FAIR WORK COMMISSION
AT MELBOURNE

AM2014/286

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

SUBMISSION FROM AED LEGAL CENTRE REGARDING THE PROVISIONAL CONCLUSIONS OF THE FULL BENCH

1. The Full Bench released a statement on 11 September 2018 (the **September Statement**) that addressed the position that interested parties adopted in response to the provisional views expressed in an earlier statement dated 16 April 2018 (the **April Statement**). These views were conveyed during a report back hearing on 29 May 2018.

2. In the September Statement, the Full Bench concluded at [5] that by reason of the position adopted by the interested parties to the review seeking to represent the interests of supported employees, it was necessary for the Full Bench to proceed to determine to finality the matters before them. One of those parties is AED Legal Centre (**AED**). The Full Bench went on to say:

> "That will require us to receive any submissions which interested parties wish to make in response to the provisional conclusions expressed in the Statement before issuing a final decision."

3. The Full Bench then directed that submissions be filed in the Commission on or before 19 October 2018. The Bench indicated that those submissions could include submissions as to the merit of the provisional views expressed in the April Statement and any proposal that any party wished to advance concerning the design and implementation of the new wage assessment mechanism outlined in that document, should the Full Bench ultimately adopt the provisional views it expressed in the April Statement.

4. On 16 June 2018, AED, in combination with a number of other interested parties (including the union parties – the HSU and United Voice), filed a submission (the **Joint**

Submission) that addressed the provisional views expressed in the April Statement.[1] AED re-affirms the Joint Submission.

5. AED:

   (a) Supports the provisional conclusion in [15(1)] of the April Statement that supported employment, covered by the *Supported Employment Services Award* 2010 (the **Award**), has a valuable and socially significant role in providing employment to disabled employees. However, as made clear in the Joint Submission, AED does not accept that the evidence before the Commission supports a conclusion that ADE employers are the only employers of disabled workers who adjust daily job tasks to suit the abilities of these workers or are the only employers who do so for those employees with intellectual disabilities.[2]

   (b) Supports the provisional conclusion in [15(2)] of the April Statement that the determination of wages by the multiplicity of wage assessment tools currently prescribed in clause 14.4 of the Award fails to meet the modern awards objective.

   (c) Supports the provisional conclusion in [15(7)] of the April Statement favouring a single prescribed method for the determination of a pro rata wage for supported employees.

6. The September Statement invites submissions concerning the design and implementation of the wage assessment approach posited in the April Statement (the **Proposed Wages Tool**). AED submits that the Proposed Wages Tool should not be adopted. AED relies on the matters referred to in [18]-[23] of the Joint Submission, and the additional matters referred to below.

The Proposed Wages Tool

7. The Proposed Wages Tool would, if adopted, perpetuate the markedly different set of minimum wage arrangements which uniquely apply to ADE employees. The case for

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1 The parties are identified in the document as the Further Submission Parties.

2 The evidence is that 68% of disabled employees being assessed under the SWS in open employment have intellectual disabilities: see transcript PN549-PN554.

doing so appears to hinge on the provisional acceptance by the Full Bench of certain conclusions that AED respectfully contends should not be given the weight apparently attributed to them in the April Statement.

8. The April Statement suggests that the Full Bench has accepted the existence of a simple/complex dichotomy with respect to the range of work performed by ADE employees, albeit that the work, uncontroversially, falls within the basic Award grade – Grade 2. The Full Bench also criticises the existing classification structure in Schedule B of the Award in [15(5)] of the April Statement, stating:

> "[I]t has not been structured with the specific circumstances of supported employment in mind, and has not been drafted in a way that clearly identifies the work tasks and skills required of a fully competent employee at each grade, and may on one view be read as entitling supported employees in ADEs who perform only disaggregated parts of a single job to the full classification rate".

9. These provisional conclusions, expose, with respect, certain assumptions for which there is no apparent basis.

10. There is no textual support in the *Fair Work Act* 2009 (the **FW Act**) for the notion that minimum rates of pay are or should necessarily be fixed with a notional fully competent employee in mind who performs a notional single job composed of unspecified tasks. It is not apparent how or on what basis such an employee is to be discerned, in the abstract, or why it should be necessary to do so, let alone what constitutes a single job within a classification. In this context, a simple/complex dichotomy is not a useful analytical tool.

