

IN THE FAIR WORK COMMISSION

JOINT POSITION - EMPLOYER INTERESTS

**4 YEARLY REVIEW OF THE MODERN AWARDS -
SUPPORTED EMPLOYMENT SERVICES AWARD 2020
(AM2014/286)**

**FILED ON BEHALF OF:
AUSTRALIAN BUSINESS INDUSTRIAL
NSW BUSINESS CHAMBER**

15 MARCH 2022

1. INTRODUCTION

- 1.1 In its Statement of 31 January 2022, the Fair Work Commission (the **Commission**) identified three issues at [9] that they said were likely to be of significance in light of the trial outcomes in the ARTD Pty Ltd Report (the **Report**):

“[9] We anticipate that the following issues are likely to be of significance in light of the trial outcomes in the Report:

(1) The clarity and workability of the drafting of the new wages structure set out in the attachment to the 30 March 2020 decision.

(2) The provisional quantum of the minimum wage rates for the proposed new Grade A and Grade B classifications set out in paragraph [372] of the 3 December 2019 decision.

(3) The operative date for the new wages structure.”¹

- 1.2 The Employers have consulted widely and in response to the Statement of 31 January 2022 set out the following position.

2. CLARITY AND WORKABILITY

A. Clarity

- 2.1 There are three issues of “*clarity*” that the employers have identified, which may benefit from further discussion between the industrial parties.
- 2.2 The *first* is the likely need for greater education when moving from a system that predominantly “*assesses*” an individual employee to classifying an employee into an award classification structure. This obligation will fall on representative bodies, but it may also involve the Department of Social Services (**DSS**).
- 2.3 The *second* arises from this and the apparent confusion some employers may have had in understanding the “*gateway*” criteria to classifying an employee into classification Grade A or B. The Commission determined that the following “*gateway*” requirements for an employee being classified into either Grade A or B are as follows:
- (a) the supported employee must be eligible for the Disability Support Pension²; and*
 - (b) the employer (**ADE**) must have created a position for the supported employee consisting of duties and a level of supervision tailored or adjusted for the circumstances of the employee’s disability; and*

¹ [2022] FWCFB 6 at [9].

² Disability Support Pension is paid to people whose physical, intellectual or psychiatric impairment prevents them from working, or who are permanently blind.

(c) *the position does not fall within Grades 1-7, that is, even where the position was created for the supported employee, the position does not require the employee to perform work at the level of any of the Grades from 1 through to 7.*³

2.4 If the employee, and the position they are engaged to perform, do not meet the above “gateway” criteria, then the employee will be classified within Grades 1-7 in the Award.⁴

2.5 The *third* may have emerged from the first and second in that some employers may have classified employees into Level 2 without effectively considering whether the employee (subject to training) could *be ready, willing and able* to do all things in that Level. This is illustrated by “*confusion*” referred to by the observations of Trial Coordinators cited in the Report, see example:

(a) A Trial Coordinator referred to uncertainty arising from evidence or knowledge of past performance: *“For the guy that only works for 50% of the time and the other 50% he does other things, we’ve sort of moulded that job to suit his requirements, so then it’s kind of a B, but then his supervision level is not as high as what the B definition was saying. So, he ended up in Grade 2, because Grade 1’s only for your first 3 months”.*⁵

(b) A Trial Coordinator observed: *“To be honest in the end we bumped them up to what their higher level would be. I can’t remember now. We have guys that I have put at a 2, but when you look at it, they might still be a B”.*⁶

(c) A Trial Coordinator raised issues as to the accuracy of the wage grading process, noting *“there are some days where I’m like, maybe I could push that they are a B grade. But then there are other days where I’m convinced that they’re Grade 2”.*⁷

B. Workability

2.6 The trial does raise an issue in the workability of the DSS funding and undertaking FWC modified SWS assessments.

2.7 Doing this at volume in a timely way may prove unworkable and it therefore begs the question of whether the A/B classification structure could be leveraged off to produce an expanded classification structure that removes the necessity of applying any FWC modified SWS.

³ See ARTD Pty Ltd Report, Appendix 4 - Wage Grade Guidance Document.

⁴ ARTD Pty Ltd Report, Appendix 4 - Wage Grade Guidance Document.

