

FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

Supported Employment Services Award 2010

Matter No: AM2014/286

**OUTLINE OF SUBMISSIONS IN OPPOSITION BY NATIONAL DISABILITY SERVICES,
AUSTRALIAN BUSINESS INDUSTRIAL AND THE NSW BUSINESS CHAMBER**

1. INTRODUCTION

- 1.1 His Honour Vice President Hatcher has issued directions in the above matter requiring that, *inter alia*:
- (a) any party who proposes a variation to the *Supported Employment Services Award 2010 (SES Award)* file in the Commission a draft determination to give effect to their variation proposal on or before 4.00pm Monday 31 July 2017; and
 - (b) any parties opposing a variation proposal file in the Commission the witness statements, expert's reports and other evidentiary material upon which they intend to rely, together with an outline of submissions, on or before 4.00pm, Tuesday 21 November 2017.
- 1.2 On 31 July 2017, AED Legal Centre (**AED Legal**) filed a draft determination in accordance with his Honour's direction at paragraph 1.1(a) above (**AED Proposal**), the effect of which would be to remove from the SES Award all wage assessment tools except the Supported Wage System (**SWS**).
- 1.3 National Disability Services, Australian Business Industrial and the NSW Business Chamber oppose the AED Proposal, and this outline of submissions has been prepared in accordance with his Honour's direction at paragraph 1.1(b) above.

2. EVIDENCE FILED WITH THESE SUBMISSIONS

- 2.1 The following 59 statements have been filed with these submissions:
- (a) 14 statements on behalf of Disability Enterprises:
 - (i) [Further Statement of Chris Christodoulou](#), CEO of Greenacres Disability Services (**GDS**), dated 15 November 2017;
 - (ii) [Further Statement of Heath Alexander Dickens](#), Business Service Operations Manager of Disability Services Australia Limited (**DSA**), dated 21 November 2017;
 - (iii) [Statement of Mark Wynen](#), Operations Manager of GDS, dated 8 November 2017;
 - (iv) [Statement of Dr Kenneth Baker AM](#), Chief Executive of National Disability Services, dated 20 November 2017;

- (v) [Statement of Tanya O'Shea](#), Chief Executive of IMPACT Community Services, dated 25 October 2017;
- (vi) [Additional Statement of Bradley Raymond Burridge](#), Operations and Business Development Manager of Centacare Industries, dated 25 October 2017;
- (vii) [Statement of Florence Davidson](#), Executive Officer of The Christie Centre, dated 1 November 2017;
- (viii) [Statement of Joanne Jessop](#), Chief Executive Officer of Multicap Limited, dated 6 November 2017;
- (ix) [Statement of James Wood](#), Managing Director of Product Action Incorporated, dated 25 October 2017;
- (x) [Statement of Kerry Browne](#), Chief Executive of Help Enterprises, unsigned;
- (xi) [Statement of Kristian Dauncey](#), Chief Executive Officer of Knoxbrooke Incorporated, dated 25 October 2017;
- (xii) [Statement of Kevin Todeschini](#), Services Manager of Start Fresh Services unsigned;
- (xiii) [Statement of Rohan Braddy](#), Chief Executive Officer of Mambourin Enterprises Ltd, dated 25 October 2017; and
- (xiv) [Statement of Paul Booker](#), General Manager of Karakan Ltd, dated 21 November 2017;
- (b) [Statement from an expert witness, Michael Smith](#), dated 21 November 2017;
- (c) [Statement of Sally Powell](#), Chief Executive of the Bedford Group between August 2011 and until December 2017, dated 21 November 2017;
- (d) 27 statements by Supported Employees:
 - (i) [redacted Statement "2DSA2"](#) of a DSA employee;
 - (ii) [redacted Statement "2DSA3"](#) of a DSA employee;
 - (iii) [redacted Statement "2MW1"](#) of a Mai-Wel Group employee;
 - (iv) [redacted Statement "2MW3"](#) of a Mai-Wel Group employee;
 - (v) [redacted Statement "2MW5"](#) of a Mai-Wel Group employee;
 - (vi) [redacted Statement "2MW6"](#) of a Mai-Wel Group employee;
 - (vii) [redacted Statement "2MW8"](#) of a Mai-Wel Group employee;
 - (viii) [redacted Statement "2MW9"](#) of a Mai-Wel Group employee;
 - (ix) [redacted Statement "2MW10"](#) of a Mai-Wel Group employee;
 - (x) [redacted Statement "2MW11"](#) of a Mai-Wel Group employee;
 - (xi) [redacted Statement "2FS12"](#) of a Flagstaff employee;
 - (xii) [redacted Statement "2FS13"](#) of a Flagstaff employee;
 - (xiii) [redacted Statement "2FS14"](#) of a Flagstaff employee;

