivity and Firm Performance," CEP Discussion Papers dp1605, Centre for Economic Performance, LSE; De Neve, J. E., Krekel, C., & Ward, G. (2019). *Employee Wellbeing, Productivity and Firm Performance* (No. dp1605). Centre for Economic Performance, LSE.

²⁴ Bailey & Dollard, Mental health at work and the corporate climate: implications for worker health and productivity (2019). Asia Pacific Centre for Work Health and Safety University of South Australia.

²⁵ Issues Paper [31].

public service (who are covered by relevant awards and/or union agreements), private practices that are national system employers, private practices that are State-system employers, and community legal centres (who are covered by a modern award);

- (c) presently, it is generally early career lawyers employed in the private sector who have lower minimum wages and less protection in relation to their conditions, than their colleagues in State or Commonwealth agencies;
- (d) Western Australian early career lawyers employed by national system employers will benefit from their inclusion in the Legal Services Award, which will partly resolve the issue described in (b);
- (e) in the absence of a State award that applies to early career lawyers employed by State-system employers, those employers may informally use the Legal Services Award as a benchmark for the pay and conditions to be afforded to early career lawyers, and early career lawyers could point to the Legal Services Award in negotiating their pay and conditions; and
- (f) because Western Australian employers are in the same employment market, it seems likely that the inclusion of some Western Australian early career lawyers in the Legal Services Award may still affect the pay and conditions being offered by State-system employers competing over the same employees.

34 Further, a modern award for early career lawyers is a national proposal. In our view, our response cannot consider WA in isolation, and must take into account the impacts on our colleagues in other States and Territories.

4. RESPONSES TO ARGUMENTS AGAINST AWARD COVERAGE FOR EARLY CAREER LAWYERS

A. Access to justice and availability of employment

35 We acknowledge the concern that, where the inclusion of early career lawyers in the Legal Services Award would result in an entitlement to higher salaries, some law firms may be unable or unwilling to employ as many practitioners as they do now.

36 It is not apparent, though, how widespread any such effect would be. However, while both access to justice and the availability of employment are important issues, both need to be balanced with the right of early career lawyers to receive a fair wage and work in fair and reasonable conditions. We do not think that it is appropriate to justify inaction on the issue of underpayment on the basis that increased costs to law firms may be borne by clients, or that the number of jobs may reduce, in circumstances where, as discussed above in section 1, there are early career lawyers across Australia being paid inappropriately low salaries.

37 Further, the acknowledged reduction in rates of attrition following increases in salaries and conditions (described above) appears likely to counteract any reduction in access to justice.

38 To the extent that some firms may consider increasing the charge-out rates of early career lawyers to cover increases to salaries, it does not seem likely that this will have a

substantial effect on access to justice. Private lawyers' charge-out rates are already prohibitively expensive for a majority of the community to access their services.

- 39 Lastly, we note that employers that are primarily involved in providing legal services to disadvantaged sectors of the community or persons with lower incomes (e.g. Legal Aid and community legal centres) are already covered by either a modern award or union agreements, and a modern award covering early carer lawyers in private practice would not affect their employees' rates of pay.
- 40 Further, any increase to the cost of the provision of legal aid or representation by community legal centres may properly be counteracted by increased advocacy for higher governmental grants to those services. It seems perverse that those services' employees should bear the costs of access to justice, rather than the community.
- 41 As a final point, to the extent that the WA legal job market is oversupplied,²⁶ a reduction in the number of jobs available may have the effect of correcting an inefficient market. In the long-term, this may have the effect of equalising the power imbalance referred to in paragraph 15.

B. Any extra administration should already be done, or would be a reasonable cost

- 42 LFA raises a concern as to increased administrative burden as a result of the inclusion of early career lawyers in the Legal Services Award.²⁷
- 43 The minimum salaries and conditions of early career lawyers are already set by the National Employment Standards.²⁸
- 44 As has recently become apparent — with audits of a number of large commercial firms resulting in back-payments being made to early career lawyers²⁹ — law firms should already be undertaking the administration required to ensure their staff are not underpaid.
- 45 From March 2020, law firms will be required to do so for staff covered by the Legal Services Award.³⁰
- 46 In those circumstances, that an additional cost may be imposed on law firms for them to ensure compliance with their legal obligations does not militate against the inclusion of early career lawyers in the Legal Services Award. The costs of compliance should be no different only because the Legal Services Award, and not the National Employment Standards, regulate early career lawyers' salaries and conditions.
- 47 In any event, even if there was a real administrative burden placed on law firms as a result of the inclusion of early career lawyers in the Legal Services Award, in our view

²⁶ See, Nicholas Van Hattem, *Graduate Glut Confusion Misses the Point, it's about jobs*, 22 Sep 2019, available at: <https://www.lawyersweekly.com.au/careers/22919-graduate-glut-confusion-misses-the-point-it-s-about-jobs>

²⁷ Issues Paper [224](b).

