



21 October 2019

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Ms Ingrid Stear  
Associate to Vice President Hatcher SC  
Fair Work Commission  
80 William Street  
EAST SYDNEY NSW 2010

Dear Associate,

**AM2014/286 SUPPORTED EMPLOYMENT SERVICES AWARD**

We act for Australian Business Industrial (**ABI**) and NSW Business Chamber (**NSWBC**) in the above proceedings.

Please find **enclosed** our further submissions prepared to assist the Fair Work Commission in anticipation of this week's Report Back listed for 9:00am AEST on Wednesday, 23 October 2019.

Yours sincerely,

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Encl.

## FAIR WORK COMMISSION

### 4 Yearly Review of Modern Awards

#### *Supported Employment Services Award 2010*

Matter No: AM2014/286

## OUTLINE OF FURTHER SUBMISSIONS

### AUSTRALIAN BUSINESS INDUSTRIAL AND THE NSW BUSINESS CHAMBER

#### 1. INTRODUCTION

- 1.1 We act for Australian Business Industrial (**ABI**) and NSW Business Chamber (**NSWBC**) in the above proceedings.
- 1.2 We refer to the recent letter from Mr Michael Lye, Deputy Secretary, Disability and Carers, Department of Social Services (**DSS**) to the Fair Work Commission (**Commission**) dated 9 September 2019 (**DSS Letter**).
- 1.3 We also refer to the Commission's response to the DSS Letter, dated 12 September 2019 (**Commission Response**).
- 1.4 The purpose of this letter is to provide the Commission with our views, particularly in response to the matters raised in the DSS Letter (and practical issues arising as a result), in advance of the Report Back before the Full Bench listed for 9:00am AEST on Wednesday, 23 October 2019.

#### 2. DSS LETTER

- 2.1 In the DSS Letter, Mr Lye raises two matters that he feels may be relevant to the Commission in its decision making in this matter:
  - (a) firstly, Mr Lye refers to a new pricing structure for 'employment support' announced by the National Disability Insurance Agency (**NDIA**) this month; and
  - (b) secondly, Mr Lye refers to additional Federal Government funding in the 2018-19 Budget of \$67 million 'over the forward years'<sup>1</sup> to support Australian Disability Enterprises (**ADEs**) to move to a new wage assessment tool following the Commission's decision in these proceedings, (collectively, the **New Funding Arrangements**).
- 2.2 In the DSS Letter, Mr Lye notes that:
  - (a) the New Funding Arrangements may enable ADEs to adopt the Supported Wage System (**SWS**) tool; and
  - (b) DSS is 'considering' consulting with parties to the proceedings.

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<sup>1</sup> We presume this means over the forward estimates, i.e. over the rolling three-year financial estimates for the Federal Budget.

2.3 To this end, he asks the Commission whether this consultation could occur ‘prior’ to the Commission handing down its determination in these proceedings.

### **3. COMMISSION RESPONSE**

3.1 In the Commission Response, we note that the Full Bench advises Mr Lye that it had reached a point whereby it intended to issue its decision in these proceedings within a 2-3 week time frame.

3.2 Accordingly, it would appear the timing of the DSS Letter is most unfortunate in terms of it having created a further delay to the parties having the benefit of the Commission’s decision in this matter. A decision which, no doubt, was the product of extensive deliberation and consideration of all the evidence and submissions from the interested parties during these lengthy proceedings.

### **4. ABI AND NSWBC POSITION**

4.1 Our clients’ position is that the Commission should, as originally intended, hand down its decision regardless of the New Funding Arrangements referred to in the DSS Correspondence.

4.2 Our clients are concerned that if the pending decision is delayed further, it will contribute to ongoing uncertainty and confusion in the sector. This is particularly the case in light of the provisional conclusions reached by the Full Bench and expressed in its Statement dated 16 April 2019.<sup>2</sup>

4.3 Accordingly, we respectfully draw your attention to the following brief points in support of our clients’ position as to why the Commission should proceed to hand down its decision as soon as practicable, namely:

- (a) the sound industrial rationale for these proceedings and the need for the supported employment industry to have certainty in respect of the overarching industrial relations framework;
- (b) the Commission has already spent a great deal of time hearing these proceedings and was only 2-3 weeks away from issuing its decision before receiving the DSS Letter; and
- (c) DSS was afforded multiple opportunities to participate in these proceedings over years and did not take up the opportunity in a substantive way, until this ‘eleventh hour’ communication, which only serves to create further delays and uncertainty for the industry.

