FAIR WORK COMMISSION
AT MELBOURNE

AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

AEDLC SUBMISSION ON OUTSTANDING ISSUES PERTAINING TO A PROPOSED DETERMINATION UNDER FORMER SECTION 156(2)(b)(i) OF THE FW ACT

Background

1. AED Legal Centre (**AEDLC**) files this submission pursuant to the directions of Vice President Hatcher to file any further written submissions in relation to outstanding issues pertaining to a proposed trial of terms to be included in the *Supported Employment Services Award* (the **Award**) by 5 PM on 17 March 2020.

2. It is apparent from the terms of the former section 156(2)(b) of the *Fair Work Act* 2009 (the **FW Act**) that, having reviewed the relevant modern award, the Commission may do one of three things. The first thing it may do is to make "one or more determinations that varies" the relevant award.

3. In their December 2019 decision and their statement dated 21 January 2020, the Full Bench expressed an intention to trial terms to give effect to their December 2019 decision.[1] In the January 2020 statement, the Full Bench said that by 31 March 2020 they "will determine the final wages structure for the purposes of the trial". AEDLC takes this statement to mean that for this purpose the Full Bench intends to make a determination under section 156(2)(b)(i).

4. On 12 December 2020 AEDLC provided a written report to the Vice President (the **Report**) pursuant to directions made on 6 March 2020. In the Report, AEDLC stated that it was unable to consent to the inclusion in the Award of the:

[1] AEDLC understands that a central purpose of the trial contemplated by the Full Bench is to trial the application of the proposed grade A and B classifications, including the application of the SWS to those classifications.

(a) classification terms contained in clause B .1 .1, B.2 and B.3 of attachment A to the December 2019 decision,

(b) the rates of pay for grades A and B contained in clause 14.2 of that attachment; or

(c) the classification term contained in clause 14.1 of that attachment insofar as that term includes the text: "and the nature of the position in which the employee is employed"

(the **grade A and B terms**).

5. On 17 December 2019, AEDLC filed a submission pursuant to the Full Bench's invitation in paragraph 378 of their December 2019 decision (**AEDLC December Submission**). In paragraph 14, AEDLC submitted that the Full Bench should not proceed with the grade A and B classifications. AEDLC reaffirms that submission. It relies on that submission and this one to resist a determination that includes the grade A and B terms in the Award, including on jurisdictional grounds.

Necessity

6. The Commission may only include terms to the extent they are necessary to achieve the modern awards objective and, if applicable, the minimum wage objective.[2] Neither the December 2019 decision or the Full Bench's statement in January contains a finding to that effect. Rather, in paragraph 377 of their December 2019 decision, the Full Bench express a qualified, provisional, conclusion: "Our conclusion at this stage, subject to what follows immediately below, is that the variations would serve to ensure that the SES Award meets the modern awards objective in s. 134(1) of a fair and relevant safety net". What followed "immediately below" was a discussion of the provision the Full Bench intended to make for further submissions and for a trial of terms for inclusion in the Award.

7. The provisional character of the Bench's conclusion reflects the provisional character of the terms the Full Bench has in contemplation. Necessarily, to include terms in an award for the purpose of trialing them is to accept the possibility that those terms do not, at the time they are purportedly

[2] Section 138 of the FW Act. Once a modern award decision is made it cannot be varied or revoked: section 603(3)(a) of the FW Act.

included in the award, achieve the modern awards objective and/or minimum wage objective. Respectfully, this precludes a finding for the purposes of section 138 of the FW Act that the trial terms are terms that only go so far as is necessary to achieve those objectives, whether in form or content. The terms cannot for this reason be included in the Award. However, the absence of a section 138 finding also forecloses a finding that the new terms *ensure* a fair and relevant minimum safety net for section 134 purposes or *establish* a safety net of minimum wages for section 284 purposes. What is "necessary" must here be distinguished from what is "desirable". Only the former suffices.[3]

