FAIR WORK COMMISSION

AM2014/286

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

SUBMISSION FROM AED LEGAL CENTRE REGARDING THE MATTERS RAISED BY THE FULL BENCH IN PARAGRAPH 378 OF ITS DECISION IN [2019] FWCFB 8179

1. On 3 December 2019, the Full Bench published reasons (the **Reasons**) for its decision to introduce two new minimum wage classifications into the *Supported Employment Services Award* 2010 (the **Award**) and to alter the text of the classification descriptors for Grades 1 to 7 in Schedule B.

2. The Reasons deal for the most part with the draft determinations proposed by the AED Legal Centre (referred to in the Reasons and in these submissions as **AEDLC**) and Australian Business Lawyers and the NSW Chamber (referred to in the Reasons and in these submissions as **ABI**).

3. The AEDLC proposal is set out in [29] of the Reasons and the Full Bench's response to it is in [315] of the Reasons. The Full Bench accepts the need for one, award based, method for determining the amount of the Award minimum wage to be paid by Australian Business Enterprise (**ADE**) employers to their employees with disability whose productivity is affected by their disabilities, but does not accept that that method should only be the Supported Wages System (the **SWS**). Nonetheless, the Bench does not reject the SWS entirely. To the contrary, notwithstanding their criticism of it, the Full Bench expressly intends to apply the SWS as a part of the wage determination method the Bench prefers, subject to some additional modifications.

4. In [315]of the Reasons the Full Bench understood that a critical aspect of the AEDLC proposal was that the SWS would work on and with the existing classification structure of the Award,[1] on the footing that these classifications, in their current form, expressed the valuation of work performed.

[1] Reasons, at [315].

5. The ABI also contended for a proposal that left Schedule B undisturbed and accepted that grade 2 of Schedule B covered the affected workforce. In its submissions dated 21 November 2017, ABI stated that:

   (a) "Currently upon appointment, an employee covered by the Award is "graded" into one of the grades set out in Schedule B (Classifications), with reference to their skills, experience and qualifications. The grades range from grade 1 (being the lowest training grade) to grade 7 (highest). The vast majority of supported employees fall into grade 2 of the Award."[2]

   (b) Its proposal was "intended to "bake-in" a competence/skills-based approach for wage determination of the Award, by providing a default classification structure, operating alongside the existing classification structure in Schedule B (classifications), in the event that a disability enterprise elected not to use one of the currently approved tools".[3]

6. No other interested party contended or sought through evidence to prove any inadequacy with Schedule B. No party to sought to run a work value case in relation to Schedule B. The Full Bench has nevertheless concluded that the Schedule is defective, describing the "assumption that the job being performed by the disabled person is one to which the relevant award classification was intended to apply and set minimum remuneration for"[4] as flawed on the basis that an "essential feature" of ADE employment is that "ADEs create and tailor jobs specifically for the purpose of providing work to disabled persons which they are capable of doing". For the reasons discussed below, AEDLC cavils with the uniqueness of this feature, and its significance for the determination of the minimum wage safety net.

7. The Full Bench has opted for an approach of its own design that involves the creation of two new classifications that substantially lower rate of pay than is prescribed for the existing entry grade, Grade 1. The SWS is to be retained as an additional measure for these grades and for work performed by employees with disability at grades 1 to 7 of the Award.

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2 Paragraph 4.1(a) of the submission.
3 Paragraph 4.2(a) of the submission.
4 Reasons, at [348].

8. The Full Bench has invited further submissions on a number of matters, as follows:

   (a) a further opportunity to make submissions about the determination which the Bench presently considers it should make;

   (b) the identification of classification descriptors for Grades 1-7 of the Award;

   (c) comment on the proposed rates of pay for Grades A and B;

   (d) matters interested parties consider relevant.[5]

9. What follows specifically addresses each of the aforementioned matters.

Further submissions

10. The AEDLC has proceeded on the basis that the Reasons express the Full Bench's review of the Award, and that what remains to be done is to make a determination, as contemplated by section 156(2)(i) (as that provision stood at the time this review commenced[6]).

