

FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

Supported Employment Services Award 2010

Matter No: AM2014/286

FURTHER STATEMENT OF HUGH KENNETH PACKARD

I, Hugh Kenneth Packard, of [REDACTED] NSW, state as follows:

1. I am the Chief Executive Officer of Valmar Support Services Ltd (Valmar) and have held this position for 26 years.
2. For the first 10 years of the life of the SWS I was a fully accredited SWS Assessor and in this time I carried out approximately 250 Support Wage Assessments in a wide range of mainstream business settings and for a wide range of employees with disabilities across SE NSW and the ACT. Some years ago I let my registration as a SWS assessor expire.
3. This is the second statement I have submitted during these proceedings.
4. On 3 October 2017 AED Legal filed a nineteen page witness statement written by Paul Cain, being his first statement filed in these proceedings. In this statement, I will respond to the statement made by Mr Paul Cain on the relative merits of the Supported Wage System and his belief that it should constitute the sole mechanism for determining the wages of supported employees.
5. Specifically, I will respond to two key questions that Mr Cain's statement purports to answer. The questions are below:
 - (8.1.) Is the Supported Wage System (the SWS) an appropriate method for determining a pro rata rate of pay for employees with a disability employed in an Australian Disability Enterprise (ADE) environment? If so, why?
 - (8.2.) Having regard to the other wage assessment tools that the Supported Employment Services Award 2010 (the SESA) permits an employer to use for this purpose, should the SWS be the exclusive pro rata wage determination method prescribed by the SESA? If so, why?
6. My responses to those questions are below.
7. Firstly, it is important to include some historical context for the development of the SWS. The SWS was specifically developed by the Australian Government to be used to determine pro rata wage rates for employees with disability working in open employment settings only.
8. I refer to the Australian Government Submission to the 2006 Australian Fair Pay Commission (AFPC) Wage Setting Review, Chapter 11, Minimum wages for employees with a disability. The submission is annexed to this statement and marked "Annexure A".
9. The submission clearly states that the use of the SWS should not be mandatory in supported employment, as it was not designed to determine wages for people with disability employed in business services (as ADEs were known at the time).
10. The relevant excerpts from the submission are included under the heading "Mandatory use of the SWS is inappropriate for business services" in pages 365, 366 and 367. [REDACTED]

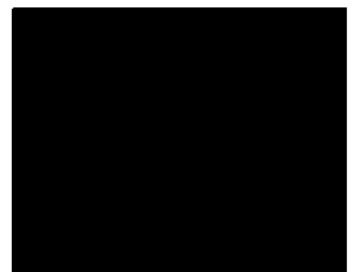
11. In addition to initially stating that the SWS was specifically designed to be solely used in open employment, the submission then notes that:

“11.97 Second, the SWS is inappropriate for the business services sector because it tends to significantly overvalue workers in particular jobs. In many situations it produces wage outcomes that make employees with a disability uncompetitive in the labour market. This is because the sole determinant of pro-rata wages under the SWS is the single measurement of productivity. This does not suit the unique character of employment in the business services sector, as generally, these jobs are redesigned to narrow the range of tasks performed by employees. This is in response to the often limited capabilities of employees in the sector. Productivity alone is not a good proxy for the value of an employee who is working in a job that is much narrower than a job that attracts full wages in open employment. To properly assess an employee’s work value in such circumstances, it is necessary to measure the overall capabilities of employees rather than productivity alone.”

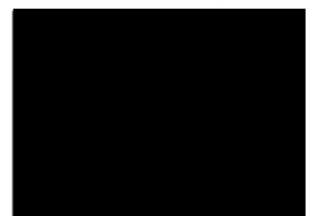
12. Finally, the submission states that:

“11.102 Despite its broad acceptance in open employment and the possible appeal of a simple, one-size-fits-all approach for all employees with a disability, the mandatory imposition of the SWS on business services would seriously undermine the viability of the sector, and reduce job opportunities for people with a disability.”

13. I am strongly of the view that wage assessment tools that only measure an employee with disability’s relative production output do not take into account the complexities of supported employment settings. Nor do they take into account the commercial and economic considerations associated with running an ADE.
14. I support the inclusion in the SES Award of the modifications to the SWS, but only on the basis that the SWS is *not* the sole mandated wage assessment tool for ADEs.
15. In my opinion, the SWS has not been successfully demonstrated in ADEs.
16. Valmar participated in the trial of a set of modifications to the SWS in 2016. ARTD Consultants were engaged by the Department of Social Services to conduct an evaluation of the trial of the modifications to the SWS. The evaluation report’s Executive Summary identified some key issues relating to the modifications that raised doubts about the applicability of the SWS in several types of supported employment settings. These specifically included group work settings and production lines – work settings where an individual employee’s rate of productive output cannot be isolated and then accurately assessed.
17. The ARTD evaluation report’s Executive Summary states in the conclusion that:
- “The Trial has not provided a clear case that the Modified SWS can be consistently applied by ADEs and assessors to provide an accurate assessment of supported employee productivity across the range of ADE operating contexts.”*
18. The employee composition of a work group is central to the rate of its productive output and changes to the group will change the rate of output. During the trial’s data collection it was identified that team composition impacted greatly on the quality and quantity of the items produced, and this significantly affected the productive output of some individuals when the teams were reconfigured. Consequently, the SWS is incapable of determining a fair wage in this situation.