8. In paragraphs 376 and 379 of the December 2019 decision, the Full Bench associates the purposes of the trial with a need to assess the impact of their proposed wages structure on employer labour costs. This impact, the Full Bench says in paragraph 379, may ultimately sound in the wage amounts prescribed by the Award for grade A and B classified employees. Respectfully, this demonstrates the problem. The possibility of future variation by reference to the future actual effect of the included terms means that the terms do not, at the time of their inclusion, *achieve* the requisite objectives or do so only to the extent it is necessary to achieve those objectives because these necessarily are the questions the trial must answer. The same is true if the question is asked, do the terms ensure and establish fair and relevant minimum wages for employees? The answer is necessarily contingent.

9. Further and in any event, the power to make a determination under former section 156(2)(b)(i) is available to give effect to the outcome of a review by the Commission in which it is concluded that new terms are necessary to ensure, establish or maintain, relevantly, fair and relevant minimum wages for employees, taking in account the non-exhaustive list of matters referred to in sections 134(1)(a) to (h) and section 284(1)(a) to (e) of the FW Act and those derived by implication from the FW Act.[4] It is only in this way, and for this purpose, that it is open for the Commission to vary the Award by this statutory method. The Full Bench proposes to rely on a far more limited purpose for the inclusion of the grade A and B terms, which is to trial them in order

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3 *Re 4 Yearly Review of Modern Awards* (2014) 241 IR 189 at [38]-[39].

4 *Shop Distributive Employees Association v Australian Industry Group* (2017) 253 FCR 368 at [50].

to assess the cost impact on employers.[5] Respectfully, this purpose is by itself too narrow to support the exercise of the variation power in the former section 156(2)(b)(i).

10. On these bases, AEDLC contends that varying the Award to include the grade A and B terms for the purpose of trialing them is beyond power.

Section 156(3) and (4)

11. Section 156(3) of the FW Act precludes the Commission from making a determination varying modern award minimum wages unless it is satisfied that the variation is justified for work value reasons. These reasons are defined in section 156(4).

12. Clause 14.2 of attachment A to the December 2019 decision proposes a rate of pay of up to $7.00 per hour and up to $14 per hour for grade A and B employees, respectively. Inclusion of this term for these classifications would constitute a variation to minimum wages.

13. Currently, every employee with a disability covered by the Award is entitled by clause 14.4 to a proportion of the minimum wage fixed by clause 14.2 for work in grades 1 to 7. As varied, these clauses would instead entitle affected employees to a proportion of the much lower grade A and B rates. Neither the December 2019 decision or the Full Bench's statement in January contain a finding expressing the Commission's satisfaction for section 156(3) purposes. In any event, the December 2019 decision does not support such a finding, for two reasons:

    (a) Section 156(3) requires that the work value reasons justify the amount that employees should be paid for "doing a particular kind of work". By contrast, the amounts proposed for the grade A and B classifications are justified as rates that will provide or maintain employment for disabled employees in created or tailored jobs offered by ADEs.[6] The wages amounts are thus for a particular kind of employee whose work is adjusted by means of employment in a particular position created by the employer for that employee due to the particular circumstances of that employee's disability.

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5 Authority demonstrates that considerations of fairness, consistency, uniformity and wage stability for employees must receive very substantial weight by the Commission in setting the amount of minimum wages for award reliant employees: *Annual Wage Review* [2013] FWCFB 4000 at [77].

6 Paragraph 367 of [2019] FWCFB 8179.

(b) The Commission has not made a finding that evaluates how the nature of the work, the level of skill and responsibility and the conditions under which it is performed justifies the variation to the amount of minimum wages for those classified under grade A and B.[7]

14. On this basis and in these circumstances, AEDLC contends that varying the Award to include the grade A and B pay term contained in clause 14.2 of attachment A for the purpose of trialing it (or otherwise) does not accord with the requirements of section 156(3). According that term cannot be included in the Award. To do so would constitute an error affecting the Commission's jurisdiction.

