



## **Submission in reply to the Fair Work Commission: Support for variation determinations - AM2014/286.**

NDS welcomes the opportunity to provide this submission in reply to the Fair Work Commission (FWC) on the Review of the Supported Employment Services (SES) Award 2010, AM2014/286.

NDS seeks to lodge further evidence in support of our variations requesting the inclusion of updated definitions of **Employee with disability** and **Supported employment service**. This follows statements lodged by the Health Services Union (HSU) and AED Legal opposing the requested variation incorporating the new definitions.

Discussion of the further evidence we are lodging is included in the second witness statement of Dr Kenneth Baker AM in this matter and is provided to the Commission with this submission. This submission also notes NDS's intention to tender the ARTD Report on the evaluation of the Modified Supported Wage System Trial.

### **Current definitions of supported employee and supported employer in the SES Award**

**Employee with a disability** means a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the Social Security Act 1991 (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act

**Supported employment services** means a service as defined in section 7 of the Disability Services Act 1986 (Cth)

The definition of **Employee with a disability** is the same definition that appears in the Fair Work Act Section 12 (Appendix F).

### **The new definitions sought by NDS:**

**Employee with disability** means a national system employee, being persons:

- (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) Meet the disability requirement in order to qualify for the Disability Support Pension; and / or
- (d) Are eligible for support under the NDIS.

## **National Disability Services**

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**Supported employment service** is a service that operates to provide employment for persons who meet the definition of Employee with disability as defined in this Award.

### **Submission of the ARTD Report: Evaluation of the Modified Supported Wage System Trial**

In response to the correspondence posted by the Commission on the SES Award Review webpage dated 1 December 2017, NDS confirms it will formally tender at hearing the ARTD Report: *Evaluation of the Modified Supported Wage System Trial Department of Social Services - Final Report – 12 October 2016*, on the basis that a copy will not be uploaded to the Commission's website and will be the subject of a confidentiality order pursuant to section 594 of the *Fair Work Act 2009* (Cth).

If the Commission requires a copy of same prior to the hearing date this can be provided.

NDS notes that the report will not be publicly released.

## **December 2017**

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**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 1100 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services - from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

## FAIR WORK COMMISSION

### 4 Yearly Review of Modern Awards

#### *Supported Employment Services Award 2010*

Matter No: AM2014/286

#### FURTHER STATEMENT OF DR KENNETH BAKER AM

I, Kenneth Baker, [REDACTED] Deakin ACT, state as follows:

1. I am the Chief Executive of National Disability Services (**NDS**), whose head office is in Deakin, ACT. I have been the Chief Executive of NDS since 2000.
2. NDS includes among its membership 143 organisations that operate Disability Enterprises.
3. This is the second statement I have submitted during these proceedings.
4. This statement is submitted in response to statements lodged with the Commission by the Health Services Union (HSU) and AED Legal in November 2017 opposing the inclusion in the SES Award of new definitions sought by NDS for "Employee with disability" and "Supported employment service".
5. The HSU submission stated that NDS:  
*"... has not provided evidence nor adequate reasons to support so radical a change to the award definitions"*
6. The AED Legal submission states that the NDS:  
*"... proposal is justified on the basis that they are necessary to recognise the ongoing right of organisations funded under the Disability Services Act 1986 (the DSA) to "continue to operate under the SES Award". It is put that funding arrangements, eligibility and access criteria may change with the introduction of the National Disability Insurance Scheme. There is no information provided by NDS that explains how these things would occur and how they connect to the new definitions that are proposed. It has not filed evidence in support of its proposal."*
7. In this statement, I will set out the reasons for NDS requesting variations to the SES Award that involve the inclusion of the updated definitions of *Employee with disability* and *Supported employment service*.
8. I will examine legislative change and policy reform as it affects supported employees and employers, the principles underpinning the requested definition changes.
9. In addition, annexed to this statement are the following additional materials in support of our request for the definitions to be varied.
  - Disability Services Act 1986
  - DSS Grant Agreement 2015-18 – Operational Guidelines
  - DSS Website – ADEs providing supported employment under the NDIS
  - NDIS Access Requirements – Disability

- Section 37 of the National Disability Insurance Scheme Act 2013
- Fair Work Act Section 12
- Guide to Social Security Law – Active participation in a program of support (DSP)

This evidence is annexed as “Annexure A”.