²⁸ Issues Paper [19] – [20].

²⁹ See eg Wootton & Marin-Guzman, 'Woolies' law firm underpaid its own staff', Australian Financial Review, 20 January 2020 <<https://www.afr.com/companies/professional-services/woolies-law-firm-underpaid-its-own-staff-20200119-p53sok>> (accessed 24 January 2020).

³⁰ Issues Paper [55] – [59].

that is not a sufficient reason to oppose that change. Such administrative costs are ordinary and reasonable parts of running a business.

- 48 To that extent, we agreed with the views of ASU (SA + NT).³¹
- 49 Further, the business of the legal profession in private practice is essentially the sale of time. The work product of lawyers in private practice is typically the billable hour, broken down more precisely into 6 minute units. Early career lawyers are generally already required to keep a record of the 'productive' hours of work they perform each day. This record is scrutinised by their employer to ensure their level of productivity is consistent with set targets. It follows that the implementation of administrative procedures to ensure that the total number of hours worked by those early career lawyers complies with the minimum working conditions of an award should be a fairly straightforward continuation of this existing process.
- 50 By comparison, other industries that involve the sale of products or non-time based services may have needed to establish stand-alone administrative systems to ensure compliance with their respective awards. In theory, it should be easier for the legal profession to adapt to the implementation of administrative processes than those other industries.
- 51 Lastly, we note that community legal centres, which often operate on limited funds, are already covered by a modern award, and there is no suggestion in the Issues Paper, or any anecdotal evidence that we are aware of, that this has imposed an unreasonable or prohibitive administrative burden on those organisations.

C. Early career lawyer autonomy, to the extent it exists, is unlikely to be affected

- 52 LFA raises a concern as to reduced autonomy for early career lawyers as a result of their inclusion in the Legal Services Award.³²
- 53 Early career lawyers, particularly restricted practitioners, are closely directed by their supervising seniors and partners. Anecdotally, early career lawyers are generally required to be available to assist senior lawyers, and do not enjoy the flexibility that those senior lawyers may. The notion of autonomy for early career lawyers appears to be more illusory than real. In our view, the inclusion of early career lawyers in the Legal Services Award is unlikely to substantially affect their autonomy.
- 54 In any event, if employers consider that flexibility must be reduced to prevent early career lawyers from working to the extent that their salaries do not cover their entitlements, the result is that early career lawyers will not be required to work for more than certain periods or outside certain times. That kind of limited flexibility remains in the interests of early career lawyers.
- 55 Alternatively, if employers do not wish to pay early career lawyers for working longer hours or outside certain times, they may still introduce flexibility in the form of time in lieu or rostered days off. Such approaches could ensure that early career lawyers do not

³¹ Issues Paper [225] – [226].

³² Issues Paper [224](a).

work to the extent that their annualised salary does not adequately compensate them for the work they are required to complete.

- 56 Further, the Legal Services Award may itself provide for flexibility as part of the minimum conditions for early career lawyers.
- 57 Accordingly, in our view, even if the flexibility described existed, this concern is not sufficient to oppose the inclusion of early career lawyers in an Award.

D. Professions traditionally not covered by awards

- 58 An argument often raised against the extension of award coverage to lawyers is that professions have traditionally not been the subject of awards. In our view, this is not a sufficient reason for not extending award coverage to early career lawyers because:
- (a) The nature of the legal profession has changed over time and is currently experiencing a range of issues and challenges that may not have traditionally been faced by the profession.³³ In relation to technological advances in particular, it is now commonplace for legal practitioners to have access to their work on work mobile phones, laptops and the like and, correspondingly, an expectation imposed on them by their employers to be contactable out of the office. This blurs the lines between work and private life that traditionally may have been more apparent.
 - (b) Modern Awards are now a standard method of regulating working conditions in Australia, and other professions are now covered by awards (e.g. the medical profession).
 - (c) Some parts of the legal profession (e.g. public sector and community legal services) are already covered by an award, with no obvious detriment that we are aware of.
 - (d) There is a clear need for stronger regulation of pay and working conditions of early career lawyers given the evidence outlined in the Issues Paper and at paragraphs 10 and 12 above.
- 59 Further, because we already have award coverage for lawyers in certain sectors, with no obvious problems that we are aware of, we do not consider award coverage to be something which is likely to conflict with, or be inconsistent with, the nature of legal practice or professional and ethical obligations.

