

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

OUTLINE OF SUBMISSIONS OF THE AED LEGAL CENTRE IN REPLY

1. These reply submissions respond to submissions in support filed by Australian Business Industrial (**ABI**) and the NSW Business Chamber (the **Chamber**) dated 25 September 2017. They also respond to the submission of National Disability Services (**NDS**) and Greenacres Disability Services (**Greenacres**) filed in September 2017. Defined terms used by the AED in its Outline of Submissions dated 3 October 2017 are used in this reply.
 - A. **The proposed changes to the definitions of supported employment service and employee with a disability**
2. NDS contends for the adoption of new definitions of “supported employment service” and “employee with a disability”. Its proposal is supported by ABI and the Chamber.¹ The proposal is contained in a draft determination filed by the ABI and the Chamber in July 2017 (the **ABI Draft Determination**).
3. The whole of 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* (Cth.) (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

¹ Submissions in Support by Australian Business Industrial and the NSW Business Chamber (the **ABI and the Chamber Submission**), at 6.1(a).

would occur and how they connect to the new definitions that are proposed. It has not filed evidence in support of its proposal.

4. Currently, the definition of "supported employment service" in the Award picks up the definition in s. 7 of the DSA. That definition is in the following terms:

"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.
5. The NDS proposal would roll the elements in (a) or the (b) definition into its new definition for the Award. However, a notable change that it proposes is that the word "is an enterprise for **which a majority of their employees** meet the definition of employee with a disability as defined in this Award" (emphasis added). No justification is given for such a substantial change. The Commission should not alter the definition unless there is material that justifies it as necessary to meet the modern award objective.
 6. The same is true of the proposed content of a new definition of "employee with a disability". Apart from the addition of the elements referred to above, NDS proposes a new element (c), which appears to reflect some parts of the existing definition, and a new element (d), namely "is eligible for support under the NDIS". Element (c) and (d) could operate as alternatives, on the proposal.
 7. The definition of "employee with a disability" in the Award is the same as the definition in s. 12 of the FW Act. If NDS wishes the Commission to derogate from the Act, it ought to explain why it is necessary to do so.

B. The proposal for a Work Value Classification Tool

The Greenacres Submission

8. Much of what the AED says in response to the ABI and the Chamber Submission will apply as a response to the submission filed by Greenacres. Greenacres supports the new tool proposed by ABI and the Chamber.²
9. Greenacres also contends that “its current wage assessment tool is a valid approach to determining wage levels for supported employees and will bring evidence in support of this”.³ The AED presumes that the reference to its wage assessment tool, is the tool currently listed in cl. 14.4(b)(vi). No evidence is offered by Greenacres in support of its assertion that its tool is valid,⁴ notwithstanding its concession that the tool “needs an overhaul”. No other party, so far as the AED is aware, has filed a submission contending for the retention of a current wages, other than those who support the SWS and Greenacres.

The ABI and Chamber Submission

10. The ABI and the Chamber propose the adoption of a new wage assessment they title the Work Value Classification Tool (the **ABI Tool**). The content of the ABI Tool is contained in the ABI Draft Determination.

The ABI Tool

11. The ABI Draft Determination states that the ABI Tool is intended to operate as the default tool, in that if an employer does not choose one of the multiple ways it can assess wages for disabled employees provided for in cl. 14.4(b) of the Award, the ABI Tool would apply. The proposal is thus to add another method by which an employer can elect how to determine for itself the minimum wages it will pay to its employees for Award covered work it wants done.

² Submissions in Support by Greenacres Disability Services, at paragraph 11

³ Ibid, at paragraph 38.

⁴ It is noted that the ABI and the Chamber have filed a statement from Chris Christodoulou of Greenacres.

12. In response to the ABI Tool, and the evidence filed by the ABI and the Chamber in support thereof, the AED relies on the further statement of Paul Cain, the statement of Robert MacFarlane and the statement of Leigh Svendsen, each dated 21 November 2017.
13. The ABI and the Chamber takes as its starting point the proposition that the SWS is an inappropriate method of wage assessment for supported employment services.⁵ The evidence will show that the premise of this contention is false. The Award covers supported employment employers. Only the SWS however takes the Award as it finds it. The ABI Tool only does so at Grade 3 and above. Below that point, the ABI Draft Determination would, if adopted, require the employer to re-classify employees, who would otherwise fall within Grade 2 (or in the case of training, Grade 1), into 4 sub-classifications (titled Level A through to D) contained only in the ABI Tool outside the Award. The four sub-classifications each contain 4 further sub-classifications linked to a fixed proportion of what is termed the weekly ordinary rate of pay.⁶ The AED presumes this refers to the cl. 14.2 rate prescribed by the Award for Grade 2 work.
14. On the material filed in support of the ABI Tool, no attempt has been made to justify the 16 sub-classifications of Grade 2 work; the proportions of the Award rate allocated to each classification or the 5% increments wage between each of the 16 sub-classifications.⁷ Nor is a rationale offered for 4 different rates of pay per Level even though there is one set of requirements stipulated in the Annexure A for each Level. In contrast, the Award fixes one rate of pay per Grade.
15. The ABI and Chamber Outline contends that the ABI Tool:

⁵ The ABI and the Chamber Outline, paragraph 5.1(b).

⁶ A phrase that appears to be undefined in the ABI Draft Determination.

⁷ As the AED understands the tool, movement within a level is to be determined by an employee's output in accordance with Schedule D.