19. For production lines, several examples of difficulties equitably or logically applying the SWS emerge. A conveyor belt will be set at the productive capacity of the slowest worker. Picking and sorting on a conveyor belt where there is no guarantee that a particular amount of items will pass through makes benchmarking these tasks difficult.
20. Another example of the impracticality of considering productive output in isolation involves supported employees that drive Forklift trucks. If an employee is attempting to achieve an excessive speed in order to ensure a higher rate of work output, this may seriously compromise work health and safety practices.
21. The SWS Handbook 2017 states on page 4:
"The SWS is not intended for contractors, short term or temporary jobs in which the core duties and tasks often change."
22. In my experience as a long-term manager of ADEs I have observed that many of my peer organisations undertake a broad range of short-term contract work, including: packaging, re-packaging, collating and labelling. These types of jobs are usually unique and contain distinct steps that are intrinsic to the specific job being undertaken.
23. Many of the jobs performed at these ADEs are one-off jobs specific to the customer's line of business. Often these jobs are short-run jobs that last for part of the day or 1-2 days. As a result it is common for employees of ADEs to work on several distinctly different jobs over the course of their work day or week.
24. I am of the view that supported employees, especially those with higher support needs or lower work skills will often be assigned simple straightforward tasks that represent a small subset of a wider range of tasks that would constitute a job. However, employees may be able to perform these tasks at a highly productive rate.
25. Due to the simplistic nature of these tasks, employees may not produce a realistic financial return on their productive efforts. The employee is not able to produce goods or services at a sufficiently productive rate or at a rate of revenue that will cover the employee's wage or the other costs incurred employing them, let alone leave some buffer for capital replacement. This will simply ensure that the employer proceeds to incur losses at such a rate that the viability of the business is compromised.
26. Mr Cain's statement (at paragraph 33) includes the following claim about the SWS:
"...It acknowledges that skills or competencies that are directly related to the employee's actual job are implicitly part of job performance, and captured implicitly during a productivity based assessment."
27. I consider this claim to be misleading. As ADEs have frequently argued, under the SWS, supported employees that gain work related skills that enable them to carry out more complex tasks are penalised if these more complex tasks reduce their rate of productive output. This may occur even if an employee is assessed against a higher grade in the Award that nominally pays a higher salary. For example, the employee's overall productive output rate might drop from 80% to 50% as a result of performing the more complex tasks. The subsequent wage rate would be patently unfair.
28. This clearly demonstrates that assessing the rate of productive output as the sole determinant of an employee's pro rata wage does not take into account all relevant factors involved in employing people with severe disability, especially sufficient recognition of job related skills/competencies. This factor is one of several key flaws in the SWS and its assessment assumptions and methodology.



29. A business cannot remain commercially viable if it is paying high wage rates to employees that are only capable of performing a limited range of simple tasks, especially if the return on the goods or services produced by those employees does not cover the costs incurred through their employment (for example, wages, on costs and utilities).
30. Mr Cain's statement (at paragraph 39) includes the following claim about the SWS:
"39. Many people with intellectual disability who currently earn award or pro-rata award rates of pay in open employment, or at ADEs, are performing job tasks that have been customised to meet the needs of the employee and the employer."
31. I accept this is a legitimate statement in the context of open employment, but not supported employment. The needs of the employer are not considered in the latter case. Supported employment exists to provide employment options for people with severe disability whose employability in mainstream settings is limited. Unlike commercial businesses which recruit employees with the skills and qualifications required to respond to market opportunities, ADEs build their business around the sub-award or sub-commercial skills and competencies of their workforce.
32. One of Mr Cain's key claims in his statement is that those organisations that are using the SWS are happy with it and that this claim adds weight to arguments that the SWS is suited to use in supported employment settings.
33. My observations over many years in the sector are consistent with the statements lodged in this Review by ADEs using the SWS (Outline of Submissions, NDS and ABLA, 21 November 2017). That is, the small number of ADEs that have adopted the SWS did so for certain key reasons, none of which were due to a satisfaction with its design, assessment methodology or wage outcomes. Several were compelled to do so as part of their grant conditions from DSS and others adopted it due to inducements from the government.
34. The statements confirm that ADEs that have used the SWS will strongly argue that it does not take into account all relevant factors needed to accurately determine an employee's wage.
35. As a result of the evidence presented above, and the previously submitted evidence statements from NDS members tendered in support of my arguments, I remain firmly of the opinion that the SWS should not be mandated as the only acceptable wage assessment mechanism for use in ADE settings.

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Date: 14/12/17

Chapter 11 – Minimum wages for employees with a disability

Introduction

- 11.1 This chapter provides the Commission with material and analysis to assist it to fulfil its functions in relation to minimum wages for employees with a disability.
- 11.2 The key functions of the Commission in relation to minimum wages for employees with a disability are to:
- determine and adjust any special FMWs for employees with a disability;
 - review and adjust as necessary the minimum wages for employees with a disability that are contained in APCs, including those wage arrangements that were derived from federal and State awards; and
 - fill any gaps in the coverage of employees with a disability by current minimum wages.
- 11.3 This chapter is in two parts. Firstly, the background section provides information regarding:
- the current structure of minimum wages for employees with a disability;
 - the arbitral history of these wages;
 - how these wages need to be set to ensure competitiveness in the labour market;
 - labour market characteristics of employees with a disability; and
 - legislative requirements in relation to the Commission's functions.
- 11.4 The second part of the chapter will examine considerations that are relevant to how the Commission might perform its functions in relation to employees with a disability.