11. The observations of the Full Bench in [252] of the Reasons should also take account of evidence that ADEs are expected to operate commercially. Their purpose may aptly be described as a dual purpose, which includes operating as a commercial business. In assessing the history of the SWS it is important to recognise that recognition of their commercial character is consistent with the recognition of ADEs as employers with employees, and subject to industrial regulation accordingly. The history of award regulation reflects that evolution. Further, attention is drawn to the evidence in [42]-[50] of Mr Cain's first statement about the use and availability of the SWS in ADEs and their predecessors.[7] The Commonwealth informed the Commission that it was committed to ensuring the viability of ADEs.

12. In [2018] FWCFB 2196 at [15(5)], the Full Bench expressed a provisional view that the classification descriptors of the Award were inadequate, including on the basis that they did not, the Bench stated, identify the work tasks and skills required of a fully

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5 Reasons, at [377].
6 Reasons, at [2].
7 Exhibit 15.

competent employee at each grade. This provisional view has been confirmed in the Reasons but with some additional conclusions. These are that:

(a) industry award classifications like those in the Award are established by the Commission on the basis that an employee whose work is classified at a certain grade must be capable, with training, of performing any duties the employer may require within the scope of that grade.[8]

(b) Grade 2 of Schedule B to the Award was never intended to set remuneration for a job consisting of the one basic and repetitive task described in [352] of the Reasons.

(c) it is relevant, in determining minimum wages for ADE employees, that they are in receipt of the Disability Support Pension.[9]

13. Leaving aside the Bench's views concerning the efficacy of the SWS, as the AEDLC understands the Reasons, the Bench has concluded that Grades A and B are justified because:

(a) ADE employment is unique, in that these employers tailors jobs to meet the work capacity restrictions caused by disability;

(b) the tailoring can result in the employee performing a work task or group of tasks that has less work value than is assumed for classifications like those currently in Schedule B of the Award on the footing that these classifications are devised on an implicit assumption that an employee is, with training, capable of performing "any duties within a classification level", if directed to do so; and

(c) the classifications will recognise the lower work value of employees who perform tailored jobs, and this is explicitly recognised in the proposed paragraph B.1 of a revised Schedule B as well as in the lower hourly rate proposed in clause 14.2 (the Grade A rate is 34% of the rate prescribed for Grade 2 and Grade B is 67% of that rate).

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8 Reasons, at [350]

9 Reasons, at [371]

14. Respectfully, AEDLC submits that the Bench should not proceed with the two classifications. They do not, and cannot, it is submitted satisfy the fairness, equity and non-discriminatory standard that the Bench has identified in [367] of the Reasons as the basis for assessing the wage outcomes of this Award. This is so, the AEDLC submits:

    (a) because the proposal views work value through a disability lens rather than through the skills/competence lens applicable to other skills based classifications contained in modern awards;

    (b) because the proposal would fix safety net of minimum wages under this award on a different, and less beneficial, basis than is the case for other Australian workers; and

    (c) discriminates (in the sense of differentiating adversely between) ADE employees with disability and other disabled employees entitled to the benefit of minimum wages established under other awards or the special national minimum wage.

15. Whilst the Full Bench has elected not to proceed with the job sizing proposal advanced in [2018] FWCFB 2196, the concerns the AEDLC has identified with respect to that proposal substantially apply to the classification approach identified in the Reasons.

Work value

16. Paragraph [350] of the Reasons addresses a submission advanced by the AEDLC arising from the text of the Award, in its current form. The AEDLC has in oral and written submissions identified a number of other modern awards that are similarly expressed. In addressing the AEDLC submission the Full Bench concluded that award classifications are established on the basis of an assumption that a given award grade carries with it an expectation that the employee is capable of performing at a certain level of skill and responsibility and, if required after appropriate training, can perform any duties at that classification level. The AEDLC agrees with the first part of this sentence, but cavils with the second aspect of it.