- (xiv) [redacted Statement "2FS15"](#) of a Flagstaff employee;
 - (xv) [redacted Statement "2FS16"](#) of a Flagstaff employee;
 - (xvi) [redacted Statement "2FS17"](#) of a Flagstaff employee;
 - (xvii) [redacted Statement "2FS18"](#) of a Flagstaff employee;
 - (xviii) [redacted Statement "2AS1"](#) of an ASTERIA Services employee;
 - (xix) [redacted Statement "2AS2"](#) of an ASTERIA Services employee;
 - (xx) [redacted Statement "2AS3"](#) of an ASTERIA Services employee;
 - (xxi) [redacted Statement "2AS4"](#) of an ASTERIA Services employee;
 - (xxii) [redacted Statement "2AS5"](#) of an ASTERIA Services employee;
 - (xxiii) [redacted Statement "2AS6"](#) of an ASTERIA Services employee;
 - (xxiv) [Statement of Jessica Emily Ratcliffe-Henson](#), GDS Employee dated 27 October 2017;
 - (xxv) [Statement of Christen Dittmer](#), GDS employee dated 27 October 2017;
 - (xxvi) [redacted Statement "2GDS1"](#) of a GDS employee;
 - (xxvii) [redacted Statement "2GDS2"](#) of a GDS employee; and
- (e) 15 statements by families and carers of supported employees:
- (i) [redacted Statement "2MW2"](#) of the mother and carer of a Mai-Wel Group employee;
 - (ii) [redacted Statement "2MW4"](#) of the mother and carer of a Mai-Wel Group employee;
 - (iii) [redacted Statement "2MW7"](#) of the mother of a Mai-Wel Group employee;
 - (iv) [redacted Statement "2DSA1"](#) of the carer of a DSA employee;
 - (v) [redacted Statement "2FS1"](#) of the mother and carer of a Flagstaff employee;
 - (vi) [redacted Statement "2FS2"](#) of the father and carer of a Flagstaff employee;
 - (vii) [redacted Statement "2FS3"](#) of the mother and carer of a Flagstaff employee;
 - (viii) [redacted Statement "2FS4"](#) of the father and carer of a Flagstaff employee;
 - (ix) [redacted Statement "2FS5"](#) of the mother of a Flagstaff employee;
 - (x) [redacted Statement "2FS6"](#) of the mother and carer of a Flagstaff employee;
 - (xi) [redacted Statement "2FS7"](#) of the mother and carer of a Flagstaff employee;
 - (xii) [redacted Statement "2FS8"](#) of the mother of a Flagstaff employee;
 - (xiii) [redacted Statement "2FS9"](#) of the mother and carer of a Flagstaff employee;
 - (xiv) [redacted Statement "2FS10"](#) of the mother and carer of a Flagstaff employee; and
 - (xv) [redacted Statement "2FS11"](#) of the father and carer of a Flagstaff employee.

2.2 Where any of the above statements has:

- (a) been redacted, any redacted information is information that may be used to identify the identity of the persons noted in that statement, and has been excluded for confidentiality reasons. To the extent that any party wishes to obtain access to unredacted evidence it can be provided subject to that party entering into appropriate confidentiality undertakings agreed between the parties. Unredacted statements may also become the subject of a future application under section 594 of the *Fair Work Act 2009* (Cth) (**FW Act**); and/or
- (b) not been signed, we have been authorised to file documents in this form by the deponents, and identical signed versions of same will follow as soon as possible. Where applicable these signatures will be redacted in accordance with the above protocol.

2.3 The above material is in addition to materials previously filed by us in these proceedings.

3. HISTORICAL BACKGROUND

3.1 In order to place the AED Proposal into context, it is useful to explore the historical background associated with:

- (a) the incorporation of Disability Enterprises into the industrial relations system; and
- (b) the recognition of wage assessment tools used to determine pro-rata wage rates within the supported employment sector.

Overview and key events

3.2 The formal recognition of Disability Enterprises within the industrial relations system took place over a period of almost a decade. The key events in this process included:

Dates	Key events
2001-2003	Extension of the coverage of the <i>Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2005</i> (AP841959) (LHMU Award) to include several Disability Enterprises
2003	Examination of the industrial circumstances of the supported employment sector during the Australian Industrial Relations Commission's Safety Net Review Case process
2003-2005	Development of the Business Services Wage Assessment Tool (BSWAT)
2005	Variation to the LHMU Award to include the BSWAT
2006-2008	<ul style="list-style-type: none">• Ongoing refinement of the LHMU Award,• Decision to recognise a wider range of wage

	<p>assessment tools</p> <ul style="list-style-type: none"> • Unions sought to incorporate the entire supported employment sector to the LHMU Award • Introduction of the Special Business Services Pay Scales by the Australian Fair Pay Commission • Identification and recognition of 22 wage assessment tools (2006-2008)
2009-10	<p>Establishment of Fair Work Australia (as the Commission then was)</p> <p>Introduction of the Modern Awards, including the SES Award, which identified 30 wage assessment tools</p>

3.3 Over the period above, the supported employment sector evolved from one in which wages were largely unregulated, to one in which ADE wage determination formally recognised in the SES Award, with wages determined by a process based on assessment of supported employees' competency and productivity.

3.4 This process of recognition involved a wide range of parties and was presided over by relevant industrial bodies. It was not a process that took place in haste, and it included a comprehensive examination of both industrial and social policy considerations.

Detailed legal and industrial history

Pre-reform awards

3.5 Industrial regulation through awards and collective agreements has never been prevalent in the sector, with the LHMU Award being the main pre-reform award.

