FAIR WORK COMMISSION
AT MELBOURNE

AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

FURTHER SUBMISSION FROM AED LEGAL CENTRE, THE HEALTH SERVICES UNION, UNITED VOICE, INCLUSION AUSTRALIA, PEOPLE WITH DISABILITY AUSTRALIA, DISABILITY ADVOCACY NETWORK

1. On 29 May 2018, the Full Bench listed its review of the *Supported Employment Services Award* 2010 (the **SESA**) for mention following publication of a statement dated 16 April 2018 [2018] FWCFB 2196 (the **Statement**).

2. VP Hatcher identified the purpose of the mention as:

> "All right, the purpose of today's short hearing is to hear the response of interested parties to the provisional views expressed by us in our statement issued on 16 April 2018. It appears to us that in the light of that statement, there are two ways forward."

3. The ways forward were identified as the scheduling of conferences before DP Booth or the scheduling of further hearings for evidence and submissions. Having canvassed the views of those appearing, the Full Bench indicated that they would consider their position. At the time of writing, that position has not been disclosed by the Commission.

4. AED Legal Centre (AED), the Health Services Union (HSU), United Voice (UV), Inclusion Australia (IA), People with Disability Australia (PWD) and the Disability Advocacy Network (DANA) wish to make a further submission about the Statement (the **Further Submission Parties**).

5. The Further Submission Parties note that on 9 July 2018 Mr Zevari of Australian Business Lawyers wrote to the Commission and informed it that various organisations had conducted a number of meetings and had formed a working group in order to assist in the development of a new wage assessment mechanism. Mr Zevari concluded by

stating that his clients preference is for further conciliation conferences. The Further Submission Parties learned of the working group through Mr Zevari's email.

6. The position of the Further Submission Parties at the time of the mention was, and still is, that further conciliation at this time would be inappropriate. This is so for two reasons:

   (a) We have concerns about aspects of the preliminary conclusions expressed in [15] of the Statement and wish to be heard further on these matters.

   (b) The Bench's preliminary conclusions in favour of a revised classification structure for Schedule B of the SESA, especially for Grade 2 and 3, and for a proposed hybrid model of wage assessment are expressed at a very high level. Undoubtedly, however, they foreshadow a very substantial, and potentially controversial, overhaul of wage setting arrangements for those covered by the SESA. Yet the parameters of this overhaul remain unclear,[1] at least to the Further Submission Parties.

7. We say more about these matters below. However, before doing so, we note that Paul McBride, Group Manager, Disability, Employment and Carers of the Department of Social Security wrote to chambers on 4 July 2018. He states in that letter that the Minister for Social Services, Dan Tehan, has announced that the Australian Government will provide up to $0.95 million to support any agreed trial and analysis activities in the Commission to inform a new wage assessment approach under the SESA. We note that the funds committed by the Commonwealth are for "agreed" trial and analysis activities in relation to a "new wage assessment approach" that is, as we have said, unclear. We identify some further concerns with the approach below.

Preliminary conclusions of fact

8. We observe at the outset that the Full Bench has expressed the matters referred to in [15] of the Statement as "preliminary conclusions". A purpose of this submission is to give the Full Bench an insight into our view of these preliminary conclusions to assist

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[1] We note the principles stated in [15(7)] of the Statement, namely that the new wage assessment mechanism should meet the objectives of fairness, equality, objectivity, independence, sustainability and be non-discriminatory. These objectives have the potential, we observe, to cut in more than one way in the formulation of a wage determination system for ADE employees.

the Bench in its consideration of the next steps referred to by VP Hatcher during the mention. Subject to what the Bench decides, some or all of the Further Submission Parties may wish to elaborate further on the matters contained herein.

9. The subject matter of the preliminary conclusions of fact contained in [15(1), (3)] of the Statement has been the subject of evidence and submissions, which we will not repeat. We do apprehend however that these preliminary findings have significance to the direction foreshadowed by the Statement. Accordingly, the Further Submission Parties submit that the Commission should proceed to make final findings that confirm or otherwise the aforementioned preliminary factual conclusions based on its assessment of all the evidence and the Bench's consideration of the submissions.

