

Fair Work Commission
Four Yearly Review of Modern Awards Supported Services Award
(AM2014/286)
Submissions of the Flagstaff Group Ltd

Response to the findings of the Fair Work Commission Full Bench Decision made on 03 December 2019 in relation to the above matter.

Acknowledgement of the Decision

1. The Flagstaff Group Ltd (“Flagstaff”) acknowledges the Full Bench decision and appreciates the complexity of the issues and the practical and considered approach the Full Bench has applied.

Support for Australian Business Lawyers Submission in reply

2. Flagstaff acknowledges and supports the submission in reply to the Decision submitted by the Australian Business Lawyers & Advisors (“ABLA”).

Support for National Disability Services Submissions

3. Flagstaff acknowledges and supports the submission in reply of the National Disability Services (“NDS”).

Broad and overall support of the Full Bench findings

4. Flagstaff acknowledges, accepts and supports the findings of the Full Bench. In particular we would seek to strongly support some particular findings and comments within the Decision.

5. At Paragraph 1 (under ‘Introduction’) the Full Bench has identified that:

A “supported employment service” is a service to support the paid employment of persons with disability for whom competitive employment at or above the relevant award wage is unlikely and who, because of their level of disability, need substantial ongoing support to obtain or retain paid employment. Supported employment services are commonly known as Australian Disability Enterprises (ADEs).

6. Flagstaff fully supports this statement and we feel that this finding is much more representative of ADE’s and the People with a Disability in Supported Employment, than the often quoted “an alternative for people who are unlikely to obtain open employment”.

7. At Paragraph 4 (under ‘Minimum wages for disabled employees in supported employment’) the Full Bench has identified (inter alia) that:

[4] In considering these proposals and assessing whether the Award met the modern awards objective and the minimum wages objective prescribed by the Fair Work Act, the Full Bench took into account the following fundamental features of employment in ADEs:

- The employment opportunities which the supported employment sector provides to disabled persons is of immense value to Australian society. Disabled persons place great weight upon the companionship, stimulation, independence, learning opportunities and the sense of dignity,

achievement and self-worth which supported employment provides them. For the carers and family members of disabled persons employed in ADEs, the support and respite which employment in ADEs provides them, and the positive personal effects such employment has on the disabled person, is regarded as being of huge worth.

8. We are particularly pleased that the Full Bench has given sincere consideration to the voices of Supported Employees and their families and Carers who have provided submissions and/or given evidence at these proceedings. Flagstaff absolutely supports these findings and the many Supported Employees and Carers I have spoken to about the findings and all are grateful that they have been heard and acknowledged in a publically available document.

The Preferred Approach

9. At paragraph 374, the Decision indicates that the Full Bench intends that the only wage assessment tool which may be used for that purpose will be the SWS, subject to modifications, with one of those modifications at 374(4) being “there will be an absolute minimum payment of \$3.50 per hour”. Flagstaff does not challenge this modification however note that within the details contained In Attachment ‘A’ at Schedule D-Supported Wage System, D.4 ‘Supported Wage Rates’ section D.4.1 states:

D.4.1 Employees to whom this schedule applies will be paid the higher of the following amounts:

(a) a percentage of the relevant minimum hourly rate of pay equal to the assessed productive capacity of the employee determined in accordance with clause D.5 rounded to the nearest whole percentage; and

(b) \$3.00 per hour.

10. Whilst having no position as to which of the two amounts is correct, Flagstaff respectfully points out that there is an inconsistency between the \$3.50 per hour figure in 374(4) and the \$3.00 per hour figure in D.4.1(b).

Coverage of the Award

10. At paragraph 386, the Full Bench has outlined a provisional view is that no change to the definition of “supported employment services” in clause 3.1, by which the coverage of the award as expressed in clause 4.1 operates, is required. As explained at the outset of this decision, the award definition incorporates by reference the definition of “supported employment services” contained in s 7 of the *Disability Services Act 1986*. We do not consider that the change to the funding model for ADEs which we have earlier described has altered the validity of this definition. However, to ensure that the coverage of the SES Award is not inadvertently altered by independent legislative changes, we propose to place the statutory definition directly into the award.

11. Whilst accepting the definition of supported employment services as proposed, Flagstaff submits that rather than referencing the Disability Services Act 1986, the actual definition be placed as wording into the definitions of the Award, for example:

Supported Employment Services means

1. *An organisation that is:*

[a] *a body corporate that is:*

[i] *registered under the Australian Charities and Not-for-profits Commission Act 2012; or*

[ii] *a not-for-profit entity that is not an ACNC type of entity;*

[b] *a local governing body established by or under a law of a State or Territory;*

[c] a tertiary institution within the meaning of the Employment, Education and Training Act 1988; or

2. And where that Organisation

[a] provides services to support the paid employment of persons with disabilities, being persons:

[i] for whom competitive employment at or above the relevant award wage is unlikely; and

[ii] who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

12. Flagstaff submits our concern that although we agree that the definition as currently included in the Disability Services Act 1986 is appropriate, referencing the Act in the Award as providing the definition means that any changes to the definitions to the Disability Services Act 1986 may be then be problematic to the Award. Therefore we submit that a direct definition in the Award will provide greater security and certainty.