3.6 The *Federated Miscellaneous Workers Union Supported Employment Award (Flagstaff Group) 1991* was the first award made in Australia which covered wages and conditions of both workers with and without disability, and which provided industrial rights for people with disabilities previously carrying out activities in sheltered workshops.¹

3.7 Other pre-reform industrial instruments included:

- (a) the *Disability Services (Northern Territory) Award 2002* (AP818985);
- (b) the *Disability Services Award (Victoria) 1999* (AP778738);
- (c) the *Supported Employees Industry Award (Western Australia)* (AN160304);
- (d) the *Cooma Challenge Limited Business Services (State) Award (NSW)* (AN120555);
- (e) the *Endeavour Foundation Enterprise Award - State 2005 (Queensland)* (AN140106); and
- (f) the *Royal Blind Foundation Award - State 2003 (Queensland)* (AN140261).

¹ See statement of Chris Christodoulou dated 21 September 2017 at [18]-[20]

- 3.8 As at 2002, the LHMU Award did not contain specific wage assessment tools. Rather, it required employers to pay employees with a disability at the rate assessed by an employer for that employee in accordance with the employer's method of assessment at the time.
- 3.9 The LHMU Award also required that the employer and the union confer, with a view to reaching agreement on salary assessment system that properly remunerates people for their skills and abilities. Failing agreement, the matter could be arbitrated by the Australian Industrial Relations Commission.

Application to include the SWS in the LHMU Award

- 3.10 In 2005, the Liquor, Hospitality and Miscellaneous Workers Union (as United Voice then was) made an application to include the Supported Wage System as an approved wage assessment tool under the LHMU Award.²
- 3.11 The union subsequently reached a consent position with the other parties, and by its amended application the LHMU Award was varied by consent³ in 2005 to include 11 wage assessment tools that had been approved by the Department as satisfying the relevant standards set for the sector.⁴

WorkChoices and introduction of the Special Business Services pay scale

- 3.12 The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) preserved pre-existing disability wage arrangements in both federal and state systems, in the form of preserved Australian Pay and Classification Scales.
- 3.13 To address the gaps in coverage of statutory minimum rates of pay and access to pro rata wage arrangements, the Australian Fair Pay Commission determined a new *Special Business Services (Employees with a disability) Australian Pay and Classification Scale [2007] APCS 2*.
- 3.14 In May 2009, supported employment services were covered by one of three pay scales:
- (a) Special Business Services (Employees with a disability) Australian Pay and Classification Scale;
 - (b) the preserved Pay Scale derived from the *Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005*; or
 - (c) the preserved Pay Scale derived from the *Cooma Challenge Limited Business Services (State) Award*.

Award modernisation

- 3.15 In 2009, the AIRC commenced the award modernisation process under Part 10A of the *Workplace Relations Act 1996* (Cth).
- 3.16 The final form of the SES Award came about after consultation with stakeholders during the award modernisation process, which involved:

² As approved by the test case decision of the Full Bench of 10 October 1994, per O'Connor J, McIntyre VP and Gay C [Print L5723]

³ [PR961610]

⁴ The wage assessment tools were: The Business Services Wage Assessment Tool; The Civic Industries Supported Employees Wage Assessment Tool; The Elouera Association Wage Assessment Tool; The FWS Wage Assessment Tool; The Greenacres Association Competency Based Wages System; The Hunter Contracts Wage Assessment Tool; The PHT Wage Assessment Tool; The Skillsmaster Wage Assessment Tool; The Supported Wages System; The Yumaro Wage Assessment Tool and The Phoenix Wage Assessment Tool.

- (a) two draft awards being prepared by the LHMU and National Disability Services respectively in July and August 2009, with the former based on the LHMU Award; and
 - (b) a subsequent Exposure Draft of the modern award being published by the AIRC on 25 September 2009.
- 3.17 Both the LHMU and the National Disability Services draft party awards proposed that there be 30 approved wage assessment tools, although the use of certain tools was proposed to be limited to specific organisations to which the name of the tool refers.
- 3.18 The Exposure Draft of the Award published by the AIRC on 25 September 2009 largely reflected the terms of those draft party awards, and it also contained 30 wage assessment tools which were listed as being approved for use under the Award.
- 3.19 Following the release of the exposure draft, certain parties made submissions arguing that the restriction on the use of the tools be varied to permit parties who were using one of the restricted tools as at 27 June 2005 to continue using the tool.
- 3.20 When the SES Award was formally made on 4 December 2009, the AIRC indicated that the Award to a large extent reflected the terms of the exposure draft which had been developed with the assistance of the parties throughout the Award Modernisation process. However, the Tribunal also decided to:
- [91] provide that those organisations previously permitted to apply an otherwise restricted Wage Assessment Tool (WAT), on or before 27 June 2005, might continue to do so. To do otherwise is likely to create instability for those services involved, although it is not our view that in the future service specific WATs should be taken as appropriate to another service without it being evident that there are circumstances justifying such an approach.
- 3.21 Accordingly, when the Award was made, it contained 30 approved wage assessment tools that Disability Enterprises could choose from. However the use of approximately five of those tools was partly restricted.
- 3.22 The SES Award came into effect from 1 January 2010.

Quality assurance for supported employment

- 3.23 The Quality Strategy for disability employment was introduced in 2002. All Australian Government funded services were required to be independently certified against the 12 Disability Services Standards⁵ by December 2004.
- 3.24 Disability Enterprises needed to meet the requirements of the Quality Assurance system to receive funding from the Commonwealth Government. The legislation containing this requirement was the *Disability Services Act 1986* (Cth).
- 3.25 At the time the relevant Disability Services Standard for assessing compliance with industrial relations provisions was Standard Nine (Employment Conditions).