10. With this in mind, there are two preliminary factual conclusions referred to in the Statement that we consider to be of particular significance and about which we wish to advance the following two submissions:

    (a) Insofar as the last sentence of [15(1)] of the Statement may be read as suggesting that ADE's are the only organisations that are capable of or do make the adjustments for employees with a disability (as defined by the SESA), we contend otherwise. The evidence supports findings that open employment employers do so too for employees with the same or similar disabilities and that a majority of those who use open employment have significant intellectual disabilities and, like ADE employees, are supported in their employment by the NDIS and by other Commonwealth funding.

    (b) Respectfully, the preliminary conclusions set out in the dot points in [15(3)] of the Statement do not, we submit, reflect the evidence available to the Commission about the operation of the SWS. On this basis, we would urge the Commission to give careful consideration to whether these conclusions ought to be confirmed. We make the same submission with respect to the Bench's preliminary conclusion that the SWS does not take into account the proper range of work value considerations used to assess award wages. This, with respect, reflects a misapprehension of the purpose and operation of the SWS.

        The SWS is a system of individual employee assessment that compares the output (in terms of rate and quality) of an employee performing required work

with the output of an employee on the full award wage of average performance doing similar work. The means used to ascertain the performance benchmark was the subject of evidence and submissions.[2] The SWS however takes the Award's valuation of required work as it finds it. That valuation, expressed as a sum of money, is the full minimum rate of pay fixed for the particular kinds of work graded and described in Schedule B of the SESA. This is the source of the work value, not the SWS. It is not part of the function of an SWS assessment to make work value determinations.

11. We next turn to some other matters arising from the preliminary conclusions referred to in [15] of the Statement.

The intersection between the SWS in ADEs and in open employment

12. The Full Bench states expressly that its preliminary conclusions concerning the SWS are not intended to affect the operation of the SWS in open employment. With respect, there is a considerable risk that they do.

13. In the dot points contained in [15(3)] of the Statement, the Bench makes certain, general, criticisms of the SWS that are not obviously capable of being quarantined to ADE employment. These criticisms have the potential to undermine the SWS as *the* modern award system for determining the proportion of the award rate to be paid by an employer to its employees with a disability for work covered by an award. In these circumstances and in the absence of further evidence that addresses the matters to which the Bench has referred in [15(3)] of the Statement, including in an open employment setting, the Commission should, we submit, exercise caution in confirming these criticisms. This is a matter of considerable significance given the extensive use made of the SWS in awards made by the Commission.

14. Another reason for exercising caution is the potential for the Commission to introduce a discriminatory system of wage setting into the award safety net that disadvantages ADE employees compared with similar employees employed in open employment. The

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[2] The Bench expresses, we apprehend, a concern about the determination of that benchmark in the last dot point of [15(3)] of the Statement.

Commission has evidence before it that describes the characteristics of users of open employment and establishes the similarity between them and ADE employees.

The Schedule B classification proposal

15. The Full Bench has singled out as inadequate the Schedule B classifications on the basis stated in [15(5)] of the Statement. We contend that the Commission ought to be cautious in adopting this preliminary conclusion. No party advanced a case before the Commission that Grades 1-3 of Schedule B were "inadequate and unlikely to meet the modern award objective". No evidence was called that addressed this issue.

16. The Commission had before it two proposals. The AED proposed the deletion of all the wage tools in cl. 14.4 of the SESA, save for the SWS. Its proposal succeeded in part. The second proposal from ABI/NSWBC was rejected in its entirety. Common to both proposals was their reliance on the existing grades, rates and classification descriptions contained in Schedule B of the SESA.

17. As a matter of procedural fairness, the Further Submission Parties contend that it is necessary for the parties to be placed in a position where they can make submissions and, if need be, call evidence about a "redesigned classification structure for Grades 1-3" based on a concrete proposal for that design. We submit that it is not otherwise open for the Commission to conclude that Grades 1-3 of Schedule B are "inadequate and unlikely to meet the modern award objective". The Commission should accordingly not reach any final conclusions at this time to that effect which changes the valuation expressed in the existing Schedule B classifications in a manner that is adverse to employees, or which has that effect.

