

FAIR WORK COMMISSION

Four yearly review of modern awards *Supported Employment Services Award* AM2014/286

SUBMISSION OF THE DEPARTMENT OF SOCIAL SERVICES

17 DECEMBER 2019

INTRODUCTION

1. On 3 December 2019, the Full Bench of the Fair Work Commission handed down a decision on the proposed wage structure in the *Supported Employment Services Award 2010 (SES Award)* as part of its four yearly review of modern awards - *Four Yearly Review of Modern Awards – Supported Employment Services Award 2010 [2019] FWC 8179 (Decision)*.
2. In the Decision, the Full Bench invited submissions on a range of issues to be filed by 17 December 2019. The Full Bench also requested advice from the Commonwealth concerning funding support.

PROVISION OF FUNDING

3. In the Decision, the Full Bench stated that it would be assisted if the Commonwealth could advise as to its preparedness to provide the financial support which it identified as being necessary.¹

Funding of trial

4. The Full Bench stated in its decision that it considers that it is vital that the new wages structure proposed be trialled at a number of representative ADEs to ascertain the cost impact it will have on ADEs before it is implemented. The Full Bench anticipated that Commonwealth funds would be required to allow ADEs to participate in the trial.²
5. While the parameters of a trial have not yet been determined by the Commission, the Commonwealth will provide funds to support the undertaking of a trial of the new wage structure set out in the Decision. Funding for the trial will be determined having regard to the parameters ultimately adopted for the trial and the cost of the trial facilitated by the Department of Social Services (**the Department**) of the modified Supported Wage System in 2016 as part of the four yearly review process.
6. The Department provides further submissions with respect to the possible form of a trial in light of its experience in facilitating the earlier trial of the modified Supported Wage System (**MSWS**) in 2016 – see paragraphs 12 to 17 below.

¹ Paragraph [378] of the Decision

² Paragraph [376] of the Decision

Funding of wage assessments

7. The Commission noted that its proposal to include a further modified version of the Supported Wage System (**SWS**) as the only wage assessment tool in the SES Award means that it will be necessary for the Commonwealth to provide funding for a greater number of SWS assessors.³
8. The Department currently funds the cost of SWS assessments via a National Panel of Assessors. These assessments are undertaken both in supported employment (under the MSWS in the SES Award) and open employment (under the SWS included in other modern awards) for employees who meet the eligibility requirements of the program.
9. The Department is currently considering its capacity to fund the cost of assessments via the National Panel of Assessors taking into account the Commission's decision and coverage of the SES Award. The Department expects to be in a position to confirm the nature and scope of funding for future SWS assessments upon the completion of the trial, when the outcomes of the trial can inform the full costing impact.

Transitional funding

10. The Commission has stated that:
 - (a) while it does not intend to impose upon ADEs any large increase in labour costs, there will be some increase to costs because some employees will become entitled to a higher pay rate under the new system and no employee is permitted to have their wage reduced; and
 - (b) there will need to be some consideration of Commonwealth assistance in this respect.⁴
11. As stated in the Department's 22 October 2019 submission:
 - (a) the Government announced in the 2019-20 Budget that it will provide \$67 million over five years from 2018-19 to support ADEs in transitioning to a new wage assessment model following a review of the SES Award by the Commission;
 - (b) the transitional funding provided by the Department is intended to assist ADEs in meeting costs associated with transitioning to a different model of wage assessment;
 - (c) details of the new support package are currently under development and subject to Government consideration and approval;
 - (d) the Department is consulting with the sector and other key stakeholders to inform its development; and
 - (e) it is not intended that ongoing funding be made available for wage subsidies.⁵

STRUCTURE AND TIMING OF TRIAL

12. The Commission has proposed that a trial of the new wage structure should be conducted over a period of three months. It has been envisaged that once the trial is completed, the results should be made public, and interested parties will then be given an opportunity to

³ Paragraph [374] and [376] of the Decision

⁴ Paragraph [376] of the Decision

⁵ Paragraph 46 of the submissions of the Department of Social Services dated 22 October 2019

make further submissions and following these submissions, the Commission will make a final determination varying the SES Award.⁶

