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20 April 2020

Email: Chambers.Hatcher.VP@fwc.gov.au

Vice President Hatcher
Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

Dear Associate

Re: AM286/2014 – Supported Employment Services Award 2010

We intend this correspondence for the members of the Full Bench and provide it to the Vice President in his capacity as the presiding member.

We refer to the decision of the Full Bench dated 30 March 2020 ([2020] FWCFB 1704) (the **March Decision**) concerning the review of the *Supported Employment Services Award 2010* (the **Award**).

As the Full Bench notes in paragraph 3 of the March Decision, AED Legal Centre (**AED**) filed a submission on 17 March 2020 pursuant to the Commission's directions. The submission identified a number of bases (jurisdictional and merit) upon which AEDLC contended that the wages structure, or aspects of it, contained in Attachment A to the Full Bench's decision dated 3 December 2019 (referred to in the March Decision, and in this correspondence, as the **principal decision**) could not, and should not, be included in the Award.

In the same paragraph, the Full Bench observed that the premise of AED's submission was that the Award would be varied by means of a determination to trial the wages structure. However, the Full Bench decided in the March Decision not to make any determination, stating that:

“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 SWS be varied in order to conduct it. As the timetable in paragraph [380] of the principal decision, as modified in paragraph [3] of the statement [made on 21 January 2020], 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.”

Having regard to the principal decision, the above statement, in AED’s opinion, gives rise to some ambiguity.

AED recognises that the Full Bench does not intend to make a determination for the purposes of the proposed trial. However, in order for AED to properly assess the impact of the Commission’s exercise of its powers on rights AED seeks clarification of the basis for, and purpose and scope of, the trial. AED respectfully requests that this clarification be provided by way of a further statement or decision.

Source of power and scope

First, we would be grateful if the Commission would clarify:

- (1) The source of power by which the Commission may require a trial of terms and conditions of employment proposed for inclusion in a modern award (in this case, the proposed wages structure in Attachment A to the principal decision, by reference to paragraph 377 of that decision) prior to concluding, or in the course of performing, its 4 yearly review functions.
- (2) The source of power under which the Commission may determine how it may regulate the conduct of the trial, including by prescribing criteria for participation by employer and employee volunteers, by prescribing the trial methodology and by ensuring that the trial, as a Commission function, is conducted in a manner that accords with ss. 577 and 578 of the *Fair Work Act 2009*.

Purpose and Scope of the trial

Second, we would be grateful if the Commission clarified the purpose and scope of the trial.

In paragraph 376 of the principal decision, the Full Bench stated that:

“We also consider that it is vital that the new wages structure we propose be trialed at a number of representative ADEs to ascertain the cost impact it will have on ADEs before it is implemented, having regard to our earlier statement of intention in respect of this.”

In paragraph 379, the Full Bench described the trial, stated that the results should be made public and that interested parties be given an opportunity to make further submissions prior to a final determination varying the Award is made, and then said this:

“The results of the trial in terms of any changes to overall labour costs will be taken into account by us in setting the final wage rates for new grades A and B.”

AED understood from these statements that the only purpose of the trial is to ascertain the labour cost impact of the Attachment A wages structure on ADEs in order that the Full Bench is able to assess and take this impact “into account” in setting the final wage rate for grade A and B employees. We understood that it was for this reason that, in paragraph

372 of the principal decision, the Full Bench characterised the wages rates referred to in sub-paragraphs (2) and (3) as “provisional”. This reflects the objective expressed by the Full Bench in paragraph 367 that any new wage fixation system for disabled employees in ADE employment not cause commercial disruption to ADEs by a sudden large escalation in their employment costs.

In paragraph 377 of the principal decision, the Full Bench characterises Attachment A as the “determination we are currently minded to make”. However, until the March Decision, AED read the principal decision (in particular the Full Bench’s conclusions commencing from paragraph 371) as the Full Bench’s findings resulting from their review of the Award and their decision about the content of the determination that would vary the Award to include new terms pursuant to their review, subject to:

- (a) their consideration of the further submissions referred to in paragraph 378 of the principal decision (which submissions were filed by interested parties and dealt with by the statement of 21 January 2020 (**January Statement**));
- (b) the text of the terms that emerged from the conference of interested persons referred to in paragraph 378, the purpose of which was to achieve a consensus position “as to the terms of the award variations to give effect to this decision” (which is addressed in paragraphs 1, 2 and 4 of the March Decision); and
- (c) the Full Bench’s consideration of the impact on ADE labour costs disclosed by a trial of “the terms of the award variations to give effect to this decision” (which AED understood would be introduced into the Award by a determination, noting that the Commission has power under former section 156(2)(b) to “make one or more determinations” varying the Award).

The March Decision however suggests a less conclusive view.

In paragraph 1 of the March Decision, after stating that two issues arose from the Bench’s January Statement, the Full Bench said that the principal decision had “provisionally adopted” the proposed wages structure. In the paragraph that follows, the Full Bench concluded that it was necessary to provisionally resolve the two issues in order to conduct the trial and ended that paragraph by emphasising that it was “not stating any final view about the new wages structure which will ultimately be placed in the [Award]”.