5. ANSWERS TO DISCUSSION QUESTIONS

Question 1

- 60 Some members of the Young Lawyers Committee practice in the public sector and are covered by enterprise agreements. The experience of one these committee members who provided comments in this regard has been positive and there have been no

³³ These include an increase in the supply of law graduates, convergence of legal services with non-law firm service providers, globalisation and liberalisation of markets, outsourcing, greater adoption of a client-centric focus, changing billing practices and technological advancement and disruption: The Law Society of Western Australia, *Future of the Legal Profession*, 12 Dec 2017, available at: <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017DEC12-Law-Society-Future-of-the-Legal-Profession.pdf>

reported instances of conflicts between the nature of legal practice and professional obligations with enterprise agreement coverage.

- 61 One committee member reported that the relevant union agreement brings positive benefits to the workplace including good pay and good leave entitlements, and that expectations as to working hours are drastically different to the private sector. There also seems to be a better understanding of entitlements and expected pay than in the private sector.
- 62 We have not identified any drawbacks.

Question 2

- 63 This is discussed at paragraph 10 above. Further, we have been provided with KBE Legal Hub's 2020 Financial Year salary guide for WA lawyers. According to this guide salary ranges for early career lawyers are not as low as those reported in some other States and Territories in the Issues Paper (\$55,000-\$85,000 for 0-1 PAE and \$60,000-\$95,000 for 1-2 PAE).
- 64 However, as noted at paragraph 10 above there are nevertheless instances of salaries outside of this range being offered in WA. We also note that KBE's clientele is generally mid- to top-tier commercial law firms. Further, even if a small minority of early career lawyers are being paid unreasonably low salaries, in our view award coverage should still be introduced to protect those lawyers and prevent such instances of underpayment from occurring.

Question 3

- 65 This is discussed in part 2 above.

Question 4

- 66 In relation to question 4(a), yes we believe that a modern award can have a positive impact on preventing underpayment by setting better minimum standards and providing clearer opportunities for enforcement of those standards.
- 67 In relation to question 4(b), we do not think that this is a likely outcome. Firms will want to be competitive employers, and it is not an outcome which was observed in relation to law graduates when the Legal Services Award was introduced. Many firms (e.g. large commercial firms) offer law graduate salaries in excess of the minimum wages provided for by the Legal Services Award.
- 68 In relation to question 4(c), a modern award could have a positive impact on regulating working conditions, and providing for entitlements.

Question 5

The Young Lawyers Committee has not considered in detail whether award coverage should be extended beyond early career lawyers and does not present a view on this issue.

Question 6

- 69 These matters are discussed in part 4 above.

Question 7

70 To the extent that there are any further issues, they are dealt with in the discussion above.

Question 8

71 We agree that the Law Council may take on this role.

Question 9

72 We do not agree that a recommended minimum wage would be an appropriate response in lieu of award coverage because it would not be enforceable. As discussed above, there is a clear need for stronger regulation of pay and working conditions for early career lawyers. We do not believe that recommended standards, which cannot be enforced, would result in positive changes.

LEGAL SERVICES AWARD 2010 – FEDERAL AWARD MODERNISATION		Item No. C070909B13 E230909B2 B.19
Senior Officer:	Andrea Lace, Executive Manager Policy and Professional Services	
Committee:	Ad hoc Committee: Chair, Matt Keogh, Committee Secretary: Andrea Lace	

Background and Summary

At the Council meeting on 7 September 2009, the Council resolved to establish an ad hoc Committee comprising Matt Keogh as a representative of the Young Lawyers Committee; Stephen Kemp, as a representative of the Employee Relations Committee; Maria Saracini, as a member of Council with industrial relations experience; Drew Pearson, a young lawyer with industrial relations experience; and a CLAP HR Manager, a barrister with industrial relations experience and a small firm representative, these three latter members to be approved by the Executive. Following the Council meeting, Jodii Giannis (formerly HR Manger Freehills), Scott Ellis (Francis Burt Chambers) and Gary Massey (Holborn Lenhoff Massey) were appointed.

The Legal Services Award was issued on 25 September 2009 as part of Stage 4 of the AIRC's award modernisation process. Admitted practitioners are excluded. The award covers employees up to and including articulated clerks/graduates at law the award wage for whom is \$740 per week + overtime after 38 hours per week at the rate of time and a half for the first 3 hours and double time thereafter + 17.5% leave loading. (Time in lieu can be taken.) Employers must give articulated clerks/graduates time off to attend courses and exams towards admission but are not obliged to pay the cost of these courses. Calculations show that if an articulated clerk worked 45 hours per week his or her wage would be \$50,657.68

The concern of the ad hoc Committee is that such a high wage could result in articulated clerks/graduates not being offered employment. The ad hoc Committee's recommendation is that articulated clerks/graduates should be excluded from the award but if they are to be included that the appropriate classification is that of Level 1 – Year 1 in the Award resulting in an annual minimum wage of \$31,200 per annum, or \$39,821 per annum with overtime based on an average 45 hour week.