Each person with a disability enjoys comparable working conditions to those expected and enjoyed by the general workforce.

⁵ <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/research-into-pro-rata-wage-assessment-tools-for-people-working-in-business-services?HTML>

3.26 The two key supporting standards were:

9. The agency ensures that each employee with a disability receives award wage rates or pro-rata award wage rates determined through an independent industrial relations process.

10. The agency ensures that each employee is employed under an award or industrial agreement.”

3.27 *A Guide to Good Practice Wage Determination for Business Services* noted several key components of a best practice wage assessment process/tool for Business Services, as identified in a research and consultation project conducted by Health Outcomes International on behalf of the Commonwealth Department of Family and Community Services. The key components were:

(a) Wage tools should comply with relevant legislation, including the:

(i) *Disability Services Act 1986* (Cth);

(ii) Disability Services Standards;

(iii) *Disability Discrimination Act 1992* (Cth) (the **DD Act**); and

(iv) *Workplace Relations Act 1996* (Cth);

(b) Industrial Relations Considerations;

(c) Rigour of the assessment process;

(d) Nature of assessment;

(e) Linking assessment to training; and

(f) Payment of a fair wage

3.28 In December 2013 all Australian jurisdictions endorsed a revised set on *National Standards for Disability Services*.⁶ These new Standards are applicable to Australian Disability Enterprises. Standard six, Service Management, covers employment conditions in Disability Enterprises.

4. GROUNDS FOR OPPOSITION TO THE AED PROPOSAL

i. Competence/skills-based wage assessment is permitted under the FW Act

4.1 In their submissions in support of the AED Proposal,⁷ AED Legal have argued that clauses 14.4(a) and (b) of the SES Award, which facilitate the inclusion within that instrument of wage assessment tools, are invalid (save for the SWS) and cannot be included in the SES Award because they:

(a) offend section 153(1) of the FW Act, in that they discriminate against an employee “because of” their “physical or mental disability”; and

(b) are not otherwise saved by section 153(3)(b) of the FW Act, because the discrimination referred to above does not occur “merely” because it provides for minimum wages for “all employees with a disability, or a class of employees with a disability”.

⁶ <https://www.dss.gov.au/our-responsibilities/disability-and-carers/standards-and-quality-assurance/national-standards-for-disability-services>

⁷ Outline of Submissions of the AED Legal Centre, 3 October 2017

All wage assessment tools, including the SWS, include terms that “discriminate” under section 153(1)

- 4.2 It is important not to conflate the test in section 153(1) with the separate test for disability discrimination deriving from the DD Act, which was the subject of judicial consideration in *Nojin*⁸ (to which we will return below). The test here stands alone.
- 4.3 All of the approved wage assessment tools in 14.4 (b) of the SES Award, including the SWS both before and after the AED Proposal, include terms that “discriminate” against employees with a disability, in the sense contemplated by section 153(1) of the FW Act (and reading that provision in isolation), in that they permit an employee with a disability covered by the SES Award to be paid less because of their disability.
- 4.4 The AED Proposal would not (and cannot) remedy this form of discrimination, in that any employee with a disability assessed below 100% under the SWS will continue to receive a rate of pay which is a subset of the full minimum rate available to an employee without a disability.
- 4.5 The difference in approach between SWS and the other wage assessment tools rests not in the inherently “discriminatory” way in which they approach payment of wage to employees with a disability, but rather in how those wages are calculated (i.e. by reference to productivity, competence/skills, or a mix of both).
- 4.6 **However**, the relevant question is whether terms of this nature are “discriminatory terms” for the purposes of section 153.

Discrimination based on competence is permitted under section 153(3)(b)

- 4.7 AED Legal have raised a number of arguments as to why section 153(3)(b) of the FW Act is not enlivened with regard to non-SWS wage assessment tools, including that one or more of these tools:
- (a) contain one or more competence components, and therefore conflate “*the mode of performance by an individual employee with work value*”;
 - (b) include competence components which are based on employee behaviour;
 - (c) provide “*multiple methods*” for calculating wages; and/or
 - (d) do not otherwise merely provide for minimum wages for all disabled workers.
- 4.8 None of the above arguments withstand scrutiny, having regard to the fact that:
- (a) the express words of section 153(3) do not require that all employees with a disability be paid the **same** minimum wage. The section uses the words “minimum wages”, rather than “*minimum wage*”. Applied to this scenario, this is consistent with the existence of different minimum wage rates under different wage assessment tools, provided that those tools pertain to employees with a disability and are otherwise authorised under the SES Award; and
 - (b) the words in section 153(3)(b) contemplate the payment of a minimum rate of pay for a “*class of employees with a disability*”. This is compatible with a wage assessment methodology which classifies employees into classes, having regard to

⁸ *Nojin v Commonwealth of Australia* [2012] FCAFC 192

their competence and/or skills, and/or uses different approved wage assessment tools as applicable and suitable to different kinds of work and/or disability.

4.9 In addition, AED Legal have sought to read the word “*merely*” in section 153 to mean “*does no more than*”. Applying this approach, a modern award clause can only comply with section 153 if it goes no further than the precise words of section 153(3)(b).

