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2011 LIV Community Lawyer of the Year Award | 2013 Tim McCoy Award | 2014 HESTA Social Impact Award
2016 National Disability Award - Excellence in Justice and Rights Protection | 2018 LIV Awards – Access to Justice

13 August 2019

By Email: Melbourne@fwc.gov.au

Associate to the President, Justice Ross AO
Fair Work Commission
Level 4, 11 Exhibition Street
MELBOURNE VIC 3000

Dear Associate

**Re: Supported Employment Services Award 2010
Four yearly review of modern awards
Matter No. AM2014/286**

We refer to the Commission's review of the Supported Employment Services Award 2010.

Nearly four weeks ago, on 18 July 2019, we wrote to the Associate to Vice President Hatcher concerning this review. Vice President Hatcher is the presiding member of the review Full Bench.

The letter is on the Commission's review website for this Award. Unfortunately, we have had no response to that correspondence on behalf of the Vice President or otherwise on behalf of the Commission. We note also that the Award does not appear on the timetable of events for 2019 published on the Commission's website at the link set out below.

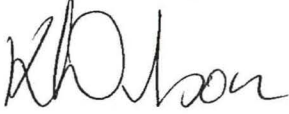
<https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/4-yearly-review/timetable>

We respectfully draw to his Honour's attention our letter of 18 July 2019 (attached) and reiterate the concerns contained therein. Specifically, we would be grateful for some indication from the Commission as to the next steps the Commission intends to take in these review proceedings and the timing of those steps.

In our view, the matter is pressing given the time that has elapsed since the last Full Bench hearing in November 2018 and the provisional view, expressed in a statement released by the review Full Bench in April 2018, that the wage assessment tools currently contained in the award (which permit employers to pay disabled employees less than the minimum rate prescribed for non-disabled employees covered by the same award) do not meet the modern awards objective

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

A handwritten signature in black ink, appearing to read 'Kairsty Wilson', written in a cursive style.

Kairsty Wilson
Principal Legal Practitioner
AED Legal Centre

Att: (1)

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18 July 2019

By Email: chambers.hatcher.vp@fwc.gov.au



Associate to Vice President Hatcher
Fair Work Commission
Level 10, Tower Terrace
80 William Street
EAST SYDNEY NSW 2011

Dear Associate

**Re: Supported Employment Services Award 2010
Four yearly review of modern awards
Matter No. AM2014/286**

We are writing in relation to the Commission's review of the *Supported Employment Services Award 2010* commenced under 156(1) of the *Fair Work Act 2009*.

The review commenced in 2017. It has not concluded.

AED Legal Centre (AED) filed a draft determination that proposed alterations to the *Supported Employment Services Award* in various ways. One alteration that AED proposed was removal of sub-clauses from clause 14.4 of the Award that authorises covered employers, through the wide array of wages tools currently available at the election of an employer, to pay disabled employees rates of pay for work covered by the Award that are well below the rates that applies to anyone else who performs covered work.

The Full Bench heard evidence in February 2018. They released a statement on 16 April 2018 [2018] FWCFB 2196 and another on 11 September 2018 [2018] FWCFB 5712.

The April statement expressed the Full Bench's provisional view that the wage assessment tools currently prescribed in clause 14.4 the Award do not meet the modern awards objective.

The September statement explained that the Full Bench conducted a report back hearing on 29 May 2018 to give parties an opportunity to respond to their provisional views and to

canvass support for a conferral process facilitated by the Commission to further develop principles set out in the April statement. The Commission recognised in that statement that AED, as well as certain of the trade unions who appeared, did so to support the interests of supported employees.

A number of parties, including AED, were opposed to the conferral process which led the Full Bench to schedule a further hearing to deal with the merit of their provisional views. That hearing occurred in November 2018. There has been no additional step since then.

AED wishes to express its concern that supported employees covered by the *Supported Employment Services Award* continue to be subject to the same multiplicity of wage assessment tools that the Commission has provisionally concluded do not meet the modern awards objective more than 12 months after the Commission expressed that view.

AED accepts that it maintained before the Commission, and still does, that one of those tools, the SWS, is appropriate and should be retained in the Award. The April statement expressed a contrary view. That this is so has ramifications beyond these proceedings, which are apparent in the last two decisions of the Annual Wage Review Panels.

In its submission to the November 2018 hearing, AED observed that the second special national minimum wage order applicable to workers with disabilities whose productivity is affected by their disability relies on the SWS to determine a rate of pay. That this Full Bench is considering the SWS was noted by the Panel in its 2017-2018 Review: at [482]-[483]. The just completed 2018- 2019 Review, indicated at [485] that the SWS was still under review by this Full Bench:

“We have decided that the adjustment granted in this Review will flow through to employees with a disability through the operation of the Supported Wage System (SWS) Schedule and that the minimum payment in the SWS Schedule will be adjusted consistent with the approach adopted in previous Reviews.⁴⁹⁸ It will also flow through to employees covered by the Supported Employment Services Award 2010 (SES Award) through the variation of the wage rates in clause 14.2 of that modern award and the operation of the Supported Wage System Schedule (SWSS) and other wage assessment tools referred to in clause 14.4(b). *We note that the wage structure and wage assessment tools (including the SWS tool) in this modern award are currently being reconsidered as part of the 4 yearly review of modern awards*” (emphasis added).

This observation adds to the importance of these proceedings. First, there has been no review of the SWS in these proceedings. No party agitated for one, no party called evidence or made a submission on the premise that there might be a review. Second, it is apparent that any review of the SWS here could have flow on consequences beyond the *Supported Employment Services Award* itself. So much was made clear in the Panel's response to a submission from ACROSS, reproduced in the 2017-2018 Review, that the system of disability wages was too complex and that the minimum rate of pay for people whose productivity is

affected by disability is too low. The response of the Panel is contained in [486], and is reproduced below:

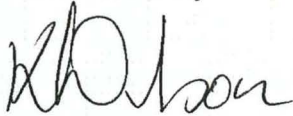
“The Panel addressed this matter in the 2016–17 Review decision. These issues may be further considered in a subsequent Review, after the issues in the SES award are finalised. *Although the consideration of the SWS in the review of the SES Award is conducted in the specific context of its use in ADEs, the modification or replacement of the SWS in that award has potential implications for the use of the SWS in other awards*” (emphasis added).

To the knowledge of AED, the Full Bench has not yet set out what they anticipate will be the next steps in these review proceedings or the timing of those steps. It is desirable, given the time that has elapsed, that this be done.

AED reiterates its view that, apart from the SWS, the wages tools contained in clause 14.4 of the *Supported Employment Services Award* subject employees with a disability employed in supported employment to disadvantage by reason of their disability. That disadvantage is the corollary, in any event, of the Full Bench’s provisional view that these wages tools do not meet the modern awards objective.

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



Kairsty Wilson
Principal Legal Practitioner
AED Legal Centre