The ad hoc Committee also recommends:

- that a separate stream of classifications should be included in the Award for law clerks based on the same levels as outlined for legal clerical and administrative employees, but targeted at legally related work rather than clerical and administrative work; and
- that based on the classification description, senior legal administrative employees should be excluded as management roles have not traditionally been covered by awards and are not within the scope of the Consolidated Request.

Submissions on the Legal Services Award 2010 must be received by 16 October 2009. The Executive met on 15 October 2009 to consider the draft submission.

Attachments

- Submission to Australian Industrial Relations Commission approved by the Executive
- Calculations of wages for articulated clerks/graduates - Legal Services Award 2010
- Extract from Statement of Industrial Relations Commission, 25 September 2009
- Exposure Draft - Legal Services Award 2010
- Records of the meetings of the ad hoc Committee held 22 and 29 September 2009
- Memo from Law Council to Constituent Bodies – 2 October 2009

Strategic Plan 08/11 Key Result Area 3: Voice of the legal profession in Western Australia Constitution Objective 4(c): To promote the development and improvement of law throughout the State of Western Australia

Discussion

Maria Saraceni advised Council that modern awards will apply as of 1 January 2010 to employers who are constitutional corporations, essentially pty ltd engaged in trade and it covers secretarial staff, which is not unusual as they are already covered, but it purports to extend coverage to articulated clerks, who in WA in private practice are not subject currently to that, Law Graduates in WA who are not currently subject to it and persons in a management area. The Ad Hoc Committee have come up with some submissions that have been put to the Executive.

COUNCIL DECISION/Recommendation

Council notes the submission dated 16 October 2009 to the Australian Industrial Relations Commission as settled by the Executive on 15 October 2009.

Moved John Staude seconded Hylton Quail

CARRIED

ACTION: AL

LEGAL SERVICES AWARD MODERNISATION

AD HOC COMMITTEE

RECORD OF A MEETING HELD ON

TUESDAY, 29 SEPTEMBER 2009 AT 1.00PM

Red Burt Room, Level 4, 89 St George's Terrace, Perth

PRESENT: Matthew Keogh YLC representative (Chair)
Stephen Kemp Employee Relations Committee Convenor
Maria Saraceni Council and LLFG representative
Drew Pearson Young lawyer with IR experience

APOLOGIES: Scott Ellis Barrister representative
Jodii Giannas HR Managers' representative
Gary Massey Small law practice representative

In Attendance: Andrea Lace (Committee Secretary)

1. LEGAL SERVICES AWARD 2010 - SUMMARY

The Legal Services Award 2010 was issued on 25 September 2009 as part of Stage 4 of the AIRC's award modernisation process.

Stage 4 covers 32 industries. On 25 September 2009, 29 draft awards were issued. Submissions must be lodged with the AIRC by 16 October 2009. The Full Bench will sit to conduct consultations in relation to Stage 4 draft awards from 26 to 30 October 2009 in Sydney and on 4 November 2009 in Melbourne, with Thursday 5 November also being available if required.

The exposure drafts reflect a provisional or tentative view and changes may be made on the basis of the material and arguments advanced. In some cases also, the drafts may be incomplete or based on the draft advanced by a particular party or group of parties.

The statement made by the AIRC on 25 September 2009 that accompanied the awards issued that day, included:

Legal services

The award will cover employees up to and including articulated clerks/graduates at law. We have not included classifications for lawyers admitted to practice. There is some award coverage for lawyers in the private sector but this is limited and does not appear, in our view, to satisfy the criteria necessary for the making of a modern award. It may be necessary for interested persons to give consideration to what if any transitional provisions may be needed for employees who are currently covered by an industrial instrument but will not be covered by the modern award.

MINIMUM WAGES

The minimum wages in the Legal Services Award 2010 (Award) are as follows:

14. Minimum wages

Classification	Per week \$
Level 1—Year 1 (legal clerical and administrative employee)	600.00
Level 1—Year 2 (legal clerical and administrative employee)	610.00
Level 1—Year 3 (legal clerical and administrative employee)	630.00
Level 2—Year 1 (legal clerical and administrative employee)	637.60
Level 2—Year 2 (legal clerical and administrative employee)	650.00
Level 3 (legal clerical and administrative employee)	675.00
Level 4 (legal clerical and administrative employee)	710.00
Level 5 (legal clerical and administrative employee)	740.00
Level 5—articled clerk/law graduate	740.00
Level 6—law clerk	786.00
Level 7—senior legal administration employee	859.00

The classification by the employer must be according to the skill level required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

CONDITIONS OF EMPLOYMENT

Conditions of employment include:

- **Ordinary hours of work** are to be an average of a 38 per week and must not exceed 152 hours in 28 consecutive days.
- **Overtime will be paid** for all work outside ordinary hours on any day shift, or in excess of 38 hours per week, at the rate of time and a half for the first 3 hours and double time thereafter.
- An employee may elect, with the consent of the employer, to **take time off in lieu** of payment for overtime – if the leave is not taken for whatever reason, payment for time accrued at overtime rates will be paid at the expiry of 12 months or on termination.
- During annual leave an employee **must also receive a loading of 17.5%** on the employee's minimum wage.

