In the Matter of

AM2014/286 – SESA proposals

Response to Full Bench Statements of the Fair Work Commission issued

16th. April 2018 and 11 September, 2018

We express our disappointment that the applicant parties (*AED Legal Services, Health Services Union and United Voice Union*) in these matters have refused to co-operate in a mediation process to advance the design of the proposed new wage assessment system as laid out in the Interim Decision issued by the Full Bench of the Fair Work Commission dated 16 April, 2018.

We firmly believe (on behalf of the employees, their families and carers) there was great merit in reaching some common ground about what the new system might look like, what changes might have been required, and how the new system would be rolled out, costed and delivered in the ever-changing climate of the new NDIS (National Disability Insurance Scheme).

Additionally the reality is that there are reducing job opportunities for all Australians (both able-bodied and disabled) and increased competition from overseas continues to threaten the type of jobs that best suit our disabled family members. Australia does not want to relive the international experience (attested to during the Hearings) of closing supported employment services in the name of "rights" and have those thousands of workers re-jigged in national unemployment statistics with little or no possibility of alternative employment options. We need to learn from the overseas experiences – not re-live it.

Our Australian Disability Enterprises (ADE's) are not just a workplace for our supported employees. They are, in many cases, the centre of their world. We need, collectively, to ensure the sustainability of our ADE's, as they re-profile to meet the demands of an increasingly automated employment industry and more inclusively integrated society that aligns with the NDIS – now being rolled out throughout Australia. .

As directed at **[6]** of the FWC Statement issued 0n 11 September, 2018 we provide our submission to:-

(i) The merits of the Provisional Views expressed in the Statement dated 16 April, 2018 and

(ii) The possible design and implementation of the new wage assessment mechanism outlined in that Statement, should the Full Bench ultimately determine to proceed with the provisional views expressed there-in.

1. Provisional Views expressed in Statement issued 16 April, 2018

(i) We support, in general, the views expressed in the Interim Decision Notice. On the basis of the substantive issues raised during two weeks of formal arbitration, witness statements provided by some of our supported employees, their families and carers and the physical evidence gathered by Commission Members who visited actual work-sites engaged in typical day-to-day activities, we believe your provisional views are realistic, fair and provide what seems to be a simpler system for employers to deliver the ultimate goal. That goal is the opportunity of a job for our disabled family members. A job that is remunerated fairly, removed from the ideological arguments of supported employment v segregated employment and delivers the dignity of employment, self-esteem and social acceptance for our disabled ADE family members – in accordance with their right of choice.

(ii) As a voice for our disabled ADE employees and family members we especially commend Para **[15]**(1) of the Interim Decision. This endorses, independently, the views of our supported employees, were they able to express it so eloquently. As their voice during these 4 years of industrial insecurity we, their families and carers, have never sought to preserve the status-quo. Rather we have battled against the well- resourced applicants (in this case) to ensure that the limited opportunities for our disabled family members were not removed because of ideology and insolvency. The SWS wage tool, the mandatory imposition of which was the case argued by the applicants, was designed for competitive open employment – not supported employment. The SWS, if accepted as the only wage assessment tool, threatened the existence of supported employment opportunity throughout the length and breadth of Australia.

(iii) We acknowledge the complexity of the existing system of Wage Assessment Tools (WAT's). Their number and specific orientation to specific tasks needed to be overhauled and reviewed as part of the Modern Award Review. The Commission might not have agreed with the Wage Classification System (ABI/NSWBC model) which we supported, but the suggested system (not necessarily the espoused model), has withstood closer scrutiny and holds some merit for further analysis.

(iv) Whilst supporting the provisional decision we remain very concerned about the lack of commitment, thus far, from the Commonwealth. The new system will need trialling. there will be a need for training, education, inductions and delivery. The new system must deliver viable services that do not deny entry to the most vulnerable – simply to ensure viability of the service. Every job counts – for our workers.