11. Schedule B grades work. All work within a grade is valued at a single rate. Grade 2 is engaged after an employee undertakes certain training "so as to *enable* them to perform work within *the scope* of this level" (emphasis added).[3] The grade covers a very broad spectrum of work. An employee is entitled to the Grade 2 rate of pay if he or she performs work within the scope of the level. There is no stipulation of how much work is to be performed what number of tasks must be performed or what must be

[3] This language is similar to the language used in the definition of "work within the scope of this level" in cl. B.3.1(b)(ii) of the *Manufacturing and Associated Industries Award* 2010.

demonstrated by the employee to justify payment of the full minimum wage.[4] An employee is competent if he or she has been enabled to perform work within the scope of the level and is performing it.[5] The Award is not unique in these respects.

12. The base level of the *Fast Food Industry Award* 2010 applies if an employee is "engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres".[6] However, the duties performed in relation to these kinds of work is determined by the employer (employees perform duties as directed) and must be "within the limits of their competence, skills and training".[7] An employer who directs the performance of a preparation duty, which might be due to the competence level of the employee, is obliged to pay the rate of pay fixed for this level. The same is true of the employer who directs a more competent employee to perform multiple tasks or duties associated with more than one kind of work; for example, preparation, the receipt of orders and sale.

13. Level 1 of the *Gardening and Landscaping Services Award* 2010 describes an employee who performs s*imple or routine tasks* essentially of a manually nature to the limit of their training.[8] (Emphasis added). The aggregation or disaggregation of simple or routine tasks does not alter the rate of pay. Under the *Nursery Award* 2010, an employee is graded at the base level if "the principal functions of their employment, as determined by the employer, require the exercise of any *one or more* of the skill levels set out below" (emphasis added).

14. The language used in the aforementioned awards may be contrasted with the classification descriptors in the *Dry Cleaning and Laundry Award* 2010 which classify

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4 See by way of comparison the classifications in the *Stevedoring Industry Award* 2010 considered in *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414, per Bromberg J at [56]. That Award specifically defined work within a grade by reference to an employee's "*demonstrated competence* in clerical and/or operational skills at this grade" and an employee's performance of "functions *as required by the employer* from time to time in relation to" particular, named, functions; see at [13] (emphasis added).

5 The Full Bench appears to envisage that this assumption be fleshed out in the classification descriptors of the Award itself: See [15(8)] of the April Statement.

6 B.1.1 of Schedule B to this Award.

7 Ibid, at cl. B.1.2.

8 Cl. B.2 – Level 1 of Schedule B to this Award.

employees into a particular grade if they are employed by an employer in particular, named and described, job.[9]

15. Nor does the traditional conception of work value assume the existence of any particular kind of employee performing a notional single job. The concept was relevantly articulated in the *National Wage Case August 1989* (1989) 30 IR 81 at p. 102 in these terms:

> "(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required all the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.
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> ……..
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> (b) Whether new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole" (emphasis added).

16. Provided that the work performed by an individual is work within a category of work of a particular nature (with a described level of skill and responsibility), no change to the valuation of that work is implied from differences in the way in which work of that kind is performed from one employee to another or as between employers. A change in work performed was not by itself sufficient to alter rates of pay. What was required was a change of sufficient significance to justify a new classification. Change at the level of an individual employee was not enough. Principle (b) recognised that there could be new or changed work arrangements applicable to particular employees, but held that if this were so it would only justify a special allowance, not a re-framing of the classification. No part of the work value concept called for an assessment of the job size of an individual employee's assigned work (from time to time) within a single classification. Nor was a simple/complex dichotomy observed for work within the same classification. Rather, this was of relevance in considering whether a new classification

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[9] See also footnote 4 above.

was justified. It is also of relevance to the progress of a worker from one classification to another.[10]

17. The allowance referred to in principle (b) may be seen as recognising that new or additional work performed by some employees within a classification delivered greater value to the employer over and above the general value of their work. Thus, the allowance was only payable when the changed work was performed and thereby absorbed by the employer. There is analogy here with the SWS. It allows the employer to recognise the disabling effects of a disability on a worker's productive output and pay only for the output of the productive work it absorbs. It is beside the point that output may correspond with that worker's capability, provided that the worker has capability to perform work covered by the Award and is retained in employment to do so.

18. The principal element of the Proposed Wages Tool is job size, which serves here as a proxy for competency. This is a unique way of viewing competency in the award system,[11] which usually conceives of it in terms of skills. In this context it adds a further detrimental effect to the discrimination s. 139(a) and s. 153(3) of the FW Act authorises. So much is apparent from the example offered of the Proposed Wages Tool at the foot of [15(9)] of the April Statement.