Special conditions for articulated clerks/law graduates and law students are:

38.1 Articled clerks/law graduates and law students

An articulated clerk/law graduate or law student is entitled to leave of absence with pay:

- (a) for study and attendance at examinations, not exceeding four days in respect of each subject for which they present themselves for examination which is necessary to enable the employee to qualify for admission; and
- (b) to attend lectures and organised classes at a university or other course of instruction which is required to enable the employee to qualify for admission.

The characteristics of Level 5 (see under Minimum Wages) are:

B.5.1 Characteristics

An employee at this level may work under broad guidance. The work of others may be supervised or teams guided. Responsibility for the planning and management of the work of others may be involved.

Competency at this level involves the self-directed application of knowledge with substantial depth in some areas and a range of technical and other skills to tasks, roles and functions in both varied and highly specific contexts.

Competencies are normally used independently and both routinely and non-routinely. Judgment is required in planning and selecting appropriate equipment, services, techniques and work organisation for self and others.

An indicative training and vocational education level for this level is part achievement of Associate Diploma at TAFE or Tertiary level (or equivalent).

B.6 Level 5 (articled clerk/law graduate)

B.6.1 Characteristics

This position requires the completion of a course of study which is recognised as an academic qualification for admission and a formal offer by the employer of articles of clerkship/law graduate, the acceptance of that offer and registration and approval of all documentation required by the relevant governing bodies.

2. DISCUSSION

Mr Pearson thought the 'bottom line' for articulated clerks/law graduates was too high. He expressed concern about graduates not being able to get a job.

Mr Keogh thought the 'devil' was in the overtime, rather than the base amount. He said the way to go might be to reduce the base amount. He suggested that a submission give a positive acknowledgement that the Award does not cover practitioners but submit that the minimum amount for articulated clerks/graduates is too high; that it presents as a barrier to entering the profession as it could lead to a reduction in the number of positions made available. He also suggested that the Award include the current Victorian exclusionary provision ie. if an employee is paid 15% over the award amount, the award does not apply.

It was noted that although articulated clerks/graduates must be paid for attendance at lectures and exams, there is no provision in the Award that employers must pay the employees practical legal training fees eg. to the ATP or the College of Law.

Ms Saraceni and Mr Kemp both agreed that the award for articulated clerks/graduates is too high. Their preferred position was that articulated clerks/graduates be excluded from the Award.

As noted at the meeting on 22 September, the 2009 Law Society Salary Survey showed salaries for articulated clerks as follows:

Fee earners 1-10			Fee earners 11-20			Fee earners 21 +		
Lowest	Highest	Median	Lowest	Highest	Median	Lowest	Highest	Median
23,000	85,000	41,725	27,000	62,000	44,578	40,000	59,500	47,646

The Committee considered the various levels in the Award for **legal clerical and administrative employees** (clerks).

Mr Keogh said the levels, increments and classifications seemed appropriate. He said the minimum and maximum base wages for clerks in the new Clerks – Private Sector Award 2010 are \$580 per week and \$740 per week. They are \$600 and \$740 respectively, in the new Legal Services Award 2010.

Mr Kemp commented that most law practices employ support staff through a Pty Ltd company and would be caught by the Award.

Ms Saraceni also raised the **Level 6 classification and wage for law clerks**. She said there can be a big difference between a law clerk who has just started the job and one who is experienced. Law clerks are fee earners and should not all be at the same level.

The minimum wage for a law clerk in the Award is \$786 per week (\$40,872 per annum for a 38 hour week).

The characteristics of Level 6 (Law Clerk) are:

B.7 Level 6

B.7.1 General

Work is under limited guidance in line with a broad plan, budget or strategy. Responsibility and defined accountability for the management and output of the work of others and for a defined function or functions may be involved.

Competency at this level involves the self-directed development of knowledge with substantial depth across a number of areas and/or mastery of a specified area with a range of skills. Application is to major functions in either varied or highly specific contexts.

Competencies are normally used independently and are substantially non-routine. Significant judgment is required in planning, design, technical or supervisory functions related to products, services, operations or processes of the firm.

