



6 February 2018

Our Ref: 20140518

Your Ref: AM2014/286

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Associate to Vice President Hatcher
Fair Work Commission
Level 10, 80 William Street
East Sydney NSW 2011

Dear Associate

**4 YEARLY REVIEW OF MODERN AWARDS- SUPPORTED EMPLOYMENT SERVICES AWARD 2010
(AM2014/286)**

1. We refer to the Schedule issued by Vice President Hatcher's Chambers on 22 January 2018 requiring parties in the abovementioned proceedings to file objections to evidence no later than 4pm on 6 February 2018.
2. We outline below the position of our clients in relation to the evidence filed by AED Legal.

General Observation as to Evidence

3. In reviewing the materials filed by AED Legal, our clients are mindful of the practice of the Fair Work Commission in 4 Yearly Review proceedings to avoid taking an overly technical approach to the admissibility of evidence.
4. As such, our clients are content to refrain from taking a technical approach to evidentiary objections and are comfortable that the Full Bench will make its own assessment as to the weight to be afforded to the witness evidence, particularly in relation to relevance and matters of opinion.
5. Notwithstanding this general approach, we take this opportunity to make a number of specific observations in respect of the witness evidence of Mr Paul Cain and Mr Robert Macfarlane below.

Opinion Evidence

6. The evidence of Mr Cain and Mr Macfarlane appears to be brought as 'expert opinion evidence', that is, evidence of an opinion held by the witness that is wholly or substantially based on the specialised knowledge of that witness.

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7. Despite this, and contrary to the custom in Fair Work Commission proceedings involving ‘expert witnesses’, neither Mr Cain nor Mr Macfarlane make reference to, nor do they appear to have complied with, the Federal Court of Australia’s Expert Evidence Practice Note (GPN-EXPT) (**Practice Note**).
8. As a threshold issue, it is not clear that Mr Cain or Mr Macfarlane have specialised knowledge based on their training, study or experience in relation to all matters that their statements go to.
9. A further practical difficulty arises for our clients in that in various parts of their statements, Mr Cain and Mr Macfarlane do not outline the assumptions and material facts on which their opinions are based.
10. In order to assist the Full Bench, we outline in the below table the specific paragraphs at which we submit Mr Cain and Mr Macfarlane make statements of opinion, which are not appropriately supported, or otherwise are merely matters of submission.
11. These paragraphs are of limited probative value and accordingly should be afforded limited weight.

STATEMENT	REFERENCE	CATEGORY
Statement of Paul Cain (undated but filed on 3 October 2017)	Paragraph 38, whole of	Opinion/submission
	Paragraph 63, whole of	Opinion
	Paragraph 67 the words “even though....tool,”	Opinion/submission
	Paragraph 71, second sentence	Submission
	Paragraph 82, whole of	Submission
	Paragraph 86, whole of, including 86.1-86.4)	Opinion/submission
	Paragraph 88, whole of	Opinion/submission
	Paragraph 92, whole of	Opinion/submission
	Paragraph 94, whole of	Opinion/submission
Further Statement of Paul Cain, dated 21 November 2017	Paragraph 7, whole of	Opinion/submission
	Paragraph 8, whole of	Submission
	Paragraph 12, first sentence	Submission
	Paragraph 14, whole of	Submission
	The word “inappropriately” in paragraph 27	Opinion
	Paragraph 31, last two sentences	Submission
	Paragraph 35, whole of	Opinion

STATEMENT	REFERENCE	CATEGORY
	Paragraph 36, whole of, including 36.1-36.2	Opinion/submission
	Paragraph 40, first sentence	Opinion/submission
	Paragraph 41, whole of	Opinion/submission
	Paragraph 46, whole of	Opinion/submission
	Paragraph 60, whole of	Opinion/submission
	Paragraph 68, third sentence	Opinion/submission
	Paragraph 70, whole of	Opinion/submission
	Paragraph 72, whole of	Opinion/submission
	Paragraph 129, the word "successfully"	Opinion
	Paragraph 191, the word "successfully"	Opinion
	Paragraph 199, whole of	Opinion
Further Statement of Paul Cain, dated 14 December 2017	Paragraph 39, last sentence	Opinion/submission
Statement of Robert Macfarlane, dated 21 November 2017	Paragraphs 82-83	Opinion/submission

If you have any questions, please contact Emily Slaytor on (02) 9458 7022.

Yours sincerely



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