

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/286

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

Supported Employment Services Award 2010

OUTLINE OF SUBMISSIONS OF THE ACTU IN REPLY

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A. Background

1. These submissions respond to submissions filed by Australian Business Industrial and the NSW Business Chamber ('**ABI and the NSWBC**') dated 25 September 2017 and the submissions filed by National Disability Services ('**NDS**') and Greenacres Disability Services ('**Greenacres**').
2. The Australian Council of Trade Unions ('the **ACTU**') supports the submissions filed by AED Legal Centre on 3 October 2017; the Health Services Union ('**HSU**') on 22 September 2017 and United Voice on 25 September 2017.
3. The ACTU opposes the proposals made by ABI and the NSWBC, Greenacres and NDS ('**employer parties**') to vary the *Supported Employment Services Award 2010* ('**SES Award**') to:
 - (a) introduce a new wage assessment tool in the award titled the Work Value Classification Tool ('**ABI Tool**');¹
 - (b) redefine 'employee with a disability' and 'supported employment services' in the award;²
 - (c) vary the penalty rates in the award for employees working in the fast food and retail industries;³ and
 - (d) retain the Greenacres wage assessment tool in the award.⁴
4. The ACTU concurs with AED Legal Centre that all approved wage assessment tools in cl.14.4 of the SES Award, except the Supported Wage System ('**SWS**'), should be eliminated.

B. Preserving the Supported Wage System as the only necessary tool

5. Whilst the Business Services Wage Assessment Tool ('**BSWAT**') has been removed from the SES Award, all the other remaining approved wage assessment tools except the SWS also contain competency-based assessments, as does the ABI Tool.

¹ See Submissions in Support by Australian Business Industrial and the NSW Business Chamber, dated 25 September 2017.

² See Submissions in Support by National Disability Services, supported by ABI and the NSWBC.

³ Ibid n1.

⁴ See Submissions in Support by Greenacres Disability Services.

6. The ACTU and the union movement have longstanding concerns about the use of competency-based wage assessment tools like the now defunct BSWAT to determine the wages of people with a disability, including scoring workers with a disability subjectively on elements such as general skills and competencies that are not related to the work being undertaken by the employee. This can lead to workers with a disability receiving wages lower than an assessment based only on their productivity/output.
7. The ACTU's longstanding concerns were noted by Katzmann J in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 (*'Nojin'*), and are worth reiterating here in full:

"[263] The evidence was that the unions had in fact proposed the use of the SWS (Supported Wage System) assessment process, not the BSWAT, to assess wage levels. Although they did later endorse the BSWAT, they also reserved the right to comment on it after a period of operation, and they repeatedly raised concerns about the way in which it tested competency, the matter that lay at the heart of the appellants' complaints. In a submission by the ACTU and the LHMU in December 2005 the organisations were critical of the aspect of scoring people against "not critical" elements of their job, describing it as "incongruous". In a letter written in August 2009 the President of the ACTU noted the union's "long-standing concerns" about the BSWAT and its implementation, and in particular, the union's "ongoing concerns with the design of the BSWAT" relating to the assessment of competency. She stated:

The BSWAT separate assessment of core competencies is inconsistent with the revised national training framework. BSWAT assessment of every employee with disability against four industry based units of competency bears little relationship to Australian employment generally and is a major design fault of BSWAT. Qualifications or specific units of competency are directly related to classification level. Under BSWAT, selection of units of competency should only occur after the assessors identified if that competency is required at the classification level at which the employee is employed. BSWAT appears to miss this important step.

[264] She called for a comprehensive review of wage assessment tools".

8. The ACTU submits that the ABI Tool and all the wage assessment tools listed in cl14.4(b) of the SES Award except the SWS (collectively, the **non-SWS tools**) should be eliminated from/not inserted in the SES Award because:
- (a) All the non-SWS Tools contain competency-based assessments;
 - (b) Competency-based assessments may unlawfully discriminate against employees with a disability;
 - (c) Unlike the non-SWS Tools, only the SWS tool:
 - i. Is entirely task-based, not competency based;
 - ii. Is developed and maintained independently by government in consultation with stakeholders;
 - iii. Involves independent, external assessment by trained assessors;
 - iv. Is simple and objective, avoiding arbitrary or subjective assessment criteria and weightings;
 - v. pays a pro rata amount of the minimum wage prescribed by the SES Award for the work an employer wishes to be performed according to the work classifications contained in the Award;
 - vi. Leaves the wage setting function and work value determinations of the Fair Work Commission (**'FW Commission'**) undisturbed; and
 - vii. Is consistent with the modern awards objective, wage setting and other objectives of the *Fair Work Act 2009* (**'the Act'**).

