

**IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT
SERVICES AWARD 2010**

**OUTLINE OF SUBMISSIONS OF THE AED LEGAL CENTRE IN REPLY TO
THOSE OPPOSING THE AED DRAFT DETERMINATION**

**The National Disability Services, Australian Business Industrial (ABI) and the
New South Wales Business Chamber Outline of Submissions.**

1. National Disability Services (**NDS**), Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**the NSW Chamber**) have filed an outline of submissions dated 21 November 2017 opposing the AED Draft Determination.
2. In paragraphs 3.2 to 3.28 of their outline, the NDS, ABI and the NSW Chamber set out some of the regulatory history associated with the inclusion in awards of wage assessment tools. The early history of the federal regulation of wages for employees with a disability employed by what are now called Australian Disability Enterprises (**ADEs**) was characterised by consensus over the use of wage assessment tools. That consensus led to the inclusion of the current multiplicity of tools.
3. The development of the Supported Wages System (the **SWS**) has proceeded from the standpoint that those with disabilities, whose disabilities affect the nature and extent of the work they can perform, can be employed like anyone else, and like anyone else are entitled to the same benefits and protections of the law. The historical consensus that characterised the early wage history of ADE employment is now not a good basis from which to assess the continuing part wage assessment tools should play in the Modern Award era.
4. The Commission assumes, on a prima facie basis, that a modern award under review met the requirements of the Modern Award Objective at the time it was made.¹ That assumption cannot continue to maintain the status quo with respect to the current list of

¹ [2014] FWCFB 1788 at [24].

wage assessment tools in the *Supported Employment Services Award* (the **Award**). The AED Draft Determination offers the opportunity to ensure that the Award does come within the framework of the *Fair Work Act 2009* (the **FW Act**). That opportunity should be taken for several reasons.

5. First, as is apparent from the history recounted by the NDS, ABI and the NSW Chamber, there has been no substantive consideration given by the Commission to the question of which tool or tools ought to be used for the purposes of determining an appropriate pro rata minimum wage for employees with a disability covered by the, or its predecessors.² More critically, there has been no substantive consideration of these tools in the context of the FW Act, and in particular the Modern Award Objective. The question is raised for the first time by the AED's Draft Determination in this Modern Award Review. The evidence and submissions filed in these proceedings demonstrates that the Award falls short for disabled employees. That it does so must be rectified by an appropriate variation.

6. Second, the Award was made before *Nojin v Commonwealth* (2012) 208 FCR 1 was litigated in the Federal Court. One of the most widely used tools recognised by a predecessor award and then included in this Award, the BSWAT, was struck down by the Court because it fell foul of the *Disability Discrimination Act 1994*. In doing so, the Court gave detailed consideration to pro rata wage assessments that rely on worker competency as part of the determination of a wage rate for an employee with a disability. The Court did not confine its views on this subject solely to the BSWAT. In circumstances where, like here, an award covers the work, the Court's reasoning raised questions about the relevance and appropriateness of assessment methodologies that rely on competency. The BSWAT was not an isolated example. Clauses 14.4(d) and (e) deems reports prepared by a consultant as the source of the descriptions of the wage assessment tools listed in cl. 14.4(b). The report referred to in cl. 14.4(d), referred to hereafter as the **First Pearson Report**³ states:

“A defining feature of the reviewed wage assessment tools, when compared to

² Notably, the industrial history recounted by NDS, ABI and the NSW Chamber omits the opposition to competency based assessment tools from the labour movement and advocates for those with disability

³ The Report is Annexure A to the statement of Kirstien Wilson dated 3 October 2017. The second report prepared by the same consultant is referred to in this outline as the **Second Pearson Report**. That report is Annexure B to the aforementioned statement

the BSWAT, is an increased focus on competency assessment.”⁴

7. The Court’s reasoning in (*Nojin*) was not available to the Commission when the Award was made. For the reasons stated below in paragraphs 18 to 23, that reasoning is of assistance to the Commission in the performance of its functions in this Review.
8. Third, after *Nojin* the HSU and United Voice applied to this Commission to have the BSWAT, as well as the competency based wage assessment tools currently contained in the Award, deleted. BSWAT was deleted by consent. There was then extensive consideration given to how the SWS could be modified to ensure there was greater use of the tool in ADEs through the conciliation process chaired by DP Booth.⁵ The standpoint from which this was done was the desirability of using the SWS as the only wage assessment tool prescribed by the Award.
9. Fourth, for the reasons outlined by the AED in its October 2017 Outline, clause 14.4(a) cannot be included in the Award because it offends s. 153(1) of the *Fair Work Act 2009* (the **FW Act**). That factor alone makes it necessary to vary the Award.

The criticism of AED’s s. 153(1) contentions

10. The NDS, ABI and the NSW Chamber contend, as the AED understands it, that the AED has conflated the test for discrimination in s.153(1) of the FW Act with the test for disability discrimination in the *Disability Discrimination Act*. They submit that the discrimination test in s.153(1) of the FW Act stands alone. That much is agreed.⁶ However, there is no conflation.
11. Simply put, the AED contends that the Commission is prohibited by s. 153(1) from including in the Award multiple ways of setting a pro rata minimum wage for disabled employees that it covers that discriminates against them on that ground. Plainly it is lawful to discriminate to the extent permitted by s. 153(3). That provision permits the Commission to include a term in the Award that authorises one method of wage assessment that discriminates (see paragraph 22 of the AED’s outline of submissions dated 3 October 2017) for all disabled employees or a class thereof. Currently, 14.4(a)

⁴ at page 91.

⁵ The SWS has, the evidence will show, been used by some ADEs for some time. There was also a greater uptake of the SWS following the deletion of the BSWAT.

⁶ In that connection, see [2014] FWCFB 1788 at [45]

treats all the disabled employees it covers as a single class and for all of them permits each covered employer to apply any one of the tools (save for those tools expressed in the Award to be employer specific) to one or more employees. This is beyond power.

12. The NDS, ABI and the NSW Chamber resist the AED's contention, pointing to the word "wages" in s. 153(3) and observing that it is in plural form. This feature is of no constructional significance. The plural form of the word merely recognises that awards do not prescribe the same minimum wage for every employee they cover. Minimum wages will and do differ according to work classification. Here, the non-disabled minima for each wage classification, or Grade, is the base upon which a pro rata wage is determined. The Commission has also observed that the very diversity of the employers and employees covered by different modern awards means the Modern Award Objective may have different outcomes as between different modern awards.⁷ The fact that s 153(3) of the FW Act permits inclusion of a discriminatory standard for a "class of employees with a disability" is also an indicator of multiplicity. But the section still expresses a collective conception. There is a profound difference between grading the level of work covered by an award (and setting a minimum wage for each grade, as the Award does) and allowing an employer to determine an individual wage for work of the same award grade. The latter is what cl. 14.4(a) permits, and it does so by authorising an ADE employer to choose from many methodologies that use different criteria. Most have the effect of suppressing wage outcomes when compared with the SWS.
13. Many ADE employers complain in these proceedings that if the SWS was the only tool available under the Award they would face large increases in the wage cost to their businesses. If that is so, it demonstrates the problem. Cl. 14.4(a) already prescribes the SWS as one of the available tools, but expresses no preference one way or another for this tool over any of the others. Its effect is to allow employers to decide for itself the minimum wage it wishes to pay, sanctioned by and nominally linked to the Award, provided it derives from a tool on the list. This results in wide minimum wage disparities for work of the same Award grade. The guarantee of a minimum wage based on a stable system of relativities that is available to non-disabled employees is denied to

⁷ Ibid at [33].

those with disabilities by cl. 14.4(a).

14. The NDS, ABI and the NSW Chamber submission also criticises the emphasis given by AED to the word “merely”, as it appears in s.153(3). Their criticism also relies on a misconception. The provision protects a modern award term from invalidity if all that it does is to provide for minimum wages for disabled employees or a class thereof. For the reasons given in the AED’s October 2017 outline, the wages tools recognised by clause 14.4(b) do more than that: they extend to other subjects. An example is the Greenacres tool. This tool brings into wage assessment performance and behavioural criteria as the means to re-classify award covered work into sub-classifications, called wage levels.⁸ These sub-classifications are entirely internal to the tool. The tool also provides for training and its own disputes process.⁹

15. The word “merely” in s. 153(3) is to be understood as referring to award terms that give effect to the minimum rate the Award prescribes. This is how the Commission “ensures” a fair safety net, and also the stability of that safety net.¹⁰ In the case of Grade 2, for example, a worker who has completed at least three month’s structured training so as to enable him or her to perform work within the scope of this level is entitled to the rate prescribed by clause 14.2. Work at this level is described at clause B.2.2 of Schedule B, with indicative tasks set out paragraph B.2.3. All work at this level has the same value. The same is true of the other Award grades. Nonetheless, cl. 14.4(a) permits an employer to select the SWS or the Greenacres tool. The first takes the Award as it finds it and determines a pro rata wage for Award covered work according to the Commission’s valuation of that work. The second re-classifies and thereby re-values Award covered work within a grade according to criteria not found in Schedule B. The same work results in two fundamentally wage outcomes that value the same work differently.

The authority of *Nojin v Commonwealth of Australia*

16. In paragraphs 4.11 through to 4.15 of their outline, the NDS, ABI and the NSW Chamber deal with *Nojin*. They submit that *Nojin* stands only for the proposition that

⁸ The First Pearson Report pages 37 to 38.

⁹ Ibid at pages 46-47. See also the statement of Paul Cain dated 3 October 2017 (the **First Cain Statement**) at [87].

¹⁰ *Paid Rates Review* (1988) 123 IR 240 at p. 254.

the incorrect application of a methodology by the Disability Enterprise for the two employees in question, coupled with the lack of a defence available to (or relied upon by) these organisations (such as under s.47 of the *DD Act*) resulted in a finding that these individuals had their pro rata wages determined on an incorrect basis. This submission is entirely misconceived.

17. It is accepted that factual matters specific to the BSWAT were important aspects of the decision in *Noijn*. However, the reasoning in *Noijn* is not confined to those facts. The case stands for the following propositions relevant to this Review:

- (a) The source of the valuation of the work covered by an award is the award. This is the foundation of the entitlement of workers covered by it to a minimum wage.¹¹
- (b) The statement in the SWS handbook that a productivity based wage requires a standard to be set of the productivity needed for award level pay and then an assessment of the worker’s productivity against that standard expresses a basic principle. This was formulated as: “The comparison contemplated by this approach is between tasks for which an award rate of pay is actually fixed and the work actually carried out by a (disabled) worker. As mentioned, consistently with this approach the SWS tool remains the only one which is approved for use in open employment.”¹²
- (c) The Grade 1 classification of the *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001* required a comparison of the applied skills at a basic level of actual work that was the sort of assessment utilised by the SWS, and not the sort of assessment “represented by the competency component of the BSWAT”.¹³
- (d) There was a conflation between suitability for employment and the suitability of the BSWAT as a measure of work value. The introduction of competencies introduced “an increased dimension to the achievement

¹¹ *Noijn* per Buchanan J at [25]

¹² *Ibid* at [27].

¹³ *Ibid* at [30].

which would be recognised, and at the same time required from a worker.”

