

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/233 – Legal Services Award 2010

Applicant: Russell Kennedy & Ors

SUBMISSIONS IN SUPPORT OF PROPOSED VARIATIONS TO THE *LEGAL SERVICES AWARD 2010*

1. The Applicant is a group of 21 law firms referred to in AM2014/233 as "Russell Kennedy & Ors" or "the Firms" (**Firms**).
2. In response to the Direction 3 of the Directions issued by DP Clancy on 14 December 2016, the Firms make the following submissions with respect to outstanding variations that the Firms say should be made the *Legal Services Award 2010* (**LS Award**).

Averaging of hours

3. The Firms submit that clause 24.1 of the LS Award (clause 8.1 of the revised exposure draft of the *Legal Services Award 2015* published by the Commission on 29 July 2016 (**Revised Exposure Draft**)) should be amended to provide for greater flexibility and clarity in the arrangement of hours of work, as follows:

24.1 Weekly hours of work

- (a) *The ordinary hours of work for day workers are to be an average of 38 per week but not exceeding 152 hours in 28 days.*
- (b) *By agreement between an employer and an employee, the employee's ordinary hours of work may be arranged on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 26 weeks.*
- ~~(b)~~(c) *The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday.*
- ~~(e)~~(d) *The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 7.00 am to 6.30 pm, Monday to Friday. The spread of hours may be altered by up to one hour at either end of the spread, by agreement between the employer and the majority of employees concerned.*

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~~(e)~~(e) Any authorised work that is required or requested by an employer to be performed outside the spread of hours is to be paid for at overtime rates. However any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the workplace in a state of readiness for other employees to start work is to be regarded as part of the 38 ordinary hours of work.

~~(e)~~(f) **Rostered days off**

Arrangements for rostered days off may be reached between an employee and an employer. Such arrangements will outline the method of accruing time towards a rostered day off as well as an agreed method of accumulating and taking rostered days off.

4. The Firms note that they have previously sought a variation to this clause to provide for averaging of hours across a period of up to 12 months however, for the reasons set out following, they pursue a variation whereby hours of work could be averaged over a period of up to 26 weeks.
5. Clause 8.1 of the Revised Exposure Draft uses slightly different language to that adopted at clause 24.1 of the LS Award, to which the Firms do not object. The effect of the Firms' proposed variation is that clause 8.1 of the Revised Exposure Draft would read as follows:

8.1 Ordinary hours and roster cycles—day workers

- (a) *The ordinary hours of work for day workers are to average 38 hours per week but must not exceed 152 hours in 28 days.*
- (b) *By agreement between an employer and an employee, the employee's ordinary hours of work may be arranged on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 26 weeks.*
- ~~(b)~~(c) *The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday.*

~~(e)~~(d) **Span of Hours**

- (i) *The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 7.00 am and 6.30 pm, Monday to Friday.*
- (ii) *The spread of hours may be altered by up to one hour at either end of the spread, by agreement between the employer and the majority of employees concerned.*
- (iii) *Subject to clause 8.1~~(e)~~(d)(iv) any authorised work that is required or requested by an employer to be performed outside the spread of hours is to be paid for at overtime rates as prescribed in clause 14—Overtime.*
- (iv) *Any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for*

example, of getting the workplace in a state of readiness for other employees to start work is to be regarded as part of the 38 ordinary hours of work.

(d)(e) Rostered days off

- (i) *Arrangements for rostered days off may be reached between an employee and an employer.*
- (ii) *Such arrangements will outline:*
 - *the method of accruing time towards a rostered day off; and*
 - *an agreed method of accumulating and taking rostered days off.*