4.10 This reasoning is, with respect, ill conceived. The use of the word “*merely*” in the context of section 153 cannot be reasonably read in this manner; it is simply intended to mean that a term in a modern award which contains a provision to this effect will not be a discriminatory term merely by virtue of the inclusion of that particular provision.

ii. Competence/skills-based wage assessment is lawful

4.11 AED Legal has cited the decision in *Nojin* as authority for the principle that competence/skills-based wage assessment is unlawful.⁹

4.12 Contrary to these assertions, *Nojin* in no way acts as an authority for the proposition that any and all wage assessment tools that have regard to competence and/or skills offend the DD Act. Rather, it must be confined to its own facts, including that the two intellectually disabled employees in question were:

- (a) less able to achieve a favourable assessment than non-intellectually disabled employees, because the assessment of competencies was conducted in a question and answer format whereby employees were required to answer theoretical and abstract questions, including the assessment of general competencies conducted without reference to whether the competencies were actually required for the relevant position; and
- (b) more likely to become stressed and adversely affected by the “test” format of assessment, as opposed to an assessment format that involves observing the employees perform their work and demonstrate the relevant competency over a gradual period of time.

4.13 *Nojin* stands only for the proposition that the incorrect application of a flawed methodology by the Disability Enterprises for the two employees in question, coupled with the lack of a defence either available to (or relied upon by) these organisations (such as under section 47 of the DD Act) resulted in a finding that these individuals had their pro rata wages determined on an incorrect basis.

4.14 It does not follow that other wage assessment methodologies, including those which properly assess of skills and competencies that are directly relevant to the performance of a job and the quality and quantity of the goods or services produced, are unlawful or otherwise invalid.

4.15 Any consideration of the principles in *Nojin* to supported employment in general should also have regard to the fact that the employees in *Nojin* had an intellectual disability, while the broader supported employee workforce includes people with physical and sensory disabilities, epilepsy, acquired brain injury and controlled mental health conditions.

⁹ AED Legal Outline of Submissions at [28]; Statement of Paul Cain at [64]-[66]

iii. The AED Proposal is not justified by work value reasons

- 4.16 Contrary to AED Legal's submissions,¹⁰ by altering the mechanisms by which Disability Enterprise can assess the wages of their employees, the impact of the AED Proposal would plainly be to vary award minimum wages for employees with a disability who are covered by the SES Award.
- 4.17 In this regard, section 156(3) of the FW Act specify that the Commission can only make an order varying modern award minimum wages if it is satisfied that the variation is justified by "work value reasons", which are defined in section 156(4) to include:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work; and
 - (c) the conditions under which the work is done.
- 4.18 The ability to demonstrate (or acquire) relevant skills and competency is a fundamental concept that is applied to the vast majority of employees across the Australian economy and its workforce. Removing this factor from wage setting for supported employees will produce a critical disconnect between the work performed and its work value for the purposes of section 156(4). Evidence filed in these proceedings demonstrates that this is highly likely to have disastrous implications for Disability Enterprises and supported employees.
- 4.19 In addition, ignoring relevant skills and competencies when determining a wage effectively precludes the rewarding of an employee for skills acquired and compromises employees' promotion opportunities. It may also serve to devalue supported employees by limiting them to positions at the Grade 1 or 2 levels of the SES Award.

iv. The AED Proposal is inconsistent with the modern awards objective and the minimum wages objective

- 4.20 In considering the AED Proposal, the Commission must be satisfied that the changes sought to the SES Award are consistent with:
- (a) the modern awards objective in section 134 of the FW Act; and
 - (b) the minimum wages objective in section 284 of the FW Act.
- 4.21 Factors weighing firmly against the granting of the AED Proposal in relation to the modern award objective are the impact this proposal would have on:
- (c) the need to promote social inclusion through increased workforce participation; and
 - ...
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- 4.22 With regard to the minimum wages objective, strongly weighing against the granting of the AED Proposal are the obligation on the Commission to maintain a safety net of fair minimum wages, while:
- (b) promoting social inclusion through increased workforce participation; and

¹⁰ Ibid, at [11]

...

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

4.23 Evidence filed in these proceedings, including statements from supported employees, families and carers and Disability Enterprises establishes beyond any doubt:

- (a) the social value and importance of employment for employees with a disability;
- (b) the inherent flaws of the SWS as a method of wage assessment; and
- (c) the very significant impact on costs and job losses of an SES Award that imposes the SWS (being a tool designed for open employment) as the only method of wage assessment in supported employment.

Australian Business Lawyers & Advisors

For National Disability Services, Australian Business Industrial and the NSW Business Chamber

21 November 2017

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

Supported Employment Services Award 2010 (AM2014/286)

The *Supported Employment Services Award 2010* is varied as follows:

- [1] By deleting definition of “employee with a disability” at clause 3.1.
- [2] By inserting a new definition of “employee with a disability” at clause 3.1 that reads as follows:

employee with a disability means a national system employee:

- (a) for whom competitive employment at or above the relevant award wage is unlikely; and
- (b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment; and
- (c) meets the disability requirement in order to qualify for the Disability Support Pension; and/or
- (d) is eligible for support under the NDIS.

