

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

**SUBMISSION FROM AED LEGAL CENTRE REGARDING THE DEPARTMENT
OF SOCIAL SERVICES CONSULTRATION PERIOD PROPOSAL**

1. The Full Bench has directed interested parties to file any submission in response to the submission of the Department of Social Services (**DSS**) dated 22nd October 2019 by 6 November 2019.
2. On 9 September 2019, Michael Lye, Deputy Director, Disability and Carers wrote to the Vice President and amongst other things informed the Full Bench of a new pricing structure for employment support scheduled to be announced by the National Disability Insurance Agency in October 2019. He states in this letter that:

"This may help to alleviate current pressures that prevent some ADEs from adopting a higher paying wage tool, such as the supported wage system."

3. The Vice President, on behalf of the other members of the Full Bench, wrote to Mr Lye dated 12 September 2019 and indicated that the Full Bench's decision in respect of the Supported Employment Services Award (the **Award**) was imminent, but that the funding changes referred to by Mr Lye in his letter had the potential to fundamentally alter the framework in which the proceedings had been conducted to date. AED Legal Centre (**AED**) agrees with that observation from the Vice President.
4. The Full Bench heard evidence and submissions from ADE's asserting that the supported wages system threatened the viability of ADE's because that system resulted in higher wages. The premise of that evidence and those submissions was necessarily existing subsidy arrangements, including the structure and amounts of funding then provided by the Commonwealth to ADE's to provide support to their employees with disability. This funding not only subsidises ADE operations, but also affects how assessments under the supported wages system are conducted. This is recognised expressly in paragraph 48 of the DSS submission, which states:

“While the increase in the funding of supports is not provided to subsidise the cost of employee wages, the increase in funding available for employment supports may be relevant to an ADE’s capacity to fund the wages of supported employees because:

- (a) an increase in funding may lead to an enhanced service offering and greater level of support for a supported employee, thereby resulting in higher productivity/output;
- (b) the increase in funding for supports may mean that ADE’s may have the ability to direct more of their revenue (which, anecdotally, is currently directed by some ADE’s at meeting some of the costs of providing supports and maintaining the work environment which are not met through existing funding) to employee wages.”

5. DSS further posits that the increase in support funding may affect the Commission’s assessment of viability. In this context, DSS encouraged the Full Bench to invite submissions from ADEs about changing to the modified supported wages system as the “single wage assessment tool”.¹
6. Like other interested parties, AED expresses its concern that DSS has waited until now to inform the Full Bench of the funding developments canvassed in its submission. Australian Business Lawyers and Advisers and the New South Wales Business Chamber outline in paragraphs 4.8 - 4.10 of their submission the extensive investment in time and resources that has been devoted to these proceedings by interested parties. As this submission implies in paragraph 4.18, it is troubling that DSS has waited until now in circumstances where the federal budget was handed down in April 2019.
7. The above notwithstanding and contrary to the Australian Business Lawyers and Advisers and New South Wales Business Chamber submission at paragraph 4.19, the funding support provided through the National Disability Insurance Scheme to ADE employees with a disability is plainly relevant to these proceedings. It bears directly on:
 - (a) the AED proposal that the supported wages system, as modified, should be adopted as the single wage assessment tool in the Award; and

¹ See paragraph 50 of the DSS submission.

- (b) the contention of many ADE employers to the Full Bench in this proceeding that if this were to happen their viability would be threatened.
8. The National Disability Insurance Scheme announcement is new information that was unknown at the time the Full Bench heard evidence and submissions. This is recognised by the Vice President's statement referred to in paragraph 3 herein.
9. However, the DSS submission contains a range of assertions and hypotheses for which it provides no evidence. AED expressly disagrees, for instance, with the dot point assertions set out in paragraph 12 of the DSS submission. Insofar as the first dot point seeks to characterise all ADE work, or all ADE work in every ADE employer all the time, it cannot be accepted. The second point is, respectfully, mere assertion and may safely be ignored by the Commission. Indeed, AED submits that none of the assertions contained in paragraphs 8 to 17 of the DSS submission should be given any weight by the Commission.² These are matters that could have been ventilated by DSS in the proceedings, and tested by reference to the evidence. DSS chose not to participate, until now. It should not be heard now on matters that do not pertain to the changed circumstances arising from the ongoing rollout of the National Disability Insurance Scheme addressed in paragraphs 18 through to 50 of the DSS submission.

The DSS proposal should be adopted by the Full Bench

10. DSS has proposed a twelve (12) week consultation period in order to discuss the implications and effects of the National Disability Insurance Scheme funding announcement with ADE's and other interested parties including, presumably AED. This is appropriate. Despite the concerns that AED shares with other interested parties about the delay this will cause, the DSS submission expresses a strong potential for the National Disability Insurance Scheme announcement to have a direct bearing on the Commission's assessment of the merit of the supported wages system, as modified, in ADE employment, and the effects of its adoption as a single wage assessment tool for fixing sub-minimum wages. AED notes that a key difference between existing support funding and National Disability Insurance Scheme funding is the individualised model

² The asserted fundamental differences cannot be reconciled with evidence about the characteristics of employees with disability in open employment. For instance, and without being exhaustive, the evidence is that 68% of disabled employees being assessed under the SWS in open employment have intellectual disabilities: see transcript PN549-PN554.

the DSS submission describes in paragraph 39. This model corresponds with the individualised assessment conducted under the supported wages system.

11. The twelve (12) week consultation offers the opportunity for DSS to assess the propositions contained in paragraph 48 of its submission and present the Commission, and the other interested parties, with better information about each matter. There is likely to be utility in that consultation. For instance, National Disability Services wrote to the Vice President on 14 October 2019 and in that letter states:

"As the Full Bench may already be aware, NDIA announced details of new pricing arrangements for supported employment on 10 October 2019. NDS has encouraged its members to immediately commence detailed modelling of the likely impact of this announcement on their operating budgets".

12. It may be inferred that ADEs are actively considering the implications of the National Disability Insurance Scheme funding announcement.
13. The AED contends that the Commission should allow the DSS time to undertake the consultation it proposes but should list a report back on or about 15 January 2020 in order to hear the progress of the consultation and program the next steps. The AED does not wish for this proceeding to be unduly delayed, with the continuing prejudice that this implies to ADE employees statutory right to enjoy minimum rates of pay that meets the modern awards objective.

The position adopted by other interested parties

14. National Disability Services and Australian Business Lawyers and Advisers and the New South Wales Business Chamber urge the Full Bench not to grant the additional time sought by DSS and instead hand down their decision. However both submissions resist the DSS proposal on a false basis, namely that the cost of support provided by the National Disability Insurance Scheme to ADE employees is irrelevant to supplementation of wages and for that reason irrelevant to this proceeding. Paragraph 48 of the DSS submission explains why that is not so. In any event, it would be sufficient for the Full Bench to be persuaded that the National Disability Insurance Scheme announcement *might have* the impact asserted by DSS for it to grant the consultation period that has been sought.

15. The prejudice arising from the alleged uncertainty that is also relied on by National Disability Services and Australian Business Lawyers and Advisers and the New South Wales Business Chamber is not obvious given that the status quo prevails. In any event, the Commission has a statutory obligation to be satisfied that the Award meets the minimum awards objective in accordance with section 134(1) of the *Fair Work Act* 2009. If the Full Bench is persuaded that the additional time will assist it in discharging this obligation it should grant the DSS request, but monitor it closely.

6 November 2019

M. Harding