

Extract

This extract of Wage-Setting Decision 1/2006, which varies the preserved LHMU Pay Scale to insert a further 11 wage assessment tools for use by employers who were currently using them, is sourced from: The Australian Fair Pay Commission, *Wage-Setting Decision and Reasons for Decision October 2006*, The Commonwealth of Australia 2006 pp. 34, 40, pp. 112 – 119, 121.

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.

Interpretation

In this decision:

“takes effect from 1 December 2006” means commences midnight 30 November 2006

“Pay Scale” means an Australian Pay and Classification Scale

“AIRC” means the Australian Industrial Relations Commission

“adult basic period rate of pay” means a basic periodic rate of pay that does not explicitly apply to a class of employees with a disability or employees to whom a training arrangement applies or junior employees.

H. Variation of Pay Scales derived from the LHMU Award

Pay Scales derived from the LHMU Award are varied to include the eleven additional wage tools specified in Schedule 2 to this wage-setting decision.

In addition, wage assessment tools so identified in Schedule 2 will not be available for use in the sector generally but will be available to those employers specified as currently using them.

SCHEDULE 2

Wage Assessment Tools

1. The Blue Mountains Employment Services Wage Assessment Tool as described in the Final Report dated 27 February 2006 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.* *
2. The Koomarri Competency Based Wages System as described in the Final Report dated 15 September 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
3. The New Horizons Wage Assessment Tool as described in the Final Report dated 23 November 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
4. The RVIB Enterprises Wage Assessment Tool as described in the Final Report dated 12 September 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
5. The Sunnyfield Association Wage Assessment Tool as described in the Final Report dated 29 September 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
6. The Valmar Support Services Wage System as described in the Final Report dated 23 September 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
7. The Wangarang Industries Wage Assessment Tool as described in the Final Report dated 16 January 2006 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
8. The Woorinyan Wage Assessment Tool as described in the Final Report dated 6 September 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
9. The Bedford Employee Wage Assessment Tool as described in the Final Report dated 9 February 2006 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
10. The Cumberland Industries Wage Assessment Tool as described in the Final Report dated 28 November 2005 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.
11. The Endeavour Wage Assessment Tool as defined in the Final Report dated 10 January 2006 of Jenny Pearson Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services.* *

* * Wage Assessment Tools restricted to those specific organisations.

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 appropriate¹) 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.

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.²

¹ 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.

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

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).³ These Pay Scales are specific to the business services sector. However, there are gaps in coverage within the sector.

8.3 Gaps in coverage of disability wage arrangements

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8.3.2 Employees with a disability who are 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

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Business services sector

The business services sector is partially covered by the Pay Scales derived from the LHMU Award which had 15 respondents as of 27 March 2006.

Employees with a disability employed in business services and who are not subject to a business services Pay Scale will be without coverage of a statutory minimum rate of pay or provision for pro rata arrangements. Employees of an estimated 200 business services fall into this category.

8.4 Agreements to fill coverage gaps in disability wage arrangements

The regulation of wages for employees with a disability has historically been characterised by a substantial level of agreement making among stakeholders.

8.4.1 Prior to 27 March 2006

This agreement making approach characterised wage regulation both in open employment and the business services sector.

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³ 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.

Business services

In 2002, amendments to the *Disability Services Act 1986*⁹ (DS Act) resulted in a requirement that business services meet new standards to qualify for federal government funding. The new standards include the requirement to pay 'award based wages' using a transparent tool for the determination of pro rata wage rates. Due to the economic impact of an increase in wage costs arising from the amendments to the DS Act, the Department of Family, Community Services and Indigenous Affairs reached agreements with some business service operations for the 'phasing in' of compliance with the new standards⁽¹⁰⁾. The Australian Government submission notes that 61 business service operations (employing 5,714 employees) have agreements in place to phase in compliance with the quality standards by 11 May 2008.¹¹

These agreements are deemed to be included in any relevant preserved Pay Scale and will exclude the relevant employers from coverage of any Pay Scale until 11 May 2008 or as otherwise provided for in the agreement.¹²