⁵ ARTD Pty Ltd Report, page 86

⁶ ARTD Pty Ltd Report, page 96.

⁷ ARTD Pty Ltd Report, page 109.

2.8 This may improve workability and save DSS many tens of millions of dollars that can be better used to fund the actual wage increases the new classification structure introduces.

3. PROVISIONAL QUANTUM

3.1 Nothing in the Report suggests an error in the A and B quantum, respectively, with the application of the FWC modified SWS. However, as the final determination averaged 61%,⁸ it provides room to explore the alternative which could see an evolution of the A/B classification structure as an alternative to using the FWC modified SWS at all.

3.2 Such a structure could be:

B.2 Grade A

1. Employees at this grade will perform a simple task or tasks consisting of up to three sequential steps or sub-tasks, any of which may involve the use of jigs or equipment or tools with basic functionality, under direct supervision and constant monitoring and *who also require regular assistance to keep on task.* **\$4.00**
2. Employees at this grade will perform a simple task or tasks consisting of up to three sequential steps or sub-tasks, any of which may involve the use of jigs or equipment or tools with basic functionality, under direct supervision and constant monitoring **\$6.00**
3. Employees at this grade will perform a simple task or tasks consisting of up to three sequential steps or sub-tasks, any of which may involve the use of jigs or equipment or tools with basic functionality, under direct supervision and constant monitoring *and who has undertaken structured training to undertake a B.3 Grade B.1 task.* **\$8.00**

B.3 Grade B

1. Employees at this grade will perform a simple task or tasks consisting of more than three sequential steps or sub-steps, each of which may involve the use of mechanical or electric equipment or tools, under direct supervision with regular monitoring. **\$9.00**
2. Employees at this grade will perform a simple task or tasks consisting of more than three sequential steps or sub-steps, each of which may involve the use of mechanical or electric equipment or tools, under direct supervision with regular monitoring *and who self-advocates their own and/or others task progress, issues or errors to a supervisor.* **\$11.00**

⁸ ARTD Pty Ltd Report, page 9, being the average overall productivity outcome.

3.3 What we are suggesting for discussion is a relatively simple evolution of Grade A and B. The rates that have been suggested are preliminary in nature but take into consideration the information set out in the Report that in the main most people were 61% productive. They are not designed to reduce the overall wages outcome of the trial. Rather, what they are designed to do is to provide greater simplicity, in terms of structure.

3.4 In addition to reviewing the need for DSS to fund the FWC modified SWS assessments, it would also mean that no employee is put through the challenging exercise of being timed and that both employee and employer would have complete clarity as to what is being paid and earned.

4. OPERATIVE DATE

4.1 On the current assessment, the wage outcome would be equal to or greater than the current wages for employees with a disability in the industry.⁹ The Report recorded an average hourly wage outcome of \$9.77, which is an increase of 50.1%.¹⁰ That increase does not effectively account for on-costs.

4.2 No industry could confront such a challenge without consideration of the following:

(a) A reasonable prospective operative dated commencing 1 July 2023 would commend itself, unless the DSS was required to individually assess all employees transitioning to the new classification structure. If this was to occur, it might reasonably take the DSS several years and thus necessitate a longer period before commencement of operation.

(b) Extensive phasing (ten years is sought) and in this regard it should be noted that in the *Equal Remuneration Case*¹¹, where the Equal Remuneration Order (**ERO**) involved an increase of 19% to 41%, the ERO involved a phasing-in of eight years.¹² Such a period is not simply about affordability but also to provide time for the industry to make likely necessary structural change as some employers will simply fail under the weight of this cost change or need time to transition their business model to survive.

4.3 Obviously, this issue is materially impacted by how the DSS is going to fund and, in effect, underwrite all wage and related cost increases. It will be important for the DSS to explain its position in that respect.

⁹ ARTD Pty Ltd Report, page 55.

¹⁰ ARTD Pty Ltd Report, pages 9 and 161.

¹¹ [2012] FWAFB 5184 (22 June 2012); Equal Remuneration Order [PR525485].

¹² [2012] FWAFB 5184 at [2], citing *Equal Remuneration Case - February 2012 Decision* [2012] FWAFB 1000 at [66].

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