



Submission in reply to the Fair Work Commission: Submission of DSS 22 October 2019 - AM2014/286.

NDS welcomes the opportunity to provide this submission to the Fair Work Commission (FWC) in reply to the Department of Social Services' (DSS) submission dated 22 October on matters concerning the Review of the Supported Employment Services (SES) Award 2010, AM2014/286.

In addition, NDS seeks to revisit our variations requesting updated definitions of ***Employee with a disability*** and ***Supported employment service***. This follows a request from the Full Bench to provide the updated definitions, following DSS acknowledging that the original definitions will need to be updated. NDS first raised this matter with the FWC in late 2017.

Response to matters raised in the DSS Submission of 22 October 2019

DSS has lodged its latest submission following correspondence sent by Deputy Secretary Michael Lye to Vice President Hatcher in September 2019. This correspondence asserted that a new pricing model for NDIS participants accessing supported employment may result in Disability Enterprises being able to meet the increased wage costs arising from application of a wage assessment tool such as the Modified Supported Wage System (MSWS).

Deputy Secretary Lye requested that the Full Bench delay releasing a decision on the SES Award until DSS had provided further detail about the pricing model. Vice President Hatcher noted that if DSS provided a publicly available submission in a reasonably timely way, the Full Bench would then consider postponing the publication of its decision and instead invite Award review parties to provide advice as to how they wish to proceed in light of the DSS submission.

DSS and the National Disability Insurance Agency released high level details of a proposed NDIS pricing framework for supported employment on 10 October 2019.

The latest DSS submission includes information on a range of matters, such as the historical funding model for supported employment, transition to the NDIS and the proposed supported employment pricing structure.

NDS has no issues with the majority of the DSS submission. We note that it makes some important and positive observations about the nature of supported employment and its place in the disability employment landscape. In addition, the submission notes that future wage arrangements in the SES Award should reflect the difference

between open and supported employment as well as providing certainty for supported employees and Disability Enterprises while ensuring the ongoing financial viability of the latter.

However, the claims made in the submission concerning the impact of the new NDIS pricing structure for supported employment require a detailed response. The impact of the new pricing structure was cited by DSS as a reason for the FWC to further delay its long awaited decision on minimum wage structures and classifications in the SES Award.

NDS notes the proposed pricing structure for supported employment represents a significant departure from the previous Case Based Funding (CBF) model, which has been in place for over 15 years. The new pricing structure takes into account a range of factors including actual hours of support provided to the participant, the workplace supports they require and a closer (though not complete) alignment with NDIS community participation support rates. Employers will only be able to claim for actual supports delivered, taking into account the frequency and intensity of supports and the setting(s) in which they are provided. Employers will also be able to claim for 'non face to face' contact associated with providing employment support.

DSS asserts that the new hourly rates for supported employment are “generally higher” under the revised pricing model than previous CBF rates. Following receipt of extensive feedback from NDS members that have compared their likely funding under the new pricing model to the CBF rates, we remain unconvinced that this is the case; indeed, based on provider feedback, the opposite appears to be the case in many instances. NDS notes at this point, some further technical detail regarding the calculation of the proposed NDIS supported employment pricing has not been released. Release of this detail should allow far more accurate modelling of the impact of the proposed pricing.

A key assertion in the DSS submission is at paragraph 44. DSS claims that improved participant support levels will allow employees with disability to be more productive in the workplace, which will in turn improve the quality and/or quantity of goods and services produced by a Disability Enterprise. NDS contends this is an untested assertion for which there is little or no evidence.

This assertion is revisited in paragraphs 47 -50 of the submission, which goes on to conflate (the possibly misconceived assumption of) increased employee support funding with increased employer revenue and then the increased revenue with an ability of the employer to pay higher wages. Paragraphs 49 and 50 then link these possibly false assumptions regarding an ability to pay higher wages, to the Award review parties considering “changes to wage setting arrangements, in particular, the use of the MSWS as the single wage assessment tool” in the SES Award.

As noted in our letter to VP Hatcher dated 14 October 2019, NDS considers that NDIS pricing only covers the cost of ongoing support provision for employees with disability and not the supplementation of their wages. There is no direct link between the two. In addition, this assertion should not be linked to the use of the MSWS as the single wage assessment tool used in supported employment settings.

