

**FAIR WORK COMMISSION**

**4 Yearly Review of Modern Awards**

***Supported Employment Services Award 2010***

**Matter No:** AM2014/286

**SUBMISSIONS IN SUPPORT BY AUSTRALIAN BUSINESS INDUSTRIAL  
AND THE NSW BUSINESS CHAMBER**

**1. BACKGROUND**

- 1.1 On 10 July 2017 his Honour Vice President Hatcher issued directions in the above matter requiring that, *inter alia*:
- (a) any party proposing a variation to *the Supported Employment Services Award 2010 (Award)* file in the Commission a draft determination to give effect to their variation proposal on or before 4.00pm Monday 31 July 2017; and
  - (b) any parties supporting a variation proposal file in the Commission the witness statements, expert's reports and other evidentiary material upon which they intend to rely, together with an outline of submissions, on or before 4.00pm Monday 25 September 2017.
- 1.2 On 31 July 2017, Australian Business Industrial (**ABI**) and the NSW Business Chamber (**NSWBC**) filed a draft determination in accordance with his Honour's direction at paragraph 1.1(a) above (**Determination**).
- 1.3 These submissions are filed on behalf of ABI and the NSWBC in accordance with his Honour's direction at paragraph 1.1(b) above.

**2. CONTENT OF DETERMINATION**

- 2.1 The Determination is intended to give effect to the following proposals submitted by ABI and the NSWBC:
- (a) introduction into the Award of the Work Value Classification Tool (**WVCT**);
  - (b) inserting new definitions of "employee with a disability" and "supported employment services" in the Award;
  - (c) variation of penalty rates in the Award for employees working in the retail and fast-food industries to ensure that their employers are not disadvantaged when compared to other employers operating in these industries; and
  - (d) variation of the Award to clarify that employers and employee(s) can agree that an employee's roster will comprise only night shift work (i.e. without the need for a rotating shift) in order to attract the relevant night shift loading.
- 2.2 For the purposes of these submissions, we will refer to:
- (a) employees who meet the definition of "employee with a disability" as "**Supported Employees**"; and

(b) “supported employment services” as “**Disability Enterprises**”.

### 3. EVIDENCE FILED WITH THESE SUBMISSIONS

3.1 The following 26 statements have been filed with these submissions:

(a) nine statements on behalf of Disability Enterprises:

- (i) Statement of Stephen Charles Burgess, Group Manager - People, Culture & Support Services for The Flagstaff Group Limited (**Flagstaff**), dated 21 September 2017;
- (ii) Statement of Bradley Raymond Burrige, Operations and Business Development Manager at Centacare Industries, dated 25 September 2017;
- (iii) Statement of Chris Christodolou, CEO of Greenacres Disability Services (**GDS**), dated 21 September 2017;
- (iv) Statement of Anne Lynette Constable, CEO of ASTERIA Services Incorporated, dated 21 September 2017;
- (v) Statement of Heath Alexander Dickens, Business Service Operations Manager of Disability Services Australia Limited (**DSA**), dated 22 September 2017;
- (vi) Statement of John Kenneth Harvey, General Manager – Enterprises of GDS, dated 25 September 2017;
- (vii) Statement of Rob William Kirkham, Chief Executive Officer of Access Industries for the Disabled Ltd, dated 25 September 2017;
- (viii) Statement of Hugh Kenneth Packard, Chief Executive Officer of Valmar Support Services Limited, dated 25 September 2017; and
- (ix) Statement of Anthony Rohr, General Manager, People Culture and Safety, of The Mai-Wel Group, dated 21 September 2017.

(b) nine statements by Supported Employees:

- (i) redacted Statement “DSA1” of a DSA employee;
- (ii) redacted Statement “DSA2” of a DSA employee;
- (iii) redacted Statement “DSA3” of a DSA employee;
- (iv) redacted Statement “DSA4” of a DSA employee;
- (v) redacted Statement “FS1” of a Flagstaff employee;
- (vi) redacted Statement “FS2” of a Flagstaff employee;
- (vii) redacted Statement “FS3” of a Flagstaff employee;
- (viii) redacted Statement “FS4” of a Flagstaff employee; and
- (ix) redacted Statement “FS5” of a Flagstaff employee.