Section 153(1) and section 153(3)

Minimum Wages

15. In paragraphs 38 to 42 of the AEDLC December Submission, AEDLC drew the Full Bench's attention to the operation of section 153(1) of the FW Act on the footing that the wages rates proposed for grade A and B do not provide for "minimum wages", as that phrase is understood in relation to safety net instruments made under the FW Act, within the meaning of section 153(3) of the FW Act. AEDLC reaffirms those submissions. Apart from enlivening the prohibition in section 153(1) of the FW Act, terms that would not provide for minimum wages would not constitute terms that are necessary to achieve the modern awards objective or the minimum wages objective.

16. A further relevant section 134(1) factor to the determination of minimum wages for this employee cohort is the statutory object found in section 3(a) of the FW Act. This object expresses an intention that the laws provided for in the Act offer workplace laws that are fair to working Australians and take into account Australia's international labour obligations.[8] Those international obligations include, as AEDLC has previously drawn to the Full Bench's attention, rights to "just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value"[9] and to "Measures should be taken to promote employment opportunities for disabled persons which conform to the employment and salary standards

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7 This evaluation would, AEDLC contends, include the basis upon which minimum wages are fixed for award covered employees and the work value comparability between affected employees and other employees with disability eligible for the SWS.

8 Section 3(a) of the FW Act.

9 Article 27(1)(b) of the *Convention on the Rights of Persons with Disabilities*.

applicable to workers generally"[10] These rights may be regarded as directed to achieving substantive equality through positive actions that enhance the dignity of employees with a disability. They are evident in open employment, which is comparable. [11]

All or a class of employee with disability

17. If the grade A and B terms do however provide for "minimum wages", they will still not engage section 153(3). To do so they must provide for minimum wages for *all* employees with a disability (as defined by section 12 of the FW Act) or *a class* of employees with a disability.

18. In paragraph 371 of the December 2019 decision, the Full Bench said that what they had in mind would necessarily mean that there were classifications in the Award that provided for rates of pay below the national minimum wage. The Bench observed however that both proposals from AEDLC and the ABI in the review proceedings were advanced on the basis that employees with a disability would be paid less than the national minimum wage. AEDLC proposal was advanced on the basis that it provided for minimum wages for employees within the same class, namely those employees with a disability who, due to the effects of disability, are eligible for the SWS. SWS eligibility is a defining feature of the class. The criteria in schedule D to the Award, other SWS schedules to other modern awards and the second special national minimum wage order is:

> "Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension." [12]

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10 Article 10 of Part II of the International Labour Organisation's *Vocational, Rehabilitation and Employment Recommendation*.

11 As mentioned in the AEDLC December Submission, relevant evidence of that comparability is paragraphs 36 to 41 of Exhibit 15; paragraphs 17 to 19, 28 to 31, 92 to 95, 103, 122 to 130, 210 to 211, 227 to 228 and 238 to 242 of Exhibit 16, including paragraph 6.2.1.1 of Part 6 of annexure D and pages 85 and 122 of annexure I to that statement; paragraphs 48 to 56 of Exhibit 17; paragraphs 16 to 18, 27 to 41 of Exhibit 9; PN 2206-PN2224, PN 2298-PN 2302, PN 2439-PN 2453, PN 2507-2519 and PN 2644-2648 of 9 February 2018; and PN3963 – PN3977 of 13 February 2018.

12 Notably, one of the qualification requirements for a disability support pension under section 94 of the *Social Security Act* 1991 is that the person is participating in the SWS.

19. It can be seen that a characteristic of the class is that, in their employment, work is adjusted (and required to be adjusted[13]) to accommodate the effects of disability. That accommodation is evident in proposed clause B.1.1 and from the SWS eligibility criteria. It is also apparent from the evidence referred to in paragraph 30 of the AEDLC December Submission.