NDS has maintained throughout the SES Award review proceedings that the SWS (and the subsequent MSWS) is not a suitable wage assessment tool for use in supported employment. While we note that there are Disability Enterprises that use the MSWS (and for which most receive a government subsidy) we have never supported it being the sole wage assessment tool in the SES Award.

The Full Bench's April 2018 Statement of provisional conclusions noted that none of the wage assessment tools (including the MSWS) identified in the SES Award met the modern awards objective and that all of them should be phased out of use.

We agree with the Full Bench's Statement of provisional conclusions and advocate strongly that a decision be made on future wage setting arrangements that reflects the historic work value principles that operate in the Australian labour market and are enshrined in industrial legislation.

We oppose the mandating of the MSWS as the sole wage assessment tool in the SES Award as there is no evidence that either the new NDIS pricing or a time limited government subsidy would prevent widespread future supported employee job losses and supported employment service closures.

Current definitions of supported employee and supported employer in the SES Award

DSS has referred the Award review parties to the SES Award's current definition of "supported employment services" from paragraph 51 onwards in its submission. DSS accepts that the definition may need reconsideration due to changes in the supported employment funding model and the changed status of employers of NDIS participants.

NDS has previously noted in submissions to the FWC that the SES Award should be varied to reflect the extent of the legislative changes resulting from Government policy reform during this decade, specifically changes to funding and service provision arrangements that have arisen due to the implementation of the NDIS.

In our view, these legislative changes have affected:

- the coverage of supported employment services by government programs
- the disability support funding arrangements for employers and employees; and
- the labour market program participation obligations for people with disability

These changes affect both the definitions of "Employee with a disability" and "Supported employment service". The current definitions are below:

Employee with a disability means a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the Social Security Act 1991 (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act

Supported employment services means a service as defined in section 7 of the Disability Services Act 1986 (Cth)

The relevant definition in section 7 of the Disability Services Act 1986 (Cth) is:

"supported employment services" means services to support the paid employment of persons with disabilities, being persons:

- (a) for whom competitive employment at or above the relevant award wage is unlikely; and
- (b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

As the current definition of **Employee with a disability** is the same definition that appears in the Fair Work Act (Section 12, Appendix F), the latter would also need to be amended to reflect the proposed definition.

Annexed to this submission (at "Annexure A") are the following additional materials in support of our request for the definitions to be varied.

- Disability Services Act 1986
- DSS Grant Agreement 2015-20 – Operational Guidelines (April 2019)
- DSS Website – ADEs providing supported employment under the NDIS
- NDIS Access Requirements – Disability
- Section 37 of the National Disability Insurance Scheme Act 2013
- Fair Work Act Section 12
- Guide to Social Security Law – Active participation in a program of support (DSP)

NDS advocates that the definitions be amended as below:

Employee with disability means a national system employee, being persons:

- (a) For whom competitive employment at or above the relevant award wage is unlikely; and
- (b) Who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment; and
- (c) Meet the disability requirement in order to qualify for the Disability Support Pension; and / or
- (d) Are eligible for support under the NDIS.

Supported employment service is a service that operates to provide employment for persons who meet the definition of *Employee with disability* as defined in this Award.

Legislative change and policy reform as it affects supported employees

There are two major developments affecting supported employees that justify changes to the definition of employee with a disability. These are:

- The amendments to social security legislation that require people with disability with assessed work capacity to participate in a program of support before being deemed eligible to receive the DSP.
- The introduction of the NDIS which fundamentally changes the way government funding is allocated for people with disability working in supported employment.

Additional evidence demonstrating the legislative changes affecting supported employees:

- DSS Grant Agreement 2015-20 – Operational Guidelines April 2019 – specifically the paragraph 7.2. (Page 1, Annexure A)
- DSS Website – ADEs providing supported employment under the NDIS. (Page 2, Annexure A)
- NDIS Access Requirements – Disability – in its entirety (Page 3, Annexure A)
- Section 37 of the National Disability Insurance Scheme Act 2013 – in its entirety (Page 3, Annexure A)
- Guide to Social Security Law – Active participation in a program of support (DSP) – in its entirety (Pages 3-6, Annexure A)

Legislative change and policy reform as it affects supported employers

Supported employers will cease to be directly funded by the Department of Social Services through the DSA under the Disability Employment Assistance Program.

