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**Sent:** Wednesday, 24 January 2018 2:46 PM

**To:** Chambers - Hatcher VP

**Cc:** 'Noni Lord'; 'KEMP, James'; 'Stephen.bull@unitedvoice.org.au'; Leigh Svendsen; 'fogarty@denmanchambers.com.au'; 'Kairsty Wilson'; 'cainpaul@icloud.com'; 'craig.rawson@ags.gov.au'; 'abigail.cooper@ashurst.com'; Nigel Ward; 'chris@greenacres.net.au'; 'MarkW@greenacres.net.au'; 'pfrench@disabilitylaw.org.au'; 'samanthaf@pwd.org.au'; 'Anthony.rohr@maiwel.com.au'; 'Smith\_c1@optusnet.com.au'; 'Steve.burgess@flagstaffgroup.com.au'; 'Roy.rogers@flagstaffgroup.com.au'; 'lmooney@dsa.org.au'; 'mlcinitialy@gmail.com'; 'mj buck2@telstra.com'; 'estelleshields@hotmail.com'; 'hdickens@dsa.org.au'; 'kerrie.langford@nds.org.au'; 'bree.willsmore@dss.gov.au'; 'johnharvey@greenacres.net.au'; 'marywalsh6@bigpond.com'; 'mpatrick@disabilitylaw.org.au'; 'Skillsmaster275@outlook.com'; 'cnewbold@actu.org.au'; 'Rowena.Freeland@dss.gov.au'; Joe Murphy; 'cwatts@actu.org.au'; 'robk@accessindustries.com.au'; 'Chris.D'SOUZA@dss.gov.au'; Emily Slaytor; 'Paul Musso ([paul.musso@nds.org.au](mailto:paul.musso@nds.org.au))'; 'Claire Bratney'; 'jzadel@hwle.com.au'; 'sryan@hwle.com.au'; 'Andrew Daly'; 'Hugh Packard'

**Subject:** AM2014/286 – Supported Employment Services Award [ABLAW-ImangeDocs.FID135807]

Dear Associate

We refer to the email from Paul Musso of National Disability Services (**NDS**) dated 18 January 2018 confirming that NDS has withdrawn its claims regarding changes to the definition of 'supported employment services' and 'employee with a disability' (**Definition Claim**) during this current review of the *Supported Employment Services Award 2010 (Award)*.

**Attached** is an amended draft determination reflecting the withdrawal of the Definition Claim.

In addition, having regard to the volume of evidence and submissions filed in this matter in relation to the other issues in dispute, and with a view to helping to ensure that these issues can be effectively ventilated during the two weeks allocated to hearing, NSW Business Chamber and Australian Business Industrial have elected not to press their proposed amendments to clauses 20.3 and 20.5 of the Award during the current award review proceedings. Instead, our clients will consider pressing these matters as part of the next award review round.

Kind regards

**Sina Zevari**

Senior Associate | Accredited Specialist – Employment & Industrial Law



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FAIR WORK COMMISSION

# DRAFT DETERMINATION

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

## **Supported Employment Services Award 2010 (AM2014/286)**

The *Supported Employment Services Award 2010* is varied as follows:

~~[1] By deleting definition of “employee with a disability” at clause 3.1.~~

~~[2] By inserting a new definition of “employee with a disability” at clause 3.1 that reads as follows:~~

~~**employee with a disability** means a national system employee:~~

- ~~(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) meets the disability requirement in order to qualify for the Disability Support Pension; and/or~~
- ~~(d) is eligible for support under the NDIS.~~

~~[3] By deleting the definition of “supported employment services” at clause 3.1.~~

~~[4] By inserting a new definition of “supported employment service” at clause 3.1 that reads as follows:~~

~~a **supported employment service** is an enterprise for which the majority of its employees meet the definition of “employee with a disability”, as defined in this award.~~

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~~[5] By inserting a new definition of “supported employment services” at clause 3.1 that reads as follows:~~

~~**supported employment services** are services conducted by a supported employment service, as defined in this award.~~

[1] By inserting the words “clause 14.7” into clause 14.2 so that it commences as follows:

Subject to clauses 14.3, 14.4, 14.5 and 14.7....