13. In support of this position, I respectfully submit that vocal opponents of ADE's, including some parties to these proceedings, have made it very clear that they will continue with whatever course of action at their disposal to bring about the closure of ADE's. Additionally, the Department of Social Services has also directly raised the question of the definition of 'Supported Employment Services' in previous submissions to the Full Bench which would indicate that the Department has given some attention on the definition. Given the Department's approach to proceedings and/or the position of opponents of ADE's has to date been agnostic, it would be disappointing to see future challenges arise because of careless or intentional changes to the Disability Services Act 1986.

Classifications

14. In Attachment 'A' at Schedule B-Classifications, sub section B.2 Grade A and B.2 Grade B, Flagstaff notes the term '*sequential actions*' and we respectfully submit that some clarification or explanation of the term is required.

15. In a previous submission to the Full Bench in relation to the re-design of a wage tool we did use the term 'sequential activity' not 'action' although we think the intention of both words is essentially the same.

16. Our initial submission included a definition of 'sequential activity' as:

any action that changes the appearance, dimensions, presentation or functionality of an original item and/or a distinct movement (or series of movements) required to operate any piece of equipment and/or machinery involved in the production or processing of the original item.

17. To expand on that, our intention is that an 'action' may have a series of movements associated with the activity, for example folding a towel may have a series of movements to undertake the action which ultimately results in a '*change in the appearance, dimensions, presentation or functionality of the original item*'

18. For clarity, we feel an activity should be determined by a task analysis. For example (for the purpose of this submission only i.e. not intended as a definitive example) "mow the yard" would be a 'job', not be an activity and that job might be broken down into a series of 3 activities (or actions) such as:

1. Remove heavy debris (e.g. branches or rocks) from the area to be mowed
2. Fuel & start the mower
3. Mow the area to be mowed & turn off the mower

19. In this example each activity may have a series of movements associated with it.

20. So using the second activity of 'Fuel & start the Mower', this may need the person to complete the following movements:

- ✓ Retrieve the fuel container from the storage area;
- ✓ Ensure you are in an area where spillage will not result in any damage to property or the environment;
- ✓ Remove mower fuel cap;
- ✓ Place funnel into the mower fuel tank;
- ✓ Remove lid from fuel container;
- ✓ Pour fuel from the container into the mower fuel tank
- ✓ Ensure no person is in the immediate vicinity
- ✓ Start the mower

21. All of these movements result in the activity being undertaken. Similarly a packaging & fulfilment job might be 'Assemble & Pack Pens' and the activities (or 'actions') identified in the task analysis may be:

1. Assemble & pack pens
2. Weigh each pack as part of QA
3. Place 50 completed packs into a distribution box
4. Place a shipping label on the box and place the box in the dispatch area

Activity 1 (Assemble & pack pens) may include a number of movements:

- ✓ Obtain stock of pen inks
- ✓ Obtain stock of pen shells
- ✓ Obtain stock of pen screw on nibs
- ✓ Obtain stock of pen lids
- ✓ Obtain stock of pen packaging boxes
- ✓ Place an ink in the shell
- ✓ Screw on a nib
- ✓ Place a lid on the pen
- ✓ Place 6 pens in a packaging box
- ✓ Place packed box on the conveyor line

22. Using the pen packaging scenario, some confusion may arise if a provider was to assume that all 4 tasks identified for the 'Assemble & Pack Pens' job are all just 1 task and get one person to do it all, however we submit that the 'safety net' there will be provided by the proposed classification structure which determine that the provider has not '*created a position tailored or adjusted for the circumstances of the employee's disability that does not fall into Grades 1-7*' and therefore the provider won't be able to use the proposed new grades of 'A' or 'B', meaning they would have to do a productivity assessment based on one of the higher Grade (1-7).

23. In Attachment 'A' at Schedule B-Classifications, sub section B.2 Grade A and B.2 Grade B, Flagstaff notes the term 'which may involve the use of mechanical or electric equipment or tools', we submit that the terminology may too broad and may inadvertently incorporate a supported employee who undertakes an activity that supports or results in the use of a mechanical or electric equipment or tool.

24. Whilst not wanting to argue what we believe is the intention of the phrase, Flagstaff submits that a more appropriate term may be:

B.3 *Grade B*

Employees at this grade will perform a simple tasks or tasks consisting of more than three sequential actions, which may involve the actual operation and/or control of mechanical or electric equipment or tools, under direct supervision with regular monitoring.

25. For example, a supported employee may place 2 corners of a pillow case into the clips of an automatic folder and whilst the activity may have interaction or use of equipment, the supported employee does not have actual operation and/or control of the equipment. Conversely, a person using a lawn mower would have actual operation and/or control of the equipment or tool and would therefore meet the definition.

26. Commencing at B.5 Grade 2, in the proposed classifications structure there is reference to a number of external industry Awards and again, whilst Flagstaff agrees with the intention of the referencing of the Awards, we submit that the Full Bench considers providing some further guidance within the Award as to whether these references are definitive or as 'reference guides'.

27. For example, must a role undertaken by, or proposed for, a supported employee be a role specifically mentioned under one of the referenced Awards or does the ADE apply a 'broader' rule of the task the supported employee is undertaking is 'most closely aligned' with one of the tasks/roles identified in the referenced Awards.

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The Flagstaff Group Ltd