Note: Submission received in chambers on 28 April 2017

SUBMISSION TO FAIR WORK COMMISSION – AM2014/286

From OUR VOICE Australia 29 August, 2016

The **Supported Employment Services Award 2016** covers workers needing various types and levels of support. This submission relates to those workers with impaired decision – making capacity and/or a lack of communication skills.

These workers can be employed in open employment or in Australian Disability Enterprises (ADE's) – where the majority of ADE workers have an intellectual disability of varying degrees.

Relevant sections of SESA 2016 – as referenced in the Exposure Draft MA000103

Our families, workers and members are already "interested persons" in AM2013/30 where we have been participating in the conciliation process by courtesy of DP Commissioner Booth and the Fair Work Commission. Such is the abysmal representation of our constituents – at the national policy level – that we have been unaware of the AM2014/286 Review – until now. We appreciate the opportunity to make the following comment- despite being outside the relevant time frames.

Using **Exposure Draft MA000103** as a point of reference – the relevant sections of the Exposure Draft are:-

Part 1 (5)	Effect of variations made by the Fair Work Commission
Part 4 (15 & 16)	Wages and Allowances
Part 6 (6.4 a-d & 6.6)	Award Flexibility for individual arrangements.
Part 7 (26,27 & 28)	Consultation and Dispute Resolution.
Schedule D	The Supported Wage System

Part 1(5): We are currently involved in conciliation of AM2013/30. If we are admitted as "interested persons" in AM2014/286 our intellectually disabled workers will have their concerns voiced – and some of these matters might be incorporated into the modern award - as part of the conciliation process and understanding of all relevant parties.

Part 4 – Wages and Allowances:

15.1: Minimum Wage: Our ADE's are, generally, Not-for-Profit organisations where the majority of workers have an intellectual disability. In line with the NDIS concept, an ADE provides social and economic participation in our communities for people with an intellectual disability. These workers – our family members - are defined as employees under Part 1.2 of the Act (*Fair Work Act 2009 (*Cth*).* As such they are entitled to have their specific needs enshrined into the legislation to protect them Those specific needs are different to workers who do not have impaired decision making capacity, who can communicate, who can also self-advocate and who could affiliate with a Union- if that was possible.

The Award structure should differentiate between a community Not-for-Profit and a standard for-profit private enterprise or public servant workplace. We remain hopeful that the current conciliation process and modified SWS trials, which are a part of that conciliation process will facilitate this aspect of the 2016 Supported Employment Services Award.

16.1: - Wage assessment – employee with a disability and an approved wage assessment tool (refer to our comment on Schedule D)

Part 6 – Award flexibility for individual arrangements:

6.2: The terms "coercion or duress" can be used against family carers – and even against the employer- where claims of "CONFLICTS OF INTEREST" abound. Family carers have been accused of having "*conflicts of interests*" where their family needs and arrangements can "*conflict*" with the perceived concepts of some funded advocates and, at times, employers. On the other hand, most employers try to protect the best interests of some of these employees – who have no family or guardian – but are said to have a conflict of interest because they are the employer and the employer/advocacy role is either a conflict of interest or said to be coercion or duress.

6.4(a) The legislation does not allow for the reality that an employee who is aged 18 years of age, but has impaired decision-making capacity, might not be judged as legally capable of making a will. Individual cases could differ but, if you can't make a will – due to lack of intellectual capacity, then signing contracts and/or agreements that are binding becomes problematic. Clause 6.4 of the **Exposure Draft** assumes the lack of legal capacity can be transferred to the *"parent or guardian".* This erroneously accepts that every such worker has a parent or a guardian – but that is, increasingly, not the case. Guardianship is almost impossible to obtain, there are no uniform national guardianship laws – even if it was more easily obtained, and many of the workers in our ADE's no longer have parents. Increasingly siblings and extended family members are assisting with the care and supported decision-

making needs of their intellectually disabled family member. In some cases the intellectually disabled worker (an *employee* under The Act) might also be living in housing arrangements provided by the same, or an affiliated not-for-profit employer. This scenario introduces another aspect of "whole of life control" as a conflict of interest.