Specific clerical and administrative competencies do not automatically apply at this level or above. Legal competencies continue to apply at least in conjunction with the clerical and administrative competencies.

Ms Saraceni also questioned the appropriateness of including in the Award, **Level 7 – senior legal administrative employees** (\$859.00 per week - base salary of \$44,668 per annum).

The characteristics of Level 7 are:

B.8 Level 7 (senior legal administration employee)

B.8.1 General

Work is in accordance with a broad plan, budget or strategy. Responsibility and broad ranging accountability for the structure, management and output of the work of others and/or functions may be involved.

Competency at this level involves the self-directed development and mastery of broad and/or specialised areas of knowledge with a range of skills. Application is to major, broad or specialised functions in highly varied and/or highly specialised contexts.

Competencies are normally used independently and are non-routine. Significant high level judgment is required in planning, design, operational, technical and/or management functions.

Specific clerical and administrative competencies do not automatically apply at this level. Legal competencies continue to apply in at least conjunction with the clerical and administrative competencies.

An indicative training and vocational educational level for this grade is Diploma/Degree at TAFE or Tertiary level (or equivalent) with the exception of articled clerk/law graduate.

The Committee agreed that a person in a position such as this eg. an Office Manager, would generally be paid in the order of \$80,000+ per annum and should not be covered by an award.

Mr Pearson suggested that the Award include levels for **law clerks** based on skills and experience along the same lines as those in the Award for legal and administrative employees.

The Committee agreed that this would be an appropriate approach.

The definition of 'law clerk' in the Award is:

law clerk means a clerk who is engaged for the major part of their time in the interviewing of clients, preparation of documents and general work assisting a barrister and solicitor in their practice, but will not include account clerks, articled clerks, law students, titles office clerks, receptionists and employees principally engaged in word processing, computer use, filing, machine operation, switchboard, delivery of documents or duties of a routine nature

It was noted that the characteristics of a Level 1 legal clerical and administrative employee are:

B.1 Level 1

B.1.1 Characteristics

Employees at this level may work under direct supervision with regular checking, but may take the form of less direct guidance and some autonomy where working in teams is required.

Competency at this level involves the application of knowledge and skill to a limited range of tasks and roles. There is a specified range of contexts where the choice of actions required is clear.

Competencies are used within established routines, methods and procedures that are predictable and within which judgment against established criteria is involved.

An indicative training and vocational educational level for this level is Certificate/Year 10 standard.

As articulated clerks/law graduates require supervision and are on a learning curve, it was suggested that these characteristics were more suitable than those listed in Level 5.

It was noted that on page 44 of the Award at paragraph B.7.2 – Level 6 under 'Legal skills' it is stated: "*Display a practical understanding and application of the structures, methods and procedures of the Victorian Legal System.*" [emphasis added]. It was agreed that "Australian Legal System" or "the Legal System in the appropriate jurisdiction" might be a suitable amendment.

It was concluded by the Committee that:

1. The exclusion of admitted practitioners from the Award should be positively acknowledged.
2. It was preferred that articulated clerks/graduates should be excluded from the Award. (They are on a learning curve and the *Minimum Conditions of Employment Act* (State) are acceptable ie. minimum hourly rate of \$15.72 (\$597.36 per week, \$31,063 per annum.))
3. If articulated clerks/graduates must be covered by the Award, their Level/levels should be more suited to their skills and experience.
4. Law Clerks are fee earners and there should be levels based on skills and experience as included in the Award for legal clerical and administrative employees.
5. Senior legal administration employees (Level 7) should be excluded from the Award. This Level covers mid-level Managers and extends the Award beyond an appropriate level of employee.

Mr Keogh volunteered to draft a submission (overnight) based on the discussion at the meeting and to circulate the draft to all Committee members for their consideration and comments.

Mr Kemp said he had asked his HR Manager to review the classifications and minimum wages in the Award.

The meeting closed at 2pm.

LEGAL SERVICES AWARD MODERNISATION

AD HOC COMMITTEE

RECORD OF A MEETING HELD ON

TUESDAY, 22 SEPTEMBER 2009 AT 1.00PM

Judy Eckert Room, Level 4, 89 St George's Terrace, Perth

PRESENT: Matthew Keogh YLC representative (Chair)
Stephen Kemp Employee Relations Committee Convenor
Maria Saraceni Council and LLFG representative
Drew Pearson Young lawyer with IR experience
Scott Ellis Barrister representative
Jodli Giannas HR Managers' representative
Gary Massey Small law practice representative

In Attendance: Andrea Lace (Committee Secretary)

1. BACKGROUND

Australia's new national workplace relations system was launched on 1 July 2009 from which date the role of the Australian Industrial Relations Commission (AIRC) changed.