[2] By inserting a new clause 14.7 to read as follows:

If a supported employment service does not choose to use an approved wage assessment tool in accordance with clause 14.4, an employee with a disability will be paid in accordance with the Work Value Classification Structure as set out in Schedule I.

[3] By inserting a new Schedule I that reads as follows:

**Schedule I - Work Value Classification Structure**

**1. DEFINITIONS**

**1.1 Definitions to be Applied**

Definitions used in this Schedule are set out in Annexure B.

**2. CLASSIFICATION OF AN EMPLOYEE WITH A DISABILITY**

**2.1 Employer to classify an employee with a disability**

Subject to clause 2.7 below, the employer will classify an employee with a disability into the relevant classification set out in Annexure A.

No employee will remain in the Training and Assessment Level for a period of more than six months or 600 hours, whichever comes first.

The classification of employees made in accordance with this clause is to be carried out by a suitably skilled person, and appropriate documentation in relation to classification must be kept for review or dispute purposes.

**2.2 Reassessment for reclassification to a higher Level**

Having initially classified an employee in accordance with this Schedule, the employer will review the classification of an employee at least every two years as part of the employee's individual plan to determine whether the employee should be reclassified to a higher Level.

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**2.3 Reclassification to a higher Level**

If, having undertaken a reassessment under clause 2.2 above, the reassessment demonstrates that the employee can consistently perform work at a higher Level, the employer will reclassify the employee into the higher Level effective from the next full pay period.

**2.4 Reassessment for reclassification to a lower Level**

From time to time an employee may no longer be capable of performing work at the Level they are classified in. Where, after having observed the employee over a period of not less than six months, an employer reasonably believes this to be the case, they may reassess the employee to determine whether they can no longer reliably perform work at the Level the employee is classified in.

**2.5 Reclassification to a lower Level**

If, having undertaken a reassessment under clause 2.4 above, the employer demonstrates that the employee can no longer consistently perform work at the Level the employee is classified in, the employee may be reclassified to a relevant lower Level, provided that the employer:

- (a) gives the employee concerned no less than eight weeks' notice of their intention to reclassify the employee;
- (b) provides the employee the opportunity to be represented by their union or advocate in any further discussions in relation to the employer's intention; and
- (c) having consulted the employee, gives the employee two weeks' notice of the reclassification.

The employee will have the right to have the matter dealt with as per the grievance procedure set out in this award.

**2.6 Progression to full award rate and/or open employment**

Once a person has reached Level D, a discussion will take place with the employee about their employment aspirations, including their ability to transition to a full award wage within the organisation or options which might be available should the employee want to work in open employment. The result of such discussions will be recorded in the employee's individual plan or relevant documentation.

**2.7 Employees carrying out majority of their duties above Grade 2**

A employee with a disability carrying out the majority of their work at Grade 3 level or above in the award will be assessed under the Modified Supported Wage System.

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**3. RATE OF PAY**

**3.1 Weekly Ordinary Rate**

An employee classified in accordance with clause 2 above will be paid at the percentage of the weekly ordinary rate of pay set out in the Wages Table below:

Each employee will have their output assessed within their skill level using the **Output Guidelines in Annexure D** to determine their wage point within the level.

Output at each level will be determined as follows:

- (a) if 25% or under output on average across level work, the first wage point will apply;
- (b) if over 25% on average across level work but under 50%, the second wage point will apply;
- (c) if over 50% on average across level work but under 75%, the third wage point will apply; and
- (d) if 75% and over, the fourth wage point will apply.