It was the award “which states the legal entitlement to a payment”.¹⁴

- (e) Assessment of competency in a given task will be expected to be reflected in some aspect of or conclusion about productivity”.¹⁵
- (f) The productivity scores obtained by Mr Noijn and Mr Prior were effectively reduced by taking into account their competency scores.¹⁶
- (g) The fact that disabled workers without intellectual disabilities may be able to enhance their scores by showing greater competency than productivity demonstrates the disadvantage that workers with intellectual disability were subject under BSWAT.¹⁷
- (h) On the subject of reasonableness, Buchanan J said: “the regime established by the award required a comparison to be made with rate of pay for a Grade 1 worker under the award. That comparison could not leave out of account either the nature of the work for which the Grade 1 rate was fixed or the nature of the work being done by the person whose wage was being assessed. In that comparison, it was not, in my view, reasonable to introduce an examination or assessment of matters which play no part in the evident range of work for which the Grade 1 rate was fixed. Yet that is precisely what the BSWAT does. Furthermore, the attempt to assess competencies distracts attention from the comparison required under the award and has the likely result (in the case of intellectually disabled workers) of penalising workers in an ADE in terms of the percentage score able to be achieved. The score is no longer based on a direct comparison of the work done, skills used and results achieved. The score is based in significant part on other matters which play no part in the wage of a Grade 1 worker”.¹⁸
- (i) Testing for competencies is not used at all in open employment at the Grade

¹⁴ Ibid at [37].

¹⁵ Ibid at [41].

¹⁶ Ibid at [130].

¹⁷ Ibid at [131]; Katzmann J agreeing at [242].

¹⁸ Ibid at [135].

1 level. This raises questions about whether the inclusion of competencies is a realistic assessment.¹⁹

- (j) The most frequently used tools were the BSWAT, the Greenacres tool, the Skills master tool, the FMS wage assessment tool and the Yulara tool. All of them applied a competency component, some such as the Civic industries tool had a higher emphasis on competency. The Phoenix tool was entirely competency based.²⁰
 - (k) The BSWAT competency assessment imposed a higher standard for disabled employees than was imposed on non-disabled employees against whose wages their wages were being pro rataed.²¹
 - (l) The emphasis placed by the primary judge on the support of the union movement generally overlooked the fact that the ACTU had proposed use of the SWS as the basis for pro rata wage assessments and had called for a review of wage assessment tools.²²
 - (m) The disparity in the competency scores and productivity scores of Mr Noiijn and Mr Prior indicates a flaw in the design of the tool.²³
 - (n) If competencies must be measured independently of productivity this must be done in such a way as to eliminate as far as is possible inequity".²⁴
18. Buchanan J emphasised the centrality of the Award as the source of the valuation of the work actually performed thereunder. This is fundamental. That is overlooked by those who oppose the AED Draft Determination and defend the non-SWS tools, demonstrates error in their approach.
19. A further observation made by Buchanan J at [37] is that the legal entitlement to a minimum wage is stated in the award. There was accordingly no room to engage in

¹⁹ Ibid at [145]

²⁰ Ibid; per Flick J at [207]. The reports from which that evidence was extracted appears to be those referred to in cl. 14.4(d) and (e) of the Award: see page i of the Executive Summary. The table extracted in the reasons of Flick J at [207] is on page 90 of the First Pearson report

²¹ Ibid, per Katzmann J at [258].

²² Ibid at [263]-[264].

²³ Ibid at [266].

²⁴ Ibid at [268].

abstract debate about competing theories of wage fixation. The same is true here. The Award has fixed the appropriate minima. The debate here must be, and can only be, concerned with identifying the tool that best gives disabled employees the benefit of the valuation conferred by the Award for the work they are required to perform. To do otherwise permits the employer to absorb work value rather than pay for it.

20. None of the justices in *Noijn* confined their reasons only to the BSWAT. A critical aspect of Buchanan J's reasoning was that the use of competencies in wage assessment tools added additional criteria (not expressed in the award) that affected the valuation of the work embodied in the Award, by devaluing it. The Greenacres tool again offers an example.
21. The Greenacres tool prescribes five sub-classifications that stipulate a percentage of the minimum wage, ranging from 10% to 55% of that wage, after which the SWS takes over. This is done by use of three broadly grouped criteria described as "task skills", "underpinning work skills" and "productivity". The task skills and underpinning work skills concern work performance or the suitability of the worker for the work, not the work that is actually performed. This was the first ground upon which Buchanan J concluded that the BSWAT was not reasonable. A similar conclusion was reached by Katzmann J at [257]. The re-classification of jobs at levels below the Award does not involve a direct comparison between the Award and the work performed.²⁵ Rather, it re-values the work according to a different, internally derived, standard.
22. The work performed by an employee, rather than the level of skill or competence with which it is performed, is the concern of the Award. For all work within a Grade, there is one valuation, which is expressed as a single rate of pay.

The criticism that the AED proposal is not justified by work value reasons

23. Under this heading, NDS, ABI and the NSW Chamber submit that the AED's application must engage s.156(3) of the FW Act. The submission is incorrect. Self-evidently, the AED variation proposal changes nothing about the minimum rate of pay the Award prescribes. Nor does it propose a change to the Award work classifications or between those classifications. As was submitted in October, the AED application is

²⁵ See First Cain Statement at [70]-[71].

concerned with the identification of the most appropriate tool to determine a pro rata amount of the minima that has already been prescribed by the Award. The AED relies on paragraphs 10 to 13 of its October outline.

24. The disconnect between work performed and its work value asserted in paragraph 4.18 of the NDS, ABI and the NSW Chamber outline is misconceived. That submission is not open for Award covered work because the work value of that work is embodied in the rate the instrument fixes.

The criticism that the AED proposal is inconsistent with the modern award objective and the minimum wages objective

25. In this part of the NDS, ABI and the NSW Chamber outline, they point to factors (c) and (f) of the Modern Award objective in s. 134(1) of the FW Act to assert inconsistency between the AED proposal and the Objective. The factors cited do not assist them.
26. The Modern Award Objective is for “a fair and relevant minimum safety net of terms and conditions”. It is accepted that in providing for that safety net the Commission is obliged to take into account the factors set out in s. 134(1). Necessarily, the relative importance of the mandatory factors varies according to the circumstances. The task of the Commission is to balance the various s. 134(1) considerations to ensure a fair and relevant safety net.²⁶ Factor (f) is neutral. The Commission can have regard to the Commonwealth’s commitment, given in these proceedings, to support the ongoing viability of supported employment services, regardless of the tool or tools that the Commission determines should form part of the Award. That commitment is a factor of considerable weight in the assessment of (f).
27. Factor (c), social inclusion, is enhanced rather than diminished by the AED Draft Determination. What is proposed constitutes a measure that would put disabled people, whose productivity is affected by their disability, on the same footing as other workers; those with disabilities in open employment and those without disability.
28. The obligation to *ensure*, relevantly, that modern awards provide for a fair and relevant safety net of terms and conditions of employment means that it would not be open to

²⁶ [2014] FWCFB 1788 at [33].

the Commission to permit ADE employers to remunerate below an appropriate minimum wage standard, as declared by the Commission, merely because the SWS increased wages costs.²⁷ If the Commission is satisfied, as it is contended it should be, that the SWS delivers to employees with a disability the minimum rate contemplated by the Award for the same work output when compared with another worker without disability performing the same tasks at the same Award Grade,²⁸ there is no need for the Commission to make provisions for other tools. Indeed, if there is an increase in employment costs arising from the application of the SWS this supports a conclusion that the other tools under value the work of employees. So much follows from Buchanan J's conclusion at [27] in *Nojin* that the SWS is consistent with the comparative approach utilised by the award that was before the Court. That reasoning holds true with respect to this Award.

29. Further, there can be no justification for utilising one method for identifying an award rate of pay for employees with a disability working in open employment and another for those working for ADE employers if the starting point for wage determination is the same. To do so is anomalous.

Outline of submissions of the Endeavour Foundation

30. The Endeavour Foundation has filed an outline of submissions dated 14 November 2017. In paragraphs 15 to 19, the Foundation supports the retention of the Greenacres wage assessment tool. The tool appears in clause 14.4(b)(v) of the Award.
31. The Foundation asserts that the Greenacres tool is “designed to accommodate employees who have an intellectual impairment who require high to moderate support needs. Neither factor is relevant to the Commission’s obligations under s. 134(1) of the FW Act. Nor is the nature of a person’s disability relevant to the work value of the work they perform and accordingly what they ought to be paid for that work. Factoring in additional support needs is not a wages issue and can only result in wage discounting to the detriment of those with disabilities relative to their non-disabled or differently

²⁷ *c/f The Equal Remuneration Decision* (2015) 256 IR 362 at [228].

²⁸ First Cain Statement at [22], see also [23]-[26].

disabled peers.²⁹ In any event, these employment costs are irrelevant to an assessment of which tool most appropriately implements the Award. The evidence will show that ADE's are funded by the Commonwealth for meeting the support needs of the workers they employ.

32. The Endeavour Foundation's outline identifies the three elements of the Greenacres tool. Two are competency based. They are called "task skills" and "underpinning work skills". These are utilised to determine which tool based classification a worker will be allocated, which attracts a pre-determined proportion of the relevant Award rate, believed to be Grade 2. As has been explained already, the effect of these tool based sub-classifications is to re-revalue the work required of worker, adding elements foreign to the classification criteria contained in Schedule B to the Award.
33. The re-valuing is most obviously seen in paragraph 16 of the Endeavour Foundation submission. There it states that the tool breaks the job down into tasks. The competencies required to complete the job are then assessed. The complexity of the task determines the Wages Level. The more complex the task, the higher the wage. So far as it goes, this last statement is unexceptional in abstract sense. The Award has done this by grading the work. The Greenacres tool does this however for work of the same grade. Breaking down or re-packaging work of the same grade into tasks does not alter its work value under the Award.
34. The elements termed "task skills" do not represent distinct elements of the output of a disabled worker. Rather, these skills are implicit in performance. To assess it independently of work output is accordingly artificial, and overlooks the fact that if the employer has employed the worker and retained that worker in its employment it is to be taken as having determined that the worker has the necessary skills to perform the work that the employer wishes to perform. Task skills are not a wages issue, unless they productivity is affected. If they do, it will be picked up in the assessment undertaken under the SWS.
35. The criteria termed "underpinning work skills" is entirely irrelevant to wage determination. It is a work performance issue. It is necessarily subjective. The

²⁹ First Cain Statement at [52]-[56]. Further statement of Paul Cain dated 21 November 2017 (the **Second Cain Statement**) at [37]-[38]. Statement of Robert McFarlane dated 21 November 2017 (the **McFarlane Statement**) at [60]-[62].

Commission should be cautious about allowing subjective assessments of performance to intrude into the determination of minimum wages. It is likely to result in inequity.

36. In paragraph 20 of its outline, the Endeavour Foundation implies that the SWS is not suitable for use in ADEs. The SWS handbook states specifically that the SWS may be used in ADEs;³⁰ it is prescribed by the Award for use by ADE employers. The evidence will show that it is used by ADE employers, and has been for some time,³¹ and that the conciliation processes chaired by DP Booth was specifically intended to improve the tool to assist in the greater take up of the SWS in ADE employment.
37. To the extent that it is suggested that the SWS is inappropriate as a method of assessing wages for those with intellectual disabilities, that suggestion must be rejected.³² The evidence will show that the SWS has been used since its inception to measure the productivity of those with intellectual disabilities.³³ The nature of a person's disability is irrelevant to the SWS, as it is to the Award. The submission does not explain why, if an employer retains a worker with an intellectual disability in its employment, the work that worker is asked to and does perform at the relevant Award grade upon which their pay is based is any less valuable than anyone else, or why additional wage determination criteria should be applied to them. On this subject, the Foundation's observation at paragraph 22 that determining wage outcomes for supported employees is not a one size fits all approach exposes a fundamental misconception. The minima prescribed by the Award for the diversity of work that falls within a grade is a one size fits all approach. There is a single rate per grade, regardless of the employer. Nonetheless, cl. 14.4(a) permits individual assessment to determine a pro rata amount of that single rate. All of the tools do that and for that purpose the evidence will show that the SWS is a flexible instrument used to measure the productivity of a worker in the performance of their actual work tasks.³⁴
38. In paragraphs 25 through to 36, Endeavour Foundation makes submissions about the increased wage cost that it would incur should it be required to apply only the SWS. Its

³⁰ Page 4 of the Handbook. The Handbook is Attachment C to the statement of Kirstien Wilson of 3 October 2017.