Averaging of hours over a period of up to 26 weeks by agreement

6. Section 63 of the FW Act provides that a modern award may include terms providing for the averaging of hours of work over a specified period, provided that the average hours over that period do not exceed 38 hours per week for a full time employee (and the lesser of 38 hours and the employee's ordinary hours for an employee who is not full time). There is no limitation under s63 on the period of time across which such hours may be averaged.
7. Section 64 of the FW Act provides that an employer and an employee that is not covered by a modern award or enterprise agreement may agree in writing to an averaging arrangement under which hours of work over a specified period not exceeding more than 26 weeks are averaged. Qualified and admitted lawyers are not covered by a modern award. In the absence of an enterprise agreement covering them, qualified and admitted lawyers may accordingly enter into an agreement with their firm to average their ordinary hours of work over a 26 week period.
8. The Firms submit that it is uncontentious that the nature of work within a law firm, and within practice areas within a law firm, fluctuates significantly depending upon the types of matters being handled at any given time.
9. Employees covered by the LS Award work side-by-side with qualified and admitted lawyers that are not covered by the LS Award. The Firms accordingly submit that it is reasonable that employees covered by the LS Award should have the same opportunity to average their hours of work over the same 26 week period that their non-award covered colleagues do in order that they can work fewer hours of work during quiet periods of time, balanced against periods of time during which they may work greater hours of work.
10. In making such a variation, the Firms submit that the Commission would fulfil the modern awards objective at section 134 of the FW Act that modern awards should promote modern work practices and the efficient and productive performance of work.

Requirement that overtime be authorised

11. There are a number of modern awards that expressly provide that overtime must be authorised in order for an entitlement to payment to arise, including:

- (a) the *Social, Community, Home Care and Disability Services Industry Award 2010* at clause 28.1;
 - (b) the *Surveying Award 2010* at clause 23.1;
 - (c) the *Educational Services (Schools) General Staff Award 2010* at clause 27.1;
 - (d) the *Educational Services (Teachers) Award 2010* at clause B.4.1;
 - (e) the *Pharmacy Industry Award 2010* at clause 26.2(a).
12. The Firms submit that each of these modern awards cover employees working with a high degree of autonomy, and consequently in an environment in which it would not be unusual for an employee to perform additional work at their own initiative without the authorisation of the employer and without any expectation of additional payment for such work.
 13. The Firms do not propose that employees covered by the LS Award should not be paid for additional hours of work where such an employee has been required or requested to perform such work.
 14. However, the Firms submit that employees covered by the LS Award work in a working environment in which they are highly autonomous. The proposed variation makes it clear that employees will only be entitled to be paid for additional work that they perform outside their ordinary hours where this has been authorised.
 15. Such clarification provides for certainty with respect to what an employee is entitled to be paid in any pay period. It also creates a disincentive against an employee performing unreasonable additional hours that have not been authorised, and which might otherwise create a risk to health and safety.
 16. The Firms accordingly submit that the variation is necessary to achieve the modern awards objective that the LS Award promotes the efficient and productive performance of work (s134(1)(d)) and that the LS Award is simple and easy to understand (s134(1)(g)).

Rest breaks

17. The Firms submit that clause 33.2 of the LS Award should be amended to provide that the timing of paid rest breaks be subject to the reasonable business needs of the practice as follows:

33.2 Rest break

- (a) All employees will be allowed two rest intervals, subject to the reasonable business needs of the practice, on each day as follows:
 - (i) the first of 10 minutes to be allowed between the time of commencing work and the usual meal interval; and
 - (ii) the second of 10 minutes to be allowed between the usual meal interval and the time of ceasing work for the day.
18. Clause 9.2(a) of the Revised Exposure Draft uses slightly different language to that adopted at clause 33.2 of the LS Award, to which the Firms do not object. The effect

of the Firms' proposed variation is that clause 9.2(a) of the Revised Exposure Draft would read as follows:

9.2 Paid rest breaks

(a) *All employees will be allowed two paid rest breaks, subject to the reasonable business needs of the practice, on each day as follows:*

- (i) *the first of 10 minutes to be allowed between the time of starting work and the usual meal break; and*
- (ii) *the second of 10 minutes to be allowed between the usual meal break and the time of finishing work for the day.*

19. The Firms do not propose that employees covered by the LS Award should not receive, or should not be paid for, rest breaks of up to 20 minutes on each day on which they perform work. This is notwithstanding that a number of the predecessor pre-reform awards to the LS Award did not provide any entitlement to a rest break in addition to meal breaks, paid or otherwise.
20. The pre-reform awards that preceded the LS Award provided for following rest break entitlements:

State	Award	Relevant provision
Victoria	<i>Victorian Legal Professional, Clerical and Administrative Employees Award 2004 (AP831581)</i>	<p>Clause 30.2: 30.2.1 All employees shall be allowed two rest intervals on each day as follows:</p> <p>30.2.1(a) the first of ten minutes to be allowed between the time of commencing work and the usual meal interval;</p> <p>30.2.1(b) the second of ten minutes to be allowed between the usual meal interval and the time of ceasing work for the day.</p> <p>30.2.2 All employees who work more than four hours on a Saturday morning shall be allowed a rest period of ten minutes between the times of commencing work and finishing work.</p> <p>30.2.3 Such intervals are to be counted as part of time worked.</p>

State	Award	Relevant provision
New South Wales	<i>Clerical and Administrative Employees Legal Industry (State) Award (AN120675)</i>	No entitlement to rest breaks in addition to meal breaks (paid or otherwise)
South Australia	<i>Salaried Lawyers Award (AN150135)</i>	<p>No entitlement to rest breaks in addition to meal breaks (paid or otherwise)</p> <p>The <i>Clerks (SA) Award (AN150039)</i> covering administrative staff in law firms also did not provide for any entitlement to rest breaks in addition to meal breaks (paid or otherwise)</p>
Tasmania	<i>Barristers and Solicitors Award (AN170008)</i>	Part V, clause 4: Employees shall be entitled to a morning and afternoon tea break. Such break shall be taken at the work station without undue interruption to the work flow.
Tasmania	<i>Legal Practitioners and Apprentice-At-Law Award (AN170056)</i>	No entitlement to rest breaks in addition to meal breaks (paid or otherwise)
Queensland	<i>Legal Aid Queensland Employees' Award - State 2003 (AN140156)</i>	<p>Clause 6.5: Employees are entitled to rest pauses subject to the following:</p> <p>(a) A total of 10 minutes for an Employee who works more than 3 hours but less than 6 ordinary hours in any one day; or</p> <p>(b) A total of 20 minutes for an Employee who works at least 6 ordinary hours in any day.</p>

State	Award	Relevant provision
Queensland	<i>Clerical Employees Award - State 2002 (AN140067)</i>	<p>Clause 6.6: 6.6.1 Where practicable all employees shall be entitled to a rest pause of not less than 10 minutes duration in the first and second half of the day's work.</p> <p>6.6.2 Where there is agreement between the majority of employees and the employer, the rest pauses may be combined into one 20 minute rest pause to be taken in the first part of the ordinary working day, with the combined rest pause and the meal break arranged in such a way that the ordinary working day is broken up into 3 approximately equal working periods.</p> <p>6.6.3 Such rest pauses shall be taken at such times as will not interfere with continuity of work where continuity is necessary.</p> <p>6.6.4 Employees who work a minimum of 4 consecutive ordinary hours on any day shall be entitled to a rest pause of 10 minutes duration without loss of pay. Such rest pause shall be taken at such times as will not interfere with the continuity of work where continuity in the opinion of the employer is necessary.</p>

21. In the drafting of the LS Award therefore, it appears that the Victorian position has been adopted, which has imposed prescriptions around the taking of rest breaks, where no such prescriptions operated previously in any other State or Territory.
22. While the Firms do not object to the LS Award providing for a minimum rest break entitlement, the Firms submit that reasonable business demands, such as Court deadlines, may affect demands upon the work performed by a particular employee, necessitating some flexibility around the taking of paid rest breaks.
23. The drafting LS Award is to some large degree based upon the drafting of the *Clerks-Private Sector Award 2010 (Clerks Award)*. The nature of the work performed by a majority of employees covered by the LS Award is of an administrative nature, as is the case for work performed by employees covered by the Clerks Award, save that it

is accepted that the work of employees covered by the LS Award at times may be of a higher competency level than that of employees covered by the Clerks Award given the nature of the legal industry.¹

24. However, unlike clause 33.2 of the LS Award, clause 26.2 of the Clerks Award provides for the taking of rest breaks in a manner that takes into account the reasonable needs of the employer's business, as follows:

26.2 Rest break

- (a) *An employee must be allowed two 10 minute rest intervals to be counted as time worked on each day that the employee is required to work not less than eight ordinary hours. **Each rest interval should be taken at a time suitable to the employer taking into account the needs of the business. If suitable to business operations, the first rest interval should be allowed between the time of commencing work and the usual meal interval and the second rest interval should be allowed between the usual meal and the time of ceasing work for the day.***
- (b) *An employee must be allowed one 10 minute rest interval to be counted as time worked on each day that the employee is required to work more than three but less than eight ordinary hours. The rest interval should be taken at a time suitable to the employer taking into account the needs of the business.*
- (c) *An employee who works more than four hours overtime on a Saturday morning must be allowed a rest interval of 10 minutes without loss of pay between the time of commencing work and finishing work.*

[Emphases added]

25. The Firms submit that it is necessary to vary clause 33.2 of the LS Award (clause 9.2(a) of the Revised Exposure Draft) to provide for commensurate flexibility in the taking of rest breaks to that provided under the Clerks Award. The Firms submit that such a variation is necessary to achieve the modern awards objective to promote the flexible modern work practices and the efficient and productive performance of work (s134(1)(d)).

Special conditions for law graduates

26. The Firms submit that clause 39 of the LS Award (clause 20 of the Revised Exposure Draft) should be deleted and replaced with the following:

39. Special conditions of employment—Law graduate

- 39.1 *A law graduate is entitled to paid study leave to attend a course of instruction, and prepare for and attend examinations, that relate to the practical legal training required for their admission to practise as an Australian lawyer.*

¹ See for example, Australian Services Union, Australian Industrial Relations Commission, Award Modernisation, Pre-drafting Submissions re Stage 4 industries/occupations (AM2008/86), Industries not otherwise assigned – Legal services, 24 July 2009, paragraphs 25 and 26.

39.2 *Paid study leave should be taken at a time agreed with the employer and may not, unless otherwise agreed between the employer and the law graduate, exceed a total of 20 days in any 12 month period for the purposes of attending any course of instruction required to complete practical legal training, including one day to prepare for each examination in addition to the time reasonably required to attend the examination.*

27. The Firms submit that this variation is necessary to reflect the different admission requirements that apply to law graduates to those that operated at the time the LS Award was made. In this regard, the Firms refer to and rely upon their prior correspondence to the Commission dated 29 August 2016 which, for ease of reference, is appended to these submissions as **Appendix A**.
28. In addition to the proposed variation being required to sensibly accommodate the admission requirements of law graduates, the Firms submit that the variation is necessary to achieve the modern award objective that the LS Award promote flexible modern work practices and the efficient and productive performance of work (s134(1d)).

20 January 2017

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29 August 2016

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Dear Sir / Madam

AM2014/233: 4-yearly review of the Legal Services Award 2010: Leave of absence for graduates

We refer to the conference conducted on 9 August 2016 under the auspice of Deputy President Clancy of the Fair Work Commission, where it was agreed that we would provide a summary of current admission requirements for graduates.

1. Admission requirements for graduates

1.1 In order to be admitted, Section 17 of the *Legal Profession Uniform Law* (as contained in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014*) requires that graduates seeking admission must:

- (a) have attained the academic qualifications specified under the Admission Rules; and
- (b) have satisfactorily completed the practical legal training requirements specified in the Admission Rules.

1.2 Rule 5 of the *Legal Profession Uniform Admission Rules 2015 (Admission Rules)* specifies that the academic requirement prerequisite involves the successful completion of a law degree.

1.3 Rule 6 of the Admission Rules then provides the following in relation to the above practical legal training prerequisite:

"(1) ...the specified practical legal training prerequisite is acquiring and demonstrating an appropriate understanding and competence in each element of the skills, values and practice areas:

- (a) set out in Schedule 2, or
- (b) otherwise determined by the Admissions Committee after consulting each of the Boards.

- (2) The requirement may be satisfied by successfully completing either:
 - (a) a practical legal training course conducted by a practical legal training provider accredited by the Board, or
 - (b) supervised legal training in a workplace for a period of not less than 12 months, under a training plan approved by the Board, which the Board determines adequately provides for the trainee to satisfy the requirements of sub rule (1)."

1.4 Schedule 2 of the Admission Rules sets out the practical legal training competencies for entry-level lawyers. The skills, compulsory and optional practice areas and values, are set out in extensive detail in Part 4 of Schedule 2, but are summarised as follows:

(a) Skills

- (i) Lawyer's skills
- (ii) Problem solving
- (iii) Work management and business skills
- (iv) Trust and office accounting.