Background

The structure of minimum wages for employees with a disability that were derived from State and federal awards

11.5 There are currently two types of wage arrangements that apply specifically to employees with a disability. These are:

- wages for those who obtain employment in open employment (the general workforce); and
- wages for those who are employed in business services (formerly know as sheltered workshops).

Minimum wages for employees with a disability in open employment

The Supported Wage System (SWS) in awards

11.6 Prior to changes made to the WR Act by the Work Choices Act, many federal and State awards enabled employees with a disability to be employed under the SWS.

11.7 A person is eligible to participate in the SWS if the person:

- cannot work at full award wages because of a disability; and
- meets the impairment criteria for the Disability Support Pension (DSP).

11.8 Central to the SWS is an assessment of the productive capacity of a specific worker in a particular job. However, before this assessment is conducted, certain pre-assessment checks must be completed. The most important part of these requires a trained and accredited wage assessor to be satisfied that the worker in question would be unable to work at the full minimum wage level for the particular job. Once these checks have been made, the assessor conducts an assessment of the SWS worker's output on the job compared with that of co-workers in the workplace who undertake similar work and who receive the full minimum wage for the job. This assessment is used to determine what percentage of the full minimum wage should be paid to the SWS worker.

11.9 For example, if an employee is assessed as having a capacity of 70 per cent for the job they are doing, the employee would be paid 70 per cent of the full rate of pay that would otherwise apply.

- 11.10 The SWS is now provided for in industrial instruments through a standard model clause [Appendix A11], as approved by the AIRC in 1994¹.
- 11.11 A minimum amount payable is also prescribed in the SWS model clause. An employee covered by the SWS cannot be paid less than this, no matter what their relative productive capacity. This minimum also applies to the trial period of employment before a wage assessment is conducted. The amount was originally determined with reference to the Income Test Free Area for the DSP. Initially, this amount was set at \$45 per week.² Since then, the minimum amount payable has incrementally increased to \$62 per week.
- 11.12 Where an industrial instrument does not provide access to the SWS, the employee must be paid the full rate of pay prescribed by that instrument.
- 11.13 Since the inception of the SWS, the FMW set by the AIRC has excluded workers employed under the SWS. The exclusion has enabled the payment of pro-rata wages for employees with a disability that are unable to earn the full rate of pay.

'Slow worker' permits

- 11.14 Employees with a disability can also be employed under 'slow worker' permit systems established under State industrial relations legislation in NSW, Queensland, South Australia and Tasmania, and prior to the Work Choices Act, under federal legislation for Victoria. Slow worker permits authorise the payment of less than full award wages to workers who are unable to gain employment on full award rates.
- 11.15 Slow worker permit systems in these States, excluding South Australia until recently, generally use the SWS methodology to calculate wages. Approximately a third of all slow worker permits in the State systems use Australian Government SWS assessors to determine wage rates, with the remainder assessed by other independent assessors (in Queensland) or by the employer in agreement with the employee.

¹ Australian Industrial Relations Commission, Supported Wage System for People with a Disability, Decision 1831/94, S Print L5723.

² Supported Wage Management Unit Commonwealth Department of Human Services and Health, *Supported Wage System General Guidelines and Assessment Process*, 7 June (1994) p 32. The joint ACTU, ACCI, Commonwealth written submission to the SWS test case stated that "no worker is to receive less than \$45 per week for full time work, irrespective of the assessed percentage."

- 11.16 Previously, South Australian slow worker permits have not required the use of the SWS methodology. However in February 2006, the South Australian Industrial Relations Commission (SAIRC) established the SWS model clause as a minimum standard for all employees with a disability in open employment, including those that are award-free. In its decision, the Full Bench of the SAIRC stated that it did not accept that slow worker permits within their jurisdiction were “a viable alternative to the supported wage approach”.³
- 11.17 Regulations under the Work Choices Act recognise all existing slow worker permits for workers who come under the new system for a period of two years.⁴ After this time, alternative minimum wage arrangements will need to be available for these employees.

Minimum wages for employees with a disability in business services

- 11.18 Approximately 17,500 people with a disability are employed by 224 business services operating from approximately 380 locations across Australia. Traditionally, business services have been run by charitable, non-profit organisations. All are incorporated. They have operated outside the formal industrial relations system. Until recently, the terms and conditions of employment in this sector has been largely unregulated and most business services have paid substantially below award wages. In some States, business services are specifically exempt from the operation of State awards by legislation.
- 11.19 A small number of business services were covered by a federal award – the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001⁵ (the LHMU Award). The wage provisions derived from the LHMU Award [Appendix B11] which are now in a preserved APCS (the Business Services APCS), were agreed by employers and the union, and authorise the use of a number of wage tools which pro-rate wages based on factors such as relative productivity and competency. The Business Services APCS also allows the phasing-in of pro-rata wages in limited circumstances. The history of the development of the LHMU Award is discussed in more detail below.

³ South Australian Industrial Relations Commission, The Establishment of a Minimum Standard of Remuneration Pursuant to s.69(3) of the Fair Work Act 1994, Decision 4464 of 2005, Statement, p.3, paragraph 10.

⁴ *Workplace Relations Regulations 2006*, Chapter 2, Part 7, Regulation 7.2 and 7.3.

⁵ Print K6264 [AW841959].

