

**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**

DATE: 19 October 2018

D No.: D192/2018

Lodged by: Australian Council of Trade Unions

Address for service: L4, 365 Queen Street Melbourne VIC 3000

Tel: 03 9664 7333

Fax: 03 9600 0050

Email: [jfleming@actu.org.au](mailto:jfleming@actu.org.au)

## A. Background

1. These submissions concern the Supported Employment Services Award 2010 ('**SES Award**') proceedings (AM2014/286) ('the **Proceedings**') with specific reference to the opportunity the Commission afforded the parties in Statement [2018] FWCFB 5712 to make submissions in relation to the provisional views the Commission expressed in its earlier Statement dated 16 April 2018 ([2018] FWCFB 216) ('**16 April Statement**'). The parties have been invited to submit as follows:

[6] We direct that written submissions in response to the 16 April 2018 Statement are to be filed in the Commission on or before 19 October 2018. Such submissions may include:

- (1) any submissions which any party wishes to make concerning the merit of the provisional views expressed in the Statement; and
  - (2) any proposal which any party wishes to advance concerning the design and implementation of the new wage assessment mechanism outlined in the Statement, should the Full Bench ultimately determine to proceed with the provisional views expressed therein.
2. We here set out our submission in relation to the above. The ACTU also supports and relies on the submissions of AED Legal Centre ('**AED Legal**'), United Voice and the Health Services Union ('**HSU**') in the Proceedings, including the joint submission filed by those parties together with Inclusion Australia, People with Disability Australia and the Disability Advocacy Network dated 16 July 2018.

## B. The Commission's provisional views

3. The Commission's provisional views are set out in subparagraphs (1) - (13) of paragraph [15] of the 16 April Statement. As the Commission summarised in its subsequent statement, the Commission:

...expressed the provisional view that the determination of wages for supported employees by the use of the wage assessment tools currently prescribed in clause 14.4 of the Award did not meet the modern awards objective, but that neither of the applications to which we have referred provided an appropriate resolution of this difficulty. We further stated the provisional view that the existing wage assessment tools should be phased out and replaced by a new classification structure together with

a single new wage assessment tool, and outlined the principles that might underlie the establishment of this new wage assessment mechanism.<sup>1</sup>

4. The proposed new tool is described as a hybrid model involving two elements: a new concept of ‘sizing’ of a job and an SWS-type productivity assessment. The Commission explained the proposed process as follows:

(a) An assessment of the “size” of the job actually assigned to the supported employee compared to a job which would attract the full Award rate of pay at Grade 1, 2 or 3. This would involve a work value assessment with particular focus on the range of tasks required to be performed compared to the relevant Award classification, the complexity of those tasks and the skills required to perform them, and the degree of support necessary to allow the employee to perform those tasks. This might involve, for example, an actual job assigned to a supported employee being “sized” in increments of 20%, 40%, 60%, 80% and 100% of a job to which an Award classification in Grades 1-3 would apply.

(b) Once the job was properly “sized”, a modified SWS-type assessment would be carried out to determine the output of the supported employee in discharging that job compared to the output of a person without that employee’s disability performing the same job. This assessment would have to take into account any non-productive periods on the part of the supported employee and provide for an objective and consistent method of benchmark-setting.

The result would be, for example, that if the job was “sized” at 60% of a full Award classification job, and if the supported employee could perform that job at an output level of 50% compared to another person who can perform to the employer’s reasonable expectation of output, the wage rate would be 30% of the Award classification minimum rate of pay. A minimum of 12.5% of the full award hourly rate would continue to apply.<sup>2</sup>

5. The Commission proposes the tool ideally be supported by trained independent Commonwealth inspectors and that that it should meet the objectives of “fairness, equality, objectivity, independence and sustainability, and be non-discriminatory.”<sup>3</sup>

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<sup>1</sup> Statement [\[2018\] FWCFB 5712](#) at para [3].