17. The capability of performing at a certain level of skill and responsibility as required is reflected in the current text of Schedule B. Having regard to [350] of the Reasons, the AEDLC takes the Full Bench to accept that, in terms, the Award currently confers an

entitlement on ADE employees to a rate of pay (subject to the tools contained in clause 14.4) that expresses the same value, in work and money terms, for the performance of one or more tasks within the scope of a Schedule B grade, and that, consistent with other modern awards, the indicative tasks listed therein do just that; they indicate the performance of work within the scope of a classification. It is relevant to note at this point that with the exception of the training grade, the skill and responsibility expectation of grade 2 is of the most basic kind.

18. The second, range of duties aspect, of the conclusion referred to in paragraph 16 above respectfully overlooks the connection between skill and competence in skills based classifications. They are two sides of the same coin, and serve to limit the range of duties that can be required to those tasks for which the employee is skilled and competent at a given grade and accordingly can apply. For example, the definition of "within the scope of this level" in paragraph B.3.1 of the *Manufacturing and Associated and Occupations Award* 2010 states:

> "for an employee who does not hold a qualification listed as a minimum training requirement, that the employee can apply skills within the enterprise selected in accordance with the National Metal and Engineering Competency Standards Implementation Guide, provided that the competencies selected are competency standards recognised as relevant and appropriate by Manufacturing Skills Australia and endorsed by the National Skills Standards Council".

19. In *Noijn* v *the Commonwealth* (2012) 208 FCR 1 Buchanan J at [42] distinguished between competencies of the kind used in the BSWAT and competency in a given task. His Honour expressly found that the latter idea related to skills and their application. This conclusion reflected its context, namely that the required skills were for work fixed against an award classification that covered basic and routine tasks. At [136] his Honour would only assume that the two employees the subject of the proceeding were suited for the work in the ADE environment for which they were employed. This suitability demonstrated competence at the requisite level because it sustained their employment.

20. Explicit in the assumption recorded at [350] of the Reasons is that a worker may require further training, presumably beyond the training at grade 1 level, to increase their capabilities to the point he or she can perform any duty within a classification as

required. However, this usually sounds in a higher classification. In *Qube Pty Ltd v McMaster* (2016) 248 FCR 414 Bromberg J, after referring to Commission authorities concerning the award restructuring exercise required by the structural efficacy principle that introduced these classifications, stated:

> "Skill recognition is an essential element of a competency-based classification structure in which employees progress from one grade to the next following acquisition and recognition of new skills and competencies".[10]

21. Apart from the training grade, grade 2 of Schedule B, in its current form, requires only a basic level of competence to perform basic work at a level sufficient to sustain employment after a period of training. There is no necessary correspondence between a particular number of tasks or actions performed by a worker and the value of their work within the scope of a single classification. Care should be exercised in inferring too much from limited observations of how some work is performed about the competencies required by Australian ADE employers. Respectfully, there is incongruity in recognising, as the Bench does at [350], that an ADE worker is paid the same rate of pay for work consisting of one or more assigned duties, yet attributing lower work value to the worker who can only do one to three by reason of their disability. Another way to view these tasks is that they are indicative of work within a designated value range. That is how the concept is expressed in paragraph B.4.1 and B.4.2-B.4.5 of the *Manufacturing and Associated Industries and Occupations Award* 2010.[11]

22. The effect of the assumption referred to in [350] of the Reasons is to inflate the work value of Grade 2 from its current position by means of comparison with a worker who can perform a hypothetical, notional, job consisting of multiple tasks. So much is evident in [348] of the Reasons. However, this assumes that greater work value can be discerned from the way an employer might wish to package tasks into a hypothetical job or position, attributing greater value to a particular kind of worker: a person with

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10 at [56]. The other members of the Court did not deal with this issue. On the construction of the contentious clause, Bromberg J differed from Jessup J but not in the result. Allsop CJ at [6] agreed with Jessup J.

11 See also clause 24.3(c) of the Award which states that: "Where an employee's level is not determined by the Metal and Engineering competency standards, the classification level is to be determined by the classification structure and definitions at Schedule B.1 to B.3 and by reference to the indicative tasks in Schedule B.4".

less disability who is able to be deployed more flexibly by the employer.[12] These may be legitimate metrics of value to the employer, but this is not the test for assessing work value in the sense relevant here (see in an analogous context *Equal Remuneration Decision* (2015) 256 IR 362 at [62(5)(c), and also at [71] which refers to comparable worth). That kind of value is usually to be reflected in arrangements above the safety net and is of no analytical significance for safety net purposes. There is also the problem of subjectivity referred to in [370(b)] of the Reasons.