10. The requested variations seeking the inclusion of the updated definitions have been lodged due to the extent of the legislative changes that have occurred as a result of Government policy reform. These legislative changes (which have occurred over the life of the current version of the SES Award) have affected:

- The coverage of supported employment services by government programs
- The disability support funding arrangements for employers and employees
- The labour market program participation obligations for people with disability

11. In addition NDS cites its previous submission requesting the definition changes, lodged with the Commission on 25 September 2017.

#### **Legislative change and policy reform as they affect supported employees**

12. The current definition of supported employee in the SES Award is:

*“Employee with a disability means a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the Social Security Act 1991 (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act”*

13. The definition of **Employee with a disability** is the same definition that appears in the Fair Work Act Section 12.

14. There are two major developments affecting supported employees that justify changes to the definition above. These are:

- The amendments to social security legislation that require people with disability with assessed work capacity to participate in a program of support before being deemed eligible to receive the DSP (these were described in more detail in our submission to the Commission posted on its website on 25 September 2017)
- The introduction of the NDIS which fundamentally changes the way government funding is allocated for people with disability working in supported employment

15. Additional evidence demonstrating the legislative changes affecting supported employees:

- Disability Services Act 1986 (DSA) – specifically, the existing definitions of “*Employment service*” and “*Supported employment services*” (Page 1, Annexure A)

- DSS Grant Agreement 2015-18 – Operational Guidelines – specifically the paragraphs:

*“6.2 New job seekers cannot become a Supported Employee where they meet the residence requirements and the age requirements under the NDIS. Those requirements are set out in sections 22 and 23 of the National Disability Insurance Scheme Act 2013 and the National Disability Insurance Scheme (Becoming a Participant) Rules 2013. The purpose of this requirement is to facilitate transition to the NDIS by ensuring that, if a person can make an access request to become a participant under the NDIS, the person*

*should seek support under the NDIS rather than directly through funding provided by the Department to ADEs.” (Page 1, Annexure A)*

- DSS Website – ADEs providing supported employment under the NDIS – specifically the paragraph:

*“From 1 July 2015, the National Disability Insurance Agency will fund supported employment for participants of the NDIS who work in Australian Disability Enterprises. Once a supported employee has a plan approved under the NDIS, funding to support them in employment from the Department of Social Services (DSS) ceases as they will be eligible to receive funding under the NDIS.” (Page 2, Annexure A)*

- NDIS Access Requirements – Disability – in its entirety (Page 3, Annexure A)
- Section 37 of the National Disability Insurance Scheme Act 2013 – in its entirety (Page 3, Annexure A)
- Guide to Social Security Law – Active participation in a program of support (DSP) – in its entirety (Pages 3-6, Annexure A)

#### **Legislative change and policy reform as it affects supported employers**

16. The current definition of Supported employment services in the SES Award is:  
*“Supported employment services means a service as defined in section 7 of the Disability Services Act 1986 (Cth)”*
17. Supported employers will cease to be directly funded by the Department of Social Services through the DSA under the Disability Employment Assistance Program.
18. There will be grandfathering arrangements in respect of the Quality Assurance Strategy for Disability Employment providers and supported employees ineligible for the NDIS. The Quality Assurance Strategy will be superseded by the NDIS Quality and Safeguards Framework and NDIS ineligible employees will be funded by DSS until they cease their employment.
19. Consequently, the current arrangements for employers will cease to apply once they no longer have any formal funding arrangement with DSS. They will cease to be funded through the DSA, which will consequently no longer apply to supported employment services.
20. Additional evidence demonstrating the legislative changes affecting supported employers:
  - Disability Services Act 1986 (DSA) – specifically, the existing definitions of “Employment service” and “Supported employment services” (Page 1, Annexure A)
  - DSS Grant Agreement 2015-18 – Operational Guidelines – specifically, the paragraph:  
*“15.7 New CBF Cases cannot be created for a client who meets the residency and age requirements as set out in section 22 and 23 of the National Disability Insurance Scheme Act 2013 or who has a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013.” (Page 2, Annexure A)*
  - DSS Website – ADEs providing supported employment under the NDIS – specifically, the paragraphs:

*“Service providers should prepare for the full scheme rollout of the NDIS. Service providers should plan for changes to their funding agreements and actively engage with the NDIA during the transition period to ensure there is minimal impact on their current clients and NDIS participants.*

*As the NDIS rolls out, people with disability supported at your Australian Disability Enterprise will gradually become NDIS participants. The NDIS is managed by the National Disability Insurance Agency. From 1 July 2015, the National Disability Insurance Agency will fund supported employment for participants of the NDIS who work in Australian Disability Enterprises. Once a supported employee has a plan approved under the NDIS, funding to support them in employment from the Department of Social Services (DSS) ceases as they will be eligible to receive funding under the NDIS.” (Page 2, Annexure A)*