Fair Work Australia (FWA) commenced on 1 July 2009 and will be the new national workplace relations tribunal.

The AIRC will continue to operate until 31 December 2009. During the transition period the AIRC will complete award modernisation.

1.1 Background papers

Committee members were provided with the following documents:

1. Council agenda item for the meeting held 7 September 2009.
2. Australian Services Union (ASU) Award Modernisation Pre-drafting Submission re Stage 4 industries/occupations (AM2008/86) Industries not otherwise assigned – Legal Services
3. *Workplace Relations Act 1996* – Request under Section 576(1) – Award Modernisation – Consolidated Version
4. Clerks – Private Sector Award 2010
5. NSW Young Lawyers Draft (24 July 2009) – Legal Services Industry and Occupations Award 2010 and Submission to Pre-drafting Consultations
6. Submission of CPSU, the Community and Public Sector Union

7. Australian Services Union (Parties Draft – 24 July 2009) – Legal Services Award 2010
8. Submission of the Legal Employers Association Inc – Legal Services (Stage 4) AM 2008/86 – 4 September 2009
9. Submission of Major Law Firms (AM 2008/86)
10. Submission of Law Society of NSW – AM2008/86

1.2 Minister's request for award modernisation

Pursuant to s576C(1) of the *Workplace Relations Act 1996*, the Minister, Julia Gillard, requested the President of the AIRC to undertake award modernisation ie. to create a comprehensive set of modern awards.

The summary of the Minister's Award Modernisation Request includes:

The creation of modern awards is not intended to:

- (a) *extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;*
- (b) *result in high-income employees being covered by modern awards;*
- (c) *disadvantage employees;*
- (d) *increase costs for employers.*

1.3 Clerks - Private Sector Award 2010

On 19 December 2008 the AIRC issued an award modernisation decision and released the 'final' awards for the priority industries including Clerks—Private Sector Award 2010.

1.4 Stage 4 - which includes the legal profession

Statement issued by the AIRC on 22 September 2009:

Stage 4 awards

We shall deal with the transitional arrangements for Stage 4 modern awards in conjunction with the program already announced for Stage 4. The exposure drafts due for publication by 25 September 2009 will generally contain the model transitional provisions. Interested parties wishing to comment on the transitional arrangements in the exposure drafts should file their submissions by 16 October 2009.

1.5 Who is to be affected by legal services award modernisation?

If a law practice is a constitutional corporation, employees who earn less than \$108,000 per annum will be subject to a modernisation award.

Sole traders and partnerships will not be affected as their arrangements are covered by State legislation.

1.6 Submissions to date re legal profession

▪ **New South Wales Law Society**

Administrative and clerical staff: There are currently 4 awards in NSW that cover these staff. The NSW Law Society welcomed the introduction of national minimum terms and conditions of employment for administrative and clerical employees in the Legal Services Industry.

Graduates-At-Law: There are currently 4 awards in NSW that cover these staff. The NSW Law Society supported the creation of a Legal Services Award that contains classification scales for Graduates-at-Law and Articled Clerks. Alternatively, the NSW Law Society supported the inclusion of a separate Legal Services Part within the Clerks-Private Sector Award 2010 for Graduates-at-Law and Articled Clerks.

Solicitors in private practice (law firms and ILPs) and corporate solicitors: The NSW Law Society submitted that the Award Modernisation process is not an appropriate vehicle through which to extend award coverage to solicitors in private practice and corporate solicitors. To do so, even with necessary exemption rate provisions, would necessitate wide-ranging changes to the way in which work is organised in the Legal Services industry.

▪ **Young Lawyers Committee – Law Society of New South Wales**

In opposition to the NSW Law Society, the YLC Committee submitted that the modern award for legal services should cover graduates-at-law and solicitors admitted to practice.

The YLC Committee submitted a draft 'Legal Services Industry and Occupations Award 2010'.

▪ **Major Law Firms (Blake Dawson, Clayton Utz, Corrs, Deacons, DLA Phillips Fox, Freehills, Gadens, Hall & Wilcox, Herbert Geer, Lander & Rogers, Maddocks, Mallesons, Middletons, Minters)**

Any modern award made in respect of the legal services industry should have no application to lawyers.

▪ **Australian Services Union**

The draft 'Legal Services Award 2010' covers employers in the private sector and their employees except for (primarily):

- employers bound by a State public sector award
- community legal centres
- aboriginal legal centres
- an employer whose primary activity is not within the legal services industry.

A full-time employee is engaged to work 38 hours or less, 52 weeks per annum. Overtime is to be paid for at overtime rates. Minimum weekly wages are listed which for an articulated clerk is \$740pwk (\$38,480) and for a 1st year lawyer is \$786.00pwk (\$40,872) + PII insurance, practising certificate fee and Law Society membership fee.