³¹ The McFarlane Statement at [19], [43]-[51].

³² See paragraphs 120 to 130 of the Second Cain Statement. See also Leggett et al Research Report 5/2010: Employees with a Disability: Open Employment and a Supported Wages System (2010) at page 23.

³³ Second Cain Statement at [124]-[125].

³⁴ See paragraph 22 of the statement of Robert McFarlane dated 21 November 2017.

dramatic submission that many of the Endeavour Foundation's ADEs would close if the SWS was made the exclusive wage assessment tool should be approached with considerable caution by the Commission.

39. The Endeavour Foundation next turns to the topic of disability discrimination. The AED repeats the submissions it has made on this subject in response to the NDS, ADI and the NSW Chamber. Some further comment is however necessary.
40. In paragraphs 54 and 55 of the outline, it is contended that *Nojin* has no application. One of the grounds for that submission is the contention that in that case Mr Nojin and Mr Prior were subject to an assessment process that did not fairly relate to the work that they performed and that the Greenacres tool does not adopt the same assessment process as the BSWAT. That may be true. However, it is incorrect to suggest that the Greenacres tool fairly relates to the work that employers require in the absence of a cogent rationale that explains why disabled employees should be subject to a different and more onerous system of wages assessment.
41. In paragraphs 59 and 61, some attention is given to the reasonableness element that appears in the test for indirect discrimination in the *Disability Discrimination Act*. The Endeavour Foundation overlooks the first factor identified by Buchanan J in *Nojin* at [135] for concluding that the BSWAT was unreasonable. The regulatory context relevant to this proceeding is different from that in *Nojin*. Here the Commission must determine how best to serve the Modern Award Objective. Nonetheless, as Buchanan J made clear the starting point must be the Award itself, not the wage assessment tools.

Submissions of the Elouera Association

42. The Elouera Association contends that the Elouera Association wage assessment tool should not be deleted from clause 14.4(b) of the award. Currently, that tool appears in clause 14.4(b)(iv) of the Award.
43. The Elouera wage assessment tool assesses tasks in component manufacturer, assembly, plant and painting and packaging. These are assessed under the tool on the basis of a worker's productivity in the performance of those tasks as well as their competency in doing so. According to the First Pearson report:

“Both productivity and competency based assessments result in a percentage rating. Productivity is a percentage of the able bodied productivity rate and the task component and competency is a percentage according to the rating category selected by the assessor ... For the purpose of wage determination, only competency assessed task components with 100% ratings are used (consistent with an instruction from FaCS that stage competencies cannot be used for wage determination). In some cases, judged on their merits, ratings of 80% may be classed as competent (ie. considered to be 100%). The ratings below 100% are used by Elouera for the purpose of training and individual planning.”³⁵

44. The First Pearson report states that the average percentage rating achieved for competency is added to the average percentage rating for productivity and the total is divided by two. The resulting percentage is applied to the award wage to determine the employee’s assessed wage. It can be seen from this that competency plays as much a part in the assessment as the determination of a disabled employee’s output.³⁶ Moreover, the comparative table at page 90 of the First Pearson report makes clear that this tool uses “the same calculation formula, task areas and core competencies as the BSWAT, although the competency items and questions are different... More similar to the earlier version of the BSWAT than the final one”. The closeness of the tool’s design to that of the BSWAT makes it unsuitable as a wage assessment tool.
45. In paragraph 20, Elouera contends that the SWS fails because it only assesses what a person does and doesn’t take into account what “they would be expected to do in another factory”. If the Elouera wage assessment tool takes into account expectations of future work undertaken in different circumstances, it is founded upon a profound misconception of award regulation. The same may be said for the statement in paragraph 50. There, Elouera poses the question contained in a heading: “Should the existing tools remain in the award?”. The answer given is in the following terms:

“If they meet the standards I discussed, yes. While AED Legal and Paul Cain argue that our wage tools are designed to discount wages, this is not true, they are designed to fairly assess wages and ensure wages we pay are equitable

³⁵ At page 19.

³⁶ At page 22.

against our competitors.”

46. The position of Elouera *vis a vis* its competitors is irrelevant, and has the hallmarks of an approach to wage determination that assesses work value from the position of the employer. This is antithetical to the Australian conception of work value.³⁷
47. This tool should be deleted.

HSU National submissions

48. In paragraph 19 of its submissions, the HSU correctly states that the SWS is in fact a skill based tool, in that employees are assessed according to the skill descriptors contained in grades 1 to 7 of Schedule B of the award. As HSU National implies, there is no need therefore for a wage assessment tool to prescribe a different method for assessing skills or capacities.

Kurri Kurri Community Services Limited Submissions

49. Kurri Kurri Community Services Limited contends for the retention of the Kurri contracting service wage assessment tool. Currently, that tool is included in the award by clause 14.4(b)(xxvii) of the Award.
50. The Kurri Kurri submission contains little information that would enable the Commission to assess the merit of its arguments against deletion of the Kurri contracting service wage assessment tool. It is asserted that the purpose of the tool is to provide an equitable method of reward for employees with a disability with medium to high support needs.³⁸
51. The tool is described in the Second Pearson Report.³⁹ The tool is substantially competency based. Individual skill components are rated using a scale is shown in section 6.5 of the Second Pearson report. The scale states that it incorporates aspects of competency, productivity and level of supervision required. How it does so is not made

³⁷ In the context of the principle of equal pay for work of comparable value, as it has emerged in industrial jurisprudence, the notion that value ought to be conceived of as value to the employer has been firmly rejected: see *The Equal Remuneration Decision* (2015) 256 IR 362 at [62(5)(c)], [71].

³⁸ It seems to be contended at paragraph 5.1 that as no employee or representative of an employee has challenged the validity of the tool or question its appropriateness, it should not be deleted. That is of no significance.

³⁹ The Second Pearson report is Annexure B to the statement of Kirstein Wilson of 3 October 2017.

explicit.

52. There are 13 levels before an employee gets to 100% of the award minima. It is not made explicit which Award rate of pay grade is utilised as the rate of pay baseline. It is assumed that it is the grade 2 rate. If that is so, the competency and supervision elements of this tool are inconsistent with the skill and supervision elements of grade 2, as stated in paragraph B.2.2 of Schedule B.
53. The method of wage assessment utilised by the tool is inconsistent with the award. The tool should be deleted.

Blue Line Laundry Incorporated submissions

54. Blue Line Laundry contends for the retention in the Award of the Blue Line Laundry wage assessment tool, which appears at clause 14.4(b)(xxiv) of the Award.
55. The Blue Line Laundry advances several arguments in favour of retention. The principal argument is that to apply the SWS would have a significant cost impact on the business which would negatively impact its capacity to maintain the level of supported employees in employment. The AED repeats its submission on this subject contained in paragraph 26 and 28 above. It also opposes the SWS, in paragraph 27 of its submission, on the ground that the SWS focuses on the measurement of how fast a person works. That is not so.⁴⁰ Consideration of the circumstances in which the assessed work is performed is taken to account in the assessment.
56. The Second Pearson report contains a description of the tool at paragraph 2.5. The tool has two aspects. The first aspect is a productivity based assessment against “productive benchmarks”. This is done on the basis of “the work tasks that the employee can do”. There is no obvious reason why the SWS is not an appropriate method of assessment for the work that an employee can do if the Blue Line Laundry wishes that work to be done. However, under this tool the output generated by the employee comprises only 50% of their wage. The remaining 50% is determined by a competency based assessment that appears to have nothing to do with the actual work that is performed. This assessment is described in the Second Pearson report in the following terms:

⁴⁰ McFarlane Statement at [25].

“Workers are also assessed against five core competencies and each of these has a waiting applied (show in brackets in the list below):

1. *OH&S and Work Area Safety: understanding the safety rules for your work area (8.33% waiting).*
2. *Ability to multitask in the given work area: do more than one task (8.33% waiting).*
3. *Apply quality standards: do work correctly, make mistakes (8.333%).*
4. *Ability to work with minimal direction, ability to communicate and work with others: work with supervision (8.33%).*
5. *Flexibility to work across the laundry: do more than one task in another work area (16.666%).”*

57. None of the matters identified in the competency list appear in the grade 2 descriptors in Schedule B, apart from the level of supervision. Notably, the supervision criterion applied by the tool is different to the one Schedule B for Grade 2. The tool requires that an employee be able to work with minimal direction. This implies a level of discretion and supervision that more closely corresponds with the Grade 3 descriptors in Schedule B of the Award. The competency elements of the tool are irrelevant to the determination of minimum wages.

58. The tool should be deleted.

Civic Disability Services submissions

59. Civic Disability Services contends for the retention of the Civic Industries Supported Employee Wages Assessment Tool. That tool appears at clause 14.4(b)(iii) of the Award. The Civic Industries tool is one of the more widely used tools, according to the First Pearson report.

60. Civic Disability Services contends that the AED has failed to discharge its onus to show that variation of the award is justified. That is not so, for the reasons given in paragraphs 4 to 9 of this outline. It is further contended at paragraph 33 that the AED appears to rely wholly on arguments connected to s.134(1)(g) of the Act. The

submission is misconceived. The AED's contentions in favour of its variation have a broader basis than factor (g) of s. 134(1).

61. In paragraphs 59 and 60, Civic Disability Services criticises the SWS on the ground that it does not make a determination of the training and support levels required to keep employees on task and does not accurately account for behaviours employers encounter during the course of the working day. The former is not a wages issue. Further, to account for it in wages confers a benefit on the employer in relation to which ADE employers are already funded for by the Commonwealth. The latter issue is taken into account by the SWS to the extent that such behaviours affect a worker's output.
62. Civic Disability Services contends in paragraphs 62 to 66 of that the *Nojin* case ought to be limited to its own factual circumstances. This submission must be rejected. For the reasons already given in these submissions, the case offers guidance to the Commission on the proper consideration to be given to wage assessment tools that include competency elements.
63. The First Pearson report describes the Civic Industries wage assessment tool as a hybrid of the Greenacres and Skills Master tools. This tool, like those tools, contains elements of task skills and competencies. It adopts its own internal classification system for work, with 5 levels that apportion a fixed percentage of the Award minima according to criteria of its own devising. The elements are described in the First Pearson report at pages 9, 10 and 11.
64. The Civic Industries tool features in the comparison table extracted by Flick J at [207] of *Nojin* and page 90 of the First Pearson report. In that table, the tool is described as "Higher emphasis on competency than productivity when compared with BSWAT". This alone renders the tool unsuitable as a means of applying the Award to covered employees with a disability.
65. The tool should be deleted.

Koomarri submissions

66. Koomarri contends for the retention of the Koomarri competency based wages system. The wages tool is currently prescribed as one of the available tools by clause

14.4(b)(xiv) of the Award.

67. Koomarri opposes deletion of the tool and the AED proposal that would make the SWS the only assessment tool available for the determination of pro rata minimum wages. The reasons advanced by Koomarri in favour of its contentions are scant.
68. There is, like other ADE employers, a misconception about the nature of award regulation. So much is apparent in Koomarri's contention that fair and equitable wage assessments include ensuring that supported employees performing a variety of more complex tasks, even if less productive are not paid less than their colleagues who perform one aspect of a job, resulting in higher productivity. There should be no difference in the rate of pay paid to a worker who does the same work of the same grade as another worker. The contention overlooks the graded system utilised by the Award to delineate between different work values. More complex work would not ordinarily result in a higher rate of pay, corresponding with the higher grade of work that the worker is required to perform. If a worker is performing grade 2 work, they ought to receive the rate of pay prescribed for that grade. Insofar as this tool and others assign different work values to grade 2 work and accordingly different, lower, rates of pay, that approach must be rejected by the Commission as inconsistent with award regulation.
69. The Koomarri competency based wages tool ought to be deleted from the award.