20. SWS eligibility is not employer or industry specific; the characteristics of covered employers or the industry the Award covers are of no significance. These characteristics may describe a class of employment, they do not describe a class of employee with a disability. However it is the characteristics of the employees as a class of employee with a disability that assumes importance for section 153(3) purposes.

21. The Full Bench intends that the SWS will apply to grade A and B classified employees. The criteria in clause B.1.1 of attachment A would if adopted apply to employees with that eligibility. In that event, those employees will have, and do, share SWS eligibility in common with other Australian SWS eligible employees, no matter their employer. Nonetheless, the grade A and B terms proposes a different, and less beneficial, minimum wage and wage determination method for one group of this single class of employee with disability. This does not enliven section 153(3) of the FW Act.

22. Plainly, the grade A and B terms would not provide for minimum wages for *all* employees with a disability. They could only be said to do so, if at all, for those employees with disability covered by the Award.

23. The wage adversity inherent in the grade A and B terms would, if adopted, discriminate against the Award sub-group of employee with a disability because of their mental or physical disability. In terms, the disability and its effects serves in proposed clause B.1.1 as the discrimen for wages.[14] In these circumstances, the Full Bench is prohibited by section 153(1) from including the grade A

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[13] An employee with a disability is protected from failures to make reasonable adjustments by the *Disability Discrimination Act* 1992 (Cth.), subject to the Act: see section 5(2) and (3) of the *Disability Discrimination Act* 1992. As the Full Bench will be aware, AEDLC made submissions on this subject in written submissions dated 21 November 2018 and orally.

[14] One need only point to the need, as an element of the classification, for the grade A or B employee to qualify for the impairment criteria of the disability support pension. The impairment criteria under section 94 of the *Social Security Act* 1991 is that the person has a physical, intellectual or psychiatric impairment to a degree that satisfies the impairment tables prescribed by the Act. The impairment criteria under section 95 of that Act is that the person is legally blind.

and B terms in the Award. To do so would, it is submitted, constitute an error affecting the Commission's jurisdiction.

The ABI Grade A and B classification definitions proposal

24. Paragraph 43 to 45 of the AEDLC December Submission contains a submission about the text of the criteria proposed for the grade A and B classifications. AEDLC again draws the Full Bench's attention to these paragraphs of that submission.

25. In email dated 28 February 2020 from Nigel Ward, Australian Business Lawyers and Advisors (**ABI**) asked the Full Bench to consider amendments to the criteria in proposed clauses B.2 and B.3 of schedule B of attachment A. ABI expressed concern that the Full Bench's attachment A formulation, specifically the word "actions", may be construed by ADE's to mean a physical movement. AEDLC shares this concern. The proposed solution is however problematic and fails to resolve the interpretative problem ABI has raised. Further, ABI's proposal, contrary to its contention, do not constitute modest changes to the grade A and B definitions. Rather it materially extend the scope of the classifications and would, if included in the Award, materially alter their work value to the detriment of employees.

26. ABI proposes that the Full Bench replace 'actions' with 'sub-tasks' in the grade A and B descriptors. And for grade A, ABI also proposes that "sub-tasks" include use of equipment or tools "with basic functionality" and that "regular supervision" be added as an additional, but alternative, proxy for the level of responsibility (the disjunctive word "or" is inserted between "regular supervision" and "constant monitoring"). The effect of these proposals is to increase the value of the grade without any corresponding benefit for employees. This is so for several reasons.

27. First, much is left to the subjective classification decision of the employer. There is no objective, concrete, content to the concepts of "sub-tasks" or "basic functionality". How are they to be discerned? By what criteria? A sub-task assumes the objective existence of a task. But what are the characteristics of these tasks in ADE employment and what is the basis for their division into "sub-tasks". No evidence is offered at all by ABI on these subjects. Nor is there evidence of the work context of the "sub-tasks" that ABI contemplates would fall within grade A or B whether for

a trial or otherwise. Replacing "actions" with "sub-tasks" in clause B.2 and B.3 does not assist much in understanding what either means. It is a phrase of entirely uncertain meaning.