2. DISCUSSION

Mr Keogh opened the discussion. He said that:

- The YLC has two competing interests:
 1. Don't want employers to be in a position where they can't offer jobs to graduates; but
 2. Don't want graduates and young lawyers to be 'screwed'.The YLC's concerns relate to terms and conditions as well as salaries. At a minimum it would like to see guaranteed terms of employment for graduates/PLTs.
- The Exposure Draft due to issue on Friday, 25 September may exclude legal professionals. But if it does not, the purpose of this meeting is to give consideration to what the Society's position should be. Any submission MUST be made by 16 October. There is therefore very limited time for discussion.

Mr Massey drew the Committee's attention to the Minister's comments that award modernisation is not intended for occupations that have not been covered by awards.

Mr Keogh said that in NSW, Victoria and SA some awards have had application to the legal profession.

Mr Pearson said that although fee earners at Freehills are employed by the partnership, all support staff are employed by corporations.

Ms Saraceni commented that:

- The Society's policy would have to be a balanced one as the Society represents employers and employees.
- Although award modernisation is a federal initiative that applies to corporations, its application could extend to those covered by State awards. A report on proposals for Western Australia is due out in October.
- It can't be said that no sectors of the legal profession in WA have been covered by awards. For example government lawyers are covered by the public sector award.
- At the recent National Legal Convention the Attorney General's emphasis was on all aspects of the legal profession being uniform so it is surprising that this is not one of those aspects.
- The State 'Clerk – Private Sector Award 2008' covers clerical staff in professional employment – it is skill based to cut across various industries.

Mr Massey said graduates with the highest marks are 'snapped up' by the large law firms. If employers are forced to pay high salaries for graduates, those without high marks may not get employed.

Mr Kemp referred to the condition in the Australian Services Union draft 'Legal Services Award 2010' that employees be paid for overtime ie. hours in excess of 38 hours per week. He calculated that the proposed weekly wage of \$740 for 38 weeks equated to an hourly rate of \$19.473. As most graduates are required to work an average of 50 hours per week, if paid for the extra hours, the annual rate would increase from \$38,480 to \$50,631.58.

Reference to the 2009 Law Society Salary Survey showed salaries for articulated clerks as follows:

Fee earners 1-10			Fee earners 11-20			Fee earners 21 +		
Lowest	Highest	Median	Lowest	Highest	Median	Lowest	Highest	Median
23,000	85,000	41,725	27,000	62,000	44,578	40,000	59,500	47,646

Mr Keogh commented that in Victoria, if a staff member is paid more than 15% more than the award rate, the terms of the award no longer apply.

Ms Giannas suggested that payment for overtime would hit small firms the hardest.

Ms Saraceni said that what needed to be considered by the Committee are the pros and cons of introducing private sector awards for the profession in Western Australia.

Mr Kemp said the focus will depend on the Exposure Draft due to issue on Friday – will the focus be on the coverage proposed by the award or simply what is in the award?

The Committee agreed to:

- download the Exposure Draft for the Legal Services Industry on Friday, 25 September 2009; and
- to next meet on Tuesday, 29 September 2009.

The meeting closed at 2.05pm.

Memo

Date: 2 October 2009
To: Constituent Body CEOs
From: Secretary-General

Exposure Draft of the Legal Services Award 2010

Action Required

Consider the implications of the Exposure Draft of the Legal Services Award 2010 and make submissions if necessary

Deadline

16 Oct 2009

Issues/Purpose

1. For CEOs to consider the implications of the Legal Services Award for their members and make submissions if necessary

Background/Developments

2. As part of the Government's industrial relations reforms, industrial awards are being modernised.
3. An Exposure Draft of a Legal Services Award was released for comment on 25 Sep 2009.
4. See <http://www.airc.gov.au/awardmod/fullbench/industries/awardmoddocument.cfm?award=legal&document=Exposure>
5. Legal practitioners are not covered in the draft but some articulated clerks and law graduates are covered, as are some work experience clerks. Clerical staff in the legal services sector are covered.
6. There is some suggestion that unions may seek coverage for newly admitted legal practitioners in the next round of consultations.

7. The Law Council will consider the implications of the draft award in the context of uniform legal profession regulation and will refer the draft award to its Legal Education Committee.
8. At this stage the Law Council is not planning to make a submission as the implications of the award seem more directly relevant to individual members of Constituent Bodies.
9. The Law Council recommends that Constituent Bodies consider the implications of the draft award and make submissions if necessary.

Regards,

A handwritten signature in black ink, appearing to read "W Grant". The signature is written in a cursive, slightly slanted style.

Bill Grant

Distribution List

- Constituent Bodies CEOs