There will be grandfathering arrangements in respect of the Quality Assurance Strategy for Disability Employment providers and supported employees ineligible for the NDIS. The Quality Assurance Strategy will be superseded by the NDIS Quality and Safeguards Framework and NDIS ineligible employees will be funded by DSS until they cease their employment.

Consequently, the current arrangements for employers will cease to apply once they no longer have any formal funding arrangement with DSS. They will cease to be funded through the DSA, which will consequently no longer apply to supported employment services.

Additional evidence demonstrating the legislative changes affecting supported employers:

Disability Services Act 1986 (DSA) – specifically, the existing definitions of “*Employment service*” and “*Supported employment services*” (Page 1, Annexure A)
DSS Grant Agreement 2015-18 – Operational Guidelines – specifically, the paragraph 16.7 (Page 2, Annexure A).

DSS Website – ADEs providing supported employment under the NDIS – Various paragraphs (Page 2, Annexure A)

Principles underpinning the requested definition changes:

The DSA funded service providers. This is clearly stated in the title of Part II of the Act, i.e. “Funding of services for persons with disability”. As noted above on the DSS website and in the DEA Agreement Operational Guidelines, the NDIA funds supported employment for participants of the NDIS who work in Disability Enterprises.

There is no ongoing recognition of the DSA under the arrangements for people with disability who are NDIS participants with funded supports to access supported employment. This is not a “may occur” scenario; it has been underway since mid-2015. The DSS submission notes the following in paragraph 33:

“At 30 June 2019, the majority of supported employees have transitioned to the NDIS and it is anticipated that around a further 1,800 will do so by 30 June 2020.”
The NDIS is expected to be fully implemented by mid-2020.

The NDS definition includes the same points (a) and (b) as per the current definition (as identified in the DSA). It also effectively recognises the current DSP eligibility requirements and the fact that employment support funding is now allocated to an individual through NDIS funding, instead of to a supported employment service funded through the DSA.

In order to achieve the modern awards objective, NDS requests the FWC accept our proposed definitions for inclusion in the SES Award, as they reflect the significant legislative changes that have been introduced during the life of the current SES Award.

The new definitions will also ensure there are no barriers to people with disability seeking supported employment and that employers are operating within current legislated disability support provisions.

November 2019

Contact: David Moody
Acting CEO
National Disability Services
Ph: 03 8341 4343
Mob: 0437 107 851
david.moody@nds.org.au

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 1,000 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services - from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

Annexure A:

NDS submission in reply to the Fair Work Commission: AM2014/286.

[Disability Services Act 1986](#)

Part II – Funding of services for persons with disability

Section seven – definition of Supported employment services:

Employment service means a service for persons with disabilities that either:

- (a) provides, or facilitates access to, wage generating employment for the majority of its clients; or
- (b) has as its primary goal the achievement of paid employment for its clients; and, without limiting the generality of the above, includes a service of any of the following kinds:
 - (c) competitive employment training and placement services;
 - (d) supported employment services;**
 - (e) services that, immediately before 1 July 2002, were transitional services within the meaning of this Act as in force at that time;
 - (f) services that, immediately before 1 July 2002, were prescribed services within the meaning of this Act as in force at that time;
 - (g) services included in a class of services approved by the Minister under section 9A.

Supported employment services means services to support the paid employment of persons with disabilities, being persons:

- (a) for whom competitive employment at or above the relevant award wage is unlikely; and
- (b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

DSS Grant Agreement 2015-20 Operational Guidelines

Disability Employment Assistance Version 9 April 2019

7. Accessing an ADE

7.1. The process to access ADE services is different for Job Seekers depending on whether or not the Job Seeker meets the residence requirements and the age requirements under the NDIS.

7.2. New Job Seekers cannot become a Supported Employee where they meet the residence requirements and the age requirements under the NDIS (subject to exceptions under paragraph 17 of these Guidelines). Those requirements are set out in sections 22 and 23 of the National Disability Insurance Scheme Act 2013 and the National Disability Insurance Scheme (Becoming a Participant) Rules 2016. The purpose of this requirement is to facilitate transition to the NDIS by ensuring that, if a person can make an access request to become a participant under the NDIS, the

person should seek support under the NDIS rather than directly through funding provided by DSS to ADEs.

7.3. For all other Job Seekers, access to and registration with an ADE is the responsibility of the Job Seeker. This includes ensuring that any and all Mutual Obligation Requirements are met to enable registration with an ADE.