(v) Again – the time frame over which this new system needs to be trialled, costed and delivered – is critical to the industrial solution with which the Fair Work Commission has been charged. That time frame – whatever it is - directly impacts on the lives of our disabled workers, their families and carers, as well as the success, or failure, of a new system designed to deliver an equitable, non-discriminatory wage for our disabled workers. We strongly disagree with the insistence by the applicant parties (*S26.page 8 of their submission dated 16/7/18*) that the Commission *"specify a short transitional period rather than a longer one, and urge against the phase out period being fixed by reference to the embryonic nature of the hybrid model".* Their request defies commercial and best business practice. It is akin to mandatorily implementing a new national computer system without reference to costs, impacts and overall feed-back. We again plead for a transition period that is realistic and capable of being implemented, sustainably, throughout the nation's diverse range of supported employments sites – none of which are the same. The lives and jobs of our disabled family members depend on a realistic and achievable transition period.

2. IMPLEMENTATION OF THE NEW WAGE SYSTEM

(i) Supported employees need, and are entitled to, security. The current insecurity created by ideological warfare has gone on since 2003. That has to end- sooner rather than later. We, as families and carers, and our disabled supported employment family members cannot curtail the rights of the applicants, but it has been shown that they are unrepresentative of the workers, themselves. Given the opportunity to provide the Court with evidence of services, supporting the legitimacy of their claims, there was no availability of services for us to inspect or employers, families and carers to cross-examine. There remains no guarantee that the applicants will not now pursue their alleged grievances through other legal avenues – as has been their history. (*Refer Appendix 1*).

(ii) Despite the enormity of the task now facing the Commission, and in the absence of any mediation or conciliation to narrow the parameters of the issue for your deliberation – we all need a final industrial decision.

(iii) Given a final industrial decision we then need some commitment from the Commonwealth – because the social issues are not the domain of the Fair Work Commission. We note by submission from the Commonwealth dated 4 July, 2018 there is a commitment for them *"to provide up to $0.95million to support any agreed trail and analysis activities in the Commission to inform a new wage assessment approach under the Supported Employment Services Award 2010* ". Only time and implementation will inform the service providers, the workers, their families and carers of how this new system will be bedded down, how the contracted work within services will be "sized", costed and the productivity of the efforts of the workers measured.

(iv) Sole carriage of this issue on behalf of our supported employee members, their families and carers remains with Our Voice Australia, in the future, as it has done, in the past. We remain an un-resourced voice for our supported employees, their families and carers- at the dictates of the applicant parties and their office and industrial resources. To date our applications to the Commonwealth for resources, other than our own personal ones, to participate at the same level as the applicant parties have been refused. Our disabled family members must continue to be given a

voice, as distinct from the service providers in this matter, and we will continue to do our very best to ensure that. We have a good working relationship with National Disability Services, but we represent the workers, their families and carers – not the services. We just need to ensure the services remain viable – and are not forced to close.

(v) We believe that, without any ability to mediate or conciliate with the applicant parties (at their insistence) there should be some type of working party overseeing the implementation of the final decision- whatever the Commission determines it to be

(vi) When the final determination is made by the Commission we would suggest there should be some definitive action plans and time-lines to test and cost the new system. The Commonwealth should have a definitive role in that – consistent with their Summary of Consultation with Supported Employees (14 May, 2018) (*Refer Appendix 2)* and their previously mentioned commitment of a defined amount to *'support any agreed trial and analysis activities".*

(vii) The issue of job-sizing, and how that is industrially achieved, must reflect the wide variety of tasks (and jobs) that are the core basis of contracts tendered for, and subsequently providing the jobs for our disabled family members at the local services throughout Australia. We know that some jobs are "one-ups" – so the system, however it is finally designed, must be flexible and fair enough to "size up" a task – as part of a job – as part of a final product – then measure the productivity to determine a price – for sale and for remuneration to the employees producing it. We cannot provide comment on this without discussing the issues with national service providers. We should be able to do so before the scheduled Hearings but wish to retain our right to address that at that time. With the absence of conciliation, as well as mediation, there has been no ability for us to "flesh out" the issues around sizing, trialling, costing and productivity, because of our lack of resources.