- [3] By deleting the definition of “supported employment services” at clause 3.1.
- [4] By inserting a new definition of “supported employment service” at clause 3.1 that reads as follows:

a **supported employment service** is an enterprise for which the majority of its employees meet the definition of “employee with a disability”, as defined in this award.

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- [5] By inserting a new definition of “supported employment services” at clause 3.1 that reads as follows:

supported employment services are services conducted by a supported employment service, as defined in this award.

- [6] By inserting the words “clause 14.7” into clause 14.2 so that it commences as follows:

Subject to clauses 14.3, 14.4, 14.5 and 14.7....

- [7] By inserting a new clause 14.7 to read as follows:

If a supported employment service does not choose to use an approved wage assessment tool in accordance with clause 14.4, an employee with a disability will be paid in accordance with the Work Value Classification ~~Tool~~Structure as set out in Schedule I.

- [8] By inserting a new Schedule I that reads as follows:

Schedule I - Work Value Classification ~~Tool~~Structure

1. DEFINITIONS

1.1 Definitions to be Applied

Definitions used in this Schedule are set out in Annexure B.

2. CLASSIFICATION OF AN EMPLOYEE WITH A DISABILITY

2.1 Employer to classify an employee with a disability

Subject to clause 2.7 below, the employer will classify an employee with a disability into the relevant classification set out in Annexure A.

No employee will remain in the Training and Assessment Level for a period of more than six months or 600 hours, whichever comes first.

The classification of employees made in accordance with this clause is to be carried out by a suitably skilled person, and appropriate documentation in relation to classification must be kept for review or dispute purposes.

2.2 Reassessment for reclassification to a higher Level

Having initially classified an employee in accordance with this Schedule, the employer will review the classification of an employee at least every two years as part of the employee's individual plan to determine whether the employee should be reclassified to a higher Level.

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2.3 Reclassification to a higher Level

If, having undertaken a reassessment under clause 2.2 above, the reassessment demonstrates that the employee can consistently perform work at a higher Level, the employer will reclassify the employee into the higher Level effective from the next full pay period.

2.4 Reassessment for reclassification to a lower Level

From time to time an employee may no longer be capable of performing work at the Level they are classified in. Where, after having observed the employee over a period of not less than six months, an employer reasonably believes this to be the case, they may reassess the employee to determine whether they can no longer reliably perform work at the Level the employee is classified in.

2.5 Reclassification to a lower Level

If, having undertaken a reassessment under clause 2.4 above, the employer demonstrates that the employee can no longer consistently perform work at the Level the employee is classified in, the employee may be reclassified to a relevant lower Level, provided that the employer:

- (a) gives the employee concerned no less than eight weeks' notice of their intention to reclassify the employee;
- (b) provides the employee the opportunity to be represented by their union or advocate in any further discussions in relation to the employer's intention; and
- (c) having consulted the employee, gives the employee two weeks' notice of the reclassification.

The employee will have the right to have the matter dealt with as per the grievance procedure set out in this award.

2.6 Progression to full award rate and/or open employment

Once a person has reached Level D, a discussion will take place with the employee about their employment aspirations, including their ability to transition to a full award wage within the organisation or options which might be available should the employee want to work in open employment. The result of such discussions will be recorded in the employee's individual plan or relevant documentation.

2.7 Employees carrying out majority of their duties above Grade 2

A employee with a disability carrying out the majority of their work at Grade 3 level or above in the award will be assessed under the Modified Supported Wage System.

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3. RATE OF PAY

3.1 Weekly Ordinary Rate

An employee classified in accordance with clause 2 above will be paid at the percentage of the weekly ordinary rate of pay set out in the Wages Table below:

Each employee will have their output assessed within their skill level using the **Output Guidelines in Annexure D** to determine their wage point within the level.

Output at each level will be determined as follows:

- (a) if 25% or under output on average across level work, the first wage point will apply;
- (b) if over 25% on average across level work but under 50%, the second wage point will apply;
- (c) if over 50% on average across level work but under 75%, the third wage point will apply; and
- (d) if 75% and over, the fourth wage point will apply.

Level Grade 2 SESA Award	Percentage of weekly ordinary rate of pay
Training and assessment Level	12.5%
Level A	
A1	15%
A2	20%
A3	25%
A4	30%
Level B	
B1	30%
B2	35%
B3	40%
B4	45%
Level C	
C1	45%
C2	50%
C3	55%
C4	60%
Level D	
D1	70%
D2	80%
D3	90%
D4	100%

4. REVIEW OF DECISION TO CLASSIFY AN EMPLOYEE AT A LEVEL

4.1 Right to review classification

Each of the persons set out in clause 4.3 below may seek a review of the employer's decision to classify an employee in a particular Level.

4.2 Review process

A review of an employer's decision issued in accordance with clause 4.1 above will be conducted in accordance with the following procedure:

- (a) The review will first be discussed between the person seeking the review and the employer; and then if the matter remains unresolved.
- (b) Either party can notify the matter to the Fair Work Commission in accordance with clause 9 of the award (Dispute Resolution) and the matter will then be dealt with in accordance with that clause.
- (c) For the purposes of this review the Fair Work Commission may utilise a qualified independent assessor to assist it in resolving a dispute in relation to an employee's classification.