16. Transitioning to the NDIS

16.1. You must Exit Supported Employees immediately when you become aware they have a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013, subject to exceptions under paragraph 17 of these Guidelines.

- In cases where employment support has been incorrectly omitted from a Supported Employee's plan, you may apply to DSS to be continued on or reinstated to CBF until a plan review is conducted. See paragraph 17 for further information about the CBF Transitional Arrangements.

16.2. You might become aware a Supported Employee has an NDIS plan when DSS tells you or when you find out directly from the Supported Employee.

16.3. You must use "Transition to NDIS" as the Status Change Reason on the Portal when you Exit the Case.

16.4. You must not Return a Case from Suspension on the Portal if the person has been Exited as an NDIS participant or has subsequently become an NDIS participant, subject to exceptions under paragraph 17 of these Guidelines.

16.5. If you have not Exited the Supported Employment under paragraph 16.1 of these Guidelines, DSS will Exit the Supported Employees when DSS becomes aware they have a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013, subject to exceptions under paragraph 17 of these Guidelines.

16.6. If a new client who meets the residency and age requirements of the NDIS self refers, you should direct them to the NDIA for assessment as an NDIS participant.

16.7. You cannot create new CBF Cases for a client who meets the residency and age requirements as set out in sections 22 and 23 of the National Disability Insurance Scheme Act 2013; or who has a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013, subject to exceptions under paragraph 17 of these Guidelines.

16.8. DSS will monitor the Portal records for all Supported Employees who have a plan in effect under section 37 of the National Disability Insurance Scheme Act 2013, subject to exceptions under paragraph 17 of these Guidelines, and DSS will recover any overpayments.

16.9. The overpayments will be treated as a repayable amount in accordance with clause 11 of the Terms and Conditions.

[Supported Employment \(Disability Employment Assistance\) \(DSS Website\)](#)

Funding for supported employment is transitioning to the National Disability Insurance Scheme (NDIS).

People employed by an ADE should talk to the National Disability Insurance Agency (NDIA) about their eligibility for the NDIS as it rolls out in their location. To start the process, complete the NDIS Access Checklist or contact the NDIA.

The NDIS re-envisages how people with disability receive support, allowing more choice and control over how, when and where supports are provided, and gives people with disability certainty they will receive the supports they need.

The NDIS delivers a new system of individually tailored support for people with disability based on a person's needs, where funding goes to the individual. This means people will have greater choice and control about the ways they are supported in employment.

NDIS participants can access funds and supports for employment through their NDIS plan.

Supported employees can choose whether to use their NDIS funds to continue in supported employment or to investigate other employment options.

[NDIS access requirements – Disability](#)

Section 37 of the [National Disability Insurance Scheme Act 2013](#):

37 When plan is in effect:

- (1) A participant's plan comes into effect when the CEO has:
 - (a) received the participant's statement of goals and aspirations from the participant; and
 - (b) approved the statement of participant supports.
- (2) A participant's plan cannot be varied after it comes into effect, but can be replaced under Division 4.

Note: Under Division 4, a participant may request a review of his or her plan at any time and may revise the participant's statement of goals and aspirations at any time, which results in the replacement of the plan.

- (3) A participant's plan ceases to be in effect at the earlier of the following times:
 - (a) when it is replaced by another plan under Division 4;
 - (b) when the participant ceases to be a participant.

[Fair Work Act Section 12](#)

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

[Guide to Social Security Law](#)

Version 1.258 - Released 20 September 2019

1.1.A.30 Active participation in a program of support (DSP)

Definition

This definition applies to people who make a new claim or are taken to have made a new claim for DSP on or after 3 September 2011, and to reviewed 2008-2011 DSP starters (1.1.R.285) who have had an opportunity to participate in a POS.

Active participation in a POS is part of the CITW criteria for certain people

To satisfy the CITW (1.1.C.330) criteria for DSP, people who claim DSP on or after 3 September 2011 and are assessed as not having a severe impairment (1.1.S.127) or who are the reviewed 2008-2011 DSP starters must, among other things, demonstrate that they have actively participated in a POS (1.1.P.440).