Mai-Wel Group Submissions

70. Mai-Wel Group opposes the removal of the Mei-Wel Assessment Tool. That tool is prescribed by cl. 14.4(b)(xxviii) of the Award.
71. The Mei Wel tool appears to be entirely competency based. A competency score is calculated as a percentage. The percentage determines which internal wage level an employee falls within.
72. The Second Pearson Report states in section 7.7 that there are 13 wage levels based on, what was then, the AFPC Hourly Minimum rate of \$13.74. Level 1 paid 69 cents per hour. Level 13 results in the full minimum wage. Under the heading Scoring and Wage Calculation, the Second Pearson report states that:

The percentage score which translates to a pay level for the employee is calculated as follows:

Sum of the scores for each competency in the employee's job role *divided by* Maximum possible score for all the competencies in the employee's job role.

For example, an employee in the Hunter PACE Setters Timber Division (where there are 47 competencies specified) achieves:

Nil *Excellent* ratings;

Very Good ratings for 6 competencies;

Good ratings for 10 competencies;

Fair ratings for 2 competencies;

A poor rating for 1 competency

No *Very Poor* ratings; and

28 *Not Competent* ratings. □

Using the scores of 0-6 assigned to the rating scale, this employee's total score would be: $(0 \times 6 \text{ points}) + (6 \times 5 \text{ points}) + (10 \times 4 \text{ points}) + (2 \times 3 \text{ points}) + (1 \times 2 \text{ points}) + (28 \times 0 \text{ points}) = 78 \text{ points}$

73. The rating determines the wages level. Notably, Mai-Wel states in paragraph 6 that the “pro rata wage is calculated [under its tool] based on classifying the job a person without a disability would undertake in accordance with the SESA classifications” further exposes the inequity of the tool. The same is not done for those with disability. For them, work is classified by the tool.
74. In addition, the Second Pearson Report states that “In addition to competency in the task and productivity, the assessment/⁴¹ scale includes aspects of supervision and training required and for one level in the scale, behavioural problems”⁴² The inclusion of these elements has the same problems as those referred to above in relation to the Civic Industries tool.
75. What is immediately obvious is that the Mai-Wel tool is quite different to and inconsistent with the Award. Nowhere does the Award value an employee’s work according to how well he or she performs the job they are required to do. Moreover, the

⁴¹ Assessment is undertaken by management personnel.

⁴² Section 7.5.2.

competency ratings include supervision levels ranging from high levels to minimal levels of supervision. Grade 2 requires “direct supervision”. Yet grade 3 requires “routine supervision”.

76. The tool should be deleted.

The New Horizons Submissions

77. New Horizons Enterprise Ltd opposes deletion of the New Horizons Wage Assessment Tool. That tool is currently prescribed in cl. 14.4(b)(xvii) of the Award.

78. The tool is described in pages 147 to 156 of the First Pearson Report. It is apparent that this tool is similar in design to the Greenacres tool. The First Pearson report states that it “uses the same hybrid concepts as Greenacres but with a number of modifications”.⁴³ Like Greenacres, it employs internal wage bands, from A to F. Wage level F is 100% of the minimum wage. Within wage levels A to E are two sub-classifications: Entry and Advanced. Entry level for Wage Band is fixed at 15% of the Award rate. To this extent, the submissions made in this outline concerning the Greenacres tool apply to this tool.

79. The wage bands are determined by “average productivity levels generated by employees with a disability working at each of the respective wage levels”.⁴⁴ This is inconsistent with terms of cl. 14.4(a), which entitles each individual disabled employee a proportion of the minimum rate “as assessed” under one of the approved tools. The use of average productivity levels to determine the pro rata wage allocated to a wage level denies the disabled employee the full value of the assessment promised by cl. 14.4(a). Allocation to a wage level is determined by application of what is termed a skills matrix. Productivity is utilised to make a “productivity adjustment” within the allocated wage level.⁴⁵

80. The tool is quite inconsistent with the comparative method employed by the Award. It exhibits the design flaws identified by Buchanan J in relation to BSWAT arising from its focus on competency, which is linchpin of its assessment methodology.

⁴³ Page 156 of the First Pearson Report.

⁴⁴ Ibid at p. 152.

⁴⁵ Ibid.

81. The tool should be deleted.

Yumaro Submissions

82. Yumaro oppose the deletion of the Yumaro wage assessment tool. That tool is prescribed by cl. 14.4(b)(xi) of the Award.

83. At the heart of the Yumaro’s justification for retention of the Yumaro tool is a misconception about the nature of the system of wage regulation established by the Award and the SWS. Yumaro points to a paragraph it extracts from the First Cain Statement. This states that employees who a disability who perform one, some or all of a specialist packing job where all of that work falls within a single classification would expect to be paid the rate of pay for that classification. Yumaro says that this statement is “deeply flawed”. Yet Mr Cain is correct.

84. Yumaro uses an example to demonstrate the flaw it contends for by comparing two groups of workers. One group performs single overlocking duties in making cleaning cloths; the second group does more complex embroidery work. Those doing the simple work, on this example, will be paid more than those doing the more complex work because the former will have greater output than the latter. However, the SWS is capable of taking account of the nature of the tasks being performed by each group in the assessment of their productivity. The example does not demonstrate any flaw in Mr Cain’s analysis.

85. The First Pearson report states that the Yumaro tool has a “higher emphasis on competency than productivity when compared with BSWAT”.⁴⁶ This itself makes it unsuitable as a wage assessment tool prescribed by the Award.

86. The tool should be deleted.

Skills Master Submissions

87. A submission has been filed by Practical Workplace Solutions “on behalf of the users of the SkillsMaster System, Pro Rata Award Based Wage Assessment Tool”. This tool is prescribed by cl. 14.4(b)(x) of the Award.

⁴⁶ Ibid, p. 90.

88. The SkillsMaster tool is described at pages 68 to 74 of the First Pearson Report. The tool, like others, utilises its own work classification system. There are 14 levels, commencing at 5% of the Award rate and concluding with 100%. In short, there are 14 sub-classifications for work with a single Award classification. What governs allocation to a wage level is the “assessment of an employee’s competency and performance demonstrated as a percentage of the employee’s ability to undertake all the indicative tasks required to complete a whole job described in the award”.⁴⁷
89. The concept of a “whole job” is not one that is found in the Award. Covered work is described in terms of the criteria stated in, for example, B.2.2 of Grade 2. What follows is then a range of “indicative tasks which an employee **may** perform” (emphasis added). The standard to which the tasks are performed is irrelevant. That being so, the units of competency measure utilised by the SkillsMaster tool is of no significance to the determination of an appropriate pro rata wage of the kind prescribed by the Award itself.
90. Practical Workplace Solutions states at [47] that the ultimate goal of this process is to increase wage level outcomes and productivity for the employees and greater efficiencies for the organisation. The efficiency for the organisation is irrelevant. The other goals identified are better achieved by application of the SWS.
91. The submission contends at paragraph that it is erroneous to contend that competency has no role to play in determining wages outcomes for employees with disability. To the extent that it does, that role is disclosed in the Award itself. Any further role is irrelevant, and, as has been said elsewhere, distorts the value of the work as embodied in the Award. The effect is to impose disadvantage on employees entitled to the benefit of the Award.
92. The tool should be deleted.

Other wage assessment tools

93. The AED relies on the contentions in this submission in response to the other competency based wages tools currently prescribed by the Award. There is no need for them. The SWS is an appropriate tool for delivering the benefit of the Award to ADE

⁴⁷ Ibid at p. 73.

employees.

Dated 14 December 2017

M. Harding

Fair Work Commission

4 Yearly Review of Modern Awards

Supported Employment Services Award 2010

Matter No: AM2014/286

Further Statement of Leigh Svendsen

I, Leigh Svendsen, c/o Po Box 236, in the State of Victoria make this statement in reply to submissions made by other interested parties, filed on or about 21 November 2017.

1. I have made a statement in these proceedings dated 21 November 2017 (the **First Statement**).
2. In this further statement, I repeat what I said in paragraphs 1 to 17 of the First Statement.
3. In paragraphs 8 to 17 of the First Statement I speak of the processes supervised by DP Booth concerning the Supported Wages System (the **SWS**). A number of statements relied on by National Disability Services, Australian Business Industrial and the NSW Chamber has referred to the SWS, including as modified, and the increased wage costs they have said it has caused. As I mention in paragraph 18 of my First Statement, Mr Christodoulou also mentions these trials.
4. The Steering Committee of which I was part had also comprised representatives of Supported Employment Services (SEs) (also known as Australian Disability Enterprises) and National Disability Services. Those who represented SEs were Mike Smith; Heath Dickens; and Lorraine Bartolo. Ms Bartolo holds the position of Supported Employment Manager at Mambourin Disability Enterprises. Mambourin DE currently uses the SWS, in its current form, and has done so for 17 years.
5. As I state in paragraph 15 of the First Statement, the “trial and projects (the trial was coordinated and overseen by the Steering Committee) led to the agreed position, currently the subject of a decision and final orders, to modify the SWS for use in SE”.
6. The trials were funded by the Commonwealth of Australia through the Department of Social Services. The Commonwealth had publicly committed \$32 million to develop the SWS. The whole purpose of the processes chaired

by DP Booth was to identify what modifications could and should be made to the SWS to promote its more widespread adoption by SESs as the wage assessment tool for determining a pro rata wage for disabled workers employed therein. I say more widespread because there were already SESs that used the SWS as their wage assessment tool; and there were more SESs that commenced using the SWS following the removal of the BSWAT from the SESA in 2016.

7. A background paper prepared for the Fair Work Commission's Annual Review titled "review of existing wage arrangements for employees with disability" contains at paragraphs 57 to 59 a summary of the measures that were identified through the conciliation process as modifications to the SWS that would improve the SWS as a wage assessment tool for application in SESs. I have attached a copy of the background paper. It is marked "**LS-1**".
8. The changes considered necessary by the steering committee participants for the purpose of improving the SWS for use in SESs were the agreed modifications to which I refer in paragraph 15 of the First Statement. A decision¹ was made on 10 October 2017 to incorporate these changes into the SESA. That has been done and they will be effective from 1 July 2018².
9. As these review proceedings demonstrate, there is resistance to the adoption of the SWS, as modified, by SES employers. However, the SWS has been the subject of extensive consultation with a view to making it the wage assessment tool for use in SES employment. For the purposes of these proceedings, the then Secretary Department of Social Security, Mr Finn Pratt, wrote to the Vice President of this Commission on 16 August 2017 referring to the variations to the SESA that I had filed (and which were adopted) and said that "as the owners of the SWS and the funders of Australian Disability Enterprises, representatives from my Department have been engaged in the conciliation proceedings with the parties. The Department's preferred position is that the varied SWS is the only wage assessment tool in the [SESA]". I have attached a copy of that letter to this statement for ease of reference. It is marked "**LS-2**".
10. The new Departmental Secretary of the Department of Social Services, Ms Campbell, has since expressed the view on 8 November 2017 that the Department now does not have a preference for the SWS over any other tool in the SESA. However, the basis upon the Department participated in the conciliation proceedings as a member of the steering committee that I was involved in is as stated in Mr Pratt's letter. It was on that basis that the

¹ [\[2017\] FWCFB 5073](#)

² [MA000103 PR597498](#)

modifications to the SWS were discussed, consulted upon and then agreed to by all parties.