4.3 Persons Eligible to Seek a Review

The following persons may seek a review in accordance with clause 4.1 above:

- (a) the employee concerned;
- (b) a legal guardian of the employee, or
- (c) if authorised by the employee/legal guardian concerned:
 - (i) a registered employee organisation of which they are a member and which is entitled to represent their industrial interests at the employer's workplace;
 - (ii) a parent of the employee; or
 - (iii) a disability advocacy organisation.

Annexure A - Classification Descriptors

A.1 Training and Assessment

An employee at this Level is undergoing training and assessment. The employee has rudimentary Base Work Skills. During the employees time at this level they will:

- (a) require a very high level of Work Support;
- (b) continuously require Personal Support;
- (c) always requires their work to be closely and directly supervised;
- (d) not work to any pre-set pace;
- (e) requires the quality of their work to be constantly checked; and
- (f) during their employment at this level are being assessed as to their future skill level.

An employee will only remain classified at the Training and Support Level for six months or 600 hours, whichever comes first, at which time they will either be offered a permanent position or not.

A.2 Level A

An employee at this level has rudimentary Base Work Skills and:

- (a) is directly supervised;
- (b) continually requires a high level of Work Support;
- (c) continually requires Personal Support;
- (d) is incapable of organising their own work;
- (e) does not work to any pre-set pace;
- (f) has some difficulty staying on task or remaining at their work station;
- (g) requires the quality of their work to be constantly checked; and
- (h) performs very basic tasks.

A.3 Level B

An employee at this level has intermediate Base Work Skills and:

- (a) is directly supervised;
- (b) requires a high level of Work Support;
- (c) requires Personal Support;
- (d) is incapable of organising their own work but can communicate with their supervisor/trainer if they have some issues with their work;
- (e) does not work to any pre-set pace;
- (f) generally stays on task but can be distracted and/or leaves their work station unnecessarily;
- (g) has the quality of their work routinely checked; and

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- (h) is capable of performing a variety of basic tasks and in training to perform more complex tasks.

A.4 Level C

An employee at this level has intermediate Base Work Skills and:

- (a) is directly supervised;
- (b) requires a moderate level of Work Support;
- (c) occasionally requires Personal Support;
- (d) is capable of organising some of their own work with the assistance of their supervisor;
- (e) stays on task unless distracted by others;
- (f) requires the quality of their work to be periodically checked by their supervisor; and
- (g) is generally capable of performing all basic tasks and some complex tasks.

A.5 Level D

An employee at this Level has achieved good Base Work Skills and:

- (a) is directly supervised;
- (b) requires limited Work Support;
- (c) occasionally requires Personal Support;
- (d) is capable of organising their own work with the assistance of their supervisor;
- (e) assists other employees in their work group by leading by example;
- (f) works at a pace with pre-determined output targets agreed to with their supervisor;
- (g) generally stays on task;
- (h) has the quality of their work occasionally checked by their supervisor; and
- (i) can mostly perform complex tasks within Grade 2.

NOTE: An employee who has the ability to carry out tasks at a higher level will not be paid at a lower level simply because higher level tasks are not available.

Annexure B - Definitions

B.1 Personal Support

- (a) **"Personal Support"** is the care and support of an employee with a disability in the workplace provided by a trainer and/or supervisor.
- (b) Personal Support may take many forms including:
 - (i) encouragement;
 - (ii) mentoring;
 - (iii) counselling; and/or
 - (iv) behavioural intervention.
- (c) Personal Support may relate to different issues in the workplace including:
 - (i) interpersonal skills;
 - (ii) life issues;
 - (iii) personal needs; and/or
 - (iv) personal behaviour.

B.2 Work Support

- (a) **"Work Support"** is the support of an employee with a disability in the workplace provided by a trainer and or supervisor including:
 - (i) the design of work tasks (including the disaggregation of work tasks to sub-tasks) tailored to the employee to allow them to perform a productive task;
 - (ii) coaching and/or training in Base Work Skills and/or work tasks and/or the use of machinery; and/or
 - (iii) coaching and/or training in communicating with others in the workplace or commuting to and from work.

B.3 Base Work Skills

- (a) **"Base Work Skills"** refers to an employee's ability to:
 - (i) work safely;
 - (ii) follow instructions;
 - (iii) perform their work at a reasonable pace;
 - (iv) have fewer errors associated with their work;
 - (v) stay on task;
 - (vi) remain at an employees workstation or area;
 - (vii) not disturb the work of others or workflow generally;

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- (viii) be punctual and reliable with respect to work attendance;
and
- (ix) alternate between tasks on which they have been trained.

B.4 Rudimentary Base Work Skills

- (a) A person at this level finds it difficult to stay on task and is easily distracted. The person can stay on task but only if the supervisor/trainer is in close proximity. The person needs reminding of work related issues and needs time to develop their understanding of new tasks. The person will have very limited ability to alternate between tasks during the course of their work day. A person at a rudimentary level must be constantly observed with respect to work health and safety issues as their ability to carry out their duties can be limited.

B.4 Intermediate Base Work Skills

- (a) A person at this level generally can stay on task for periods of time (e.g. an hour at a time) but not at a consistent pace. A person can be distracted by other things happening in the workplace. A person at this level can generally learn new tasks within their skill level and have a very basic understanding of work health and safety issues in their immediate work area under the observation of their supervisors/trainers. The person will have a basic ability to alternate between different tasks similar in nature during the course of their work day.