<sup>2</sup> Statement [\[2018\] FWCFB 2196](#) at para [15] (9).

<sup>3</sup> Ibid para [15](7).

### **C. Response to provisional views**

6. We have the following main concerns about the Commission's provisional views:
  - (a) The proposed tool would not meet the Commissions' stated objectives for a wage assessment tool of being objective and fair. The concept of job 'sizing' would lead to lower wages through double discounting, as well as inconsistency and discrimination against workers with an intellectual disability;
  - (b) 'Sustainability', that is, the consideration of wage costs and the capacity of employers to pay, is already accounted for in the reference wage rates adjusted in the Annual Wage Review, and should not be used to further discount wages in the supported employment context. This would amount to a further form of double discounting; and
  - (c) The criticisms of the SWS are unfounded and based on incorrect provisional findings of fact.
7. Instead, we believe the Commission should retain the modified SWS as the only appropriate wage assessment tool in the SES Award and that it is more capable of meeting the Commission's stated objectives than the Commission's proposed hybrid tool.

#### *The disadvantages of pro rata wages under the SES Award*

8. Unfortunately, the wage setting arrangements under the SES Award and its predecessors are distant from and abhorrent to safety net wage setting principles more generally. The SES Award provides for the following disadvantages to workers with disabilities that do not apply to any workers without disabilities in any modern award:
  - (a) Minimum wage rates that can be merely a small fraction of the minimum rates that apply to non-disabled workers performing the same work;
  - (b) Subjecting workers to performance/competency assessments and discounting their wages according to those assessments;
  - (c) A large variance and inequality in pay rates within a job classification that does not exist or is significantly less amongst workers without a disability. The wage disparity amongst non-disabled workers engaged at the same classification in all awards on minimum wages is invariably zero but for workers with disabilities

engaged under the SES Award within a classification it is enormous – potentially up to **800%** – as a worker can be engaged at anything from 12.5% to 100% of the applicable classification wage rate. This disparity worsens when one considers the differences in pay across the lowest three classifications of the SES Award, where the overall variance is a potential **855%** (\$89.90, being 12.5% of the lowest classification, compared to \$768.30, being 100% of the highest of the three classifications). In contrast, non-disabled workers engaged under the *General Retail Industry Award 2010*, for example, experience a wage disparity between the lowest and third-lowest grades of only 4% (i.e., \$789.90 for a Retail Employee Level 1 compared to \$821.40 for a Retail Employee Level 3). Hence, wage inequality, is a mind-boggling **214** times greater between disabled workers and non-disabled workers in this context (855% compared to 4%); and

(d) Workers employed at the lowest rates may earn so little that they never accrue enough to meet the current superannuation threshold even if they were to work full-time and hence would ultimately retire with minimal superannuation.

9. All workers should enjoy the right to be paid at least the full award minimum rate of pay, irrespective of their disability. Indications are that with the right level of government support, institutional arrangements, investment in technical and labour-productivity-enhancing equipment, upskilling, job redesign and a focus on appropriate products, services, industries and production methods that best harness disabled workers' talents and potential, the full employment of all people with disabilities at full award rates is entirely achievable. Were the system to be redesigned, this ought to be the objective.
10. However, the Commission is currently considering a far more modest claim within the existing system: in essence, whether the modified SWS or some other form of tool should replace the existing wage assessment tools in the award to ensure the modern awards objective is met. Whilst no wage assessment tool is capable of resolving the above broader systemic issues, we submit the modified SWS remains the better tool for achieving the modern awards objective within the logic of pro rata wages and the specific objects that the Commission has outlined. We submit it is superior to the alternative tool that the Commission has proposed.