**Principles underpinning the requested definition changes:**

21. The DSA funded service providers. This is clearly stated in the title of Part II of the Act, i.e. “Funding of services for persons with disability”.
22. As noted above on the DSS website and in the DEA Agreement Operational Guidelines, the NDIA funds supported employment for participants of the NDIS who work in Australian Disability Enterprises.
23. There is no ongoing recognition of the DSA under the arrangements for people with disability who are NDIS participants with funded supports to access supported employment. This is not a “may occur” scenario; it has been underway since mid-2015. The new DSS discussion paper “Ensuring a strong future for supported employment” identifies the following statistics:  
*“By the end of 2017, over 8,000 supported employees are expected to have transitioned to the NDIS. In total, around 19,000 supported employees of the existing 20,000 will be transitioned by the time the NDIS is at full scheme.”*

(<https://engage.dss.gov.au/the-future-of-supported-employment/a-strong-future-for-supported-employment-discussion-paper/>, page 11)

24. The NDIS is expected to be fully implemented by mid-2020.

**The new definitions sought by NDS**

25. ***Employee with disability*** means a national system employee, being persons:
  - (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) Meet the disability requirement in order to qualify for the Disability Support Pension; and / or
  - (d) Are eligible for support under the NDIS.
26. This definition links directly to the criteria specified in the current definition of Supported Employment Service and reflects the fact that these services will no longer be funded under the DSA. However, the target group remains the same, as specified in points (a) and (b) of the requested definition change for employee with disability. The changed DSP eligibility requirements are recognised in point (c). The fact that the employee’s funding will be provided through the NDIS is recognised in point (d).

27. **Supported employment service** is a service that operates to provide employment for persons who meet the definition of Employee with disability as defined in this Award.
28. Following discussions with various parties, this definition differs from our previous definition in our submission lodged 25 September, in that it:
- Removes the term "enterprise" and includes the term "service" in its place
  - Identifies that a "service" operates to provide supported employment
  - Removes the term "majority" in respect of the proportion of employees with disability supported by the service
29. The definition includes the same points (a) and (b) as per the current definition (as identified in the DSA). It also effectively recognises the current DSP eligibility requirements and the fact that employment support funding is now allocated to an individual through NDIS funding, instead of to a supported employment service funded through the DSA.
30. In order to achieve modern awards objective, NDS requests that the Commission accept the new definitions for inclusion in the SES Award, as they reflect the significant legislative changes that have been introduced during the life of the current SES Award. These changes affect the DSA, the NDIS and Social Security legislation.
31. The new definitions will also ensure there are no barriers to people with disability seeking supported employment and that employers are operating within current legislated disability support provisions.



14<sup>th</sup> December 2017

Date

## Annexure A:

### Disability Services Act 1986

#### Part II – Funding of services for persons with disability

##### Section seven – definition of Supported employment services:

**Employment service** means a service for persons with disabilities that either:

- (a) provides, or facilitates access to, wage generating employment for the majority of its clients; or
- (b) has as its primary goal the achievement of paid employment for its clients; and, without limiting the generality of the above, includes a service of any of the following kinds:
  - (c) competitive employment training and placement services;
  - (d) supported employment services;**
  - (e) services that, immediately before 1 July 2002, were transitional services within the meaning of this Act as in force at that time;
  - (f) services that, immediately before 1 July 2002, were prescribed services within the meaning of this Act as in force at that time;
  - (g) services included in a class of services approved by the Minister under section 9A.

**Supported employment services** means services to support the paid employment of persons with disabilities, being persons:

- (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.

#### **DSS Grant Agreement 2015-18**

##### Operational Guidelines

Disability Employment Assistance Version 8.2 October 2016

#### 6. Accessing an Australian Disability Enterprise (ADE)

6.1. The process to access ADE services is different for job seekers depending on whether or not the job seeker meets the residence requirements and the age requirements under the NDIS.

6.2. New job seekers cannot become a Supported Employee where they meet the residence requirements and the age requirements under the NDIS. Those requirements are set out in sections 22 and 23 of the National Disability Insurance Scheme Act 2013 and the National Disability Insurance Scheme (Becoming a Participant) Rules 2013. The purpose of this requirement is to facilitate transition to the NDIS by ensuring that, if a person can make an access request to become a participant under the NDIS, the person should seek support under the NDIS rather than directly through funding provided by the Department to ADEs.