What constitutes active participation in a POS

A person has actively participated in a POS if the person:

- complied with the requirements of the POS, and
- participated in a POS during the relevant period applying to the person,

and the following requirements are satisfied:

- the person participated in the POS for at least 18 months during the relevant period applying to the person, or
- where the duration of the POS was less than 18 months, the person completed the entire program during the relevant period applying to the person, or
- where the POS was terminated before the end of the relevant period applying to the person, the POS was terminated because the person was unable, solely because of his or her impairment, to improve their capacity to prepare for, find or maintain work through continued participation in the program, or
- where at the end of the relevant period applying to the person, the person is participating in the POS, the person is prevented, solely because of his or her impairment, from improving their capacity to prepare for, find or maintain work through continued participation in the program, and
- the person provides the (delegate of the) Secretary with information which demonstrates the person's participation in the POS. This includes but is not limited to the details of the designated provider of the program (1.1.D.115), the dates the person participated in the program, the dates the person did not participate in the program and why, the terms and activities of the program specifically designed to address the person's impairment, needs and barriers to employment and to help the person to prepare for, find and/or maintain work,

and the POS:

- was provided by a designated provider, and
- was specifically tailored to address the person's level of impairment, individual needs and barriers to employment, and
- provided vocational, rehabilitation or employment services with a particular focus on developing skills the person requires to improve the person's capacity to prepare for, find, gain or maintain work (including self-employment), and
- included at least one of the following activities:

- job search,
- job preparation,
- education and training,
- work experience,
- employment,
- return to work,
- vocational or occupational rehabilitation,
- injury management,
- an activity designed to assist the person to prepare for, find or maintain work.

Explanation: All these POS criteria must be met. Activities that are not part of the program provided by a designated provider or that are not specifically tailored to the person's needs and barriers to employment are not considered as meeting POS requirements.

Example: John has been undergoing medical treatment by his doctor and rehabilitation treatment for his spinal injuries by his physiotherapists. While injury management is an activity that could meet the POS requirements, in this case it does not. This is because health professionals administering standard medical or rehabilitation treatment are not considered to be designated providers for POS purposes. Also, standard medical treatment and rehabilitation are not considered to be a program that is specifically tailored to a person's barriers to employment.

Applicable relevant periods differ depending on people's circumstances

For the person who claims or is taken to have made a DSP claim on or after 3 September 2011 and is assessed as not having a severe impairment, the relevant period mentioned above in this definition means the period of 36 months ending immediately before the day on which the person makes (or is taken to make) the claim.

For the person who is a reviewed 2008-2011 DSP starter who:

- is participating in a POS at the time the person becomes a reviewed 2008-2011 DSP starter, or
- was participating in a POS at any time during 6 months before they become a reviewed 2008-2011 DSP starter,

relevant period means the period of 36 months starting on the day the person commenced that POS.

For all other reviewed 2008-2011 DSP starters, relevant period means the period of 36 months starting on the day the person is notified of becoming a reviewed 2008-2011 DSP starter.

Opportunity to participate in a POS

SSAct does not specifically define the meaning of 'having an opportunity to participate' that applies to reviewed 2008-2011 DSP starters as per section 94(2)(aa).

Having an opportunity to participate relates to the relevant periods discussed above.

A DSP recipient who is either participating in a POS when they become a reviewed 2008-2011 DSP starter or was participating within 6 months before they became such, is deemed to have had an opportunity to participate by virtue of the fact they currently are, or recently were, participating in a POS. For this recipient, the opportunity to participate occurred on the day they started that POS.

Any other reviewed 2008-2011 DSP starter is deemed to have had an opportunity to participate by virtue of being notified in writing of becoming a reviewed 2008-2011 DSP starter. For this recipient, the opportunity to participate in a POS occurs on the day they are so notified.

Explanation: DSP recipients will be notified in writing of becoming reviewed 2008-2011 DSP starters. Such notices will contain information about participation requirements relevant to individual recipients, including POS requirements, and information about appropriate POS providers.

Periods of inactivity do not count as participation in a POS

Any periods during which a person who started a POS does not participate in it for any reason (including when they are exempted on medical or any other grounds, are suspended from the program or are in the period of relief from the program) do not count as participation in a POS.

Act reference: SSAct section 94(2) A person has a continuing inability to work...
Policy reference: SS Guide 3.6.1.12 Qualification for DSP - 15 Hour Rule, 3.6.2.112 DSP Assessment of Continuing Inability to Work - 15 Hour Rule, 3.6.2.10 Medical & Other Evidence for DSP, 6.2.5.03 Application of DSP Qualification Rules at Review.