*Objective and fair*

11. The Commission's wage assessment tool appears aimed at introducing a general competency element in the form of job sizing that is not capable of being as objective and fair as a productivity-only assessment. To paraphrase the old adage, productivity assessment is the worst alternative except for all the others. The SWS is as objective as is possible, based as it is on an assessment of a worker's output without consideration of any general competency factors. The SWS wage assessment tool uses the classification structure in the award and translates that into a wage rate that is discounted in direct proportion to a worker's assessed output. Hence, it ensures at least that workers with equal output performing the same job are paid equally and no worker can be paid any lower fraction of the award than their productivity rate. The Commission's sizing of the job component would appear to introduce an unnecessary competency component and result in the further discounting of workers' wages below their productivity. This capacity for further discounting for general competencies over and above a worker's productivity was explicitly criticised by the Federal Court in *Nojin*<sup>4</sup> and a reason that the Court found in that case that BSWAT discriminated against intellectually disabled workers.

*The Commission's criticisms of the SWS*

12. The Commission has made a number of provisional criticisms of the SWS as follows:
- (3) The SWS does not, by itself and in its current form, represent an appropriate method of determining the wage rates for supported employees in ADEs because it:
- does not take into account the proper range of work value considerations used to assess award wage rates, namely the nature of the work, the level of skill and responsibility involved in doing the work and the conditions under which the work is done (which, in the context of supported employment, would include the complexity of the task(s) performed, the range of tasks performed, and the level of support required in order for the task(s) to be performed);
  - may not adequately measure non-productive time at work on the part of supported employees; and

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<sup>4</sup> *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

- does not provide a sufficiently objective and relevant means of identifying the performance benchmark by which any SWS assessment is conducted.<sup>5</sup>

13. On these points we refer to the evidence of Mr Paul Cain<sup>6</sup> which confirms:

- (a) The SWS takes appropriate account of the level of support required for tasks to be performed in that it takes account only of the level of support a non-disabled worker would receive. The other levels of support are government funded and do not impact an employer's bottom line.
- (b) The nature, range and complexity of tasks and range of work value considerations are accounted for in the award classifications, which the SWS applies; and
- (c) Non-productive time at work is adequately accommodated. As Mr Cain notes:

“For example, a productivity assessment can observe if an employee chooses to leave their workstation or area. The assessor[‘s 'stopwatch' keeps running during the assessment which means that it is likely that the employee's productivity result will be low in comparison to the agreed performance standard. If an employee leaves the work space they are not being productive.”<sup>7</sup>

Additionally, we note the modified SWS allows for an employee to be retested by an employer in the event the worker's productivity differs from that tested over time. Where the two differ, the result of the employer's test and the result of the independent test contribute equally to the final productivity score.

14. We observe that the Commission has noted the desirability of a wage assessment tool that is developed and administered by an independent assessor and hopes the Commonwealth will be involved in the development and administration of any new tool. We wish to emphasise that these aspects are already guaranteed in the current modified SWS which is owned by the Commonwealth and may not be in any new tool that is not.
15. We note that as well as being fairer in that it is more objective, the SWS is fairer in that it results in (very low paid) disabled workers being paid closer to non-disabled workers under the same job classification. Workers assessed under the SWS must be paid more than those assessed using competency-based tools because competency testing allows

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<sup>5</sup> Statement [\[2018\] FWCFB 2196](#) at para [15].

<sup>6</sup> [Witness Statement of Paul Cain](#) dated 21 November 2017

<sup>7</sup> Ibid at para 67.

for further wage discounting beyond a worker's productivity. Hence, all the non-SWS tools in the SES Award result in comparatively lower pay. The Commission's proposed tool would also result in lower pay because of its double discounting features.

16. The evidence from the modified SWS trials suggests the rise in pay would be modest but not insignificant. Nevertheless, the essence of the employers' opposition to using the SWS is precisely their concern that a pay rise would put them under financial pressure and, in the absence of additional Government support, lead to disemployment. The Commission appears sympathetic to this view given it proposes a new tool that includes job sizing measures that would suppress wages. We seek to further dissuade the Commission of this view on the following basis:

(a) In the absence of detailed financial evidence, employers' claims about a significant financial impact in transitioning all ADE workers with disabilities to the SWS should be viewed with some scepticism. The evidence is that wage rises would be modest and wages are only one cost input in any enterprise. Many ADEs already use the SWS and are able to function adequately; and

(b) Current levels of Commonwealth funding should not be determinative in setting wage rates either directly or indirectly through classification and wage assessment tool design. The Commission's relevant task as an independent statutory body is to ensure that the safety net is fair and relevant and that includes setting absolute standards. Government already tends to defer to the Commission on wage and condition standards. Were each to merely defer to each other, the Commission would be shirking its role as the guardian of a fair and relevant safety net.