19. The principal purpose of section 134(1) of the FW Act is that the Commission ensure that modern awards prescribe a fair and relevant minimum safety net. The safety net extends to minimum wages. Section 135(2) requires that the Commission, in exercising its powers under the Part to set, vary or revoke modern award minimum wages, take into account the rate of the national minimum wage as currently set in a National minimum wage order. In this way, the FW Act confirms the relevance of national minimum wage instruments to modern award minimum wages.

20. The current National minimum wage order, which was promulgated after the April Statement on 1 June 2018, relevantly, prescribes a special national minimum wage for award free employees with a disability. There are two. The criterion used to distinguish

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10 *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414, per Bromberg J at [56].

11 The conception of competency as it emerged from the *National Wage Case August 1989* was concerned with skill recognition as "an essential element of a competency-based classification structure in which employees progress from one grade to the next following the acquisition and recognition of new skills or competencies" at [55].

between these two forms of special national minimum wage is productivity.[12] Those disabled employees whose productivity is not affected by their disability are entitled to the same national minimum wage as anybody else. Those whose disability does affect their productivity are entitled to a special minimum wage calculated in accordance with the SWS.[13]

21. Whilst the Annual Wage Review held that fixation of a national minimum wage was to not to be viewed exclusively from the perspective of employees, it was accepted that the:

> "statutory provisions relating to the Review and to NMW orders as remedial, or beneficial, provisions. They are intended to benefit national system employees by creating regulatory instruments which intervene in the market, setting minimum wages to lift the floor of such wages".[14]

22. This sentiment applies with equal force to the determination of minimum wages for employees with a disability, including those whose wages are governed by the Award. With these considerations in mind, three observations can be made relevant to the exercise of the Commission's review of the Award, having regard to the provisional views contained in the April Statement:

    (a) The Review panel accepted the link between modern award wages and the National minimum wage.[15] The submission of the Ai Group that the review decision should flow on to modern award rates of pay was cited to that end.[16] The Review also cited evidence from the Victorian Government that "submitted that the median incomes of persons with a disability were less than half of those without a disability and that more than half lived in households in the lowest two quintiles of equalised gross household incomes".[17] It persuasively tells in favour of a minimum wages setting that lifts the floor of such wages for all disabled employees.

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12 Annual Wage Review 2017-2018 (2018] FWCFB 3500, at [478].
13 Ibid, at [489(b)].
14 Ibid, at [16].
15 Ibid, at [490] and [496].
16 Ibid, at [462].
17 Ibid, at [463]. It was not suggested that this submission was not accepted.

(b) Competency does not feature at all as a criterion for the second special national minimum wage.[18] The second special national minimum wage is concerned only with output. There is no specific evidence of any material distinction between the disabilities of ADE employees and those entitled to the benefit of the second special National minimum wage order.[19] In these circumstances, use of competency, by means of the job size criterion, for ADE employees as a limiting factor in the amount of remuneration an employee performing Award covered work can earn, as a minimum, requires specific justification.[20]

(c) For special national minimum wage purposes, the output of disabled employees whose productivity is affected continues, as in past years, to be determined by application of the SWS. This appears inconsistent with the provisional conclusion of the Full Bench that the SWS is an inappropriate method of determining wage rates for supported employees for the reasons stated in [15(3)] of the April Statement; each of these reasons could apply equally to an award free productivity affected employee with a disability. Notably, the SWS is the only method utilised by this form of special national minimum wage to authorise a lower rate than is prescribed by the national minimum wage.

23. The Proposed Wages Tool does not promote the lifting of the minimum wages floor for ADE employees, it diminishes it. Whilst the SWS also discounts the full award wage, the Proposed Wages Tool would entitle ADE employers to a further discount by reference to competency and output criteria. The disadvantage is compounded by the provisional acceptance of job size increments of the kind referred to in [15(9)(a)] of the April Statement. These increments appear entirely arbitrary.

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18 The Panel concludes at [487]: "For award/agreement free employees with disability whose productivity is not affected, the wage will be set at the rate of the NMW. For award/agreement free employees with disability whose productivity is affected, the wage will be paid in accordance with an assessment under the SWSS". See also [489].

19 The April Statement provisionally finds that ADE employment provides employment principally to those with intellectual disabilities. The evidence is that 68% of disabled employees being assessed by the SWS in open employment have intellectual disabilities: see transcript PN549-PN554.

20 *Nojin* per Buchanan J at [138].