In 2004, the LHMU applied to the AIRC to vary the LHMU Award to introduce pro rata award wages. In August 2005, the AIRC varied the LHMU Award to reflect the agreement. It was anticipated that this award would be extended to other business services in the sector, with the exception of Western Australia, through 'roping-in' applications.¹³

8.4.2 After 27 March 2006

After 27 March 2006, parties can no longer apply to vary awards to extend disability wage arrangements. Rather the Commission decides such matters. Many submissions argue that the Commission should extend disability wage arrangements consistently with pre-existing agreements for both open employment and business services:

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'The parties should be allowed to continue the agreed approach as reflected in the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005, including the acceptance of agreed and compliant wage assessment tools (that were not inserted into the Award prior to Work Choices) as minimum wages for people with a disability working in Supported Employment Services.

9 *Disability Services Amendment (Improved Quality Assurance) Act 2002* (Cth).

10 Since 24 January 2006, FaCs has been renamed the Department of Families, Community Services and Indigenous Affairs (FaCSIA).

11 Australian Government, 2006, p. 352, para. 11.41.

12 Workplace Relations Regulations 2006, Part VII, Division 2, Regl. 7.4.

13 Australian Government, 2006, p. 353, para. 11.42.

There is an industry, union, parent and disability group consensus in support of the agreed terms of the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005, which was finalised only last year. This enjoys continued support as the way forward for the industry during this time of transition and modernisation and should be maintained.¹⁵

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'In keeping with the process that produced the original agreement, the key industry parties have held discussions about how the agreement can be best implemented under the Commission's jurisdiction, and have reached a common position on the action that needs to be taken. The Australian Government also supports the position agreed by the industry parties as follows...'¹⁷

The Australian Government submission goes on to list the elements of the common position as including:

- adoption of the additional 11 wage assessment tools for business services that have been agreed;
- coverage of all employers currently using approved tools in the Pay Scale; and
- exemption of employers subject to phase-in agreement with FaCSIA till 2008.¹⁸

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In addition, the ACTU notes the preferences of employees with a disability:

The wages and conditions of employees eligible for and employed under the SWS are located in most industry or occupational awards (up to 27 March 2006). This reflects the strong preference of employees with a disability to be employed under the relevant industry or occupational award, as opposed to a disability Award'.²¹

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The agreement of additional assessment tools in relation to business services employment is raised as an issue. The 2004 agreement between the LHMU, ACTU and employer representatives provided that:²⁹

For a period of time after the variation was made, business services would be able to nominate further tools for inclusion in the Award, provided the tools met the requirements of the quality assurance standards. As outlined in the AIRC decision, the LHMU agreed that it would not unreasonably withhold consent in relation to a tool proposed to be added to the Award list. As an aid for the parties in assessing further tools, FaCSIA agreed to arrange for a consultant to evaluate each proposed tool against the requirements of the Guide to Good Wage Practice Determination. Further wage tools were evaluated and identified by the parties as warranting inclusion in the Award.⁽³⁰⁾

15 ACCI, 2006, p. 473-4 para. 21.52-3.

17 Australian Government, 2006, p. 363, para. 11.83.

18 Australian Government, 2006, pp. 363-4, paras 11.84-90.

21 ACTU, ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 144.

29 including ACROD, VECCI and ABL.

30 Australian Government, 2006, p. 353, para. 11.42.

Eleven additional tools have since been agreed.³¹

The Commission will accept submissions at any time regarding the addition of new wage assessment tools to preserved Pay Scales, new special Pay Scales and new special FMW instruments.

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 appropriate³²) 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.

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Business services not covered by Pay Scales

Decision

The Commission will establish a new special Pay Scale under s. 220 of the WR Act that provides pro rata wages to employees with a disability employed in the business services sector and who are not otherwise covered by preserved Pay Scales.

The new special Pay Scale will include the 11 additional wage tools that have been agreed by industry parties (22 total).

Pay Scales derived from the LHMU Award will also be varied to include the 11 additional wage tools that have been agreed by industry parties, including identified restrictions on the use of some assessment tools.

Business services that are not currently using a recognised wage tool will be excluded from this special Pay Scale until 11 May 2008.

31 Australian Government, 2006, p. 363, para. 11.86.