(viii) Critical to the introduction of a new classification system, the issue of "non-productive" time in the workplace, and how it is industrially treated, remains a matter of great concern for us, as families and carers. Our disabled family members have more significant workplace issues than most employees. This dictates the levels of individual supports required. That support level is never a constant, as we, their families know only too well. We are also aware that the support levels and incidental issues on the floor of the workplace create further disruption issues for fellow workers. "Assessment day" at the workshop, is one of heightened anxiety for our family members, as well as one when they are aware they have to be "fast" and "do it well" – for that day. That often produces an above average response. We offer no solutions, other than advocating for a good understanding of what it is, its impact, and the need for flexibility in both interpretation and implementation. Non-productive time in supported employment is a very different "training" issue to that in open/competitive employment. Our disabled family members can have more than the average "bad" day, what they learn to-day could be forgotten to-morrow and the re-inforcement of routines and requirements needs to be more regular and more consistently provided.

(ix) We have provided submissions, yet to be determined, relating to the support available in the workplace for our disabled employees when dealing with workplace issues. We contend the current mechanisms for workplace change and grievance

require better understanding and education about workplace rights for our employees, their families, carers and/or advocates/nominees. We have suggested that there could/should be a process written into the modern Award to address this and we await a final determination

We provide these comments as our submission under your direction at **[6]** of your Statement issued on 11 September, 2018. We ask that it be accepted without any prejudice to any submissions we might wish to make at any future date in relation to these matters.

We also thank the Commission for their consideration, time and understanding of the unique needs of our disabled family members throughout the past 4 years, and whatever the future holds as this new wage system is defined, costed and implemented.

Sincerely,

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Appendix 1

As our disabled supported employees, their families and carers struggle to deal with employment changes and insecurity, we do so in an environment of insecurity and unheralded change with the NDIS (National Disability Insurance Scheme) roll out across our nation. We have all worked hard for this new entitlement system for people with a disability – their families and carers - but it is a matter of recorded fact that there are considerable "glitches in the system" still to be worked through – 5 years later.

It is a commercial and practical reality that all new systems have those glitches. No doubt the embryonic hybrid wage system will also experience those issues.

With a basic lynch-pin of "choice and control" as the foundation of the NDIS – many of our members lack the capacity to exercise either - without considerable advocacy and emotional support. This is often provided by their families who remain, in many cases, the primary carers.

As we all plan to move forward we need to remember that the applicant parties will, based on their history, use all their "rights" to obtain their own organisational goals. We respect their right to do so – but it is relevant to refer to the latest example of their rights-based advocacy determined in the Administrative Appeals Tribunal in case number **2016/0787** dated 11 December, 2017.

This was presided over by Deputy President Kenny and Senior Member Poljak and was the case brought by People with a Disability Australia against the Australian Human Rights Commission in the Sydney Registry. On behalf of our supported employee members, their families and carers, Our Voice Australia was an adjoined party to these proceedings, at our own cost. We were the only voice for our affected workers, their families and carers. The applicant case sought to over-turn the extension granted by the Human Rights Commission for our Australian Disability Enterprises (ADE's) to transition from the use of the BSWAT (Business Services Wage Assessment Tool) to any other industrially approved alternate tool.

The full transcript of the case is available from the relevant agency as AAT2016/0787. The Decision and Reasons for decision in AAT2016/0187 & 2016/1854 was delivered, under the General Division on 19 June, 2018.

Four (4) of the findings of that case are relevant to *FWC - AM2014/286-* because the action includes some of the same applicant parties. We have, therefore, included this as part of our submission relevant to the FWC Interim Decision.