<b>Level Grade 2 SESA Award</b>	<b>Percentage of weekly ordinary rate of pay</b>
<b>Training and assessment Level</b>	12.5%
<b>Level A</b>	
A1	15%
A2	20%
A3	25%
A4	30%
<b>Level B</b>	
B1	30%
B2	35%
B3	40%
B4	45%
<b>Level C</b>	
C1	45%
C2	50%
C3	55%
C4	60%
<b>Level D</b>	
D1	70%
D2	80%
D3	90%
D4	100%

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**4. REVIEW OF DECISION TO CLASSIFY AN EMPLOYEE AT A LEVEL**

**4.1 Right to review classification**

Each of the persons set out in clause 4.3 below may seek a review of the employer's decision to classify an employee in a particular Level.

**4.2 Review process**

A review of an employer's decision issued in accordance with clause 4.1 above will be conducted in accordance with the following procedure:

- (a) The review will first be discussed between the person seeking the review and the employer; and then if the matter remains unresolved.
- (b) Either party can notify the matter to the Fair Work Commission in accordance with clause 9 of the award (Dispute Resolution) and the matter will then be dealt with in accordance with that clause.
- (c) For the purposes of this review the Fair Work Commission may utilise a qualified independent assessor to assist it in resolving a dispute in relation to an employee's classification.

**4.3 Persons Eligible to Seek a Review**

The following persons may seek a review in accordance with clause 4.1 above:

- (a) the employee concerned;
- (b) a legal guardian of the employee, or
- (c) if authorised by the employee/legal guardian concerned:
  - (i) a registered employee organisation of which they are a member and which is entitled to represent their industrial interests at the employer's workplace;
  - (ii) a parent of the employee; or
  - (iii) a disability advocacy organisation.

## **Annexure A - Classification Descriptors**

### **A.1 Training and Assessment**

An employee at this Level is undergoing training and assessment. The employee has rudimentary Base Work Skills. During the employees time at this level they will:

- (a) require a very high level of Work Support;
- (b) continuously require Personal Support;
- (c) always requires their work to be closely and directly supervised;
- (d) not work to any pre-set pace;
- (e) requires the quality of their work to be constantly checked; and
- (f) during their employment at this level are being assessed as to their future skill level.

An employee will only remain classified at the Training and Support Level for six months or 600 hours, whichever comes first, at which time they will either be offered a permanent position or not.

### **A.2 Level A**

An employee at this level has rudimentary Base Work Skills and:

- (a) is directly supervised;
- (b) continually requires a high level of Work Support;
- (c) continually requires Personal Support;
- (d) is incapable of organising their own work;
- (e) does not work to any pre-set pace;
- (f) has some difficulty staying on task or remaining at their work station;
- (g) requires the quality of their work to be constantly checked; and
- (h) performs very basic tasks.

### **A.3 Level B**

An employee at this level has intermediate Base Work Skills and:

- (a) is directly supervised;
- (b) requires a high level of Work Support;
- (c) requires Personal Support;
- (d) is incapable of organising their own work but can communicate with their supervisor/trainer if they have some issues with their work;
- (e) does not work to any pre-set pace;
- (f) generally stays on task but can be distracted and/or leaves their work station unnecessarily;
- (g) has the quality of their work routinely checked; and

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- (h) is capable of performing a variety of basic tasks and in training to perform more complex tasks.

**A.4 Level C**

An employee at this level has intermediate Base Work Skills and:

- (a) is directly supervised;
- (b) requires a moderate level of Work Support;
- (c) occasionally requires Personal Support;
- (d) is capable of organising some of their own work with the assistance of their supervisor;
- (e) stays on task unless distracted by others;
- (f) requires the quality of their work to be periodically checked by their supervisor; and
- (g) is generally capable of performing all basic tasks and some complex tasks.

**A.5 Level D**

An employee at this Level has achieved good Base Work Skills and:

- (a) is directly supervised;
- (b) requires limited Work Support;
- (c) occasionally requires Personal Support;
- (d) is capable of organising their own work with the assistance of their supervisor;
- (e) assists other employees in their work group by leading by example;
- (f) works at a pace with pre-determined output targets agreed to with their supervisor;
- (g) generally stays on task;
- (h) has the quality of their work occasionally checked by their supervisor; and
- (i) can mostly perform complex tasks within Grade 2.