11. The conciliation proceedings before DP Booth were triggered by the application made by the HSU and United Voice to delete the BSWAT and other competency based tools from the SESA, which I refer to in paragraph 7 of the First Statement. The Unions' application was itself triggered by the Full Federal Court in *Noijn v Commonwealth of Australia*. What emerged from these proceedings, sponsored by the Commonwealth, was the identification of agreed changes to the SWS to better meet the circumstances of SES employment.

14 December 2017

Leigh Svendsen

ATTACHMENT

LS-1



BACKGROUND PAPER

Fair Work Act 2009

s.285—Annual wage reviews to be conducted

Annual Wage Review 2016–17—Review of existing wage arrangements for employees with disability

(C2017/1)

MELBOURNE, 19 SEPTEMBER 2016

Note: This is a background document only. It has been prepared by the Commission research area and does not represent the concluded views of the Commission on any issue.

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Abbreviations

2014–15 Review	Annual Wage Review 2014–15
2015–16 Review	Annual Wage Review 2015–16
2016–17 Review	Annual Wage Review 2016–17
ABS	Australian Bureau of Statistics
ABI	Australian Business Industrial
ACCI	Australian Chamber of Commerce and Industry
ACOSS	Australian Council of Social Service
ACTU	Australian Council of Trade Unions
AFPC	Australian Fair Pay Commission
Ai Group	The Australian Industry Group
AIRC	Australian Industrial Relations Commission
AWR	Annual Wage Review
Commission	Fair Work Commission
DSP	Disability Support Pension
DSS	Department of Social Services
Fair Work Act	<i>Fair Work Act 2009</i> (Cth)
Fair Work (Transitional Provisions) Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> (Cth)
FMW	Federal Minimum Wage
HREOC	The Human Rights and Equal Opportunity Commission
NMW	National Minimum Wage
NMWO	National Minimum Wage Order
Panel	Expert Panel for annual wage reviews
Pay Scales	Australian Pay and Classification Scales
Pre-reform Workplace Relations Act	Pre-reform <i>Workplace Relations Act 1996</i> (Cth)
SES Award	<i>Supported Employment Services Award 2010</i>
Special FMW2	Special Federal Minimum Wage No. 2
Special NMW1	Special national minimum wage 1
Special NMW2	Special national minimum wage 2
Social Security Act	<i>Social Security Act 1991</i> (Cth)
SWS	Supported Wage System
WATs	Wage Assessment Tools
Work Choices Amendment Act	<i>Workplace Relations (Work Choices) Amendment Act 2005</i>
Workplace Relations Act	<i>Workplace Relations Act 1996</i> (Cth)

Overview

[1] The Fair Work Commission (Commission) is the national workplace relations tribunal. It is an independent body with power to carry out a range of functions as established by the Fair Work Act 2009 (Cth) (Fair Work Act). The Expert Panel for annual wage reviews (Panel) of the Commission is responsible for conducting annual wage reviews (AWR), which must include making a national minimum wage order (NMWO) for all award/agreement-free employees, as well as reviewing modern award minimum wages.¹ The NMWO must set special national minimum wages (NMW) for employees with disability.²

[2] There are two categories of employees with disability in the national system:

- Employees whose disability does not impact on their productive capacity; and
- Employees whose productive capacity is affected by their disability.

[3] As part of the 2016–17 Review, the Panel proposed a preliminary hearing scheduled for 24 October 2016,³ which will, among other matters, deal with a review of existing wage arrangements for employees with disability. Parties have until 10 October to file submissions in relation to the matters considered at the hearing.⁴ This background paper is intended to inform parties' submissions to the hearing.

[4] This paper reviews the history and development of the special NMWs that apply to these two categories of employees with disability. It also reviews the Expert Panel's history of wage-setting in relation to employees with disability, and provides an analysis of the characteristics of Supported Wage System (SWS) employees. The paper is divided into the following sections:

- Introduction
- Wage setting for employees whose disability does not impact on their productive capacity
- Wage setting for employees whose productive capacity is affected by their disability
- The operation of the Supported Wage System
- Supported Wage System employee characteristics, wages and income
- Summary of questions for parties
- Attachment A—Supported Wage System Schedule in the National Minimum Wage Order 2016
- Attachment B—Supported Wage System Schedule in the *Supported Employment Services Award 2010*.

¹ Fair Work Act, s.285.

² Fair Work Act, s.294(1)(b)(iii).

³ [2016] FWCFB 3500 at para. 607.

⁴ [2016] FWC 5924.

Introduction

[5] Section 12 of the Fair Work Act defines an employee with a disability as:

“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.”⁵

[6] Under the *Social Security Act 1991* (Cth) (Social Security Act), a person qualifies for the Disability Support Pension (DSP) if they are 16 or over and permanently blind (s.95), or satisfy the criteria of section 94(1) of the Social Security Act. This section provides that a person qualifies for the DSP if:

- a) the person has a physical, intellectual or psychiatric impairment; and
- b) the person’s impairment is of 20 points or more under the Impairment Tables; and
- c) one of the following applies:
 - (i) the person has a continuing inability to work;
 - (ii) the Health Secretary has informed the Secretary that the person is participating in the supported wage system administered by the Health Department, stating the period for which the person is to participate in the system; and
- d) the person has turned 16 ...”⁶

[7] Section 94 also provides that a person will meet the requirement of a ‘continuing inability to work’ where they are unable to work independently of a program of support (or undertake training to enable such work) for at least 15 hours per week at a relevant minimum wage for a fully productive employee.⁷

[8] In AWR decisions the Commission has set two special NMWs for employees with disability:

- **Special national minimum wage 1** (special NMW1) for employees with disability whose disability does not affect their productivity. This wage rate has been set at the same rate as the National Minimum Wage (NMW).
- **Special national minimum wage 2** (special NMW2) for employees whose disability affects their ability to perform the range of duties to the competence level required of them within the class of work for which they are engaged. These employees must meet the impairment criteria for receipt of a DSP. Schedule A of the NMWO sets their base rate of pay, which is known as the Supported Wage rate, and calculated as a percentage of the NMW. The Supported Wage rate cannot be lower than the income-free threshold amount of the DSP.

⁵ Fair Work Act, s.12.

⁶ Social Security Act, s.94(1).

⁷ Social Security Act, s.94(2).

[9] In submissions to AWRs, the Australian Council of Social Service (ACOSS) has raised concerns about the complexity of the system and appropriateness of wage rates for employees with disability.⁸ In the 2015–16 Review, repeating its submissions of previous years, ACOSS submitted that it had two concerns with the present system of pay rates for people with disabilities. First, ACOSS submitted that:

“The system is too complex. For example, there is no need to adopt a separate system of minimum wage regulation for people whose disabilities do not affect their productivity, as is the case presently (even though for practical purposes it is the same as the Federal Minimum Wage).”⁹

[10] And second:

“The minimum rate of pay for people with disabilities whose productivity is affected by a disability is far too low. This is set at the income test free area for the Disability Support Pension.”¹⁰

[11] In the 2014–15 Review, the Panel suggested that ACOSS could apply to the Commission to have the rates varied or seek to have the issues addressed in a preliminary hearing to the 2015–16 Review.¹¹

[12] ACOSS did not seek a preliminary hearing as part of the 2015–16 Review. In the 2015–16 Review, the Panel again proposed that these matters be the subject of a preliminary hearing as part of the 2016–17 Review:

“It seems to us that the concerns raised by ACOSS are important and require careful consideration. While it will be a matter for the Panel constituted to conduct the 2016–17 Review, we would propose that these matters be the subject of a preliminary hearing as part of the 2016–17 Review.”¹²

[13] The hearing has been scheduled for 24 October 2016, and parties have until 10 October to file submissions in relation to the matters considered at the hearing, which will be conducted by members of the 2016–17 Panel.¹³ The preliminary hearing will deal with a review of existing wage arrangements for employees with disability, examining ACOSS’ concerns regarding the complexity of the system and appropriateness of pay rates in the NMWO.

[14] This hearing will not deal with the method of conducting wage assessments for employees working in Australian Disability Enterprises (ADEs) under the *Supported*

⁸ ACOSS submission to AWR 2014–15 at pp. 52–53; ACOSS submission to AWR 2013–14 at pp. 59–60; ACOSS submission to AWR 2012–13 at pp. 58–59; ACOSS submission to AWR 2011–12 at pp. 57–58; ACOSS submission to AWR 2010–11 at pp. 45–46 and ACOSS submission to AWR 2009–10 at pp. 45–46.

⁹ ACOSS submission to AWR 2015–16 at p. 38.

¹⁰ ACOSS submission to AWR 2015–16 at p. 39.

¹¹ [2015] FWCFB 3500 at paras 549–551.

¹² [2016] FWCFB 3500 at para. 607.

¹³ [2016] FWC 5924.

*Employment Services Award 2010*¹⁴ (SES Award) as these matters are currently being considered in the 4 yearly review of modern awards.¹⁵

¹⁴ MA000103.

¹⁵ AM2013/30 United Voice and HSU, Application to vary the *Supported Employment Service Award 2010*, 16 December 2013 and AM2014/286 *Supported Employment Award 2010*

Wage setting for employees whose disability does not impact on their productive capacity

[15] Employees whose disability does not affect their productive capacity are covered by the same minimum wage industrial instruments that apply to other employees in their workplace. However, there remain employees under the national system who are not covered by an award or agreement. To cover these employees, the Commission created special NMW1.

Special NMW1

[16] Special NMW1 has been set at the same rate as the NMW since its first iteration in 2009. ACOSS have submitted that there is no need for a separate wage for employees with disability whose disability does not affect their productive capacity.¹⁶

History and development of special NMW1

Workplace Relations Act 1996

[17] Under the pre-reform *Workplace Relations Act 1996* (pre-reform Workplace Relations Act) employees with disability working in open employment whose disability does not affect their productivity were entitled to full award or agreement wages if their workplace was covered by a federal award or enterprise agreement. If an employee was not covered by an award or agreement, no minimum rate of pay applied (as with other employees without disability) because there was no national minimum wage.¹⁷

Workplace Relations (Work Choices) Amendment Act 2005

[18] In 2005, the *Workplace Relations (Work Choices) Amendment Act 2005* (Cth) (Work Choices Amendment Act) expanded coverage of the federal industrial relations system to include employees covered by State industrial systems, including those with disability. The Work Choices Amendment Act removed minimum wage rates and casual loadings from awards and preserved them in new wage instruments named Australian Pay and Classification Scales (Pay Scales). The Work Choices Amendment Act also created the Australian Fair Pay Commission (AFPC) as the statutory body responsible for setting and adjusting the Federal Minimum Wage (FMW), as well as wage rates in Pay Scales.¹⁸

[19] In 2006, the AFPC noted in its first wage-setting decision that employees with a disability who were not covered by a Pay Scale were without a prescribed minimum rate of pay as they had been exempted from the standard FMW.¹⁹ Section 182 of the amended Workplace Relations Act expressly excluded the FMW guarantee from applying to employees

¹⁶ ACOSS submission 2014–15 at pp. 52–53; ACOSS submission 2013–14 at pp. 59–60; ACOSS submission 2012–13 at pp. 58–59; ACOSS submission 2011–12 at pp. 57–58; ACOSS submission 2010–11 at pp. 45–46 and ACOSS submission 2009–10 at pp. 45–46.

¹⁷ Leggett, J, Archer, S & Leung, E, *Employees with disability: open employment and the Supported Wage System*, Fair Work Australia, February 2010, p. 10.

¹⁸ Workplace Relations Act, s.20 as amended by Schedule 1A of the Work Choices Amendment Act.