(c) eight statements by families and carers of Supported Employees:

- (i) redacted Statement “GDS1” of the legal guardian of a GDS employee;
- (ii) redacted Statement “GDS2” of the mother of a GDS employee;

- (iii) redacted Statement “GDS3” of the mother of a GDS employee;
- (iv) redacted Statement “DSA5” of the legal guardian of a DSA employee;
- (v) redacted Statement “DSA6” of the brother of a DSA employee;
- (vi) redacted Statement “FS6” of the mother, carer and legal guardian of a Flagstaff employee;
- (vii) redacted Statement “FS7” of a carer and family member of a Flagstaff employee; and
- (viii) redacted Statement “FS8” of the mother and carer of a Flagstaff employee.

3.2 Where any of the above statements has:

- (a) been redacted, any redacted information is information that may be used to identify the identity of the persons noted in that statement, and has been excluded for confidentiality reasons. To the extent that any party wishes to obtain access to unredacted evidence it can be provided subject to that party entering into appropriate confidentiality undertakings agreed between the parties. Unredacted statements may also become the subject of a future application under section 594 of the *Fair Work Act 2009* (Cth) (**FW Act**); and/or
- (b) not been signed, we have been instructed to file identical signed versions of same as soon as possible, however these signatures will be redacted in accordance with the above protocol.

#### **4. BACKGROUND TO AND SUMMARY OF THE WVCT**

##### **4.1 Current wage determination under the Award**

- (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.
- (b) Supported Employees are paid a percentage of the rate of pay under their assigned Grade by application of one of a number of approved “wage assessment tools” (**WATs**). There are currently a number of approved WATs identified in the Award (some of which are no longer used), including:
  - (i) the Supported Wage system (**SWS**), which adopts a productivity/output-based approach to determining wages; and
  - (ii) a number of other WATs, the majority of which aim to capture a Supported Employee’s competence/skills in determining wages, rather than the SWS’ productivity/output-based approach.
- (c) With some exceptions for certain WATs, the choice of which approved WAT to use is a matter for each Disability Enterprise.

## **4.2 Wage determination under the WVCT**

- (a) The WVCT is intended to “bake-in” a competence/skills-based approach for wage determination to the Award, by providing a default classification structure, operating alongside the existing classification structure in Schedule B (Classifications), which will apply in the event that a Disability Enterprise elects not to use a WAT approved under the Award.
- (b) Employees under the WVCT are classified into “Levels” (starting with a Training and Assessment Level, and then progressing from Level A through to Level D at the highest).
- (c) A Supported Employee’s Level under the WVCT is determined by reference to their competence/skills with regard to a range of classification descriptors as set out in Annexure A of the WVCT, and indicative task schedules in Annexure C. The tasks available in a particular Disability Enterprise are not a relevant factor – that is, a Supported Employee who is assessed at a higher Level will not be paid at a lower Level simply because higher level tasks are not available at that Disability Enterprise at a particular time.
- (d) Each Level is split into four wage points. An employee’s wage point is determined based on an average of their output (as benchmarked against a person without a disability) for a range of tasks forming part of their job, as per the methodology set out in Annexure D of the WVCT.
- (e) The WVCT includes provides for Supported Employees:
  - (i) to be reclassified/reassessed to higher/lower Levels in particular situations;
  - (ii) to challenge their Level classification; and
  - (iii) to progress to the full award rate/open employment once they reach Level D.
- (f) The WVCT does not affect Supported Employees who are classified at Grade 3 or above under Schedule B in the Award. These employees’ wages would be assessed under the SWS, subject to agreed modifications to same, which are presently before the Commission.

## **5. SUBMISSIONS IN RELATION TO THE WVCT**

### **5.1 Productivity/output vs competency/skills-based wage determination**

- (a) All WATs for Supported Employees (including the SWS) are predicated on the basis that Supported Employees will generally receive an amount less than the relevant Award rate.
- (b) The evidence from Disability Enterprises makes it readily apparent that there are significant problems associated with a wage assessment system that is determined solely by reference to productivity and output (as is the case with the SWS), rather than one which takes into consideration supported employees’ competency and skills.
- (c) ABI and NSWBC will provided a fulsome critique of the SWS in its submissions in opposition (due on 13 November 2017), however for the purposes of these support

submissions, it is useful to summarise the main ways in which the WVCT will assist in addressing these issues.