11.20 However, larger numbers of business services are covered by federal or State registered agreements. These agreements generally include provisions for some form of pro-rata wage assessment.

The history of the past treatment of minimum wages for employees with a disability

The development of the SWS for employees with a disability in open employment

11.21 Prior to 1994, the only arrangements that enabled employers to pay employees with a disability less than full award rates, were slow or infirm worker provisions contained in awards, or slow worker permits under State industrial relations legislation. However, these arrangements were not universally available and did not provide any consistent or transparent basis for assessing productive capacity. Consequently, the provisions did not ensure that employees with a disability received appropriate wages.

The Ronalds report

11.22 In 1990, the Australian Government commissioned a report into major employment issues for people with a disability. The report entitled: *National Employment Initiatives For People With A Disability* was conducted by Chris Ronalds. The Ronalds report examined a range of employment issues for people with a disability and recommended future directions in the development of policies to promote their employment.

11.23 The report identified the major barriers preventing people with a disability entering the general labour market. These included the type of job; job design; training and on-going support; and income support, including wages. Limited access to slow worker permit arrangements was identified as a major impediment, as these systems were rarely used because their provisions were not clearly understood and did not always provide adequate safeguards for people who were having their wages set in this way.

11.24 Ronalds concluded that the systems run by State governments, such as slow worker permits and aged and infirm clauses in awards, were not able to meet the needs of workers with a disability who are able to work productively but at a reduced skill level. The report made a number of recommendations to develop a new system to facilitate access for such workers to the general labour market.

11.25 The report concluded that a system should be developed to provide for payment of fair and equitable wages based on measurement of the workers' skills and productive capacities. The system should include processes for the effective monitoring and regulation of the arrangements.

11.26 As a result of these developments, and in close consultation with relevant representative organisations, the Australian Government commissioned research and other work directed at developing a pro-rata wage system for employees with a disability in open employment.

The Dunoon report

11.27 In 1991, Don Dunoon was commissioned to develop an assessment process which determined fair and equitable wage outcomes based on a uniform assessment of employees' skills and productive capacities matched to the requirements of the position. The Dunoon report provided a set of guidelines for the operation of an assessment process to determine the percentage of the award rate to be paid to workers with a disability. The SWS assessment process is based largely on the Dunoon model.

11.28 The assessment process:

- assesses the key tasks and duties required in the position;
- identifies the minimum acceptable level of performance for each task or duty; and
- assesses the workers' performance against the minimum acceptable standards.

11.29 An important aspect of the assessment process is that assessments are individually based against specific job requirements and are not transferable to other jobs. A separate job assessment is necessary for each job.

Industrial relations arrangements for the SWS

11.30 Using the Dunoon report's assessment process as the basis, the Australian Government, peak industrial councils and bodies representing people with a disability developed the SWS. In order for the SWS to be implemented, it was necessary for awards to be varied so that SWS wages applied in lieu of full minimum wages. In 1994 a consent application for endorsement of model

award provisions for the SWS was made to the AIRC, by the ACTU, ACCI and the Australian Government. The parties to this application submitted that:

To provide a mechanism for a wages system for workers unable to work at full productive capacity, several options exist.

Pro-rata wages could be provided for by way of a general exemption to pay the minimum rate, with wages determined by agreement at the workplace. Alternatively the Commission could set an appropriate rate of pay for such workers upon application on a case by case basis.

However, the parties to this application, and disability groups more generally, consider that there are shortcomings with each of these options and consider that in order to provide the necessary safeguards and to ensure equity in outcomes wages should be determined on an assessment of the productive capacity of the individual in the particular job that they are performing.⁶

11.31 The AIRC approved the model clause to be inserted in federal awards. It provides the legal basis for the assessment and payment of pro-rata wages based on an assessment of the employee's skills and productive capabilities using the SWS.⁷

Legislative underpinnings

11.32 To facilitate the spread of the SWS to all federal awards applying to open employment, the WR Act was amended in 1996 to ensure that the AIRC, in performing its dispute prevention and settlement functions, had regard to the need to provide a supported wage system for people with a disability.⁸ The WR Act was also amended to require that when the AIRC made an award or an order, it should ensure that the SWS was provided for people with a disability where appropriate.⁹ Furthermore, the list of allowable award matters under section 89A(2) of the WR Act (as it was immediately before the amendments made by Work Choices) specifically included "rates of pay for employees under the supported wage system".

⁶ *Supported Wage System for People with a Disability: A Joint Submission by the ACTU, ACCI, Commonwealth Government*, 20 July 1994.

⁷ Australian Industrial Relations Commission, *Supported Wage System for People with a Disability*, Decision 1831/94, S Print L5723.

⁸ *Workplace Relations Act 1996*, subsection 88B(3)(c).

⁹ *Ibid*, subsection 143(1C)(e).