13. The trial of the modified SWS in 2016 which was funded and facilitated by the Department was undertaken using a methodology, which included:
 - (a) approximately 200 supported employees were selected from 20 ADEs to participate in the trial;
 - (b) the trial was undertaken between March and July 2016;
 - (c) a steering committee, comprising representatives from the Fair Work Commission conciliation parties and other key experts, such as wage assessors and ADEs, set the parameters for, and oversaw the trial;
 - (d) the production of guidelines; and
 - (e) a three day training session was held with Australian Disability Enterprises (**ADEs**) and assessors;
 - (f) ethics approval through an independent ethical body;
 - (g) developing contract arrangements to engage subject matter expert assessors to assist with development of trial;
 - (h) developing contract arrangements for assessors to conduct the demonstration of the trial; and
 - (i) engaging a consultant to evaluate the trial.
14. This trial informed the parties to the four yearly review proceeding reaching a consent position with respect to the inclusion of the MSWS in the SES Award.⁷
15. Having regard to the above considerations, the Department is concerned that the timetable proposed in the Decision may not provide sufficient time for:
 - (a) interested parties to provide input on the form of the trial;
 - (b) arrangements for the trial to be established, including:
 - (i) appropriate ADEs and participants to be identified;
 - (ii) appointments to a steering committee;
 - (iii) parameters and guidelines for the trial to be drafted and agreed upon;
 - (iv) engagement of consultants to assess and report on the trial;
 - (v) engagement of qualified wage assessors to participate in the trial;
 - (vi) briefings to be provided to ADEs on the running of the trial;
 - (vii) seeking ethics approval through an independent ethical body; and

⁶ Paragraph [379] of the Decision

⁷ See *Supported Employment Services Award 2010* [2017] FWCFB 5073

- (viii) briefings with supported employees and their support people and informed consent sought for their participation.
16. In light of its experience facilitating the MSWS trial and the steps required to establish the trial, the Department considers that it may be more feasible to commence the trial from 1 May 2020, rather than 1 March 2020.
17. The Department submits that it would be prudent for interested parties to discuss the following matters at the conference listed for 20 December 2019:
- (a) the nature and parameters of the trial to be undertaken; and
 - (b) the timing for the establishment and undertaking of the trial.

SUBMISSIONS ON PROPOSED WAGES STRUCTURE

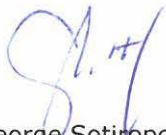
18. The Commission proposes to:
- (a) include two new classifications for positions created by an ADE to meet the circumstances of an employee's disability below the currently Grade 1 classification (Grades A and B);
 - (b) amend the classification descriptors for Grades 1 to 7; and
 - (c) adopt a single further modified Supported Wage System tool to adjust the wage of a supported employee based upon an assessment of their productivity.⁸
19. The Department has identified the following issues that the Commission may wish to consider in finalising the proposed wages structure or that relevant parties should consider in designing the proposed trial:
- (a) whether further guidance is required in relation to the steps an ADE should take to confirm whether it is appropriate to classify a position as Grade A or B, or instead as Grades 1 to 7;
 - (b) where a position is classified as Grade A or B, whether there will be any differences in how the further modified SWS is applied when compared to the current MSWS, noting that the assessment will already have been tailored or adjusted to meet the particular circumstances of the employee's disability;
 - (c) where a position is classified as Grades 1 to 7, whether there will be any differences in how the further modified SWS is applied when compared to the current MSWS;
 - (d) noting that the proposed classification descriptors for Grades 1 to 7 reference classifications in other modern awards, the extent to which the further modified SWS is intended to operate differently from the SWS (as it applies to people with disability working in open employment, including in classifications proposed to be incorporated by reference into Grade 1 to 7 descriptors in the SES Award classification);
 - (e) whether the current rate proposed at clause D.4.1(b) of Schedule D should be amended to \$3.50 per hour to reflect paragraph 374(4) of the Decision (rather than \$3.00 as currently stated); and
 - (f) whether the proposed clause D.5.5 has been retained in error.

⁸ Paragraph [372] of the Decision

20. It may be that other issues or considerations in relation to the proposed wages structure are identified through the conduct and outcomes of the proposed trial. The Department supports the Commission's proposal to receive further evidence and submissions concerning the outcomes of the trial and any consequential further modifications that might be required to the new wages structure. This might include consideration of transitional arrangements to support the phasing out of existing wage assessment tools.

DEFINITION AND COVERAGE

21. The Full Bench has noted that while it does not consider that the change to the funding model for ADEs has altered the validity of the definition of "supported employment service" in the SES Award, it proposes to insert the definition of "Supported Employment Services" contained in section 7 of the *Disability Services Act 1986* into the Award to ensure that the coverage of the SES Award is not inadvertently altered by independent legislative changes.⁹
22. Given the significant implications of an unintended broadening of the coverage of the SES Award and in light of the timetable proposed by the Commission with respect to the finalisation of the terms of the SES Award, the Department proposes that:
- (a) a further period of consultation be undertaken with ADEs with respect to the coverage of the SES Award and the Commission's proposal.
 - (b) interested parties be afforded the opportunity to make submissions on the issue of coverage as part of any final submissions to be filed following the completion of the proposed trial; and
 - (c) the Commission make a final determination of the issue regarding the coverage of the SES Award as part of its final determination.



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⁹ Paragraph [386] of the Decision