¹⁹ AFPC, *Wage-Setting Decision and Reasons for Decision*, October 2006 at p. 114, para. 8.3.1.

with a disability and provided these employees with a separate special FMW guarantee,²⁰ while section 194(1)(b) stated that:

“**[Employees to whom FMW applies]** There is an [sic] FMW for an employee if the employee is not ... an employee with a disability.”²¹

[20] Section 194(3) then expressly provided a special FMW for employees with a disability:

“**[FMWs for employees with a disability]** There is an [sic] FMW for an employee with a disability (other than an APCS piece rate employee) if the AFPC has determined a special FMW that applies to all employees with a disability, or to a class of employees with a disability that includes the employee. The FMW for the employee is that special FMW.”²²

[21] Section 197(b) provided that the AFPC could determine a special FMW for all employees with a disability, or a class of employees with a disability.²³

[22] The AFPC explained the gap in coverage and potential consequences if the gap was not addressed in its first wage-setting decision:

“This represents a gap in coverage since fully productive employees with a disability could be paid at rates below the standard FMW compared to other fully productive employees doing the same type of work who are covered by the standard FMW.”²⁴

[23] The AFPC in its first wage-setting decision noted that:

“Employees with a disability who are fully productive in the class of work for which they are engaged do not require access to pro rata rates of pay.”²⁵

[24] The AFPC further stated that:

“The Commission notes the consensus advocating the consistent filling of gaps in coverage to ensure that ... employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate) as the effects of their disability do not impair their productive capacity have access to a statutory minimum wage.”²⁶

²⁰ Workplace Relations Act, ss.182(3) and 182(4).

²¹ Workplace Relations Act, s.194(1)(b).

²² Workplace Relations Act, s.194(3).

²³ Workplace Relations Act, s.197(b).

²⁴ AFPC, *Wage-Setting Decision and Reasons for Decision*, October 2006 at p. 114, para. 8.3.1.

²⁵ AFPC, *Wage-Setting Decision and Reasons for Decision*, October 2006 at p. 114, para. 8.3.1.

²⁶ AFPC, *Wage-Setting Decision and Reasons for Decision*, October 2006 at p. 119, para. 8.5.

[25] Accordingly, the AFPC created a new special FMW (special FMW1) equal to the standard FMW, for employees with a disability who were able to earn full adult, junior or trainee wages because their disability did not impair their productive capacity.²⁷

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

[26] When the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Fair Work (Transitional Provisions) Act) came into effect in 2009, employees with disability who were covered by the APFC's special FMW1 were covered by an equivalent transitional special NMW set at the same rate as the adult NMW.²⁸ This wage covered employees until Fair Work Australia's Minimum Wages Panel handed down its first AWR decision.

Fair Work Act 2009

[27] Section 294(1)(a)(iii) of the Fair Work Act provides that a NMWO must set special NMWs for all award/agreement free employees with disability.²⁹ Section 294(3)(c) provides that the national minimum wage (NMW) applies to all award/agreement free employees who are not employees with a disability,³⁰ while section 294(4)(c) provides that the special NMW applies to all employees with a disability who are award/agreement free employees, or a specified class of those employees.³¹ Taken together, these provisions appear to prevent the NMW from applying to employees with a disability, while providing a separate special NMW to cover employees with disability.

[28] In the first AWR, the then Minimum Wages Panel noted that while the extent of coverage of the two special national wages was unclear, there was broad agreement that the two transitional instruments should continue.³² This was the approach in submissions from Australian Industry Group (Ai Group),³³ Australian Chamber of Commerce and Industry (ACCI),³⁴ and the Australian Council of Trade Unions (ACTU).³⁵

[29] In its first decision, the Panel continued to set a special NMW for employees whose productivity was not affected by their disability at the same rate as the NMW.³⁶

[30] Under the Fair Work Act, the Minimum Wages Panel became known as the Expert Panel in annual wage reviews (Panel).³⁷ The Panel has, in subsequent AWRs, adopted the

²⁷ AFPC, *Wage-Setting Decision and Reasons for Decision*, October 2006 at p. 120.

²⁸ Fair Work (Transitional Provisions) Act, Item 12(2), Part 3, Div 3, Sch 9.

²⁹ Fair Work Act, s.294(1)(b)(ii).

³⁰ Fair Work Act, s.294(3)(c).

³¹ Fair Work Act, s.294(4)(c).

³² [2010] FWAFB 4000, at para. 418.

³³ Ai Group submission to the AWR 2009–10 at pp. 66–7, para. 220.

³⁴ ACCI submission to the AWR 2009–10 at p. 45, para. 219.

³⁵ ACTU submission at p. 184 at paras 15.13–14.

³⁶ [2010] FWAFB 4000 at para. 422.

³⁷ Fair Work Act, s.617(1).

previous Panel's approach and continued to set a special NMW for employees whose productivity is not affected by their disability at the same rate as the NMW.³⁸

Scope and application of special NMW1

[31] Fair Work Australia's 2010 report into *Employees with disability: open employment and the Supported Wage System* notes that although, the Australian Bureau of Statistics (ABS) collects data on people with disability, there was no current data available at the time which could "accurately outline the scope, size and nature of all employees with disability as defined in the FW Act, whose disability does not affect their productive capacity."³⁹

Question for parties:

Setting and varying wage rates for employees whose disability does not impact on their productive capacity

1. Taking into account the historical and legislative development of special NMW1, is a special national minimum wage required to ensure minimum wage coverage for employees whose disabilities do not impact on their productive capacity?

³⁸ See, for example, the most recent AWR decision: [2016] FWCFB 3500 at para. 652.

³⁹ Leggett, J, Archer, S & Leung, E, *Employees with disability: open employment and the Supported Wage System*, Fair Work Australia, February 2010, p. 31.

Wage setting for employees whose productive capacity is affected by their disability

[32] Employees whose productive capacity is affected by their disability are “unable to perform the range of duties to the competence level required within the class of work for which they are engaged.”⁴⁰ Accordingly, the Supported Wage System (SWS) is a wage setting system that allows employers to pay productivity-based wages for people with disability. The SWS is included as an attachment to the NMWO, as well as to some modern awards.

The development and implementation of the Supported Wage System⁴¹

[33] In 1994 the SWS was developed by the Australian Government, together with peak industrial councils and bodies representing people with disability.⁴² A joint consent application was then made to the Australian Industrial Relations Tribunal (AIRC) by the ACTU, ACCI, the then Public Sector, Professional, Scientific Research, Technical, Communications, Aviation and Broadcasting Union and then Minister for Industrial Relations, for federal awards to be varied to include the SWS clauses.⁴³ The AIRC, with the consent of parties, adopted a model clause for insertion into federal awards on application by the parties.

History and development of special NMW2

[34] Using the assessment method under the SWS, the Panel set special NMW2 to provide a pro-rated wage for employees whose productive capacity is affected by their disability.⁴⁴ The minimum rate of pay is set at the income-test-free threshold for the DSP, currently at \$82 per week.⁴⁵ ACOSS in its submissions to the Commission maintain that this minimum rate of pay is too low.⁴⁶ This section provides an overview of the development of special NMW2, examining its evolution through recent federal legislative frameworks.

Workplace Relations Act 1996

[35] In 1996 the pre-reform Workplace Relations Act came into effect, requiring the AIRC, where appropriate when making an order or award, to provide for “... a Supported Wage System for people with disabilities.”⁴⁷ Despite the creation of the SWS and the pre-reform Workplace Relations Act provisions, the SWS was not implemented uniformly across federal

⁴⁰ Department of Employment, ‘Supported Wage System’, <https://www.employment.gov.au/supported-wage-system>, accessed 26 August 2016.

⁴¹ For a detailed account of the historical development of the SWS, see Leggett, J, Archer, S and Leung, E, *Employees with disability: open employment and the Supported Wage System*, Fair Work Australia, February 2010, pp. 4–9.

⁴² Australian Government, *Submission to the Australian Fair Pay Commission 2006*, 28 July 2006 at p. 348, para. 11.30.

⁴³ ACTU & Others (Supported Wage System for People with a Disability) (1994) PR L5723

⁴⁴ PR581239, *National Minimum Wage Order 2016*, 20 June 2016, at cl. 7.1

⁴⁵ PR581239, *National Minimum Wage Order 2016*, 20 June 2016, at cl. A.3.2.

⁴⁶ ACOSS submission to AWR 2014–15 at pp. 52–53; ACOSS submission to AWR 2013–14 at pp. 59–60; ACOSS submission to AWR 2012–13 at pp. 58–59; ACOSS submission to AWR 2011–12 at pp. 57–58; ACOSS submission to AWR 2010–11 at pp. 45–46 and ACOSS submission to AWR 2009–10 at pp. 45–46.

⁴⁷ Pre-reform Workplace Relations Act, s.143(1C)(e).

and state systems, and there were gaps in coverage for employees with disability seeking access to the SWS.

Workplace Relations (Work Choices) Amendment Act 2005

[36] The Work Choices Amendment Act continued the operation of the SWS by preserving existing SWS wage arrangements as preserved Pay Scales. Submissions to the AFPC's first wage review in 2006 highlighted the gaps in coverage the SWS system had created for some employees with disability:

“A number of APCSs have gaps in SWS coverage because they have been derived from pre-reform federal or State awards. Many of these federal and State awards did not provide access to the SWS for employees with a disability. Employees with a disability who are covered by an APCS that does not provide access to the SWS, can only be paid the full wage guaranteed under that APCS.”⁴⁸

[37] Employees with disability who were covered by a preserved Pay Scale but unable to access the SWS model clause were entitled to receive full adult, junior or trainee rates of pay. The AFPC noted in its first wage-setting decision that:

“This represents a gap in coverage, since employees with a disability are required to be paid full rates of pay, potentially impacting their competitiveness in the labour market.”⁴⁹

[38] The AFPC also noted:

“the consensus of parties advocating the consistent filling of gaps in coverage to ensure that employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity have the protection of statutory minimum wages that include pro rata arrangements.”⁵⁰

[39] To address these gaps the AFPC created two new wage-setting instruments:

- **Special Federal Minimum Wage No. 2** (special FMW2) - which extended the coverage of the SWS pro-rata wages to previously award-free employees with a disability.⁵¹ This special FMW allowed the SWS to be applied against the Federal Minimum Wage.
- **Special Supported Wage System (Employees with a Disability) Australian Pay and Classification Scale [2007] 1** (Special Pay Scale 1) – which extended the SWS to employees with disability under preserved Pay Scales that did not provide for pro rata wage arrangements.⁵²

⁴⁸ Australian Government, *Submission to the Australian Fair Pay Commission 2006* at p. 357, para. 11.56

⁴⁹ AFPC, Wage-Setting Decision October 2006 at p. 114, para. 8.3.2.

⁵⁰ AFPC, Wage-Setting Decision October 2006 at p. 119, para. 8.5.

⁵¹ AFPC, Wage-Setting Decision October 2006 at p. 24.

⁵² AFPC, Wage-Setting Decision October 2006 at p. 120.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

[40] Under the Fair Work (Transitional Provisions) Act on 1 January 2010, Fair Work Australia was deemed to have created a transitional national minimum wage order with two special NMWs for award/agreement free employees with disability, derived from the two special FMWs created by the AFPC.⁵³ The second transitional special NMW replaced special FMW2, and covered employees whose disability affected their productivity, allowing for assessment under the SWS, which was then applied against the NMW rate.