24. A non-ADE employer of disabled workers would not have the aforementioned right.[21] It is incongruous that an ADE employer should have it.[22] In these circumstances, the Proposed Wages Tool, AED submits, will fail to meet the fairness and equality benchmarks the Commission has set, as well be discriminatory. A non-discriminatory object is one that minimises the deleterious effects of discrimination and seeks if possible to eliminate them. [23]

The SWS in open employment

25. The Full Bench has emphasised in [15(3)] of the April Statement that they express no conclusion about the operation of the SWS in the context of open employment. The Joint Submission expressed concern about the possibility that the Commission's finding in this review may undermine the SWS more broadly. That concern appears to be borne out. The Annual Wage Review made clear at [486] that "although the consideration of the SWS in the review of the SES award is conducted in the specific context of its use in ADE's, the modification or replacement of the SWS in that award has potential implications for the use of SWS in other awards."

26. No party called upon the Commission to review the SWS. The predicate of AED's variation application was the Commission's acceptance in other awards it has made (other than in the Award) of this tool as the method for determining a pro rata wage for employees with a disability. The Commission has again applied it, as late as 1 June 2018, to the determination of the second special National minimum wage. The Commission should exercise caution in these circumstances. It should consider refraining from making further adverse findings about the SWS, at this time, and instead consider whether a broader inquiry into the role of the SWS in the award system is justified. should the Full Bench confirm their concerns about the SWS in these proceedings. In the absence of such an inquiry, a finding that the SWS does not take proper account of the work value considerations used to assess award wage rates cannot

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21 Nor would an ADE employer in respect of a non-disabled employee covered by the Award.

22 Attention is drawn to Article 27(1)(b) of the *Convention on the Rights of Persons with Disabilities* to which Australia is a signatory, which requires State parties to: "Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value".

23 So much is apparent from the observation of Katzmann J in *Nojin* at [268] that: "If competencies must be measured independently of productivity, consistently with the objects of the Act that should be done in such a way as to eliminate as far as possible its inequitable aspects."

safely be made in light of the wide-spread use made by the Commission of the SWS to do just that.

Further matters

27. Since the April Statement there have been several developments that, AED submits, also stand against adoption of the Proposed Wages Tool.

28. First, as is apparent from the September Statement, there is not a consensus in favour of the Proposed Wages Tool. Those who the Full Bench recognises seek to represent the interests of supported employees have expressed their strong concerns in the Joint Submission. The Annual Wage Review observed at [483] that:

> "The Full Bench proposed that interested parties and the Commonwealth participate in a conferral process to develop a new classification structure and wage assessment mechanism in line with a number of identified principles. The process envisaged would necessarily involve the modification or replacement of the SWS in the SES".

29. The conferral process has not occurred.

30. Second, there is no indication from the Commonwealth that it has shifted its support from the SWS to the Proposed Wages Tool. As mentioned in [7] of the Joint Statement, the relevant Commonwealth Minister informed the Vice President on 4 July 2018 that some funding was available for *agreed* trial and analysis activities. No further commitment has been made by the Commonwealth, including a commitment to support and fund both elements of the Proposed Wages Tool.

31. On 10 October 2018, Our Voice filed a submission in response to the September Statement. It expressed general support for the provisional views of the Full Bench, but pointed to the lack of commitment thus far from the Commonwealth. AED shares this concern but sees it as a factor that counts against adoption of the Proposed Wages Tool.

32. The Proposed Wages Tool threatens minimum wage uncertainty for supported employees for an extended period. The Full Bench has no way of knowing how major elements of the approach (those that require assessment of a job and an individual) will be delivered, by whom, how they will be paid for, or how long it will take to determine whether they can work appropriately and fairly in the multiplicity of work environments of the employers covered by the Award. This may result in a longer

phase out period than might otherwise be the case, permitting ADE employers to continue to use the tools currently prescribed by cl. 14.4 of the Award. This is undesirable.

Conclusion

33. As observed in the Joint Submission, the high level nature of the Proposed Wages Tool, as it emerges from the April Statement, necessarily results in high level submissions about its appropriateness and practicality. AED understands that the Commission would welcome submissions from interested parties that might advance the design of the Tool, if it is minded to adopt it. The Proposed Wages Tool is, at this time, purely conceptional. The Commission does not have sufficient information to enable it to decide if such a Tool can be applied uniformly, or to identify the effects on employees were it to do so.[24] In these circumstances, if the Full Bench decides that it will pursue development of the Tool, it should only consider doing so in light of a concrete proposals or proposals supported by evidence and submissions that persuades the Commission of its merit as an award instrument. This will require further programming by the Commission of steps necessary to facilitate the Commission's further consideration.

19 October 2018

M. Harding

[24] For example there may be employees who are worse off under the Proposed Wages Tool than they are under the tool from the current list in cl. 14.4. that their employer has elected to use.