11.33 The current WR Act requires the AIRC to ensure that any order made in relation to transitional awards provides for the SWS where appropriate.¹⁰ Provisions have also been included in the WR Act to ensure that people with a disability can also access the SWS under workplace agreements, even where the relevant award does not include the model clause.¹¹

Provision of access to the SWS in State systems

11.34 In some jurisdictions, access to the SWS has been provided through the inclusion of enabling provisions in awards on an award-by-award basis. However, this has generally been a slow and uneven process, with many awards not yet varied. In other jurisdictions, universal access has been provided. For example:

- in 1996, the Queensland Industrial Relations Commission introduced blanket coverage of the SWS model clause through the introduction of a Supported Wage Award;
- the AIRC approved applications to include the SWS model clause in all Victorian minimum wage orders in July 2004;¹² and
- most recently in February this year, the South Australian Industrial Relations Commission established a minimum standard for all employees within its jurisdiction in open employment (award-free or otherwise), which includes the provision of the SWS for employees with a disability.¹³

SWS participation

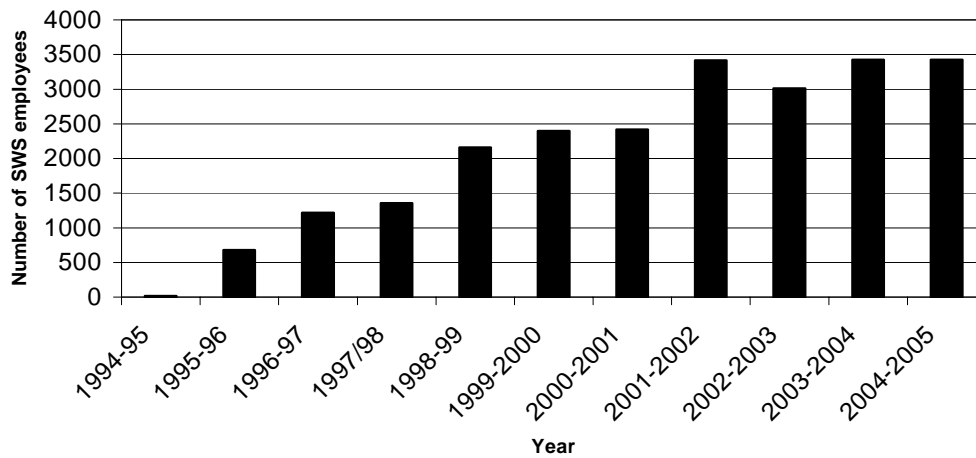
11.35 In the first year of operation of the SWS (1994-95), the initial uptake was relatively small, with just 19 employees employed under the SWS. The expansion of industrial coverage across all awards in Queensland, together with gradual expansion in the other States and Territories has contributed to a steady increase in participant numbers (See Chart 11.1).

¹⁰ Ibid, schedule 6, section 62.

¹¹ Ibid, section 184.

¹² Australian Industrial Relations Commission, s.501 applications to adjust minimum wage orders, s.501A Supported Wage System - minimum wage, Print PR949450.

¹³ South Australian Industrial Relations Commission, The Establishment of a Minimum Standard of Remuneration Pursuant to s.69(3) of the Fair Work Act 1994, Decision 4464 of 2005, Statement, p.3, paragraph 10.

Chart 11.1: Number of SWS participants at end of each financial year ¹⁴

The history of industrial relations regulation in business services

11.36 Historically, the employment of workers with a disability in sheltered workshops or business services has not been covered by the formal industrial relations system. On a number of occasions over the last 20 years, governments have considered the introduction of pro-rata award based wages for employees of business services. However, little progress has been made until recently due to the financial fragility of many business services, the vulnerability of their employees and the significant social role that business services play in the lives of people with a disability, their parents and carers.

Government reforms to business services

11.37 The major impetus for the introduction of pro-rata award wages in business services were amendments to the *Disability Services Act 1986* made by the *Disability Services Amendment (Quality Assurance) Act 2002*. The effect of the amendments were that, after 31 December 2004, only business services that met new quality assurance standards would be eligible for Australian Government funding. A key requirement of the standards was the payment of award based wages as determined by a transparent assessment tool or process.

¹⁴ Statistics from 1994 to end of June 2000 are taken from the Supported Wage System Evaluation, Department of Family and Community Services. The figures for 1995/96 and 1996/97 are estimates based on Graph 2: Number of SWS participants at the end of each financial year (P26). For those two years the actual figures are not included in the text. According to the evaluation the 1997/98 figures are an estimate due to the changeover from the SWSMIS to TARDIS.

- 11.38 To assist business services introduce pro-rata award wages that meet the new standard, the Department of Family and Community Services (FaCS) developed a Business Services Wage Assessment Tool (BSWAT). The tool was designed to assess the relative productivity and competency of each employee, enabling a proportionate award wage to be calculated. It was developed in consultation with provider, consumer, business and union representatives to ensure a fair and transparent tool for assessing pro-rata award wages. However, the use of the BSWAT was not mandatory. The quality assurance standard allowed business services to implement another tool that satisfies the requirements of the standard.
- 11.39 FaCS' testing of the BSWAT indicated that it would substantially increase wage costs, and would be unaffordable for many business services. In response to this finding, the Government announced a \$99 million assistance package in April 2004 to address the effect of increased wages, and ensure that business services remain viable and their employees have job security.
- 11.40 The package of arrangements included a process for identifying business services that were unable to introduce full pro-rata award wages immediately. Such business services were evaluated through a full capability review, undertaken by external financial consultants. On the basis of the outcomes of the capability reviews, the Department of Family and Community Services and Indigenous Affairs (FaCSIA) entered agreements with business services specifying the nature of the assistance they would be given and a timetable for phasing in pro-rata award wages. A phase-in agreement must result in full implementation by 11 May 2008.
- 11.41 Of the 224 business services, 82 were identified as being unable to introduce pro-rata award wages immediately and were subsequently subject to a full capability review. Of the 82 business services, 21 employing 1,554 people with a disability, have since fully introduced pro-rata award wages without phase-in. This takes to 163, the number of business services (employing approximately 11,700 employees) that are now paying pro-rata award wages. Since the review process, the remaining 61 business services employing a total of 5,714 employees have entered into agreements with FaCSIA to phase-in award based wages.