The proposed new model of wage assessment

18. Finally, we draw attention to three matters arising from the Commission's proposed hybrid model of wage assessment.

19. The hybrid model would embrace a valuation range at certain percentage points of the full SESA rate fixed for a particular kind of work based on the 'size' of an award covered job that an employer wishes to be performed. At the high level the model is described in the Statement, we have the following three concerns.

20. On its face, "job size" is a dynamic concept; the configuration of a "job" is in the hands of the employer, not the Commission. We understand the Commission's intention is to devise criteria for the sizing of jobs. These criteria, depending of course on what they are, may constrain an employer's discretion but would not, we apprehend, immunise against variations in job size whether by a single employer from time to time, between ADE employers, or indeed from one employee to another. Unfairness may result from variations to the size of a job through the addition or subtraction of tasks between assessments or due to differing assessments conducted at different times between different employers with different work needs. Further, since it appears that "job size" must be assessed, it is not apparent to us why this system is any more objective than an SWS assessment. Both systems would, it appears, require assessment of the tasks an employer requires at the point in time the assessment is undertaken. However, the result for the employee of a job sizing assessment is, as we apprehend it, that he or she will be allocated to a proportion of the full modern award rate, for award covered work, within a fixed range.

21. Second, the job sizing assessment is to have a "particular focus on the range of tasks required to be performed" as the foundation for the work value assessment the hybrid model contemplates. However, the form of work value assessment contemplated by s. 156(4) of the *Fair Work Act* 2009 is one that justifies the amount to be paid for employees doing a particular kind of work, rather than the elemental tasks that might make up a "job". Further, we anticipate difficulty in designating required work as merely a task that forms part of a job (which diminishes the value of the work) as opposed to a job in itself. What constitutes a full job may be difficult to discern and may mean different things to different employers. Tying value, and hence remuneration, to the size of a job also has the potential to be subject to manipulation, and will create a difference that has not existed before between open employment employees, including those performing customised work, and ADE employees.

22. The usual focus of work value assessment is on characterising and categorising the work that will be covered by an award and then assessing the value of each category of that work. The job sizing model appears to anticipate something more particular than that, with the result that the actual minimum rate payable to ADE employees will likely be determined on a different, and less beneficial, basis to non-ADE employees.

23. Third, the hybrid model contemplates an SWS like assessment as the means of governing movement within a value range (for example 20%-40%). This assessment is "to take into account any non-productive periods on the part of the supported employee and provide for an objective and consistent method of bench-marking". This preliminary conclusion appears to accept that this "SWS like" assessment is able to do something that the Bench perceives the SWS as being unable to do adequately. The same is true with respect to the apparent acceptance in [15(9)(b)] of the Statement that the "SWS like" assessment can "provide for an objective and consistent method of benchmark setting". The SWS is criticised for an inability to do just that. It is not apparent to the Further Submission Parties how these features of the SWS like assessment to be used in the hybrid model can be reconciled with a rejection of the SWS.

24. We do not suggest that the three matters we have identified constitute an exhaustive list of the concerns that we may have about the new wage assessment proposal, once there is a concrete proposal released by the Commission. They are however significant concerns that, we consider, have the potential to undermine the achievement of the objectives the Bench has set as the benchmark for its satisfaction that the SESA could meet the modern award objective.

Conclusions

25. If the Bench's preliminary conclusion in favour of adoption of its hybrid model becomes their concluded view, the development, and testing, of this model will, we expect, take time to properly develop. What is contemplated is a significant reform. To devise such a model that meets the objectives stated in [15(7)] of the Statement is, we apprehend, a matter of some complexity. The Further Submission Parties intend to participate in the Commission's processes within the resources each of us has to do so. Nonetheless, the likely time we expect these processes to take is a matter of considerable concern. ADE employees are currently subject to quite inadequate wage setting processes that do not conform to the modern award objective. The necessary conclusion is that they are currently disadvantaged compared with other employees who are entitled to the benefit of a safety net that does conform to the objective.

26. We accept that the Commission intends to phase out cl. 14.4 of the SESA. On the reasoning of the Full Bench this results in ADE employees continuing to be subject to an award that does not conform to the modern award objective until the transitional period ends. For that reason, we would urge the Commission to specify a short transitional period rather than a longer one, and urge against the phase out period being fixed by reference to the embryonic nature of the hybrid model.

16 July 2018