“aims to address the disconnect between work value and wages under the SWS by properly taking into consideration factors which are relevant to the “work value reasons” that the Commission is required to consider under the 4-yearly review pursuant to section 156 of the FW Act”.

16. First, this misstates s. 156 of the FW Act. S. 156(3) precludes the Commission from varying minimum wages unless a variation can be justified for work value reasons. However, what is proposed does not seek a variation in the rate of minimum wages, but inclusion in the Award of another method to determine the proportion of the minimum wage that is to be paid for that work to an individual employee.
17. Second, there is no disconnect, as asserted by ABI and the Chamber. The tool they propose, like the others listed in cl. 14.4(b) of the Award, is a method of individual wage determination in relation to work that employers wish to be performed. It is uncontroversial that the nature of the work that is performed by supported employees to whom the ABI Tool would apply is Grade 1 and 2 work. The nature of that work has been described in Schedule B and the level of skill and responsibility necessary for that work determined and graded accordingly.⁸ Clause 14.1 states:

“Upon appointment, an employee will be graded by the employer in one of the grades in Schedule B, Classifications having regard to the employee’s skills, experience and qualifications”

18. The Award however recognises that Award covered work will be performed by employees with a disability. The presence of disability, and its effects, is a condition under which work is performed. That recognition is given effect in cl 14.4.

⁸ These are the essential characteristics of the work referred to by Buchanan J in *Noijn v Commonwealth* (2012) 208 FCR 1 at [138].

19. There is a suggestion in the ABI and the Chamber Submission that “conditions under which the work is done” extends to the business or operational circumstances of the employer. That is not so. Self-evidently, s. 153(4)(c) concerns the work. The value of the work to the employer is irrelevant.
20. There is no challenge to Schedule B of the Award, or to the minima fixed for that work in cl. 14.2. There is accordingly no justification proffered for a variation to rates for the kinds of work to which the Award applies. Section 153(3) does not permit the Commission to fix multiple minimum rates for the same kind of work by reference to s. 153(4).
21. The evidence will show that the SWS already takes into account individual capacity to perform the kind of work prescribed in Schedule B. The value of the work however remains the same. That is not so with respect to the ABI Tool. It proposes a wholesale re-valuation of Grade 1 and 2 for some disabled employees, but not others. No need to do so is apparent on work value grounds, or otherwise, in order to address the effects of disability on a particular person.

Discrimination

22. As mentioned above, the ABI and the Chamber propose the ABI Tool as another wage assessment tool amongst the pre-existing list. For the reasons stated in paragraphs 18 through to 32 of the AED’s Outline of Submissions, the adoption of the ABI Tool on the basis proposed would not save cl. 14.4 from invalidity.
23. In the ABI and the Chamber Outline, they distinguish between the SWS and the other wage assessment tools prescribed by the Award on the ground that most of these tools capture a supported employee’s competence/skills in determining wages.⁹ The same is true of the ABI Tool.¹⁰ The deleted BSWAT

⁹ The ABI and the Chamber Outline, at paragraph 4.1(b).

¹⁰ Ibid, at paragraph 4.2(a).

did so also. This tool was found to unlawfully discriminate by the Full Federal Court in *Noijn v Commonwealth* (2012) 208 FCR 1.¹¹ No attempt is made by the ABI and the Chamber to address the reasoning of the Court in *Noijn* in relation to the ABI Tool. Rather, an identified purpose of the ABI tool is to invoke the protection that s. 47(1)(c)(i) of the *Disability Discrimination Act* 1992 gives to those who discriminate but do so in “direct compliance” with a fair work instrument.¹²

24. For the Commission to adopt the ABI Tool in these circumstances would undermine the Objects of the *Disability Discrimination Act*.¹³ The existence of the SWS avoids any need for the Commission to adopt a discriminatory wages standard for disabled workers. This tool makes and renders it unnecessary for the Commission to ensure that the Modern Award Objective is met.

Asserted risk to the viability of supported employment businesses

25. The ABI and the Chamber state that adoption of the ABI Tool will help disability enterprise remain sustainable.¹⁴ Greenacres states there might be job losses or the closure of the Greenacres business.¹⁵ The implication is that adoption of the SWS will be the cause. No submission is made on the topic by NDS.
26. The effect on the profitability of the employer is not a legitimate basis for discounting wages properly fixed according to the work value of the work. The function of the Award is fix minimum rates of pay for the work an employer wants done, regardless of the identity of the employer. In any event, the claims of job losses or closure due the application of the Award through application of the SWS, are serious claims that must be clearly established by evidence. The Commission is otherwise entitled to and should treat these claims with caution.

¹¹ Special Leave to appeal was refused by the High Court.

¹² The ABI and the Chamber Outline, at paragraph 5.3(c).

¹³ see s. 3.

¹⁴ The ABI and the Chamber Outline, at paragraph 5.2(b).

¹⁵ Greenacres submission, paragraph 42.

The material filed in chief by the ABI and the Chamber does not establish the probability or even possibility of job losses or business closures.

27. The Australian Government's position is now that the tools contained in the Award are a matter for the Award parties. However, the Government has stated that it will "ensure future policy settings allow for the ongoing viability of Australian Disability Enterprises for employees, their families and carers and the businesses, while also meeting Australia's obligations under international law". The viability concerns have been addressed.¹⁶

C. Conclusion

28. To the extent that the ABI Draft Determination deals with matters raised in this Outline, the Commission should not adopt it.

21 November 2017

M. Harding

¹⁶ The statement is contained in a letter from the Secretary of the Department of Social Security addressed to VP Hatcher and dated 8 November 2017.