Competency based tools are discriminatory

9. The majority of employees with a disability employed under the SES Award are employed at Grade 2, the lowest grade applicable to an employee that has completed training. Neither Grade 2, nor Grade 1, as defined by Schedule B of the SES Award, refer to any general competencies that cannot be described and assessed as (basic) tasks and duties.
10. In *Nojin*, the Full Court of the Federal Court ruled that the competency-based component of the Business Services Wage Assessment Tool (**'BSWAT'**) was unlawfully discriminatory, including that it indirectly discriminated against workers with an intellectual disability compared to workers with a physical disability. The Full

Court ruled the competency based assessments in the BSWAT constituted requirements that were more difficult for intellectually-disabled workers to comply with and that this put such workers at a disadvantage compared to other workers, including physically disabled workers. The Bench identified a number of problems with competency-based tests, including that the testing of general skills introduced criteria irrelevant to the job and acted to diminish the wages of workers with a disability compared to what they would receive from an exclusively productivity-based test such as the SWS.

11. Following the decision in *Nojin*, BSWAT was removed from the SES Award.

C. Wage setting function

12. The minimum wages objective in s284(1) of the *Fair Work Act 2009* ('FW Act') requires that the FW Commission 'establish and maintain a safety net of fair minimum wages, taking into account...', the following factors:

"(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

(b) promoting social inclusion through increased workforce participation; and

(c) relative living standards and the needs of the low paid; and

(d) the principle of equal remuneration for work of equal or comparable value; and

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.”.

13. In setting, varying or revoking minimum wages in modern awards, the FW Commission is also required to take into account the modern awards objective in s134 of the FW Act.⁵

14. The modern award objective requires that the FW Commission 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions' taking into account the following factors:

"(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

⁵ *Annual Wage Review 2014* [2014] FWCFB 3500 at para [66-67].

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.”⁶

15. Section 578(a) of the FW Act also directs the FW Commission to take into account the object of the FW Act in performing functions or exercising powers.

16. In keeping with those considerations, the FW Commission has set and maintains a stratum of classifications in modern awards with attendant scales of minimum pay rates. In determining those classifications, the FW Commission has made its own assessment of the work value of the work performed within those classifications. The classification structure in awards represent the FW Commission's assessment of work value and work value relativities between different classifications and pay rates.

17. Section 156(3) of the FW Act mandates that the Commission can only vary modern award minimum wages if satisfied that the variation is justified by work value reasons. In its annual wage reviews, the FW Commission has shown great care to preserve existing classifications and relativities in order to ensure uniformity and consistency of treatment. The FW Commission said in the 2011-2012 Annual Wage Review:

[258] The notion of a fair safety net of minimum wages embodies the concepts of uniformity and consistency of treatment. These concepts underpin the fixation of

⁶ Se FW Act s134(1).

minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* [167](#) and implemented in the *August 1988 National Wage Case decision*.[168](#) The principle of consistent minimum rates across awards was maintained through the award simplification process;[169](#) the Paid Rates Review;[170](#) and award modernisation.[171](#) If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with similar or comparable levels of skill. In that context, it is important to note that in establishing and maintaining the minimum wages safety net, the Panel must take into account the principle of equal remuneration for work of equal or comparable value.

[259] The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.⁷

18. Only the SWS Tool preserves the classification and work value relativities in the SES Award and applies a pro rata rate of pay to an employee based on the employee's productivity/output. The non-SWS tools introduce their own classification systems based on different criteria and a different assessment of work value and work value relativities between different rates of pay. Hence, these tools undermine the wage setting function of the FW Commission. They reduce the FW Commission's ability to ensure that the minimum wage objective, modern award objective and object of the FW Act are met and that the FW Commission's work value assessment is preserved and uniformity and consistency of treatment is maintained.
19. We submit this function must remain with the FW Commission and a fair and relevant safety net requires that the same job classification structure apply to employees with and without disabilities.

D. Other employer parties' claims

20. The ACTU supports and adopts the submissions of the HSU and AED Legal Centre. in relation to the other employer parties' claims: to redefine 'employee with a disability' and 'supported employment services' in the SES Award and to vary the

⁷ Annual Wage Review 2011–12 [2012] FWAFB 5000.

penalty rates in the SES Award for employees working in the fast food and retail industries.

E. Modern awards objective

21. In deciding whether to grant the employer parties' claims or to accede to the ACTU's submission that all non-SWS tools be eliminated, the FW Commission is required to ensure that the proposed variations of the SES Award meet the modern awards objective. The FW Commission may also only vary the award to the extent necessary to achieve the modern award objective.⁸
22. As the Preliminary Jurisdiction Issues Decision confirms, there is a statutory presumption that, *prima facie*, the modern awards objective was met at the time the modern awards in question were made. This presumption can be displaced through submissions supported by probative evidence to the contrary. This presumption and the various criteria of the modern awards objective in s134 of the Act are addressed below.

Relative living standards and the needs of the low paid

23. Most employees with disabilities employed under the SES Award are employed at Grade 2 and often paid a fraction of that rate. Many are paid a small fraction of that already low rate. As such, they are low paid workers. The potential for the non-SWS tools to provide for a lower rate of pay for low paid employees than a productivity-based test like the SWS Tool should not be countenanced.

