



# STATEMENT

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards – Supported Employment Services Award 2020** (AM2014/286)

VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT SAUNDERS  
COMMISSIONER CAMBRIDGE

SYDNEY, 31 JANUARY 2022

### *4 yearly review of modern awards – Supported Employment Services Award 2020*

[1] On 3 December 2019, a differently-constituted Full Bench of this Commission issued a decision<sup>1</sup> in which it found, among other things, that the capacity of employers under clause 14.4 of the *Supported Employment Services Award 2010* (now clause 18 of the *Supported Employment Services Award 2020*) to use any one of a multiplicity of named wage assessment tools to establish minimum award wages for disabled employees does not achieve the modern awards objective in s 134(1) of the *Fair Work Act 2009* (FW Act) or the minimum wages objective in s 284(1) of the FW Act.<sup>2</sup> The Full Bench went on to state our *provisional* view as to the form of a new minimum wages assessment structure to replace the existing system.<sup>3</sup> As stated in the decision, the Full Bench envisaged that before it proceeded to make any determination to vary the *Supported Employment Services Award* (SES Award), it would give interested parties the opportunity to participate in a conference process and make submissions about the proposed new wages structure, and that a field trial would then be undertaken of the new wages structure. Following the public release of information about the outcome of the trial, the Full Bench would receive further evidence and submissions and, if necessary, conduct a further hearing before making a final determination.<sup>4</sup> The timetable envisaged at that stage was that the trial would be conducted in March-May 2020, any further hearing would occur in August 2020, and a final determination to vary the SES Award to delete the existing wage assessment tools and add the new wages structure would be made by the end of October 2020, with an operative date of 1 January 2022 (in order to allow sufficient time for the transition to the new system).<sup>5</sup>

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<sup>1</sup> [2019] FWCFB 8179

<sup>2</sup> Ibid at [315]-[316]

<sup>3</sup> Ibid at [372]-[377]

<sup>4</sup> Ibid at [378]-[379]

<sup>5</sup> Ibid at [380]

[2] The Full Bench issued a statement on 21 January 2020<sup>6</sup> after a conference with the parties had been conducted following the 3 December 2019 decision. In its statement, the Full Bench made some relatively minor adjustments to the timetable,<sup>7</sup> identified some issues which parties had raised in relation to the drafting of the proposed new wages structure,<sup>8</sup> and recorded matters which had been agreed in relation to the conduct of the trial.<sup>9</sup>

[3] The Full Bench issued a further decision on 30 March 2020.<sup>10</sup> In that decision, the Full Bench resolved, for the purpose of the conduct of the trial only, the issues raised by the parties as to the drafting of the proposed new wages structure.<sup>11</sup> The Full Bench emphasised that these conclusions were not to be taken as representing its final view about the new wages structure which would ultimately be placed into the SES Award.<sup>12</sup> The Full Bench also said:

“[3] In a submission filed on 17 March 2020, the AED Legal Centre filed a lengthy submission expressing its opposition (on both jurisdictional and merit grounds) to the SES Award being varied to include any wages structure the same as or similar to that proposed in the principal decision. The premise of that submission is that the SES Award is to be varied to give effect to the new classification structure *prior to the commencement of the trial*. In that respect, at least, the submission is entirely misconceived. The purpose of the trial is to assist the Commission in determining whether the SES Award should be varied to include the wages structure we indicated we preferred in the principal decision. Participation in the trial is voluntary, and it is not necessary that the SES Award be varied in order to conduct it. As the timetable set out in paragraph [380] of the principal decision, as modified in paragraph [3] of the statement, was intended to make clear, we do not anticipate making any final variation to the wages structure in the SES Award until after the results of the trial are known and interested parties have been afforded a further opportunity to adduce further evidence and make further submissions. The current plan is that the final determination will not be made until 27 November 2020 and will not take effect until 1 January 2022. Accordingly, the matters raised in the AED Legal Centre’s submission do not require consideration at this time.”

[4] A Steering Committee was established to oversee the conduct of the trial. The Steering Committee was chaired by a member of the Commission, and involved representatives of interested industry parties and the Australian Government (Department of Social Services). The conduct of the trial was financially supported by the Department. ARTD Pty Ltd, an independent consultancy, was engaged to administer the trial, evaluate its outcome and prepare an evaluation report (Report).

[5] A number of intervening events caused considerable delay in the conduct of the trial and the preparation of the Report. The primary delaying factor was the onset of the COVID-19

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<sup>6</sup> [2020] FWCFB 343

<sup>7</sup> *Ibid* at [3]

<sup>8</sup> *Ibid* at [5]-[6]

<sup>9</sup> *Ibid* at [7]

<sup>10</sup> [2020] FWCFB 1704

<sup>11</sup> *Ibid* at [4]-[5] and the attachment to the decision

<sup>12</sup> *Ibid* at [2]

pandemic, which caused many employers covered by the SES Award to close or limit their operations for long periods of time. There were also unanticipated difficulties which arose in the implementation and evaluation of the trial.

[6] Another intervening event was that the Association of Employees with a Disability Inc. (AED), which we understand to be the body which operates the AED Legal Centre referred to in paragraph [3] of the 30 March 2020 decision quoted above, made an application for judicial review of the Full Bench's decision of 3 December 2019. The application was dismissed by order of a Full Court of the Federal Court on 18 February 2021. The Court published its reasons on 15 March 2021.<sup>13</sup>

[7] ARTD Pty Ltd has now finalised the Report. A copy of the Report was provided to the Commission on 25 January 2022. The Report will be published on the Commission's website in conjunction with the publication of this statement.

[8] We now intend to undertake the final step in the process envisaged in the decision of 3 December 2019, namely to receive further evidence and submissions from the parties in light of the trial outcomes recorded in the Report and to make a final determination as to the new wages structure to be placed in the SES Award. We will conduct a directions hearing at **10.00 am AEDT on 14 February 2022** in order to proceed with the further programming of the matter.

[9] We anticipate that the following issues are likely to be of significance in light of the trial outcomes in the Report:

- (1) The clarity and workability of the drafting of the new wages structure set out in the attachment to the 30 March 2020 decision.
- (2) The provisional quantum of the minimum wage rates for the proposed new Grade A and Grade B classifications set out in paragraph [372] of the 3 December 2019 decision.
- (3) The operative date for the new wages structure.

[10] However, this is not intended to limit the range of issues which may be raised by the parties. We also acknowledge that, assuming they are still pressed, it will be necessary for us to consider and determine the jurisdictional issues previously raised by the AED/AED Legal Centre.

[11] It is possible that a conference of the parties may serve to resolve or at least narrow the merit issues likely to arise in light of the Report. If interested parties wish to pursue this course,

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<sup>13</sup> [2021] FCAFC 36, 305 IR 203

this may be raised at the directions hearing on 14 February 2022. However, the Commission will only participate in any such process if there is a broad consensus that it should do so.



VICE PRESIDENT

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