Approach to safety net

23. The Commission is of course here devising a safety net of minimum wages. Work must be given to that idea. ADE employees are entitled to the same minimum wage consideration as other employees. That must start from the proposition that minimum wages is a relational concept based on uniformity and consistency of treatment across industries. That this is so was clearly articulated in the Annual Wage Review of 2012-2013: [2013] FWCFB 4000. There, the Commission (which included the President) stated from [76]:

> "At the outset it is important to appreciate that the Act was legislated against the background of a long-standing approach to minimum wage fixation. Parliament may be presumed to have known of the historical approach taken to such claims. The concepts of uniformity and consistency of treatment have underpinned the fixation of minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* and implemented in the *National Wage Case August 1988* decision. The principle of consistent minimum rates across awards was maintained through the award simplification process; the *Paid Rates Review*; and award modernisation.
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> As to the current legislative framework, the minimum wages objective requires us to establish and maintain "a safety net of fair minimum wages" and the modern awards objective requires us to ensure that modern awards (together with the National Employment Standards) provide a fair and relevant minimum safety net of terms and conditions. The modern awards objective also speaks of the need to ensure a "stable and sustainable modern award system". In our view, considerations of fairness and stability tell against an award-by-award approach to minimum wage fixation. If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with

[12] B.3, Reasons at p. 144.

similar or comparable levels of skill. In this regard, we note that in its submission, Australian Business Industrial (ABI) "fully accepts that there is a presumption of uniformity in the Fair Work Act and compelling reasons for the system of modern awards for awards to be treated equally in Division 3 Part 2-6 reviews". Similarly, in its oral submission during the 22 May 2013 consultations, the Australian Industry Group (Ai Group) referred to the need for consistent relativities within and between modern awards. It is also relevant that in establishing and maintaining the minimum wages safety net, the Panel must take into account the principle of equal remuneration for work of equal or comparable value. Such a principle supports the determination of consistent minimum rates for work of equal or comparable value. The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.

At a broader, conceptual, level it is important to appreciate that the framework for workplace relations established by the Act is predicated on a guaranteed safety net which underpins enterprise level collective bargaining. The safety net of fair, relevant and enforceable minimum wages and conditions is provided through modern awards, national minimum wage orders and the National Employment Standards. Collective bargaining at the enterprise level is underpinned by that safety net. This is evident from the fact that enterprise agreements must pass the "better off overall test" in s.193 of the Act and the terms of an enterprise agreement may supplement, but cannot exclude, any provision of the National Employment Standards (ss. 55 and 186(2)(c)).

The award-by-award approach to minimum wage fixation, based on sectoral considerations, advocated by some parties in these proceedings *is inimical to the safety net nature of modern award minimum wages. Enterprise level collective bargaining is the primary means by which the statutory framework envisages differential treatment based on the circumstances in particular enterprises, which would be influenced by relevant sectoral considerations.* That the system functions in this way is evidenced by the sectoral variation in actual wage outcomes." (emphasis added).

24. These views echoed the position adopted in the previous Annual Wage Review: [2012] FWCFB 5000. Those views included this observation at [258]:

> "The notion of a fair safety net of minimum wages embodies the concepts of uniformity and consistency of treatment. These concepts underpin the fixation of minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* and implemented in the *August 1988 National Wage Case decision*."

25. The approach of the Full Bench in the Reasons involves a departure for ADE employees to these principles of minimum wage fixation by a specific award based method for fixing minimum rates for ADE employees. The circumstances of ADE employment and its future appeared to have played a significant part in why the Bench has taken this path.[13] However, a critical feature of section 134(1) of the *Fair Work Act* (**FW Act**) having regard to the approach extracted above is the Commission's antipathy to minimum wage fixation based on sectoral considerations. There is no obvious work value relationship between the rates proposed for Grades A and B and other minimum rates contained in this Award or other modern awards.