**NOTE:** An employee who has the ability to carry out tasks at a higher level will not be paid at a lower level simply because higher level tasks are not available.



## **Annexure B - Definitions**

### **B.1 Personal Support**

- (a) **"Personal Support"** is the care and support of an employee with a disability in the workplace provided by a trainer and/or supervisor.
- (b) Personal Support may take many forms including:
  - (i) encouragement;
  - (ii) mentoring;
  - (iii) counselling; and/or
  - (iv) behavioural intervention.
- (c) Personal Support may relate to different issues in the workplace including:
  - (i) interpersonal skills;
  - (ii) life issues;
  - (iii) personal needs; and/or
  - (iv) personal behaviour.

### **B.2 Work Support**

- (a) **"Work Support"** is the support of an employee with a disability in the workplace provided by a trainer and or supervisor including:
  - (i) the design of work tasks (including the disaggregation of work tasks to sub-tasks) tailored to the employee to allow them to perform a productive task;
  - (ii) coaching and/or training in Base Work Skills and/or work tasks and/or the use of machinery; and/or
  - (iii) coaching and/or training in communicating with others in the workplace or commuting to and from work.

### **B.3 Base Work Skills**

- (a) **"Base Work Skills"** refers to an employee's ability to:
  - (i) work safely;
  - (ii) follow instructions;
  - (iii) perform their work at a reasonable pace;
  - (iv) have fewer errors associated with their work;
  - (v) stay on task;
  - (vi) remain at an employees workstation or area;
  - (vii) not disturb the work of others or workflow generally;

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- (viii) be punctual and reliable with respect to work attendance;  
and
- (ix) alternate between tasks on which they have been trained.

**B.4 Rudimentary Base Work Skills**

- (a) A person at this level finds it difficult to stay on task and is easily distracted. The person can stay on task but only if the supervisor/trainer is in close proximity. The person needs reminding of work related issues and needs time to develop their understanding of new tasks. The person will have very limited ability to alternate between tasks during the course of their work day. A person at a rudimentary level must be constantly observed with respect to work health and safety issues as their ability to carry out their duties can be limited.

**B.4 Intermediate Base Work Skills**

- (a) A person at this level generally can stay on task for periods of time (e.g. an hour at a time) but not at a consistent pace. A person can be distracted by other things happening in the workplace. A person at this level can generally learn new tasks within their skill level and have a very basic understanding of work health and safety issues in their immediate work area under the observation of their supervisors/trainers. The person will have a basic ability to alternate between different tasks similar in nature during the course of their work day.

**B.5 Good Base Work Skills**

- (a) A person at this level generally stays on task at a reasonable pace as determined with their supervisor. The person is rarely distracted and has a basic understanding of work health and safety issues with respect to the work they are carrying out. A person at this level can pick up new work tasks following initial training or instruction reasonably well. The person will be able to alternate between different tasks during the course of their work day. A person at this level can also communicate reasonably well with their supervisor/trainer regarding work issues. A person at this level does not require ongoing motivation other than when they require Personal Support.

### **Annexure C - Indicative Task Schedules**

**C.1** Most duties of employees with a disability are contemplated in Grade 2 of the award. The duties of employees with a disability and (and as a consequence tasks) vary greatly between and within different supported employment services. In many cases employees with a disability can carry out only some tasks of a whole duty. Within a duty tasks may vary in complexity. Indicative tasks to be undertaken by an employee are referenced for each Level in the classification structure set out in this Schedule in accordance with the definitions below. Each employer will hold a register of tasks relevant to their enterprise which are consistent with the definitions below. These tasks will be reviewed from time to time by the employer.

**C.2 Level A tasks - very basic tasks**

This involves tasks which are elementary and simple to carry out. Such tasks are easy to complete and can be carried out in a sitting or stationary position. Typically it would involve very basic packing or assembly or work involving simple jigs or templates that have been created to guide the employee. Such tasks are not considered to have significant work health and safety risk.