6.6 – The work agreement (which is a contract) – "*except as provided by clause 6.4(a) must not require the approval or consent of a person other than the employer and the individual employee".* Clause 6.4(a) only allows for *"the employee's parent or guardian".* Many of our workers have neither - and advocacy services do not cover the length and breadth of Australia. There are public claims by certain advocates and agencies that "the Award is about the employee – the person with a disability – nothing to do with the family or carers"

6.7 – This requires a "written agreement" – but makes no provision for a person with an intellectual disability, who might be unable to read – or write- but must "*understand the proposal".* The employer *"must take measures, including translation into an appropriate language".* However, who determines what is "*appropriate"* and what "*the measures"* could or should be- when the barrier is more than *"an appropriate language", but also a lack of legal capacity, an inability to self- advocate, the lack of an advocate, no union representation, and with no parent or guardian to assist them. The employer has a perceived conflict of interest which is, in some cases – real.*

Part 7 – Consultation and Dispute Resolution:

26.1(a) – Major Workplace Change – obliges the employer to *"notify the employees when they are affected by the proposed changes and their representatives, if any."* The term "*representatives"* requires more definitive terminology for our family workers who are employees with an intellectual disability and impaired decision-making capacity. Also – what provisions are made and acceptable, if the intellectually disabled employee does NOT HAVE "*any representative"?* – which is increasingly the case.

26.2 (a) – as above

26.2(c) - as above

27- Consultation about changes to rosters or hours of work

27.1 - as referenced above.

27.2(a) and (c) These clauses accept that where changes are proposed to the workplace, rosters and hours of work the (INTELLECTUALLY DISABLED) employee *"and their representative, if any"* must be given an opportunity to express their view ""*including any impact in relation to their family or caring responsibilities".* Whilst the funded advocacy

position is that work and remuneration are about the person with the disability – not the family or carer – this section of the Award tends to refute that – as any modern Award should – whether the employee has a disability or is able-bodied. It becomes problematic when the employee has an intellectual disability that is not "mild", has no legally acceptable "*representative*" , still requires full time support for their personal living needs and family carers trying to meet those needs have their own employment and wider family obligations. It is also problematic if the worker lives in supported accommodation and the support hours conflict with the proposed changes in the workplace conditions.

The reference to the impact on families and carers is essential and should be retained. It does, however, need to be clearer, with a legislated and definitive process that protects all parties, the person with an intellectual disability, *"their representative"* – however that is eventually defined- the employer and the funding body.

Historically, and unfortunately, the lack of differentiation between those with mild intellectual disability and those without legal capacity, communication and self-advocacy skills - have dominated the workplace – and the community. The Modern Award should address that.

27.3 states consultation is not required *"where an employee has irregular, sporadic or unpredictable working hours".* This qualification *d*oes cover some of our family members – but even those with these qualified hours still have support needs outside the workplace. Their continued economic participation should be recognised.

28 - Dispute Resolution

28.1-28.6: Assuming the relevant processes have been duly followed by all parties, the interests of employees with an Intellectual Disability, their families and carers are not recognised – within the Exposure Draft – or the earlier Award

Regurgitating history – as AM2013/30 attests – does not ensure the future Award will prevent a repetition of past issues – as pending wage assessment disputes currently rest with the Human Rights Commission and, we believe, the Federal Court.

We are all hopeful that the current AM2013/30 conciliation will result in a modified SWS tool that the sector and the Government will accept and provide- without the loss of jobs. However, a more definitive process and acceptance of the specific needs of workers with an intellectual disability – their families and carers – needs to be part of the Modern Award

It is reasonable to require that, in resolving an industrial dispute for a worker with an intellectual disability and the use – or appropriateness – of the approved legislative wage assessment tool, the relevant parties should be required to:-

1. Follow the processes dictated for any such industrial dispute

2. Ensure, from an independent and industrially acceptable source, that the particular assessment tool is being properly used

3. Consider the outcome of any such review of the wage assessment process for the parties in dispute, and any recommendations for adjustments in use - or financial outcome for the employee – before the whole sector is overwhelmed by a specific case which represents a minute percentage of the whole sector, other workers, their families and carers.