B.5 Good Base Work Skills

- (a) A person at this level generally stays on task at a reasonable pace as determined with their supervisor. The person is rarely distracted and has a basic understanding of work health and safety issues with respect to the work they are carrying out. A person at this level can pick up new work tasks following initial training or instruction reasonably well. The person will be able to alternate between different tasks during the course of their work day. A person at this level can also communicate reasonably well with their supervisor/trainer regarding work issues. A person at this level does not require ongoing motivation other than when they require Personal Support.

Annexure C - Indicative Task Schedules

C.1 Most duties of employees with a disability are contemplated in Grade 2 of the award. The duties of employees with a disability and (and as a consequence tasks) vary greatly between and within different supported employment services. In many cases employees with a disability can carry out only some tasks of a whole duty. Within a duty tasks may vary in complexity. Indicative tasks to be undertaken by an employee are referenced for each Level in the classification structure set out in this Schedule in accordance with the definitions below. Each employer will hold a register of tasks relevant to their enterprise which are consistent with the definitions below. These tasks will be reviewed from time to time by the employer.

C.2 Level A tasks - very basic tasks

This involves tasks which are elementary and simple to carry out. Such tasks are easy to complete and can be carried out in a sitting or stationary position. Typically it would involve very basic packing or assembly or work involving simple jigs or templates that have been created to guide the employee. Such tasks are not considered to have significant work health and safety risk.

C.3 Level B tasks - basic tasks

This involves tasks which involve more physical movement, but (like very basic tasks) are easy to complete. At this level quality issues are more susceptible. Easy to use machinery tools or mechanisms may be used to complete a task. Tasks require a very basic understanding of work health and safety issues associated with their work.

C.4 Level C tasks - more complex tasks

This involves tasks where initiative is greater than basic tasks and where work health and safety issues are of greater significance. This includes the use of more complex tools and or machinery and /or where the work to be carried out requires greater levels of communication skills. Tasks at this level may also involve greater productive interaction with the workers without disabilities or in the service sector interaction with the public. The tasks require a basic understanding of work health and safety issues associated with their work.

C.5 Level D tasks - complex tasks

This involves a person who is capable of carrying out a wider variety of the work outlined in Grade 2 of the award and as such with general training and ongoing direct supervision and support can carry out most tasks requested of them.

The person would still require a limited level of Personal Support and/or Work Support. A person at this level would be required to have a general understanding of work health and safety matters

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Annexure D - Output Guidelines

- D.1** To determine an employee with a disability's output and hence wage point within their classification Level, the following will apply.
- D.2** A employee with a disability will be assigned a range of tasks within their level. The employee's wage point within the Level will be determined by their output as follows;
- (a) If 25% or under output on average across the level work, the first wage point will apply;
 - (b) If over 25% on average across level work but under 50%, the second wage point will apply;
 - (c) If over 50% on average across level work but under 75%, the third wage point will apply; and
 - (d) If 75% and over, the fourth wage point will apply.
- D.3** The employee with a disability output will be benchmarked against a person who has carried out the same task who does not have a disability. Such benchmarks can be historical as long as they have been updated within a four year period or if required to be updated in the case of a dispute relating to the wage point.
- D.4** The comparative count will occur over a two hour period, allowing for a 30 minute hour count on each of four tasks that the employee spends the majority of their time on. The average percentage of the outcome of all four counts will determine the output percentage figure for the level and thus determine the wage point within the level.
- D.5** The following are examples:

The employee with a disability is at Level B of the Classification Structure

Task	Supported employee	Benchmark	%
<i>Task 1</i>	<i>50</i>	<i>100</i>	<i>50</i>
<i>Task 2</i>	<i>210</i>	<i>350</i>	<i>60</i>
<i>Task 3</i>	<i>65</i>	<i>180</i>	<i>36</i>
<i>Task 4</i>	<i>35</i>	<i>100</i>	<i>35</i>
Average %			45 %

Based on the above calculation an employee with a disability classified at Level B will be paid at level B2, which is 35% of the minimum rate.

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The employee with a disability is at Level C of the Classification Structure

Task	Supported employee	Benchmark	%
Task 1	40	100	40
Task 2	210	350	60
Task 3	50	180	28
Task 4	35	100	35
Average %			41 %

Based on the above calculation, an employee with a disability classified at Level C will be paid at level C2, which is 50% of the minimum rate.

- [9] By amending clause 20.3 of the award to read as follows (underlined text is new to the clause):

Where work is carried out on weekends, payment will be at time and a half on Saturdays and double time on Sundays, other than for employees engaged in:

- (a) catering services, who will be paid at the rate of time and three quarters on Sunday;
- (b) the retail industry, who will be paid at time and a quarter on Saturday and double time on Sundays and
- (b) the fast-food industry, who will be paid at the rate of time and a quarter on Saturday and time and a half on Sunday.

- [10] By amending clause 20.5 of the award to read as follows (underlined text is new to the clause):

By agreement between an employer and an employee, an employee who works their rostered hours of work or hours in a rotating roster shift which finishes after 12.00 midnight and at or before 8.00 am Monday to Friday, will be paid for the whole shift 30% more than their ordinary rate.

The determination will operate on and from [date].

BY THE COMMISSION