6.3. For all other job seekers, access to and registration with an ADE is the responsibility of the job seeker. This includes ensuring that any and all mutual obligation requirements are met to enable registration with an ADE.



## 15. Transitioning to the NDIS

15.1. You must Exit Supported Employees immediately you become aware they have a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013.

15.2. You might become aware when we tell you or when you find out directly from the Supported Employee.

15.3. You must use "Transition to NDIS" as the Status Change Reason on FOFMS when you Exit the Case.

15.4. You must not return a Case from Suspension on FOFMS if the person has been exited as an NDIS participant or has subsequently become an NDIS participant.

15.5. If you have not exited the Supported Employment under Paragraph 15.1 we will Exit the Supported Employees when we become aware they have a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013.

15.6. If a new client, who meets the residency and age requirements of the NDIS, self refers you should direct them to the NDIA for assessment as an NDIS participant.

15.7. New CBF Cases cannot be created for a client who meets the residency and age requirements as set out in section 22 and 23 of the National Disability Insurance Scheme Act 2013 or who has a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013.

15.8. We will monitor FOFMS records for all Supported Employee who have a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013 and we will recover any overpayments.

15.9. The overpayments will be treated as a recoverable amount in accordance with Clause 11 of the Terms and Conditions.

### **[ADEs providing supported employment under the NDIS \(DSS Website\)](#)**

The NDIS is a major opportunity for service providers to grow and diversify their business and the broader sector. The NDIS website has more details about where the NDIS is currently operating. Service providers should prepare for the full scheme rollout of the NDIS. Service providers should plan for changes to their funding agreements and actively engage with the NDIA during the transition period to ensure there is minimal impact on their current clients and NDIS participants.

As the NDIS rolls out, people with disability supported at your Australian Disability Enterprise will gradually become NDIS participants. The NDIS is managed by the National Disability Insurance Agency. From 1 July 2015, the National Disability Insurance Agency will fund supported employment for participants of the NDIS who work in Australian Disability Enterprises. Once a supported employee has a plan approved under the NDIS, funding to support them in employment from the Department of Social Services (DSS) ceases as they will be eligible to receive funding under the NDIS.

## NDIS access requirements – Disability

You may meet the disability requirements if:

- you have an impairment or condition that is likely to be permanent (i.e. it is likely to be lifelong) and
- your impairment substantially reduces your ability to participate effectively in activities, or perform tasks or actions unless you have:
  - assistance from other people or
  - you have assistive technology or equipment (other than common items such as glasses) or
  - you can't participate effectively even with assistance or aides and equipment and
- your impairment affects your capacity for social and economic participation and
- you are likely to require support under the NDIS for your lifetime.

An impairment that varies in intensity e.g. because the impairment is of a chronic episodic nature may still be permanent, and you may require support under the NDIS for your lifetime, despite the variation.

### **Section 37 of the National Disability Insurance Scheme Act 2013:**

37 When plan is in effect:

(1) A participant's plan comes into effect when the CEO has:

- (a) received the participant's statement of goals and aspirations from the participant; and
- (b) approved the statement of participant supports.

(2) A participant's plan cannot be varied after it comes into effect, but can be replaced under Division 4.

Note: Under Division 4, a participant may request a review of his or her plan at any time and may revise the participant's statement of goals and aspirations at any time, which results in the replacement of the plan.

(3) A participant's plan ceases to be in effect at the earlier of the following times:

- (a) when it is replaced by another plan under Division 4;
- (b) when the participant ceases to be a participant.

## Fair Work Act Section 12

**Employee with a disability** means a national system employee who is qualified for a disability support pension as set out in section 94 or 95 of the Social Security Act 1991, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.

## Guide to Social Security Law

Version 1.238 - Released 6 November 2017

### **1.1.A.30 Active participation in a program of support (DSP)**

## Definition

This definition applies to people who make a new claim or are taken to have made a new claim for [DSP](#) on or after 3 September 2011, and to reviewed 2008-2011 DSP starters ([1.1.R.285](#)) who have had an opportunity to participate in a [POS](#).

### **Active participation in a POS is part of the [CITW](#) criteria for certain people**

To satisfy the [CITW](#) ([1.1.C.330](#)) criteria for DSP, people who claim DSP on or after 3 September 2011 and are assessed as not having a severe impairment ([1.1.S.127](#)) or who are the reviewed 2008-2011 DSP starters must, among other things, demonstrate that they have actively participated in a [POS](#) ([1.1.P.440](#)).