Agreement to vary and extend the LHMU Award

11.42 In 2004, the LHMU applied to the AIRC to vary the LHMU Award to introduce pro-rata award wages. The LHMU indicated that it would also seek to extend coverage of the Award to cover all business services within the sector. Following extensive discussions, agreement was reached between the LHMU, ACTU and employer representatives (including the National Industry Association for Disability Services (ACROD), the Victorian Employers' Chamber of Commerce and Industry (VECCI) and Australian Business Lawyers (ABL)), [the industry parties]. The key elements of the agreement were:

- The Award would be varied to include a number of specified wage assessment tools, which would be available to be applied by parties to the Award in assessing pro-rata wages.
- Two further specified tools would not be generally available, but could still be used by the business services currently using them.
- For a period of time after the variation was made, business services would be able to nominate further tools for inclusion in the Award, provided the tools met the requirements of the quality assurance standards. As outlined in the AIRC decision, the LHMU agreed that it would not unreasonably withhold consent in relation to a tool proposed to be added to the Award list. As an aid for the parties in assessing further tools, FaCSIA agreed to arrange for a consultant to evaluate each proposed tool against the requirements of the Guide to Good Wage Practice Determination. Further wage tools were evaluated and identified by the parties as warranting inclusion in the Award.
- Business services that had entered an agreement with FaCSIA would be allowed under the Award to phase-in wage increases in accordance with their agreement with the Department.
- It was anticipated that the LHMU Award would be extended to other business services in the sector through 'roping-in' applications – a process through which specified employers are made parties bound to an existing award.
- However, the LHMU agreed with Western Australian business services that were then covered by an award of the WA Industrial

Relations Commission that it would not seek to rope them into the federal Award.

- 11.43 The Australian Government supported the agreement in AIRC proceedings on the basis that the agreement was consistent with the position that the Award variation should not result in job losses nor threaten the viability of employers. In August 2005, Commissioner Gay of the AIRC varied the LHMU Award to reflect the agreement insofar as it applied to the employers then bound by the Award.¹⁵
- 11.44 The LHMU Award as varied, authorised the use of 11 different wage tools (including the SWS) to pro-rate wages based on relative productivity and competency. Since Commissioner Gay's variation, there has been another 11 tools approved by the parties to the LHMU Award, which have not yet been included in the Award. The Award also reflected the parties' agreement to allow business services to phase-in pro-rata wages in limited circumstances until 11 May 2008, on the same basis as the FaCSIA reforms.

How minimum wages for employees with a disability need to be set to ensure they are competitive in the labour market

- 11.45 If full minimum wages are applied to employees with a much reduced productive capacity due to their disability, those employees are likely to be priced out of the labour market. If an employer is faced with the choice of hiring an employee with a disability with reduced productive capacity, or an employee with full productive capacity at the same wage rate, an economically rational employer will select the fully productive employee.
- 11.46 Therefore, the key determinant of the competitiveness in the labour market of people with a disability is the relative cost of employing such a person as opposed to an employee with full productive capacity. To ensure competitiveness, minimum wages for employees with a disability must have an appropriate relativity to the applicable minimum wage that covers the same type of work. An appropriate minimum wage for an employee with a disability would be one that reflects the lesser capacity of the employee relative to other employees doing the same job. Such a minimum wage would pro-rate the full minimum wage for the job in proportion to the relative capacity of the employee.

¹⁵ Australian Industrial Relations Commission, *s.113 applications for variations*, C2004/4617 and C2005/1405, PR961607.

- 11.47 This is what the SWS and the tools used by business services are designed to do. They assess the relative capacity of employees with a disability in the job in question and use this assessment to pro-rate the full minimum wage applicable to the job. In this way, they ensure that employees with a disability are competitive in the labour market.
- 11.48 The importance of minimum wage relativities is illustrated by the employment barriers faced by those categories of employees with a disability whose vulnerability in the labour market is multiplied by other factors, such as the lesser experience and maturity associated with youth, or time spent in training as an apprentice. For example, an employer hiring an apprentice at the apprenticeship rate of pay is unlikely to employ a person with a disability if the employee has a reduced productive capacity due to their disability. In this instance, the employer would be burdened with an extra cost of decreased productivity in addition to the costs of employing an apprentice. Therefore, it is necessary that the employer receive a further incentive to provide employment to this particular employee, by being able to pay a rate that pro-rates the apprenticeship rate of pay in proportion to the relative productivity of the employee. A similar process is also necessary for junior employees with a disability. It will ensure that the employment of people with a disability seeking employment in other sub-minimum wage categories is not further impaired.
- 11.49 Therefore, to ensure that adequate employment opportunities are offered to people with a disability, it is necessary that their wages be set at a level which will make certain they are competitive in the labour market. This also necessitates the payment of wages that are pro-rated against those rates of pay that already reflect factors that reduce productive capacity, such as rates for apprentices, trainees and juniors. These requirements are already reflected in the SWS for open employment and in the other wage tools that are being used in business services.