Fair Work Act 2009

[41] In its first AWR under the Fair Work Act, the Panel noted that there was a “broad agreement that the two transitional instruments should continue”,⁵⁴ and that there was “general support for reduced minimum wages for employees with disability and for the use of the SWS as the sole method for assessing productivity.”⁵⁵

[42] The Panel also noted that a number of parties, including the ACTU, ACCI and Australian Business Industrial (ABI) proposed that the Panel adjust the SWS minimum weekly payment to equal the weekly equivalent of the maximum per-fortnight income-test-free earnings for the DSP, “consistent with past practice.”⁵⁶

[43] The Panel followed this approach in setting special NMW2 and has, since its first decision:

- used the SWS as a basis for determining pro-rated wages for employees with disability whose disability affects their productivity; and
- determined the minimum wages for these employees to be set at the same rate as the weekly income test free threshold for a single person receiving the DSP.⁵⁷

Varying the Supported Wage System in modern awards

[44] Under the Fair Work Act, the Panel has the power to make a determination to set, vary or revoke modern award minimum wages during an AWR.⁵⁸ Modern award minimum wages are defined as “the rates of minimum wages in modern awards, including ... wage rates for ... employees with a disability.”⁵⁹

[45] The Fair Work Act further defines setting and varying modern award minimum wages:

“Setting modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally

⁵³ Fair Work (Transitional Provisions) Act, Schedule 9, Item 12.

⁵⁴ [2010] FWAFB 4000 at para. 418.

⁵⁵ [2010] FWAFB 4000 at para. 365.

⁵⁶ [2010] FWAFB 4000 at para. 367.

⁵⁷ See, for example, the most recent AWR decision: [2016] FWCFB 3500 at para. 652.

⁵⁸ Fair Work Act, s.285(2)(b).

⁵⁹ Fair Work Act, s.284(3).

made or by a later variation of the award. Varying modern award minimum wages is varying the current rate of one or more modern award minimum wages.”⁶⁰

[46] There are two types of employment for employees with disability covered by modern award minimum wages:

- **open employment** which refers to the general workforce where employees with disability compete with fully productive employees in a commercial setting. As such, employees with disability are covered by the same minimum wage industrial instruments that apply to other employees in their workplace; and
- **supported employment** through ADEs (formerly known as “business services” or “sheltered workshops”).

[47] Employees in open employment are usually covered by the SWS schedule in most modern awards,⁶¹ while ADEs are generally covered by the SES Award. The SES Award allows employers to use an identified wage assessment tool (WAT) to assess the pro-rated wages for employees with disability under this award, including the SWS. Currently, there are 29 WATs attached to the SES Award, which an employer may use to assess an employee’s productive capacity.⁶²

[48] In *Nojin v Commonwealth of Australia*⁶³ the Full Court of the Federal Court found that requiring workers with intellectual disability to undergo assessment under a particular WAT, the Business Services Wage Assessment Tool (BSWAT), amounted to unlawful discrimination.

[49] The BSWAT assessed both a worker’s “productivity” by reference to work performed, as well as identified “competencies”, which relate to a worker’s general knowledge and aptitude. The Commonwealth suspended the “competency” test while it attempted to appeal the decision in the High Court, but the High Court refused leave to appeal.

[50] Following the *Nojin* decision, on 16 December 2013 the Commission received a joint application by United Voice and the Health Services Union to vary the SES Award to remove the BSWAT and other WATs, ensuring that the SWS was the only WAT for use under the award. The parties submitted that the variation was ‘necessary to achieve the modern awards objective (s.157) specifically, to provide a fair and relevant minimum safety net of terms and conditions.’⁶⁴ This application is currently before the Commission.

[51] Under the Fair Work Act, the Panel has the power to set or vary wages in modern awards, but cannot determine or vary methods of wage assessment. This means that the wage

⁶⁰ Fair Work Act, s.284(4).

⁶¹ In the award modernisation process, the AIRC decided that the SWS was not appropriate for inclusion in some awards because conditions in the industry covered by the award were not conducive to the employment of persons with a disability (such as the construction industry): [2009] AIRCFB 345, *Award Modernisation*, at para. 30.

⁶² MA000103, *Supported Employment Services Award 2010*, cl. 14.4.

⁶³ [2012] FCAFC 192.

⁶⁴ United Voice and HSU, Application to vary the *Supported Employment Service Award 2010*, 16 December 2013, at 4.1.

received by an individual employee and the wage paid by an individual employer is determined by the process of applying a WAT to the relevant award wage rate.

[52] The matter under consideration by the Commission relating WATs (see paragraph 49) is outside the Panel's powers in conducting an AWR, and is subsequently not included in this review.

The operation of the Supported Wage System

[53] The SWS allows employers to pay a productivity-based wage for people with disability that matches an independently assessed productivity rate.⁶⁵ It is administered by the Department of Social Services (DSS), and is the only WAT used to assess productivity based wages in open employment workplaces. The DSS manages a National Panel of Assessors to deliver a range of assessment services, including SWS Assessments.⁶⁶

[54] A person is eligible to participate in the SWS if:

- the job under consideration is covered by an industrial instrument or legislative provision which permits employment for productivity wages under the SWS, and
- the person is an Australian citizen or is a person resident in Australia whose continued presence is not subject to a time limit imposed by Commonwealth law (e.g. a temporary visa), and
- the person is at least 15 years of age, and
- the person has no outstanding workers' compensation claim against the current employer, and
- the person meets the impairment criteria for receiving the DSP.⁶⁷

[55] If there are no SWS provisions in the award or registered agreement, an employee with disability must be paid the full pay rate for their classification.

[56] Employees can work a trial period for the SWS. During the trial period, the employee's capacity is assessed by a qualified assessor. Employees still have to be paid at least \$82 per week for the trial period.

[57] In 2016, the parties to the conciliation for matter AM2013/30 agreed with the DSS to undertake a no-prejudice trial of a modified SWS for supported employees in ADEs.

[58] A steering committee of representatives from parties to the conciliation and other key experts such as wage assessors and ADEs, will set the parameters for, and oversee the trial. The key modifications that will be tested include:

- draft guidelines for the collection and use of workplace data in SWS assessments
- removing the minimum wage floor (currently \$82 per week)
- removing the "rounding" that is currently applied to SWS wage assessment outcomes
- training and support for assessors, ADEs and employees.⁶⁸

⁶⁵ Department of Employment, 'Supported Wage System', <https://www.employment.gov.au/supported-wage-system>, accessed 24 August 2016.

⁶⁶ Australian Government Supported Wage System Guidelines, 12 September 2015, p. 3.

⁶⁷ Department of Employment, 'Supported Wage System', <https://www.employment.gov.au/supported-wage-system>, accessed 24 August 2016.

⁶⁸ DSS, '2016 trial of a modified Supported Wage System for supported employees in Australian Disability Enterprises', <https://www.dss.gov.au/disability-and-carers/programmes-services/for-people-with-disability/2016-trial-of-a-modified-supported-wage-system-for-supported-employees-in-australian-disability-enterprises>, accessed 24 August 2016.

[59] The trial commenced in April 2016, and the Commonwealth Government has committed \$32 million for the development of a new wage assessment tool for supported employees in ADEs. DSS issued a statement about the trial:

“The results will enable the steering committee to see what works and what can be improved; build an understanding of the impact a modified SWS has in relation to supports for supported employees; and inform any additional work to be considered in the Fair Work Commission.”⁶⁹

⁶⁹ DSS, ‘2016 trial of a modified Supported Wage System for supported employees in Australian Disability Enterprises’, <https://www.dss.gov.au/disability-and-carers/programmes-services/for-people-with-disability/2016-trial-of-a-modified-supported-wage-system-for-supported-employees-in-australian-disability-enterprises>, accessed 24 August 2016.

Supported Wage System employee characteristics, wages and income

Key characteristics of SWS job seekers

[60] For the period between March 2010 and June 2016, more than 10 500 participants had a SWS assessment. Of this cohort:

- 66.5 per cent are male, 33.5 per cent are female
- around two thirds are aged between 20 to 39
- 51 per cent had a job placement
- 49 per cent were in a job for at least 26 weeks, and
- around half (46 per cent) had been assessed as having a future work capacity (i.e. work capacity in two years' time from assessment) of 8+ hours.⁷⁰

[61] No data was available at the time of publication regarding the distribution of assessed productive capacity.

Wages and disposable income of SWS employees

[62] Table 1 compares weekly earnings and disposable income of a hypothetical adult SWS employee with a range of assessed capacities as at July 2016. The table includes scenarios in which the SWS employee works 8 hours or 15 hours, is living in private rental accommodation (and receiving Rent Assistance) or at home with parents, and is covered by the SES Award or is considered award/agreement free and therefore is covered by the NMWO.

[63] Table 2 provides the same scenarios, but with the employee being paid at the Grade 2 classification of the SES Award. At this level, the employee works under direct supervision (individually or in a team environment) and understands basic quality control/assurance procedures. An employee at this level working in Timberwork, for example, would perform tasks such as labouring, sorting, packing, undercoat painting, assembly and/or repetition work on (automatic, semi-automatic, or single purpose) machines or equipment. An employee working in Gardening would perform tasks such as basic grounds and lawn maintenance, including use of lawn-mower and whipper snipper, repotting and/or basic labouring.

[64] In all scenarios across these two tables, the employee's disposable income includes receipt of at least a partial rate of DSP.

⁷⁰ Participation requirements are applied to DSP recipients under 35 years of age (who do not have a dependent child under 6 years of age) with a work capacity assessment of 8+ hours.

Table 1: Weekly wage and disposable income of adult award/agreement free SWS employees with various levels of assessed capacity, July 2016

	Works 8 hours per week		Works 15 hours per week	
RENTING PRIVATELY				
Assessed capacity	Wage (\$pw)	Disposable income (\$pw)	Wage (\$pw)	Disposable income (\$pw)
10%	*82.00	584.15	*82.00	584.15
30%	*82.00	584.15	*82.00	584.15
50%	*82.00	584.15	132.75	609.53
70%	99.12	592.71	185.85	636.08
90%	127.44	606.87	238.95	662.63
AT HOME				
Assessed capacity	Wage (\$pw)	Disposable income (\$pw)	Wage (\$pw)	Disposable income (\$pw)
10%	*82.00	518.95	*82.00	518.95
30%	*82.00	518.95	*82.00	518.95
50%	*82.00	518.95	132.75	544.33
70%	99.12	527.51	185.85	570.88
90%	127.44	541.67	238.95	597.43

Assumptions: Persons are 22 years old, single with no children. For those employees who are award/agreement free, wages are calculated as a proportion of the national minimum wage (\$17.70 per hour) factoring in the assessed capacity. Tax/transfer parameters as at July 2016. Disposable income includes all available income transfers, primarily consisting of Disability Support Pension. Persons renting privately pay sufficient rent to receive maximum Rent Assistance.

*Reflects the minimum rate payable under special NMW2 of \$82 per week.

Source: Fair Work Commission modelling; *National Minimum Wage Order 2016*.

Table 2: Weekly wage and disposable income of SES Award-reliant adult SWS employees with various levels of assessed capacity, July 2016

	Works 8 hours per week		Works 15 hours per week	
RENTING PRIVATELY				
Assessed capacity	Wage (\$pw)	Disposable income (\$pw)	Wage (\$pw)	Disposable income (\$pw)
10%	*82.00	584.15	*82.00	584.15
30%	*82.00	584.15	*82.00	584.15
50%	*82.00	584.15	136.58	611.44
70%	101.98	594.14	191.21	638.76
90%	131.11	608.71	245.84	666.07
AT HOME				
Assessed capacity	Wage (\$pw)	Disposable income (\$pw)	Wage (\$pw)	Disposable income (\$pw)
10%	*82.00	518.95	*82.00	518.95
30%	*82.00	518.95	*82.00	518.95
50%	*82.00	518.95	136.58	546.24
70%	101.98	528.94	191.21	573.56
90%	131.11	543.51	245.84	600.87

Assumptions: Persons are 22 years old, single with no children. Employee is paid at the Grade 2 classification of the SES Award, wages are calculated as a proportion of the applicable hourly rate of \$18.21 factoring in the assessed capacity under the SWS as per 14.4(b)(i) of the SES Award. Tax/transfer parameters as at July 2016. Disposable income includes all available income transfers, primarily consisting of Disability Support Pension. Persons renting privately pay sufficient rent to receive maximum Rent Assistance.