#### ***Need for industrial certainty***

4.4 The Commission’s decision in these proceedings, whatever the overall outcome, is expected to provide a much needed stable classifications and associated wages framework for the industry.

4.5 The decision of Nojin<sup>3</sup> created a sense of uncertainty in relation to the use of wage tools and how ADEs pay employees with a disability under the *Supported Employment Services Award 2010 (SES Award)*.

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<sup>2</sup> [2018] FWCFB 2196 at [15].

<sup>3</sup> *Nojin v Commonwealth of Australia* [2012] FCAFC 192 (21 December 2012).

- 4.6 In addition, the Commission's provisional conclusions that:
- (a) the use of the wage assessment tools in clause 14.4 of the SES Award does not meet the modern awards objective;<sup>4</sup> and
  - (b) the SWS also does not (in its current form) represent an appropriate method of setting wages in an ADE environment,<sup>5</sup>
- with respect, contribute to that industrial uncertainty.

4.7 There is a clear benefit to ADEs, and to the supported employees engaged in their operations, to have their minimum rights and entitlements clearly set out in the SES Award, in the same manner as any other national system employee.

***Proceedings have concluded***

4.8 All of the parties to these proceedings made an exceptionally large investment in time and financial resources over the last three years to date.

4.9 Indeed, our clients:

- (a) attended dozens of conferences, directions hearings, substantive hearings etc before the Commission;
- (b) prepared 59 witness statements as evidence;
- (c) appeared during two weeks of hearings;
- (d) prepared over 10 unique substantive submissions;
- (e) prepared award variation determinations; and
- (f) responded, reviewed and considered materials filed by other parties.

4.10 We note that the other parties also prepared similar volumes of work in these proceedings.

4.11 The Commission's Statement<sup>6</sup> dated 16 April 2019, which clearly outlined the Full Bench's 'provisional conclusions' in relation to the various claims and issues in these proceedings, gave our clients (and no doubt the parties at large) the understanding that shortly, the Commission would finalise its conclusions and provide the ADE industry with this much needed certainty and stability.

4.12 As noted above, in its 16 April 2019 Statement, the Full Bench rejected both the SWS and the modified SWS as appropriate for setting wages in the ADE environment. The Full Bench also indicated a commitment to introduce a new classification structure into the SES Award which placed employee skills and competence front and centre in wage determination, by 'sizing' tasks performed against the broader range of tasks required to be performed for a full award wage.<sup>7</sup>

4.13 Importantly, the Full Bench stated that existing wage assessment tools would also be phased out over a period to be determined.<sup>8</sup>

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<sup>4</sup> [2018] FWCFB 2196 at [15](2).

<sup>5</sup> [2018] FWCFB 2196 at [15](3).

<sup>6</sup> [2018] FWCFB 2196.

<sup>7</sup> [2018] FWCFB 2196 at [15](9).

<sup>8</sup> [2018] FWCFB 2196 at [15](7) and (10).

- 4.14 We note that after this Statement was handed down, additional submissions were filed and a further (short) hearing was held on 29 November 2019 regarding the merit of the Full Bench's provisional conclusions, and to receive the parties' submissions about how any new classification structure may look.
- 4.15 In our clients' view, the proceedings have been finalised, but for this decision.
- 4.16 It is our respectful request that the Commission conclude the proceedings and hand down its highly anticipated decision at the earliest opportunity.

***DSS Letter***

- 4.17 DSS has now requested that it be permitted to consult with the parties to the proceedings, in relation to the New Funding Arrangements, 'prior to a determination by the Commission.'
- 4.18 It is unclear from the DSS Letter why the Department has raised these matters now, particularly given the 2018-19 Budget funding would have been known to DSS when the Federal Budget was handed down in April of this year.
- 4.19 We also understand the NDIA pricing structure for 'employment support', is relevant to funding the support workers only, but is not relevant to the payment arrangements for supported employees, the subject of these proceedings.
- 4.20 Regardless of the New Funding Arrangements, which we note are susceptible to change with changes to both Government policy and to Governments, it is appropriate that the Full Bench hand down its decision in the context of the 4 Yearly Review.
- 4.21 This will enable the industry to understand its wages costs and to what extent DSS can support the Full Bench's decision, not the other way around.

**Australian Business Lawyers & Advisors**

**For Australian Business Industrial and NSW Business Chamber**

**21 October 2019**