Requirements of the WR Act in relation to minimum wages for employees with a disability

- 11.50 As previously outlined, the key functions of the Commission in relation to minimum wages for employees with a disability are to:
- determine and adjust any special FMWs for employees with a disability;

- review and adjust as necessary the minimum wages for employees with a disability that are contained in APCSs, including those wage arrangements that were derived from federal and State awards; and
- fill any gaps in the coverage of employees with a disability by current minimum wages.

Provisions in the WR Act that guide the exercise of these powers

11.51 When exercising these powers, the wage fixing parameters of the WR Act requires the Commission to have regard to, among other things:

- providing a safety net for the low paid; and
- providing minimum wages for employees with a disability that ensure they are competitive in the labour market.

11.52 Section 222 of the WR Act also requires the Commission to have regard to the need to provide pro-rata disability pay methods for employees with a disability. Paragraph 354 of the Explanatory Memorandum to the Work Choices Act gives the supported wages system as an example of such a method.

The setting of special FMWs

11.53 The WR Act contains special arrangements for the setting and adjustment of minimum wages for employees with a disability.¹⁶ In particular, minimum wages for these employees are exempt from the guarantee of the standard FMW.¹⁷ This is because many employees with a disability are not able to earn the standard FMW due to the effects of a disability on their productive capacity. As discussed above, minimum wages for these employees must reflect this if they are to have adequate employment opportunities.

11.54 The WR Act empowers the Commission to establish special FMWs for employees with a disability, or for a class of these categories of employees.¹⁸ For example, the Commission could determine a special FMW for employees who are not covered by an APCS (e.g. who are APCS-free), or could determine a special FMW for employees whose APCS rate is currently below the new special FMW.¹⁹ As stated in paragraph 410 of the Explanatory Memorandum to

¹⁶ Section 178 of the *Workplace Relations Act 1996* defines an employee with a disability as an employee who is qualified for the disability support pension.

¹⁷ *Workplace Relations Act 1996*, section 194.

¹⁸ *Ibid*, section 197.

¹⁹ *Ibid*, section 198.

the Work Choices Act, a special FMW for employees with a disability could provide a number of methods for determining the rates of pay for the employees it covers. For example, the Commission could establish a special FMW for employees with a disability in business services that includes a choice of wage tools, such as the BSWAT, the SWS and the other tools currently recognized by the LHMU Award.

- 11.55 The extent to which the Commission acts on any of these options is a matter for the Commission to determine, for example whether it establishes special FMWs for employees with a disability and if so, what form they should take.

Filling gaps in minimum wage coverage for employees with a disability

- 11.56 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.

- 11.57 The WR Act enables the filling of these gaps by requiring the Commission to determine minimum wages in a special APCS for employees with a disability that the Commission considers should be covered by specific minimum wages.²⁰

- 11.58 Paragraph 462 of the Explanatory Memorandum of the Work Choices Act sets out the objective of these gap filling provisions. It states:

462. Subdivision L [now Subdivision M] would remove major barriers to the employment of persons with a disability or apprentices or trainees. Where an APCS inhibits the employment of a particular category of apprentice or trainee or a person with a disability because it does not make specific provision for them, proposed sections 90ZP and 90ZQ [now sections 220 and 221] would require the AFPC to ensure that appropriate minimum wages are available.

- 11.59 The Explanatory Memorandum goes on to give an illustrative example in which a special APCS fills gaps in the coverage of the SWS, enabling a person with a disability who is unable to earn the full wage for the job to obtain employment.

²⁰ Ibid, subsection 220(1).

11.60 Section 190(4) of the WR Act has the effect of ensuring that minimum wages provided in a special APCS apply even if a higher rate would have applied in the same circumstances before reform commencement. However, this is not the case for special FMWs. A special FMW does not apply if the employee is guaranteed a higher basic rate of pay under an APCS (including a rate derived from a pre-reform award).²¹

How the Commission might perform its functions

11.61 This part of the chapter presents considerations that are relevant to how the Commission might perform its functions in relation to employees with a disability. First, minimum wages in open employment will be discussed, followed by minimum wages for employees of business services.

Open employment

The gap filling function

11.62 As discussed above, if the Commission considers that there should be an APCS that applies to all, or a class of employees with a disability, the WR Act requires the Commission to determine a special APCS for those employees. A special APCS will prevail over any APCSs that do not already include specific wages for those employees with a disability. A special APCS could therefore be established to ensure that all APCSs provide pro-rata wages for employees with a disability who are unable to earn the full minimum wage for the job. Using the gap filling power to achieve this would be consistent with the need to ensure that employees with a disability are competitive in the labour market. It would also be consistent with the need to provide pro-rata disability pay methods for employees with a disability.

11.63 Consideration would then need to be given to which pro-rata pay method or methods should be included in the special APCS made under section 220 of the WR Act.

11.64 To date, the most successful method of pro-rating wages for employees with a disability in open employment has been the SWS which has also been widely adopted in all State jurisdictions.

²¹ Ibid, section 182(1).

The SWS was always intended to be extended to all areas of open employment

11.65 When the Full Bench of the AIRC approved the SWS model clause, it expected that those provisions would eventually be extended to all areas of open employment.²² The AIRC has continued to support full SWS coverage in open employment. In its decision in the 2003 Safety Net Review case, the AIRC stated:

*In particular we are concerned that there appear to be a significant number of federal awards which do not include the supported wage model clause.*²³

and

*We think it is appropriate that during the hearing of applications for the implementation of the safety net adjustment provided for in this decision, parties give consideration to the inclusion of the model supported wage clause in the award.*²⁴

11.66 An indication of the wide acceptance of the AIRC's decision to approve the SWS model clause and extend its coverage throughout the Award system has been the absence of employer and union applications to alter the SWS.