*Reflects the minimum rate payable under special NMW2 of \$82 per week.
Source: Fair Work Commission modelling; SES Award.

Additional costs associated with disability

[65] When considering wages and disposable incomes of employees with disability it is important to acknowledge additional expenses that may be incurred people with disability when compared with other groups of employees. The minimum needs to attain a basic level of well-being for people with disability are higher than those without disability.⁷¹

[66] ACOSS notes a range of additional living costs faced by people with disability such as adjustments to the home or workplace, purchase of care, additional transport costs such as taxis, pharmaceuticals and medical treatment.⁷² A broad range of other costs specific to the individual's disability may include such things as: tailored clothing or footwear to accommodate a physical disability; having to pay for services/goods that cannot be performed or undertaken by the individual, such as delivery of groceries/pre-prepared meals; more frequent use of the washing machine; purchase of specific aids or computer software or

⁷¹ Palmer, M (2011) 'Disability and Poverty: A Conceptual Review', *Journal of Disability Policy Studies*, Volume 21, Issue 4, p. 212.

⁷² ACOSS, *Poverty in Australia 2014*, p. 27

equipment to accommodate the disability; additional heating/cooling and lighting costs;⁷³ and costs related to socialising (e.g. covering expenses for a friend to accompany them in activities that may otherwise be difficult) and going on holiday.⁷⁴

[67] Saunders (2007)⁷⁵ did not directly measure the costs of disability directly but applied a “standard of living” method of estimating costs of disability, which aims to estimate how much income is required to raise those with a disability to the same standard of living as those without. Using ABS Household Expenditure Survey data, Saunders estimates the cost of disability is around 29 per cent of equivalised disposable income. This is close to the cost of an additional adult to a household as per the modified OECD equivalence scale.⁷⁶

[68] Further analysis on the impact of the severity of restriction of the reference person in the household undertaken by Saunders, indicates that where someone in the household has a moderate restriction, the cost is equivalent to around 30 per cent of income, while the costs of a severe or profound restriction increases to around 40 per cent of income.⁷⁷

Questions for parties:

Setting and varying wage rates for Employees whose productive capacity is affected by their disability

2. Do current wage rates provide adequate incentives for employees with disability to participate in the workforce?
3. Would any increases to wages for employees with disability impact employees’ access to employment?
4. Is it still appropriate to set the minimum wage for SWS employees at the income-free DSP threshold amount? If not, how should the threshold for these wages set?
5. What is the likely impact on employers of employees with disability to any changes in wage-setting arrangements or wage rates?

⁷³ Hinton T (2006), *My life as a budget item: Disability, budget priorities and poverty in Tasmania*, Anglicare Tasmania

⁷⁴ Hill K, Davis A, Hirsch D, Padley M, and Smith N (2015), *Disability and Minimum Living Standards: The additional costs of living for people who are sight impaired and people who are Deaf*, Loughborough University, p. 5

⁷⁵ While Saunders’ research was conducted around 10 years ago, more recent Australian research on the costs of disability does not appear to have been undertaken and there are difficulties with drawing conclusions from research conducted in other countries given differences in tax/transfer and service systems.

⁷⁶ Saunders P (2007), ‘The Costs of Disability and the Incidence of Poverty’, *Australian Journal of Social Issues*, Volume 42 Issue 4 (Summer 2007), p. 471

⁷⁷ Saunders P (2007), ‘The Costs of Disability and the Incidence of Poverty’, *Australian Journal of Social Issues*, Volume 42 Issue 4 (Summer 2007), p. 473

Summary of questions for parties

Setting and varying wage rates for employees whose disability does not impact on their productive capacity

1. Taking into account the historical and legislative development of special NMW1, is a special national minimum wage required to ensure minimum wage coverage for employees whose disabilities do not impact on their productive capacity?

Setting and varying wage rates for Employees whose productive capacity is affected by their disability

2. Do current wage rates provide adequate incentives for employees with disability to participate in the workforce?
3. Would any increases to wages for employees with disability impact employees' access to employment?
4. Is it still appropriate to set the minimum wage for SWS employees at the income-free DSP threshold amount? If not, how should the threshold for these wages set?
5. What is the likely impact on employers of employees with disability to any changes in wage-setting arrangements or wage rates?

Further research

6. What additional research would parties like to be conducted in relation to wage setting for employees with disability?

Attachment A—Supported Wage System Schedule in the National Minimum Wage Order 2016

Schedule A—Special national minimum wage 2

A.1 This schedule deals with the calculation of special national minimum wage 2 in relation to an employee to whom that wage applies.

A.2 In this schedule:

approved assessor means a person accredited by the management unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system

assessment instrument means the tool provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system

Disability Support Pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme

supported wage system (SWS) means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au

SWS wage assessment agreement means the document in the form required by the Department of Social Services that records the employee's productive capacity and agreed wage rate

A.3 Supported wage rates

A.3.1 Special national minimum wage 2 must be calculated as a percentage of the national minimum wage in cl.4.1 of the National Minimum Wage Order 2016 according to the following table:

Assessed (cl.A.4) %	capacity	National minimum wage in cl.4.1 %
10		10
20		20
30		30
40		40
50		50
60		60
70		70
80		80
90		90

A.3.2 Provided that the minimum amount payable to an employee to whom special national minimum wage 2 applies is not less than \$82 per week.

A.3.3 Where an employee's assessed capacity is 10%, they must receive a high degree of assistance and support.

A.4 Assessment of capacity

A.4.1 For the purpose of establishing the applicable percentage in cl.A.3.1, the productive capacity of the employee will be assessed in accordance with the SWS by an approved assessor, having consulted the employer and employee and, if the employee so desires, a union which the employee is eligible to join.

A.4.2 All assessments made under this schedule must be documented in a SWS wage assessment agreement, and retained by the employer as a time and wages record in accordance with the Act.

A.5 Lodgement of SWS wage assessment agreement

A.5.1 All SWS wage assessment agreements under this schedule, including the applicable percentage of the national minimum wage to be paid to the employee, must be lodged by the employer with the Fair Work Commission.

A.5.2 All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment.

A.6 Review of assessment

The assessment of the applicable percentage should be subject to annual or more frequent review on the basis of a reasonable request for such a review. The process of review must be in accordance with the procedures for assessing capacity under the SWS.

A.7 Workplace adjustment

An employer wishing to employ a person under the provisions of special national minimum wage 2 must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

A.8 Trial period

A.8.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of special national minimum wage 2 for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

A.8.2 During that trial period the assessment of capacity will be undertaken and the applicable percentage of the national minimum wage for a continuing employment relationship will be determined.

A.8.3 The minimum amount payable to the employee during the trial period must be no less than \$82 per week.

A.8.4 Work trials should include induction or training as appropriate to the job being trialled.

A.8.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under clause A.4 of this schedule.

Attachment B—Supported Wage System Schedule in the *Supported Employment Services Award 2010*

Schedule D—Supported Wage System

[Sched D inserted by [PR529171](#) ppc 27Sep12; varied by [PR537893](#), [PR542223](#), [PR551831](#), [PR568050](#), [PR581528](#)]

D.1 This schedule defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award.

[D.2 varied by [PR568050](#) ppc 01Jul15]

D.2 In this schedule:

approved assessor means a person accredited by the management unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system

assessment instrument means the tool provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system

disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme

relevant minimum wage means the minimum wage prescribed in this award for the class of work for which an employee is engaged

supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au

SWS wage assessment agreement means the document in the form required by the Department of Social Services that records the employee's productive capacity and agreed wage rate

D.3 Eligibility criteria

D.3.1 Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension.

D.3.2 This schedule does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their employment.

D.4 Supported wage rates

D.4.1 Employees to whom this schedule applies will be paid the applicable percentage of the relevant minimum wage according to the following schedule:

Assessed capacity(clause <u>D.5</u>) %	Relevant minimum wage %
10	10
20	20
30	30
40	40
50	50
60	60
70	70
80	80
90	90

[D.4.2 varied by PR537893, PR551831, PR568050, PR581528 ppc 01Jul16]

D.4.2 Provided that the minimum amount payable must be not less than \$82 per week.

D.4.3 Where an employee's assessed capacity is 10%, they must receive a high degree of assistance and support.

D.5 Assessment of capacity

D.5.1 For the purpose of establishing the percentage of the relevant minimum wage, the productive capacity of the employee will be assessed in accordance with the Supported Wage System by an approved assessor, having consulted the employer and employee and, if the employee so desires, a union which the employee is eligible to join.

D.5.2 All assessments made under this schedule must be documented in an SWS wage assessment agreement, and retained by the employer as a time and wages record in accordance with the Act.

D.6 Lodgement of SWS wage assessment agreement

[D.6.1 varied by PR542223 ppc 04Dec13]

D.6.1 All SWS wage assessment agreements under the conditions of this schedule, including the appropriate percentage of the relevant minimum wage to be paid to the employee, must be lodged by the employer with the Fair Work Commission.

[D.6.2 varied by PR542223 ppc 04Dec13]

D.6.2 All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment. Where a union which has an interest in the award is not a party to the assessment, the assessment will be referred by the Fair Work Commission to the union by certified mail and the agreement will take effect unless an objection is notified to the Fair Work Commission within 10 working days.

D.7 Review of assessment

The assessment of the applicable percentage should be subject to annual or more frequent review on the basis of a reasonable request for such a review. The process of review must be in accordance with the procedures for assessing capacity under the supported wage system.

D.8 Other terms and conditions of employment

Where an assessment has been made, the applicable percentage will apply to the relevant minimum wage only. Employees covered by the provisions of this schedule will be entitled to the same terms and conditions of employment as other workers covered by this award on a pro rata basis.

D.9 Workplace adjustment

An employer wishing to employ a person under the provisions of this schedule must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

D.10 Trial period

D.10.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this schedule for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

D.10.2 During that trial period the assessment of capacity will be undertaken and the percentage of the relevant minimum wage for a continuing employment relationship will be determined.

[D.10.3 varied by [PR537893](#), [PR551831](#), [PR568050](#), [PR581528](#) ppc 01Jul16]

D.10.3 The minimum amount payable to the employee during the trial period must be no less than \$82 per week.

D.10.4 Work trials should include induction or training as appropriate to the job being trialled.

D.10.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under clause [D.5](#).

ATTACHMENT

LS-2



Australian Government
Department of Social Services

Finn Pratt AO PSM
Secretary

Vice President Hatcher
Fair Work Commission
Level 10, Terrace Tower
80 William Street
EAST SYDNEY NSW 2011

Email: amod@FWC.gov.au

Dear Vice President Hatcher

Concerning matter AM2014/286 Supported Employment Services Award 2010

The Department of Social Services notes with approval the proposed variation to the *Supported Employment Services Award 2010* (SES Award) submitted to the Fair Work Commission by Ms Leigh Svendsen, Senior National Industrial Officer, on behalf of the Health Services Union, on Monday, 31 July 2017. The variation would amend the operation of the Supported Wage System (SWS) assessment tool under the SES Award.

The Commonwealth is not an industrial party to this matter, however as the owners of the SWS and funders of Australian Disability Enterprises, representatives from my Department have been engaged in the conciliation proceedings with the parties. The Department's preferred position is that the varied SWS is the only wage assessment tool in the SES Award but I note that is to be the subject of separate consideration.

Should the Full Bench of the Fair Work Commission agree to the proposed variation, I suggest the variation come into effect from 1 July 2018. This will enable my Department to: plan and undertake a change management process with affected stakeholders; develop and deliver training and resources to assist wage assessors and employers using the SWS under the SES Award; and implement information technology system upgrades necessary to administer the changes.

I thank you in advance for your consideration of this proposed implementation timing.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Finn Pratt'.

Finn Pratt

16 August 2017