26. For other minimum wage employees, including disabled employees whose productivity is affected by their disability and for that reason are entitled to the special national minimum wage, this Commission made clear in the 2018 Annual Wage Review: [2018] FWCFB 3500 the matters referred to in paragraphs [19]-[23] of the AEDLC's submission dated 19 October 2019. The AEDLC reiterates these considerations, especially the principle recorded at [478] which states that the purpose of the relevant statutory provisions is "to benefit national system employees by creating regulatory instruments that intervene in the market setting minimum wages to lift the floor of such wages". This principle refers to the minimum wage objective. The link between minimum wage setting under modern awards and the national minimum wage is expressly recognised in the 2018 Annual Wage Review, and it is in this context the minimum wage concept articulated by the FW Act is to be understood.

27. Respectfully, the identity of the employer has not been treated as a matter of great significance in the determination of safety net wages for other Australian workers, including other workers whose productivity is affected by disability.

The Disability Support Pension

28. The Full Bench states in [371] of the Reasons that they have proceeded on the basis that the affected employees are in receipt of the Disability Support Pension (the **DSP**), and this will operate in conjunction with the prescribed rate of pay to ensure that the employee receives a total income that is socially acceptable. The Reasons contain an analysis of the interaction between the DSP and wages rates at [253]. The Bench's

[13] See for instance Reasons, at [358].

conclusion of an overall, if diminished benefit, from an increase in the rate of pay is not inconsistent with the evidence of Mr Cain, albeit as Mr Cain pointed out in his evidence the size of the benefit will be influenced by the amount of the wage and the number of hours worked by the employee.[14]

29. The above notwithstanding, receipt of the DSP is not particular to ADE employees. By reason of the definition of "employee with disability" in section 12 of the FW Act any employee with disability subject to the SWS under another modern award or entitled to the special national minimum wage must be in receipt of the DSP. If it were otherwise the definition is not engaged. The DPS does not seem to have been a factor that has influenced minimum wage setting for non-ADE disabled employees.

Tailoring of work is not unique to ADE employment

30. Respectfully, there is evidence before the Commission that the tailoring of work to meet the competencies of the disabled person is not unique to ADE employment. AEDLC draws the Bench's attention to:

    (a) the AEDLC's oral submissions as follows:

        (i) 16 February 2018, PN4982

        (ii) 16 February 2018, PN5035;

        (iii) 16 February 2018, PN5044-PN5046;

        (iv) 16 February 2018, PN5116-PN5118;

        (v) 17 February 2018, PN535-PN554.

    (b) the written submissions of the AEDLC, as follows:

        (i) Further Submission dated 16 July 2018 at [10(a)] and [14]

        (ii) Submission dated 19 October 2019 at [22(b) and (c)] and footnote 19;

    (c) the evidence of Paul Cain:

[14] Further statement of Paul Cain Exhibit 16 at [86], as well as [88]-[89].

(i) First statement of Paul Cain at [36]-[39];[15]

(ii) Further statement of Paul Cain dated 21 November 2017 at [90]-[104] (see in particular [92]); [111]-[112], [224]-[228], [235]-[242] (especially [239]; Evaluation of Disability Employment Services, annexure I at pp. 122-123.[16]

(iii) viva voce at PN2200, PN2209, PN2507-PN2509;

(d) the evidence of Robert McFarlane dated 21 November 2017 at [27]-[41] and [56]-[62][17]

31. Notwithstanding the observation stated in [352] of the Reasons about the open labour market, the submissions and evidence referred to above pertain to that market but are not dealt with by the Bench in the Reasons.

32. Further, AEDLC draws the Bench's attention to the observations of Buchanan J in *Noijn* at [145].

Discrimination

33. On 21 November 2018, the AEDLC provided the Commission with submissions that addressed discrimination. The AEDLC reiterates these submissions.

34. Whilst the submissions directly concerned the job sizing model, which is no longer being advanced, the AEDLC contends that, as currently proposed, Grades A and B are vulnerable to challenge as authorising indirect discrimination against ADE employees who are paid according to these classifications.[18] Properly construed, section 161 of the FW Act manifests an intention that a modern award not include terms that oblige an employer to unlawfully discriminate.