4. Considering the specific needs of people with intellectual disability who lack informed decision-making skills – their families and carers – within the Award would be a positive acknowledgment of the need for flexibility, and consultation. Definitions which acknowledge the lack of legal capacity, the lack of self-advocacy skills and the changing needs of families who are ageing and, often, double income younger families who have to work to make ends meet - as well as providing support for their intellectually disabled family member/worker –are needed in the Modern Award

Schedule D

As this is the subject of AM2013/30 we comment on

D3- D31. Which covers employees *"who are unable to perform the range of duties to the **competence level** (*our emphasis*) 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".*

The issue of competency v productivity – or competency + productivity – is not the issue for this submission, however, it is a common business principle that "You cannot manage what you cannot measure". Schedule D accepts that the level of disability affects competency and productivity – but if you cannot measure "competency" – (AM2013/30 aims to remove any reference to competency) you cannot manage it – effectively and efficiently.

Without pre-empting the final outcome of AM2013/30 and the trial of a modified SWS – we state the following facts

1. The AM2013/30 application was to outlaw the BSWAT and all wage tools with a competency component.

2. This was designed to ensure that the SWS remained the ONLY legislated wage assessment tool for use in our Australian Disability Enterprises (ADE's)

3. Such an outcome would have led to a loss of jobs and closures -- Australia wide.

4. It is obvious that the Supported Wage System (Schedule D – the SWS) does not – in its present state- represent that group of employees for whom we advocate

5. It is equally obvious that – commercially- the SWS, again in its present state – does not protect the interests of the employers – or their employees. Deliberate job losses and a lack of viability are contrary to industrial law - with the latter being contrary to corporate law.

6. Mediation is a necessary part of any industrial disagreement but it is difficult for parties – with differing views- to collaborate, co-operate and compromise if, - historically - there is an ideological barrier preventing the parties from collaborating and compromising to obtain an acceptable outcome . The loss of jobs is NOT an acceptable outcome for our disabled family members – their families or carers.

7. The national body of service providers – the NDS – is accepted as the Peak Body for employers. We might not always agree with them, any more than we agree with the applicants in AM2013/30 – but we all need to work together. Generally we manage to do that quite successfully to achieve our common goals – jobs and an active participation in social and economic options – to provide our family members with dignity, choice and an income to supplement their Pension entitlements. The applicants for AM2013/30, historically, seem unprepared to liaise with anyone who has a view that is contrary to that espoused by them. That hasn't changed in the past decade.

8. The current view in AM2013/30 – as it was back in 2004, when the BSWAT was legislated – is one of ideology. . An ADE is seen by the Applicants as segregation and discrimination. They advocate that all people with a disability, in supported employment, should be assessed for remuneration using only the SWS(Supported Wage System). Further it should be in an open employment environment – not a segregated (specialised) ADE workplace. This trenchant view ignores the level and type of disability – the differing needs of each, and does not deliver justice for the majority. .

9. No ADE is the same as others – because they are Not-for-Profits. NFP's have created a workplace to meet the needs of people with a disability. The work – and the contracts – are built around the needs of the workers. ADE's

> are a humanitarian and social option for providing our intellectually disabled family members with social and economic participation in their individual communities. They are unlike private enterprise which is designed to make a commercial profit, and then hires the specific employees whose competency and capacity will deliver the financial goals of the enterprise.

Exposure Draft MA000103 Supported Employment Services Award 2016 covers the industrial needs of people with a disability. However, our intellectually disabled family members- and their specific needs- are inadequately represented in this Draft and the future Modern Award, unless the issues we raise are considered – and addressed. .

Disability cannot be addressed by a blanket label when intellectual disability excludes our family members from social and economic participation in a workplace- unless they have adequate representation - by people who actually know them – and care about - and for them.

We advocate for our workers – their families and carers – because there is no one else to speak for them. They have no voice. We have no funded Voice – or access to legal representation - to participate in a Review that will affect the lives of our intellectually disabled family members –and we, their family and carers – FOREVER.

OUR VOICE Australia replaces the Carer's Alliance – now represented in AM2013/30 – because our workers, your employees under The Act, need to have input into the future Award. It is the Voice of our workers, their families and carers - not just families and carers

On behalf of our family members we thank you for the opportunity to provide these comments and trust that conciliation of AM2014/286 will achieve better formal recognition of the specific needs of our family members – and provide processes which will deliver that – in the best interests of all parties.

Signed:

Mary Lou Carter

29 August, 2016