The need to encourage collective bargaining

24. This criteria is neutral in relation to the claims before the FW Commission.

The need to promote social inclusion through increased workforce participation

25. The case of *Nojin* demonstrates a factual example where competency-based assessment resulted in an employee with a disability receiving less pay than they would on a productivity-based test. Mr Prior, a legally blind employee with a mild intellectual disability working at an Australian Disability Enterprise ('ADE') was assessed using BSWAT and had his assessed productivity score of 50% reduced by

⁸ See Preliminary Jurisdictional Issues decision [2014] FWCFB 1788.

half due to him scoring zero in the competency side of the test.⁹ Hence, he was paid just 25% of Grade 1 of the applicable award at the time, the *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001*.

26. Expert and evidence and survey data in that case suggested that, across the board, employees with disabilities' competency-based scores under BSWAT were lower than productivity scores and this acted to reduce the wages that they would receive from an exclusively productivity-based test.¹⁰
27. To the extent competency-based assessments unfairly reduce the wages of employees with a disability below what their productivity warrants, they discourage employees with a disability from seeking and maintaining employment and diminish workforce participation.

The need to promote flexible modern work practices and the efficient and productive performance of work

28. Unlike the non-SWS tools, only the SWS tool focuses exclusively on productivity rather than irrelevant competencies. The tool incorporates training where possible that improves productivity relevant to the job tasks so that employees can, where possible, move to higher duties and classifications within the award. Hence, the SWS tool is likely to be superior at promoting the efficient and productive performance of work.

The need to provide additional remuneration for employees working overtime; working unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts

29. This criteria is neutral with respect to the claims addressed here.

The principle of equal remuneration for work of equal or comparable value

30. Both the minimum wages and modern awards objectives require the FW Commission to account of the principle of equal remuneration for work of equal or comparable value. Section 302(2) of the FW Act states that '**Equal remuneration for work of equal or comparable value** means equal remuneration for men and women workers for work of equal or comparable value'. However, this did not prevent the FW Commission from determining that a broader concept of uniformity and consistency

⁹ See *Nojin* at paragraph 76.

¹⁰ See *Nojin* at paragraph 84.

of treatment is relevant to exercising its minimum wage setting functions in maintaining the minimum wages safety net as outlined above. If anything, the identification of 'equal remuneration for work of equal or comparable value' as a relevant consideration in the objective underscores and highlights that the principle of work value remains embedded in the wage fixation framework.

31. Of all the tools in question, only the SWS Tool preserves the FW Commission's classification structure and applies the applicable classification at a pro rata rate based on productivity. The other tools, having competency components, introduce work value assessments that do not apply to employees without disabilities thus preventing uniform and consistent treatment.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

32. As described above, the SWS Tool is likely to increase productivity compared to other wage assessment tools. It also reduces employment costs in that only the SWS Tool is conducted by and paid for by government. Simplifying the wage assessment process by removing the 19 wage assessment tools and attendant processes in the SES Award to one universal process will reduce the regulatory burden.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

33. Likewise, reducing the 19 wage assessment tools in the SES Award to one universal tool applicable across all awards will help to ensure a 'simple' and 'easy to understand' modern award system. So too, will preserving the job classification structure for all employees and linking any reduced wages for employees with disabilities to a simple non-arbitrary productivity assessment on a pro rata basis.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

34. As the SWS Tool is a superior tool for promoting productivity, it is likely to have a positive effect on employment growth.

Only the extent necessary to achieve the modern award objective

35. Including another wage assessment tool such as the ABI Tool is not necessary in order to achieve the modern award objective when an existing tool, the SWS Tool, is adequate and indeed superior.

Fair and Relevant Safety Net

36. It is not fair that people with disabilities:
- (a) Have less certainty about their job classification;
 - (b) Are subjected to unnecessary ongoing threat of performance assessment;
 - (c) Have their pay determined by additional competency criteria and are subject to a less certain work value assessment not performed by the FW Commission; and
 - (d) Unlike workers without disabilities, have their pay determined by criteria irrelevant to their job.
37. A fair system would preserve the same classification and work value system for employees with and without disabilities and only the SWS Tool ensures this.

Presumption regarding the modern award objective

38. The decision of *Nojin*, handed down after the insertion of the approved wage assessment tools into the award, highlights a number of problems with competency-based wage assessment as well as a detailed consideration of the SWS tool not before the FW Commission at the time it varied the award. The decision is sufficient to displace the presumption that the award objective was met at the time the award was made and to prompt the FW Commission to undertake a detailed review of the wage assessment tools under the SES Award.

F. Conclusion

39. In conclusion, we submit that the modern awards objective and the maintenance of a fair and relevant safety net requires that the employer parties' claims in the SES Award be rejected and all wage assessment tools but the SWS be eliminated from the award. This is further buttressed by the need to preserve the FW Commission's wage setting function. The SES Award should authorise the wage assessment tool that best applies the award and that tool is the SWS.

14 December 2017

ACTU