(1) The Nojin Principle – as established in Cwlth [2012] FCAFC 192 – relates solely to workers with intellectual disability. This was re-affirmed in *AAT2016/0787*. It is that group of workers and their families whom we represent;

(2) The *AAT2016/0787* case sought to overturn the transition period granted by the Human Rights Commission for our ADE's to transition from the BSWAT to an alternative, industrially approved Wage Assessment Tool (WAT). This was not upheld by the Tribunal Decision which affirmed the transition period granted to the sector by the Human Rights Commission. This is important for the FWC as we move towards a final decision and implementation process in the current Review. The applicant parties in AAT2016/0787 (and its subsidiary cases) took legal action to speed up – and backdate - the determined transition period – after the event. This was despite the obvious commercial and logistical

difficulties in assessing almost 9000 workers, with limited assessors, throughout a nation where the tyranny of distance reigns supreme. The applicant parties have already given notice that they do not want the transition date to be extended on the basis of the embryonic nature of the new hybrid wage system. This is a further example of rights v reality and responsibility. It is very relevant to the implementation issues now faced by us all.

(3) The *"duality of focus*" that constitutes our ADE's was reaffirmed by the expert witness for the applicant parties (*Para 5 –P-38 AAT 2016/0787*). That *"duality of focus*" is acknowledged as social and employment. The Fair Work Commission has no control over the social aspect. That is a matter for the Commonwealth. However, the FWC is cognisant of it. We can only ask for a transition period that is both reasonable and achievable as the new wage system is implemented;

In a more general way I refer to *Para 20(P-78)of AAT2016/0787*. Statements within the proceedings related to claims by the applicant parties that the Human Rights Commission had not given sufficient weight to the supported employees who had made their own submissions supporting the case being put by the applicant parties. The applicant parties felt aggrieved because they felt too much weight had been given, by the Human Rights Commission to submissions made by parent/carers. My transcript response then remains the same for this submission. *"If only our family members could exercise their rights by doing submissions themselves. God help us – none of us would be here".* We remain the only un-resourced group in these – and other legal battles – but the reality remains the same.

Many of our disabled supported employees cannot make their case – in an industrial court- and/or many other settings. We, as their parent/carers have to make that case for them. We continue to do our best to do that. We do so as un-resourced advocates.

Employment options and the dignity of work are critical for our disabled family members. Our ADE's must move forward in the new climate of the NDIS. We need to ensure those options remain sustainable because every job counts.

APPENDIX 2

In their summary of stakeholder consultations undertaken by the Department of Social Services December, 2017 – April, 2018) the community received the feed-back from 63 submissions, 10 targetted workshops in 6 cities with around 200 stakeholders and group discussions with 54 supported employees in April, 2018.

The Department later released an overview of key themes and concerns raised through the submissions, workshops and interviews with supported employees within supported employment.

The full summary is now available at:-

http://engage.dss.gov.au/the-future-of-supported-employment/consultation-summary-report/

The consultation outcomes as provided by the DSS (May, 2018) did advise, as a pre-amble to the outcomes the following parameters:-

The supported employees who were a part of the consultation process are not statistically representative of the cohort, and that the numbers used in the report are done so to give some insight into the amount of supported employees who provided similar responses to qualitative questions

Some of the feed-back from these consultations, however, re-inforces the substantive case which we have consistently made in the past 4 years before the FWC and in conciliation over that time:-

- Many of the supported employees interviewed noted they had been "*bullied or poorly treated by managers, staff and/or customers in open employment (11 of 20 employees who had worked in open employment).* This is consistent with the experience of our disabled family members, their families and carers. Some of the submissions we tabled as evidence confirmed the fact that the poor retention rate of ADE workers moving into open employment and then returning resulted from many factors- not the least of which was that they were not treated inclusively in the competitive open market; there was a lack of ongoing support or the hours provided were inadequate

- *"meaningful work*" – so frequently promoted by the applicant parties as the primary criteria for our supported employees- means different things to different people, and many of the supported employees valued their work – it was a job.

- Some of the feed-back also referred to the social aspect of the *duality of focus* which confirmed that a majority of the supported employees valued the positive environment of their ADE where they feel safe and supported and, in particular, have social interaction with people who are their friends and who they often consider "family"

We highlight these aspects of the Report because our biggest concern with the applicant parties was their determination to have the SWS as the single mandatory WAT – even though this could lead to insolvency in some cases.