

IN THE FAIR WORK COMMISSION

Matter: AM2014/286

REGISTRY: SYDNEY

4 yearly review of modern awards – Supported Employment Services Award

Further Submissions on behalf of the Commonwealth of Australia as represented by the Department of Social Services

1. On 10 November 2022, the Full Bench of the Fair Work Commission (**Commission**) handed down its decision (**2022 Decision**) in relation to the 4 yearly review of the *Supported Employment Services Award 2020* (**Award**) which expressed a provisional view on amendments to be made to the Award and provided a draft determination giving effect to this provisional view (**Determination**).
2. The Full Bench invited parties to file submissions by 5:00pm on 30 November 2022 to address the following matters:
 - a. the provisional view concerning the modification to the “gateway” requirements for Grades A and B;
 - b. the provisional views concerning the operative date for the variations and the transitional arrangements;
 - c. the provisional view concerning alteration of the requirements as to the timing of SWS assessments;
 - d. the provisional view concerning the redrafting of the definition of “*supported employment services*” in connection with the coverage of the Award; and
 - e. any other drafting issues identified in the Determination.
3. The Department has set out its response to items a and e in its submissions below.
4. The Department does not require a hearing to deal with the matters set out in these submissions unless the Full Bench would be assisted by this.

Minor typographical error in Determination

5. At clause 15.3(b) of the Determination, a reference is made to the *Supported Employment Services Award 2010* whereas it appears the appropriate reference should be the *Supported Employment Services Award 2020*.

Gateway requirements for Grades A and B

6. In the 2022 Decision the Commission observed employees who are capable of performing a job which falls into Grades 1 -7 should not be placed in Grades A and B¹. It stated: *As an added protection to ensure that no employee is placed in Grades A or B who is capable of performing a job which falls into any of Grades 1-7, we propose to add a further requirement that Grades A and B will only apply to employees with a disability who, because of their*

¹ 2022 Decision at [246].

*disability, do not have the capacity to undertake the duties or exercise the level of skill and responsibility of any position to which Grades 1-7 apply*². This requirement, or qualifier, is given effect in the provisional clause A.1.1 (b) of the Determination.

7. The Department supports this qualifier as it serves to guard against the misclassification of employees with a disability into lower paid classifications when they could perform work of a higher Grade.
8. However, the Department has concerns the provisional gateway requirements for Grades A and B, in the Determination, do not adequately protect against inadvertent misclassification³ and / or deliberate exploitation by some employers - particularly in the context of long term classification of employees under Grades A or B.
9. The Department submits the Determination should be modified to include further protections for employees with a disability, given the unique nature of those employees and the supported employment industry.
10. To that end, the Department submits that it is appropriate that the Full Bench introduce, as a component of the gateway requirement, a right for employees to request a review of their classification. It is envisaged the right to request a review of classifications would not be dissimilar to the right to request flexible working arrangements already included in the *Fair Work Act 2009* (Cth) (**FW Act**) or modern awards.⁴
11. The Department recognises that the Full Bench, in its decision on 10 November 2022, stated the issues relating to appropriate classification of employees under the Award are best dealt with via the dispute clause in the Award and the application of the principal purpose test.⁵ However, the Department submits that the unique nature of the supported employment industry and, in particular Grades A and B, requires a simple, tailored and accessible provision to ensure appropriate compliance with the requirements of the Award and to minimise the risk of misclassification.
12. While the Department's primary concern is in respect of misclassification of Grades A and B, it is submitted a similar right of review would also be appropriate for Grades 1 to 7.
13. In essence, this right of review for Grade A and B would function as follows:
 - a. an employee (or a person on their behalf) could make a written request for their employer to review their classification under the Award to ensure they are appropriately classified under Grades A or B. Given the nature of the supported employment industry, the specific requirements would be broad to make the use of such a right accessible.
 - b. The employer would have 21 days to provide a written response which would either confirm the employee's re-classification or refuse to change the employee's classification. Written reasons would be required to be provided by the employer to the employee if no change in classification occurred.

² As above.

³ See page 86 of the Fair Work Commission New Wage Assessment Structure Trial Evaluation of 24 November 2021. The confusion amongst some ADE's that is highlighted in this report has the potential to lead to this misclassification.

⁴ See also for example section 65 and Division 4A of the FW Act as well as the model flexibility clause in the modern award.

⁵ 2022 Decision at [235].

