

## Extract

This extract of Wage-Setting Decision 1/2006, which establishes new special Federal Minimum Wage No. 1, is sourced from: The Australian Fair Pay Commission, *Wage-Setting Decision and Reasons for Decision October 2006*, The Commonwealth of Australia 2006, pp. 23, 112-114, 119-120.

The text of the full decision can be accessed at:

<http://fairpay.hosts.network/fairpay/WageSettingDecisions/General/2006/Documents/>

## Wage-Setting Decision No 1/2006

On 6 October 2006 we, Ian Harper (Chairman), and Hugh Armstrong, Patrick McClure, Mike O'Hagan, and Judith Sloan (Commissioners), collectively comprising the Australian Fair Pay Commission, acting pursuant to the powers conferred on the Australian Fair Pay Commission by sections 196, 197, 214, 216, 218, 220 and 864 of the *Workplace Relations Act 1996* (the Act) make the following decision to be known as Australian Fair Pay Commission wage-setting decision No.1/2006. This decision takes effect from 1 December 2006.

### G. Establish new special Federal Minimum Wages and new special Pay Scales for employees with a disability

#### New special Federal Minimum Wage No.1 - Employees with a disability who are able to earn full adult, junior or trainee wages as the effects of their disability do not impact on their productive capacity

##### 1. Interpretation

In this special FMW:

**Commission** means the Australian Fair Pay Commission;

**Pay Scale** means an Australian Pay and Classification Scale;

**employee with a disability** has the same meaning as in section 178 of the Act;

**standard FMW** means the standard FMW under section 175 of the Act;

**training arrangement** has the same meaning as in section 178 of the Act.

## Special Federal Minimum Wage

2. A special FMW of an amount equal to the standard FMW applies to an employee with a disability who:
  - a) is not a junior employee; and
  - b) is not an employee to whom a training arrangement applies; andwhose employment is not covered by:
  - c) a Pay Scale; or
  - d) another special Federal Minimum Wage decision.
3. This special FMW does not operate as a minimum standard for any Pay Scale.

## Reasons for Decision

### Section 8

#### 8. Employees with a disability

The *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) preserved pre-existing disability wage arrangements in both federal and state systems in the form of preserved Australian Pay and Classification Scales (Pay Scales).

Prior to 27 March 2006, the regulation of rates of pay for employees with a disability contained gaps in the coverage of statutory minimum rates of pay and access to pro rata wage arrangements in both open and business services employment.

Work Choices does not legislatively fill these gaps. It does, however, oblige the Australian Fair Pay Commission (Commission) to examine these matters with a view to filling gaps in coverage of disability wage provisions.

#### 8.1 The legislation and the definition of an employee with a disability

An 'employee with a disability' has a specific meaning for the purposes of the Commission's determination and is defined by s. 178 of the WR Act as follows:

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

Qualification for the Disability Support Pension (DSP) under the Social Security Act 1991 (SS Act) is met under s. 95 where a person who has turned 16 is permanently blind. The SS Act provides qualification for other impairments and states at s. 94(1):

- A person is qualified for disability support pension if:
- (a) the person has a physical, intellectual or psychiatric impairment; and
  - (b) the person's impairment is of 20 points or more under the Impairment Tables; and

- (c) one of the following applies:
  - (i) the person has a continuing inability to work;
  - (ii) the Health Secretary has informed the Secretary that the person is participating in the supported wage system administered by the Health Department, stating the period for which the person is to participate in the system; and
- (d) the person has turned 16; and ...

Section 94 further provides that a person will meet the requirement of a 'continuing inability to work' where they are unable to work independently of a program of support (or undertake training to enable such work) for at least 15 hours per week at a relevant minimum wage for a fully productive employee.

## 8.2 Employment of employees with a disability

There are two types of employment where wages are specific to employees with a disability:

- open employment; and
- business services (also known as 'supported employment services' or 'sheltered workshops').

Open employment exists where employees with a disability are engaged in the mainstream workforce and compete with fully productive employees in a commercial setting.

There are two sub-types of open employment:

- employees with a disability who are able to earn full adult, training or junior wages (with reasonable adjustment as appropriate<sup>(1)</sup>) as their disability does not impair their productive capacity; and
- employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged because of the impact of their disability on their productive capacity.

The Supported Wage System (SWS) was established for employees whose disability affects their productive capacity. A model award clause provided for a system to assess the productivity of disabled employees to determine a specified pro rata wage rate. The model clause now forms part of the Pay Scales where it was included in pre-reform wage instruments.

The Australian Government submission estimates that there were almost 3,500 participants in the SWS in the 2004-05 financial year.

<sup>1</sup> The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

Business services are charitable not-for-profit organisations and have traditionally operated outside of the federal and state systems of employment regulation through a lack of specific coverage (federal) or statutory exemption (state). Business services are subject to federal government funding and accreditation through the *Disability Services Act 1986* and are required to meet specified standards.

The Australian Government submission estimates that 17,500 people with a disability are employed by 224 business services operating at 380 locations across Australia.<sup>2</sup> Pay Scales covering business services are derived from the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001 [Fed] (LHMU Award).<sup>3</sup> These Pay Scales are specific to the business services sector. However, there are gaps in coverage within the sector.

<sup>2</sup> Australian Government, *Submission to the Australian Fair Pay Commission 2006*, 28 July 2006, p. 346, para. 11.18.

<sup>3</sup> The Supported Employees Industry Award 1998 [WA] does not contain rates of pay and so did not translate into Pay Scales for employees covered by the award. However, some of these business services may be covered by either federal or state registered agreements.

## Section 8

### 8.3 Gaps in coverage of disability wage arrangements

#### 8.3.1 Employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate<sup>4</sup>) as the effects of their disability do not impact on their productive capacity

Employees with a disability who are fully productive in the class of work for which they are engaged do not require access to pro rata rates of pay. Many of these employees are already (and will continue to be) employed in positions covered by Pay Scales that are not pro rated.

However, where the employee with a disability is not covered by a Pay Scale, they will be without a prescribed minimum rate of pay as they are exempt from the standard Federal Minimum Wage (standard FMW).

This represents a gap in coverage since fully productive employees with a disability could be paid at rates below the standard FMW compared to other fully productive employees doing the same type of work who are covered by the standard FMW.

### 8.5 Extending coverage of disability wage arrangements

The Commission notes the consensus advocating the consistent filling of gaps in coverage to ensure that:

- employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate) as the effects of their disability do not impair their productive capacity have access to a statutory minimum wage; and
- employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity have the protection of statutory minimum wages that include pro rata arrangements.

This is consistent with the direction and approach taken by the key stakeholders prior to 27 March 2006 and reflects an intention to provide employees with a disability, who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, minimum rates of pay based on productivity that lead to greater opportunities to enter and remain in the labour market.

...

4 The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

**Employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate<sup>33</sup>) as the effects of their disability do not impact on their productive capacity**

**Decision**

The Commission will establish a new special FMW - equal to the standard FMW - for employees with a disability as defined by the legislation who are able to earn full adult, junior or trainee wages as the effects of their disability do not impair their productive capacity.

This will be a default statutory minimum for employees with a disability as defined by the legislation. This special FMW will not apply to workers with a disability who are juniors, covered by training arrangements or who are otherwise covered by a Pay Scale or other special FMW.

33 The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.