28. Secondly, ABI's proposal contemplates the application of skills. So much is implied by its incorporation of "use equipment or tools, including mechanical or electrical equipment or tools". Notably no evidence is offered as to the types and complexity of the equipment or tools that an employer may direct an employee to use. The phrase "basic functionality" proposed for grade A, presumably as an indicia of, and limitation on, required skill, does neither; it simply begs the question.

29. Thirdly, Grade A and B compares unfavourably with the classifications the Full Bench proposes be aligned with grade 2 of the Award (which attracts a much higher minimum wage).

30. Level 2 of the *Food, Beverage and Tobacco Manufacturing Award* 2010 contains a description of employee competency that limits employees to a range of general duties essentially of a manual nature and to the level of the employee's competency. The employee exercises limited judgement under direct supervision. A level 1 employee under the *Gardening and Landscaping Services Award* performs routine duties essentially of a manual nature and to the level of their training, the employee exercises minimal judgment and works under direct supervision. A C14 employee under the *Manufacturing and Associated Industries Award* performs routine duties essentially of a manual nature to the level of their training and in doing so exercises minimal judgment and works under direct supervision. A C13 employee works beyond those skills to the level of their skills, training and competence. A level 1 employee under the *Textile, Clothing, Footwear and Associated Industries Award* performs basic tasks and exercises skill to perform those tasks.

31. Further, Award covered employees the subject of induction or training would, if the grade A and B terms were included in the Award, be entitled to the national minimum wage, which is $12.49 per hour higher than grade A and $5.49 higher than grade B.

32. The imprecision of the grade A and B definitions reflects the lack of evidence about the range of work that is done in ADE employment and how it is done. The ABI proposal illustrates the problem. Its proposal implicitly rejects the definitions proposed by the Full Bench as too limited. It

offers new words, but no evidence. This problem is made worse by the terms of proposed clause B.1.1 of schedule B.

33. The Full Bench will be mindful that proposed clause B.1.1 hinges on the position the employer creates for the employee, rather than exclusively the work that the employee does. Proposed clause 14.1 in attachment A would require classification including according to the nature of the position "in which the employee is employed". AEDLC contends that this approach to valuation:

    (a) accommodates wide variations in the nature and range of tasks (or sub-tasks) associated with the position the employer chooses to employ the employee in; and

    (b) has the potential to preclude or inhibit reclassification should the employee demonstrate greater competence or enhance their skills.

34. The difficulties expressed above are compounded by the absence in attachment A of Award based indicia of the kind of "tasks, "duties", sub-tasks" or "work" that fall within each of the grades, but especially the basic ones, to delineate the application of each. Notably, proposed clause B.1.1(b) excludes work in other grades with the words "that does not fall into Grades 1-7". Thus regardless of the position created by an employer for an employee with a disability, work that falls within grades 1 to 7 is excluded. That requires clear criteria for discerning when that occurs. Instead, the classification definitions for grades A to 2 in particular are, AEDLC submits, opaque, and lack an evident justification based on appropriate evidence that supports them as terms which are necessary to ensure achievement of the modern awards objective and minimum wages objective. In these circumstances, it is not open for the Full Bench to include them in any determination it makes in respect of this review.

Operative date of effect of any determination and judicial review

35. In the Report, AEDLC informed the Full Bench of its intention to request that the operative date of any determination, if one is made to include the grade A and B terms, be deferred to afford AEDLC a reasonable opportunity to consider the Commission's decision and, if AEDLC considers it appropriate to do so, apply to the Federal Court for judicial review. In that event, AEDLC would request that the operative date be deferred pending determination by the Court of its application, if made.

17 March 2020

M. Harding