- (d) The WVCT 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, being:
  - (i) “the nature of the work” carried out by Supported Employees, the breakdown of which is set out in detail in the evidence in terms of showing how Disability Enterprises specifically engineer roles to allow them to be performed by Supported Employees;
  - (ii) the “level of skill or responsibility involved in doing the work”, including by taking into the complexity of different types of work carried out by different Supported Employees; and
  - (iii) the “conditions under which the work is done”, including the unique operational pressures and natural competitive disadvantages associated with supported employment.
- (e) As opposed to focussing on productivity/output associated with a small subset of tasks that form part of each Supported Employee’s broader “job”, the WVCT, consistent with employees in every other sector and with most existing WATs, calculates work value with regard to each Supported Employee’s competencies and skills more broadly, together with their level of output within each competency-based “Level” (based on a range of tasks forming part of their broader job).

## **5.2 Importance and value of supported employment**

- (a) As will be apparent from the statements filed, there is a wealth of evidence that the Commission will be able to draw upon in these proceedings which demonstrate the absolutely critical role that supported employment plays in the lives of Supported Employees, their families and carers, and the broader community.
- (b) The WVCT will help ensure that Disability Enterprises remain sustainable and can continue to employ significant numbers of Australian employees with a disability, and its introduction into the Award is consistent with the modern awards objective, particularly having regard to the “*need to promote social inclusion through increased workforce participation*”: ss137(1)(c).

## **5.3 The WVCT is consistent with, and complements, disability discrimination law**

- (a) It is clear from the evidence that Supported Employees often struggle to obtain or maintain work in open employment. This is, in our submission, in part a reflection of the operation of the “inherent requirements” defence available to employers under disability discrimination law.
- (b) As noted above and confirmed in the evidence, Disability Enterprises are specifically set up to engineer roles that Supported Employees can perform based on their capacity, and therefore provide these employees with a means to secure and maintain employment which is simply not realistic in open employment.

- (c) By providing a default competency/skills based approach in the Award, and by operation of section 47 of the *Disability Discrimination Act 1992* (Cth), the WVCT is intended to provide employers with a lawful means by which to continue to provide gainful employment to Supported Employees.

## **6. SUBMISSIONS IN RELATION TO OTHER PROPOSALS**

### **6.1 Definitions**

- (a) ABI and the NSWBC concur with the submissions of National Disability Services filed 31 July 2017 and GDS filed 25 September 2017 in relation to the grounds upon which these definition changes in the Determination are necessary.

### **6.2 Penalty rates**

- (a) ABI and the NSWBC concur with the submissions of GDS dated 25 September 2017 in relation to the change in penalty rates set out in the Determination.

### **6.3 Rosters**

- (a) The changes to rosters forming part of the Determinations self-explanatory, and the rationale for same is simply to confirm the operation in circumstances where there is agreement between employers and employees in this regard under the Award.
- (b) Should there be opposition to these changes, ABI and the NSWBC will provide further commentary by way of its submissions in reply.

**Australian Business Lawyers & Advisors**

**For Australian Business Industrial and the NSW Business Chamber**

**25 September 2017**

### **Links to evidence filed with these submissions**

1. [Statement of Stephen Charles Burgess](#)
2. [Statement of Bradley Raymond Burridge](#)
3. [Statement of Chris Christodolou](#)
4. [Statement of Anne Lynette Constable](#)
5. [Statement of Heath Alexander Dickens](#)
6. [Statement of John Kenneth Harvey](#)
7. [Statement of Rob William Kirkham](#)
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14. [redacted Statement "FS1"](#)
15. [redacted Statement "FS2"](#)
16. [redacted Statement "FS3"](#)
17. [redacted Statement "FS4"](#)
18. [redacted Statement "FS5"](#)
19. [redacted Statement "GDS1"](#)
20. [redacted Statement "GDS2"](#)
21. [redacted Statement "GDS3"](#)
22. [redacted Statement "DSA5"](#)
23. [redacted Statement "DSA6"](#)
24. [redacted Statement "FS6"](#)
25. [redacted Statement "FS7"](#)
26. [redacted Statement "FS8"](#)