35. In this respect, it is noteworthy that Grade A and B employees will have their minimum wages determined on a different, and less advantageous, basis than:

15 Exhibit 15.
16 Exhibit 16.
17 Exhibit 9.
18 see from [10] of the submissions.

(a) other Australian employees - whose safety net wages are rates fixed by reference to other minimum rates for work of equal or comparable value, rather than the circumstances of particular enterprises;

(b) other disabled employees – whose safety net wages are determined as stated above and by means of the SWS, whether under an Award or the Special National Minimum Wage.

36. By contrast, Grade A and B ADE employees will have their minimum wages fixed in an award specific way by reference to:

(a) classifications that first fix a wage rate that is lower than the national minimum wage based on the competencies they have due to their disability; then

(b) makes that wage subject to further reduction through the application of the SWS.

37. This may only be done if the person meets the impairment criteria for receipt of a DSP: clause B.1.1(a),[19] and only if the position is tailored or customised "for the circumstances of the person's disability". On this subject, it is noteworthy that this proposal will result in the work of disabled employees under this Award being valued less favourably than would employees with disability who have restricted work capacity under other modern awards and the special national minimum wage instrument. For the purposes of exposing disadvantage it has been accepted that the circumstances of the disabled person the subject of treatment may be a person with a different disability.[20]

38. The AEDLC is also concerned that the Grades A and B, in their present form, do not constitute "minimum wages" for the purposes of the FW Act and in particular section 153(3).

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19 Reasons, at p. 143.

20 *Watts v Australia Post* (2014) 222 FCR 221 at [250] (Mortimer J).

39. As has been mentioned, minimum wages has a well understood meaning under the FW Act. This Commission concluded in the Annual Wage Review [2013] FWCFB 4000 at [76]-[77] that:

> "the Act was legislated against the background of a long-standing approach to minimum wage fixation. Parliament may be presumed to have known of the historical approach taken to such claims."

40. Whilst the Full Bench does not accept that Grade A and B work is of equal and comparable value to that of the other grades in the Award, to constitute "minimum rates" within the historical conception of that term a proper work value relationship must exist between the rates there prescribed and other minimum rates.[21] As the AEDLC has already observed, it is not obvious that such a relationship exists or if so the basis for it. In these circumstances, the rates may be perceived as arbitrary.

41. The above is also significant because in [374] of the Reasons the Full Bench contemplates that the SWS will operate for any grade as a percentage of the specified rate based on the productivity of a relevantly non-disabled person. There are two consequences of this:

    (a) In the case of grade A and B, the comparison will be between a relevantly non-disabled person entitled to the full award rate of pay (because that person will not be an employee with a disability, as defined) and a disabled employee entitled to a rate fixed on an entirely different basis.

    (b) Grade A and B will prescribe rates determined on a basis that is divorced from, and less beneficial than, the way wages are determined for other Australian workers.

42. If the Grade A and B rates do not constitute properly fixed minimum rates of pay, in that the sense that they have been arrived at by an assessment of their relationship to other minimum rates, it is contended that section 153(1) of the FW Act is engaged. This will preclude their inclusion in the Award for want of jurisdiction.

The text of grades A and B

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[21] c/f *The Paid Rates Review* (1998) 123 IR 240 at p, 253 and p. 255-256.

43. Under Annexure A of the Reasons, Grades 1 and 2 are to retain the full minimum award rate for the performance of a "basic task or tasks". However, an additional element is prescribed for Grade A and B. To engage the classifications the employer must create a "position" that it considers is tailored or adjusted to the circumstances of the person's disability. This gives wide latitude to the employer to construct a job of its choosing by reference to its view of a person's capabilities due to disability before training is provided, as contemplated by Grade 1. This is of significance. The Dunoon Report observed at p. 22:

> "Many people with severe disabilities do in fact earn full wages in open employment. Often people with physical and sensory disabilities very successfully performed job for full award wages where they make use of their abilities - in particular, intellectual abilities - with necessary adjustments being made in the work environment to minimise any difficulties arising. Similarly, significant numbers of people with intellectual disabilities achieve and maintain full award wage employment with the assistance of supportive employment agencies. In the consultant's view it is vital that the assessment system in no way creates barriers that might inhibit individuals from achieving their employment potential.
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> …….
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> Moreover, and as also recognised by the Wages Sub-Committee's principles, *people with disabilities commonly improve their ability to perform a job over time. In part, these improvements will come about as individuals develop their skills and competencies, either as a result of on-the-job experience or specific training*. Improved performance may also reflect the introduction of modifications (often quite small ones) to the job and the work setting. The assessment this system needs to be sufficiently dynamic to take account of these changes affecting performance"[22] (emphasis added).

44. Further, in a skills based classification system it is not obvious why the additional element specified in clause 14.1 "the nature of the position in which the employee is employed" is relevant or how it will operate. The AEDLC contends clause 14.1 should focus on what is necessary for the employee to apply skills appropriate to work within a job classification. The existing formulation of skills, experience and responsibility is sufficient for this purpose. The additional element has the potential to prevent reclassification on the footing that the employee has been employed to a particular

[22] Exhibit 16, Annexure F.

position. In this regard attention is drawn to the extract from the Dunoon report referred to in the preceding paragraph. It is observed that this element would apply to all grades, albeit it replicates aspects of the additional element prescribed for grades A and B specifically.

45. Next, if a worker performs a simple task consisting of up to three sequential actions under supervision and monitoring Grade A applies, but if there are 3 sequential actions supervision and regular monitoring Grade 3 applies. Respectfully, the distinction between and the meaning of "simple" and "basic tasks" is illusive. There is a considerable risk that both will be viewed through the prism of disability and its effects, compounding the disadvantage to the disabled ADE employee arising from subjective judgments about their capacity made by their employer. Further, it is not apparent what "sequential actions" consists of and how it is to be distinguished from "tasks".

Other relevant matters

46. In their report dated 15 October 2019, the Committee on the Rights of Persons with Disabilities, which supervises the Convention on the Rights of Persons with Disabilities, expressed concern about:

> "The ongoing segregation of persons with disabilities employed through Australian Disability Enterprises and the fact that such persons receive a sub-minimum wage".[23]

47. This concern was expressed in connection with Australia's obligations under the work and employment article of the Convention, Article 27. The Committee further recommended that Australia:

> "Undertake a comprehensive review of Australian Disability Enterprises to ensure that they adhere to article 27 of the Convention and provide services to enable persons with disabilities to transition from sheltered employment into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value".[24]

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23 CRPD/C/AUS/CO/2-3 at [49(b)].

24 Ibid at [50].

48. The AEDLC submits that, having regard to the views expressed by the Committee, the proposal for inclusion of Grades A and B in the Award will be inconsistent with Australia's obligations under Article 27 of the Convention.

The timetable

49. The Commission envisages a trial of 3 months for the modifications that it proposes to make to the Award for ADE employees with disability once it has determined the final wages structure for the trial. The Bench states at [379] of the Reasons that the results should be made public and a further opportunity should be given to make further submissions. This is appropriate. The AEDLC has assumed that the Full Bench does not intend to limit what it takes into account in the final determination to the overall labour costs referred to in [379] of the Reasons.

50. The AEDLC contends that the Bench should invite submissions about the work that will be the subject of the trial. These examples should, to the extent possible, typify the services performed by ADEs in the sector. Further, the AEDLC considers that the impact on employee wages of those selected for the trial should be published as well as the nature of the work, how it is arranged by the employer and the nature of the employee's disability.

Conclusion

51. The AEDLC contends that as currently described in the Reasons the Bench's proposal for a new Grade A and B in Schedule B and the consequential adjustments to Grades 1 to 7 do not *ensure* a fair and relevant safety net minimum rate as required by section 134(1) of the FW Act. However, consistent with the evolution of award regulation of this form of employment the AEDLC welcomes the development of a single, award based, wage determination method prescribed by the Award. The AED intends to participate in the process the Commission has established pursuant to the timetable referred to above.

17 December 2019

M. Harding