- c. If the employee was not satisfied with the outcome of this review, they would be entitled to raise a dispute under the dispute resolution clause.
14. Similar wording could be adopted for Grades 1 to 7.
15. This right of review is intended to be an additional right and would not limit any other rights of employees covered by the Award (including raising a dispute).
16. Given that an employee covered in Grades A or B (and others in a supported role) may not be able to request a review themselves, it is also important that this right can be exercised on behalf of employees.
17. The Department recognises that such a provision, if not appropriately restrained, has the potential to be misused and / or create an administrative burden on an employer. As a result, the Department proposes that this right only be available for use once every six months unless there has been a significant or material change to the employee's duties or the "circumstances of their disability".
18. The inclusion of a right to request a review of classification for employees is consistent with the objects of the FW Act and the modern award objective as:
 - a. It provides employees in the supported employment industry with a simple, accessible and easy to use mechanism for enforcing their rights and ensuring compliance with the Award. This is particularly important given employees in the supported employment industry are vulnerable and the use of the Grades A and B and wage assessments permits an employer to pay rates that are significantly below the national minimum wage for employees outside this industry. As a result, the introduction of these changes ensures a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions as well as ensuring compliance with this safety net.⁶
 - b. The provision of this right ensures that the vulnerable employees within the supported employment industry have a fair and relevant minimum safety net of terms and conditions having regard to their unique challenges as employees with significant disabilities in the workplace.⁷
 - c. This right is appropriately limited in scope to avoid an unnecessary administrative, regulatory or other burden on ADEs in this sector. In this way, the Department's proposed changes have regard to the impact on businesses, including productivity and regulatory burden.⁸
19. We have set out at **Annexure A** the proposed amendments and additions to the Determination which will give effect to the Department's proposal. We have included consequential amendments to clause 32 which the Department submits are appropriate to accompany the introduction of this right.

⁶ Section 3(b) of the FW Act.

⁷ Section 134(1) of the FW Act.

⁸ Section 134(1)(f) of the FW Act.

20. Alternatively to the Department's proposal at Annexure A, the Full Bench may also form a view that these changes are appropriate to be introduced at clause 32 of the Award and apply to all Grades.

30 November 2022

Sparke Helmore Lawyers

Lawyers for the Commonwealth of Australia as represented by the Department of Social Services

Annexure A – Proposed Amendments to the Determination from the Department

1. Insert after clause A1.2 as follows:

“A1.3 An employee (or a person acting on behalf of an employee) who is classified under Grades A or B, may request that their classification be reviewed to determine if they should be classified under Grade B (if applicable) or Grades 1 to 7. In relation to this request:

- (a) The request must:
 - (i) as far as possible, be made in writing;*
 - (ii) if made by the employee themselves, set out (to the extent the employee can do so) why the employee believes they are not currently classified correctly; or*
 - (iii) if made by a person on behalf of the employee, set out why the employee is not currently classified correctly and why they should be classified at a higher Grade.**
- (b) If the employee cannot make a request in writing, they, or a person on their behalf, may request a meeting with the employer and the employer must, as soon as practicable, conduct such a meeting.*
- (c) The employer must provide a written response to this request to the employee within 21 days which states:
 - (i) the result of the employer’s review, being whether the employer will or will not re-classify the employee;*
 - (ii) if the employer has decided it will re-classify the employee, what the employee’s new classification is; and*
 - (iii) if the employer has decided it will not re-classify the employee, the reasons for the refusal, which must include why Grade A or B continues to apply to the employee’s position.**
- (d) Where requested by the employee or a person on their behalf, the employer must also conduct a meeting with the employee to explain its written response.*

A1.4 If the reasons for refusal provided by the employer are contested by the employee, a dispute regarding this can be resolved in accordance with the dispute resolution procedure set out in clause 31. Nothing in this clause (or any other clause dealing with the right to request a review of classification) is intended to restrain, impact or otherwise affect:

- (a) an employee’s right to raise a dispute under clause 31;*
- (b) the process for raising such a dispute;*
- (c) the rights of an employee to otherwise query the appropriateness of their classification; and / or*
- (d) the ongoing obligation of an employer to ensure an employee is classified and paid in accordance with the requirements of this award.*

A1.5 A person acting on behalf of an employee for the purposes of making a request under clause A1.3 includes:

- (a) a union or employee association (whether a registered organisation or otherwise);*
- (b) a support worker or social worker of the employee;*

- (c) *a family member or carer of the employee;*
- (d) *a lawyer or paid agent; or*
- (e) *any other person or organisation which the employee (or their legal guardian) has authorised to act on the employee's behalf.*

A1.6 An employee can only make a request for review under clause A1.3 if at least one of the following is satisfied:

- (a) *the employee has not already requested a review of classification under clause A1.3 in the prior six month period; and / or*
- (b) *the employee's regular duties or circumstances of their disability have significantly or materially changed since the employee last requested a review of classification under clause A1.3 .*

2. Insert clause 32.2(d) as follows:

"Providing information to a supported employee classified under Grades A or B about their rights to request reclassification under clause A1.3"

3. Insert clause 32.4(e) as follows:

"requests for review of classification made under clause A1.3;"