**C.3 Level B tasks - basic tasks**

This involves tasks which involve more physical movement, but (like very basic tasks) are easy to complete. At this level quality issues are more susceptible. Easy to use machinery tools or mechanisms may be used to complete a task. Tasks require a very basic understanding of work health and safety issues associated with their work.

**C.4 Level C tasks - more complex tasks**

This involves tasks where initiative is greater than basic tasks and where work health and safety issues are of greater significance. This includes the use of more complex tools and or machinery and /or where the work to be carried out requires greater levels of communication skills. Tasks at this level may also involve greater productive interaction with the workers without disabilities or in the service sector interaction with the public. The tasks require a basic understanding of work health and safety issues associated with their work.

**C.5 Level D tasks - complex tasks**

This involves a person who is capable of carrying out a wider variety of the work outlined in Grade 2 of the award and as such with general training and ongoing direct supervision and support can carry out most tasks requested of them.

The person would still require a limited level of Personal Support and/or Work Support. A person at this level would be required to have a general understanding of work health and safety matters

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**Annexure D - Output Guidelines**

- D.1** To determine an employee with a disability's output and hence wage point within their classification Level, the following will apply.
- D.2** A employee with a disability will be assigned a range of tasks within their level. The employee's wage point within the Level will be determined by their output as follows;
- (a) If 25% or under output on average across the level work, the first wage point will apply;
  - (b) If over 25% on average across level work but under 50%, the second wage point will apply;
  - (c) If over 50% on average across level work but under 75%, the third wage point will apply; and
  - (d) If 75% and over, the fourth wage point will apply.
- D.3** The employee with a disability output will be benchmarked against a person who has carried out the same task who does not have a disability. Such benchmarks can be historical as long as they have been updated within a four year period or if required to be updated in the case of a dispute relating to the wage point.
- D.4** The comparative count will occur over a two hour period, allowing for a 30 minute hour count on each of four tasks that the employee spends the majority of their time on. The average percentage of the outcome of all four counts will determine the output percentage figure for the level and thus determine the wage point within the level.
- D.5** The following are examples:

*The employee with a disability is at Level B of the Classification Structure*

<b>Task</b>	<b>Supported employee</b>	<b>Benchmark</b>	<b>%</b>
<i>Task 1</i>	<i>50</i>	<i>100</i>	<i>50</i>
<i>Task 2</i>	<i>210</i>	<i>350</i>	<i>60</i>
<i>Task 3</i>	<i>65</i>	<i>180</i>	<i>36</i>
<i>Task 4</i>	<i>35</i>	<i>100</i>	<i>35</i>
<b>Average %</b>			<b>45 %</b>

*Based on the above calculation an employee with a disability classified at Level B will be paid at level B2, which is 35% of the minimum rate.*

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*The employee with a disability is at Level C of the Classification Structure*

<b>Task</b>	<b>Supported employee</b>	<b>Benchmark</b>	<b>%</b>
Task 1	40	100	40
Task 2	210	350	60
Task 3	50	180	28
Task 4	35	100	35
<b>Average %</b>			<b>41 %</b>

*Based on the above calculation, an employee with a disability classified at Level C will be paid at level C2, which is 50% of the minimum rate.*

~~[9] By amending clause 20.3 of the award to read as follows (underlined text is new to the clause):~~

~~Where work is carried out on weekends, payment will be at time and a half on Saturdays and double time on Sundays, other than for employees engaged in:~~

~~(a) catering services, who will be paid at the rate of time and three quarters on Sunday;~~

~~(b) the retail industry, who will be paid at time and a quarter on Saturday and double time on Sundays and~~

~~(b) the fast food industry, who will be paid at the rate of time and a quarter on Saturday and time and a half on Sunday.~~

~~[10] By amending clause 20.5 of the award to read as follows (underlined text is new to the clause):~~

~~By agreement between an employer and an employee, an employee who works their rostered hours of work or hours in a rotating roster shift which finishes after 12.00 midnight and at or before 8.00 am Monday to Friday, will be paid for the whole shift 30% more than their ordinary rate.~~

The determination will operate on and from [date].

BY THE COMMISSION