



2 March 2015

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Your Ref: AM2014/286

BY EMAIL amod@fwc.gov.au

Award Modernisation Team
Fair Work Commission

ABN 76 008 556 595

140 Arthur Street
North Sydney NSW 2060

Locked Bag 938
North Sydney NSW 2059
DX 10541 North Sydney

10 Felix Street
Brisbane QLD 4000

t: 1300 565 846

f: +61 2 9954 5029 (NSW)

f: +61 7 3832 1058 (QLD)

ablawyers.com.au

Dear Sir / Madam

**4 YEARLY REVIEW OF MODERN AWARDS - SUPPORTED EMPLOYMENT SERVICES AWARD 2010
(AM2014/286)**

We refer to the above proceedings and confirm that we act for Australian Business Industrial and the New South Wales Business Chamber Ltd.

Pursuant to the Statement published by the Commission on 23 January 2015 ([2015] FWC 618), interested parties were directed to file outlines of variations they wished to pursue in Group 3 and 4 Awards by no later than 2 March 2015.

Our clients intend to pursue a number of variations to the Supported Employment Services Award 2010 (**Award**), and we set out below details of the variations our clients intend to pursue.

1. DETERMINATION OF MINIMUM WAGES FOR EMPLOYEES WITH A DISABILITY EMPLOYED BY AUSTRALIAN DISABILITY ENTERPRISES

1.1 We note that the Award is currently the subject of separate applications made by the United Voice and the Health Services Union to vary the Award pursuant to section 160 of the Fair Work Act 2009 (Cth), given proceedings number AM2013/30 (**Section 160 Applications**).

1.2 The Section 160 Applications were filed with the Commission on 23 December 2013 and were made following a decision of the Federal Court of Australia in *Nojin v Commonwealth and Another* [2012] FCAFC 192.

1.3 The interested parties to the Section 160 proceedings are currently involved in a conciliation process being conducted by Deputy President Booth, which is exploring the broader issue of wage assessment tools to be utilised to determinate the minimum wages for employees with a disability. Our clients are participating in this conciliation process, and the proceedings are next listed for a further conciliation on 27 April 2015.

1.4 While the Section 160 Applications have been amended a number of times since the initial applications were made, in general terms the applications seek to:

- (a) remove the 'Business Services Wage Assessment Tool' from the list of approved wage assessment tools at clause 14.4 of the Award;





- (b) have the other approved wage assessment tools listed at clause 14.4 of the Award reviewed by the Commission for the purposes of determining whether they are discriminatory; and
 - (c) ultimately have the Supported Wage System as the sole mechanism for wage assessments for employees with a disability.
- 1.5 The decision of *Nojin* has raised a number of critical issues for how Australian Disability Enterprises (ADEs) pay employees with a disability. In simple terms there is now an ongoing debate about the efficacy and/or legality of approved wage assessment tools in the Award.
- 1.6 It is currently unclear whether the Section 160 proceedings will resolve this debate in a manner that provides not only a sustainable outcome for ADEs but also a stable framework for minimum wages that is secure from further challenge in the Federal Court.
- 1.7 Accordingly, while our clients will continue to participate in the Section 160 Applications conciliation process, they also seek to ventilate this issue in the 4 Yearly Review for the Award.
- 1.8 What form of claim this ultimately takes will obviously evolve through the conference process but it could require the introduction of a classification and wage structure for employees with a disability for ADEs that can operate alongside and as an alternative to traditional wage assessment tools in the Award.
- 1.9 We note that such a claim may result in a substantial process and potentially lengthy arbitral proceedings which may require a consideration of work value reasons.

2. OTHER PROPOSED VARIATIONS TO THE AWARD

- 2.1 In addition to the wage assessment issue addressed above, our clients also intend to pursue the following variations:
- (a) Variation to clause 14 to include minimum rates of pay for apprentices and junior employees;
 - (b) Variation to clause 14.4 to include a reference to a new version of an existing wage assessment tool;
 - (c) Variation to clause 18 to increase the timeframe for an employer to pay termination payments to employees;
 - (d) Variation to clause 20.1 to increase the maximum ordinary hours of work per shift;
 - (e) Variation to clause 20.2 to allow for adjustments to the span of hours;
 - (f) Variation to clause 20.3 and 20.4 to amend penalty rates to reflect the industry in which the employer operates;
 - (g) Variation to clause 21.5 to cover a situation where an employee works additional hours prior to the commencement of their ordinary hours of work;
 - (h) Variation to clause 26 and the definition of 'shift worker'; and



- (i) Variation to Schedule B to ensure classification definitions reflect the work performed by employees under the Award.

If you have any questions, please contact Emily Baxter on (02) 9458 7802.

Yours faithfully

Nigel Ward

CEO + Director

Australian Business Lawyers & Advisors Pty
Limited

(02) 9458 7286

nigel.ward@ablawyers.com.au

Emily Baxter

Lawyer

Australian Business Lawyers & Advisors Pty
Limited

(02) 9458 7802

Emily.Baxter@ablawyers.com.au