17. Whilst the Commission notes that it makes no findings in relation to the use of the SWS in open employment, its criticisms of the SWS in supported employment are likely to have potential implications for the use of the SWS in other awards, as noted in the most recent Annual Wage Review.<sup>8</sup> These criticisms are made despite the fact that no party has sought to challenge the SWS or been afforded the opportunity to lead evidence in its defence. Hence, we strongly concur with AED Legal's submission in these Proceedings that the Commission ought to instead consider whether a broader inquiry into the role of the SWS in the award system is justified and, in the absence of such an

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<sup>8</sup> Annual Wage Review 2017–18 [\[2018\] FWCFCB 3500](#) at para [486].



inquiry, a finding that the SWS does not take proper account of work value considerations to assess award wage rates cannot be made.

*Further comments on job sizing*

18. We make some further comments on the Commission's notion of 'sizing of the job':
  - (a) A worker's pay should not be reduced at all on the basis of the number of tasks within a classification they are engaged to perform. It is common, if not the norm for workers to perform a subset of the tasks within a classification; and
  - (b) If there is any reduction and therefore variance of pay within a classification it should be less than the variance that exists in the award between classifications. The Commission's proposal regarding job sizing that, for example, a worker performing 60% of listed tasks within a classification would receive 60% of the award rate (then also subject to further reduction on the basis of productivity) would seem to invoke an arbitrary coefficient between the number of tasks and proportion of award rate and one that is out of all proportion with the variances that exist between classifications. There exists a 2.9% variance between Grades 1 and 2 in the SES Award and 3.8% between grades 2 and 3 (6.7% in total). Hence, the maximum reduction via job sizing should, in any event, be less than 3.8%. Such a limit is necessary to make the exercise fair but highlights the futility of job sizing.
  - (c) There is at least a rationale for why, under the SWS, a worker is paid less in direct proportion to their productivity and for the quantum of that reduction: the loss in productivity is passed on to the employer in wage costs. The measure ensures the employer gets the same output per dollar from any worker whose output is affected by their disability. This cannot be said of the job sizing concept, for which the relation between number of tasks and rate of pay is irrelevant to output (output being tested separately under the proposed tool) and arbitrary;
  - (d) Job sizing is likely to be highly impractical to administer and lead to bizarre and unfair results when combined with an SWS-type productivity assessment. For example, if a worker performs one function out of five in the classification very quickly (at 100% productivity) they would receive much less (e.g. 20% of the award rate) than a worker performing all ten tasks at half the speed (thereby receiving 50% of the award rate). How would one compare the real value of each worker's contribution?

#### **D. Conclusion**

19. For the above reasons, we urge the Commission to retain the modified SWS as the only wage assessment tool in clause 14.4 of the SES Award. In the alternative, rather than implementing a sizing of the job component, we submit the Commission could consider retaining the modified SWS and outlining the existing lower three award classifications in more descriptive detail. This would have the advantage of avoiding any subjective interpretive function on behalf of the assessor. However, this should not result in the lowering of the wages of workers with disabilities compared to the current classifications as applied by the modified SWS. Changing the classification structure of the award was not sought by any party in these Proceedings. Were the Commission to make any significant changes, natural justice would demand that a concrete proposal is put to the parties and the parties are given the opportunity to adduce evidence and make submissions on it before any determination is made. This would entail further hearings and for all the reasons above is not the preferred course of action.

**October 2018**

ACTU