In paragraph 3, the Full Bench addressed the AED submission of 17 March 2020. The Full Bench held that a determination to undertake the trial is not necessary and that participation will be voluntary. The Bench then said that they don’t anticipate making “any final variation to the wages structure” in the Award until the “trial results are known and interested parties have been afforded a further opportunity to adduce further evidence and make further submissions before a final determination is made on 27 November 2020.” The Full Bench identified the purpose of the trial as assisting the “Commission in determining whether the SES Award *should* be varied to include *the wages structure* we indicated that we preferred in the principal decision” (emphasis added). On these bases,

the Full Bench held that the matters raised by AED's submission did not require consideration at this time.

These aspects of the March Decision suggest that the trial has a wider purpose than mere consideration of the labour cost impact of the proposed wages structure, and that the merit of the whole of that structure remains unresolved. Further, the March Decision suggests that the Full Bench will entertain further evidence and submissions about the merit of all aspects of the wages structure once the results of the trial are available, rather than limit their consideration to how trial results bear on the amounts of the Grade A and B wage rates that the Full Bench should fix. That this is so is perhaps confirmed by the Full Bench's conclusion that it was not necessary to deal with the AED submission at this time. As the Full Bench acknowledged, the AED submissions contended against inclusion of the proposed wages structure itself, and identified a number of jurisdictional barriers to doing so. The foundation for these submissions derive principally from the conclusions and findings made by the Full Bench in the principal decision.

AED would be grateful for clarification of these matters.

Additional matters.

Potential for interferences with legal rights

It is not clear from the March Decision just how the trial will affect the existing rights of employees covered by the Award, or whether there is a lawful basis for affecting those rights in the absence of an Award term, or order or determination of the Commission supported by power. Without seeking to be exhaustive, we draw attention to s. 45 and s. 351(1) of the *Fair Work Act*. Moreover, in the absence of an Award term, or order or determination of the Commission supported by power it would appear that s. 47 of the *Disability Discrimination Act 1992* could not be engaged by an employer: see in that respect s. 351(2)(a) and s. 351(3)(ab) of the *Fair Work Act*.

We also draw attention to clause 9A of the Award. Whilst this provisions obliges employers to take the steps there referred to in order to ensure employees are in a position to make an informed choice, it is relevant for the Commission to take this into account in regulating the conduct of the trial.

Administration of the trial

The extract referred to above from in paragraph 379 of the principal decision suggests that only the results of the trial will be public once it is complete. AED contends that all aspects of the trial should be published on the Award review website, including the participation criteria; the ADE participants; the kind or kinds of work selected for assessment, by employer; the basis selected for classifying employees in grade A or B; the trial methodology; and any SWS benchmarks that have been adopted.

The steering committee participants have been asked to sign a non-disclosure agreement. AEDLC submits that this is inappropriate. The Commission is exercising public statutory power and expressly contemplates that interested parties will be afforded an opportunity to lead further evidence and make further submissions.

Further, we understand that the Commonwealth Department of Social Services has engaged a consultant to conduct the trial and that it will determine the trial methodology, supervised, we assume, by the steering committee. If the Commission considers that it has the power to conduct a trial of prospective modern award terms, AED considers that it would be desirable for the Full Bench to identify the source of power to administer the trial in this way, and how it is proposed those powers will be exercised, in order to avoid impermissible delegations of statutory functions.

Effect of the Pandemic

The Full Bench recognised in the March Decision that the COVID-19 pandemic may have an effect on the trial timetable. We expect this to be so. AED contends that the effect of the pandemic on ADE operations has the potential to distort trial results. For instance, even if there are some employees currently attending work with their ADE employer, there may be fewer of them and the range of disabilities may be atypical which may bear on classification decisions. Further, the work undertaken by an ADE participant, and hence their current workforce, is unlikely to be properly representative due to the economic effects of the pandemic. Further depending on the length of time it takes for this crisis to be resolved supported employees may require retraining before they are able to be assessed if they are off work for an extended period. AED contends that the Full Bench should give consideration to delaying the trial until they are satisfied that the trial is capable of assessing work in circumstances that constitute the circumstances in which work is usually performed by ADE employees with the range of skills and competencies that usually comprise the employer's workforce.

Timing of requested Statement or Decision

Subject to a different decision of the Full Bench, the trial is scheduled to commence on 1 May 2020. In these circumstances, AED wishes to understand how rights are or are capable of being affected by decisions of the Commission, culminating in the March Decision. Further, planning for the trial is underway through the steering committee chaired by Full Bench member, Deputy President Booth and resources are being expended by interested parties for that purpose.

For these reasons, we would be grateful if the requested statement or decision were provided by 27 April 2020 or otherwise at the Full Bench's earliest convenience.

If you have any queries in relation to the above, please email us at noni.lord@aed.org.au or leave a voicemail message on (03) 9639 4333 with some convenient times for us to return your call.

Yours sincerely



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