(b) Practice areas

- (i) Compulsory
 - (A) Civil litigation practice
 - (B) Commercial and corporate practice
 - (C) Property law practice
- (ii) Optional practice (graduates must complete any two of):
 - (A) Administrative law practice;
 - (B) Banking and finance law practice;
 - (C) Criminal law practice
 - (D) Employment and industrial relations law practice;
 - (E) Family law practice;
 - (F) Planning and environmental law practice; or
 - (G) Wills and estates practice

(c) Values

- (i) Ethics and professional responsibility.

- 1.5 In accordance with item 4 of Schedule 2, the practical legal training prerequisite can generally only be commenced after academic qualifications have been completed, unless otherwise approved by the Board.
- 1.6 Item 5 of Schedule 2 provides that a practical legal training course must comprise both programmed training and workplace experience as follows:
- (a) In the case of a graduate diploma:
 - (i) programmed training appropriate to a diploma that is equivalent to at least a Level 8 qualification under the Australian Qualifications Framework; and
 - (ii) the equivalent of at least 15 days' workplace experience.
 - (b) In the case of supervised legal training, the equivalent of at least 12 months' full-time work which includes a minimum of at least 90 hours' programmed training.
- 1.7 The Admission Rules also provide requirements for a course other than a graduate diploma or supervised legal training. However in the experience of firms and The College of Law these are not undertaken by employed law graduates and are therefore not relevant for the purpose of the Award review.
- 1.8 Items 6-9 of Schedule 2 contain further common requirements for practical legal training courses and supervised legal training. Both must:
- (a) be provided at a level equivalent to post-graduate training and build on the skills acquired through tertiary qualifications. They must be appropriate for at least a Level 8 Qualification under the Australian Qualifications Framework;
 - (b) be supervised by someone with substantial current or recent experience in practising law or someone with comparable qualifications or experience. The supervisor must comply with any other legislative or regulatory requirements in the relevant jurisdiction; and
 - (c) employ comprehensive methods of assessment for assessing an applicant's competence and certifying whether or not an applicant has demonstrated the requisite level of competence.
- 1.9 We note that Schedule 2 sets out performance standards and competencies, but does not provide an indication of the time typically required to complete the practical legal training pre-requisite, other than the reference to at least 90 hours of programmed training for the purpose of supervised legal training.
- 1.10 There is no mandated training time that a graduate must fulfil in order to complete a graduate diploma, and in the experience of law firms it is appropriate that the time allowed to be taken as a leave of absence is no more than 20 days.
- 2. Supervised legal training requirements**
- 2.1 The additional requirements for undertaking a supervised legal training are outlined in Schedule 3 of the Admission Rules.

- 2.2 Graduates and their employer are required to implement and follow a training plan, to ensure graduates complete a range of legal work. The graduate must maintain a workbook to exhibit the work they have completed and to demonstrate their competence across the required areas.
- 2.3 Graduates must complete 12 months of supervised legal training before they can be eligible for admission.
- 2.4 Section 6(c) of Schedule 3 provides that graduates must also:

"acquire an appropriate understanding of, and competency in, and satisfactorily complete assessment in:

- (i) each element of Ethics and Professional Responsibility and of Lawyer's Skills, and
- (ii) the Risk Management element of Work Management and Business Skills

as set out in Schedule 2 or otherwise determined under rule 6 (1), through a course of instruction and assessment conducted by:

- (iii) a provider accredited under rule 7 (1) for the purposes of rule 6 (1), or
- (iv) another body approved by the Board for the purpose of providing an equivalent course of instruction and assessment."

- 2.5 This course of instruction must be equivalent in content and depth to, and the assessment must be as rigorous as for the comparable element of a practical legal training course.

3. Justification for the proposed changes

- 3.1 We submit that the proposed change to clause 39 of the Award aligns more closely to the wording of the new legislation, which makes no reference to the completion of subjects.
- 3.2 The revised wording allows graduates to access their entitlements holistically, rather than strictly tying them to certain subjects. This poses tangible benefits for graduates as it enables them utilise their leave of absence as and when they need it. For example, it allows graduates to allocate a greater number of days to a practice area that they are struggling with and fewer days to one in which they are comfortable.

Yours faithfully


Nick Ruskin
Partner