### **What constitutes active participation in a POS**

A person has actively participated in a POS if the person:

- complied with the requirements of the POS, and
- participated in a POS during the relevant period applying to the person,

and the following requirements are satisfied:

- the person participated in the POS for at least 18 months during the relevant period applying to the person, or
- where the duration of the POS was less than 18 months, the person completed the entire program during the relevant period applying to the person, or
- where the POS was terminated before the end of the relevant period applying to the person, the POS was terminated because the person was unable, solely because of his or her impairment, to improve their capacity to prepare for, find or maintain work through continued participation in the program, or
- where at the end of the relevant period applying to the person, the person is participating in the POS, the person is prevented, solely because of his or her impairment, from improving their capacity to prepare for, find or maintain work through continued participation in the program, and
- the person provides the (delegate of the) Secretary with information which demonstrates the person's participation in the POS. This includes but is not limited to the details of the designated provider of the program ([1.1.D.115](#)), the dates the person participated in the program, the dates the person did not participate in the program and why, the terms and activities of the program specifically designed to address the person's impairment, needs and barriers to employment and to help the person to prepare for, find and/or maintain work,

and the POS:

- was provided by a designated provider, and
- was specifically tailored to address the person's level of impairment, individual needs and barriers to employment, and
- provided vocational, rehabilitation or employment services with a particular focus on developing skills the person requires to improve the person's capacity to prepare for, find, gain or maintain work (including self-employment), and
- included at least one of the following activities:
  - job search,
  - job preparation,
  - education and training,

- work experience,
- employment,
- return to work,
- vocational or occupational rehabilitation,
- injury management,
- an activity designed to assist the person to prepare for, find or maintain work.

**Explanation:** All these POS criteria must be met. Activities that are not part of the program provided by a designated provider or that are not specifically tailored to the person's needs and barriers to employment are not considered as meeting POS requirements.

**Example:** John has been undergoing medical treatment by his doctor and rehabilitation treatment for his spinal injuries by his physiotherapists. While injury management is an activity that could meet the POS requirements, in this case it does not. This is because health professionals administering standard medical or rehabilitation treatment are not considered to be designated providers for POS purposes. Also, standard medical treatment and rehabilitation are not considered to be a program that is specifically tailored to a person's barriers to employment.

**Applicable relevant periods differ depending on people's circumstances**

For the person who claims or is taken to have made a DSP claim on or after 3 September 2011 and is assessed as not having a severe impairment, the relevant period mentioned above in this definition means the period of 36 months ending immediately before the day on which the person makes (or is taken to make) the claim.

For the person who is a reviewed 2008-2011 DSP starter who:

- is participating in a POS at the time the person becomes a reviewed 2008-2011 DSP starter, or
- was participating in a POS at any time during 6 months before they become a reviewed 2008-2011 DSP starter,

relevant period means the period of 36 months starting on the day the person commenced that POS.

For all other reviewed 2008-2011 DSP starters, relevant period means the period of 36 months starting on the day the person is notified of becoming a reviewed 2008-2011 DSP starter.

**Opportunity to participate in a POS**

SS Act does not specifically define the meaning of 'having an opportunity to participate' that applies to reviewed 2008-2011 DSP starters as per section 94(2)(aa).

Having an opportunity to participate relates to the relevant periods discussed above. A DSP recipient who is either participating in a POS when they become a reviewed 2008-2011 DSP starter or was participating within 6 months before they became such, is deemed to have had an opportunity to participate by virtue of the fact they

currently are, or recently were, participating in a POS. For this recipient, the opportunity to participate occurred on the day they started that POS.

Any other reviewed 2008-2011 DSP starter is deemed to have had an opportunity to participate by virtue of being notified in writing of becoming a reviewed 2008-2011 DSP starter. For this recipient, the opportunity to participate in a POS occurs on the day they are so notified.

**Explanation:** DSP recipients will be notified in writing of becoming reviewed 2008-2011 DSP starters. Such notices will contain information about participation requirements relevant to individual recipients, including POS requirements, and information about appropriate POS providers.

**Periods of inactivity do not count as participation in a POS**

Any periods during which a person who started a POS does not participate in it for any reason (including when they are exempted on medical or any other grounds, are suspended from the program or are in the period of relief from the program) do not count as participation in a POS.

**Act reference:** [SS Act](#) section 94(2) A person has a continuing inability to work...

**Policy reference:** SS Guide [3.6.1.12](#) Qualification for DSP - 15 Hour Rule, [3.6.2.112](#) DSP Assessment of Continuing Inability to Work - 15 Hour Rule, [3.6.2.10](#) Medical & Other Evidence for DSP, [6.2.5.03](#) Application of DSP Qualification Rules at Review