SWS Evaluation

11.67 The operation of the SWS has also been evaluated and found to be operating effectively. In 1999, FaCS commissioned KPMG Consulting to conduct an evaluation of the SWS. The resulting report examined the effectiveness of the SWS in relation to employment and the appropriateness of the SWS within the workplace relations context.

11.68 A key finding of the evaluation was that the SWS promotes the participation of employers and employees equally and has at its core, values of integrity and transparency in decision-making. These values have ensured the system's continuing appropriateness within the broad workplace relations and employment environment.²⁵

²² Australian Industrial Relations Commission, Supported Wage System for People with a Disability, Decision 1831/94, S Print L5723.

²³ Australian Industrial Relations Commission, Safety Net Review – Wages, May 2003, Print PR002003, p.73, paragraph 235.

²⁴ Ibid, p.74, paragraph 238.

²⁵ KPMG Consulting, *Supported Wage System Evaluation*, 1999, p.1.

11.69 The report found that the SWS provided employment opportunities that would not otherwise exist by enabling access to employment for people with disabilities through the use of productivity based wages.²⁶ It also stated that the SWS has overwhelming support from the majority of stakeholders and is seen as a far more effective mechanism than previous and alternative systems for establishing productivity based pro-rata wages for people with disabilities in the labour market.²⁷

11.70 The report recommended that the Australian Government, in conjunction with the ACTU, further encourage the provision of pro-rata award based wages for employees with a disability in open employment services through the SWS.²⁸

Conclusion

11.71 Given the widespread acceptance of the SWS and its ability to set minimum wages for employees with a disability that ensure they are competitive in the labour market, the Commission could consider determining a special APCS that provides universal access to the SWS under APCSs by filling all gaps in its coverage.

Establishment of special FMWs for employees with a disability in open employment

11.72 Currently, there is no minimum wage for employees with a disability that are APCS-free. This is because the FMW excludes employees with a disability.²⁹ This exclusion enables APCSs to include pro-rata wage arrangements that can produce minimum wages lower than the FMW for employees with a disability that are unable to earn the full FMW. In order to consider what minimum wages should be established for APCS-free employees with a disability, it is useful to consider them in two categories:

- those who are unable to earn the full rate of pay due to their disability;
and
- those whose productive capacity is not impaired and are therefore able to earn the full rate of pay despite their disability.

²⁶ Ibid.

²⁷ Ibid, p.6.

²⁸ Ibid, p.3.

²⁹ *Workplace Relations Act 1996*, subsection 194(1).

APCS-free employees with a disability who are unable to earn the full rate of pay

11.73 APCS-free employees with a disability who are unable to earn the full rate of pay could be covered by a special FMW that applies the SWS to the FMW. The SWS would be used to pro-rate the FMW in proportion to the productive capacity of the employee and would include the minimum amount payable as prescribed in the SWS model clause. This would complete the provision of universal SWS access to all employees with a disability in open employment that are unable to earn the full rate of pay. It would also meet the Commission's legislative parameters by providing appropriate pro-rata wages that ensure the competitiveness of people with a disability in the labour market and by establishing a safety net for employees with a disability who are low paid.

APCS-free employees with a disability who are able to earn the full rate of pay

11.74 There does not appear to be any justification for applying pro-rata wages to those employees with a disability who are able to earn the full minimum rate of pay for the job. They will be competitive in the labour market at the full minimum rate of pay. In any event, the pro-rata pay method would assess them at 100 per cent of the full minimum rate. For these reasons, a special FMW equivalent to the FMW could be established for these APCS-free employees whose disability does not impair their productive capacity in their job. All employees who are unable to earn the full FMW and who are paid less than the FMW will be employed under the SWS. The special FMW equivalent to the FMW could therefore apply to all employees with a disability in open employment who are not employed under the SWS.

Adjustment of minimum wages for employees with a disability in open employment

11.75 As we have seen in previous chapters of this submission, rate provisions in preserved APCSs have been notionally adjusted under section 209 of the WR Act, to directly specify rates as monetary amounts. For example, although junior rates were previously specified in awards as a scale of percentages, in preserved APCSs they are specified only as monetary amounts. However, unlike rate provisions for all other employees, pro-rata rate provisions for employees with a disability are excluded from this notional adjustment.³⁰ As a result, APCSs that include the SWS still prescribe the method used by the SWS to calculate rates of pay.

³⁰ Ibid, subsection 209(3).

- 11.76 The SWS provides a schedule of percentages that are applied to the minimum rate of pay formerly prescribed by the Award (now in the relevant APCS) for the class of work being performed. Therefore, pro-rata wages determined by the SWS are self-adjusting. If the minimum rate of pay in the APCS for the relevant class of work is adjusted, the pro-rata disability wage will be automatically adjusted in accordance with the applicable percentage.
- 11.77 In other words, no specific action needs to be taken by the Commission to adjust SWS wages that are calculated using the percentage scale.
- 11.78 However, the minimum amount payable prescribed in the SWS model clause is expressed as a monetary amount, and consideration could be given to adjusting it whenever other minimum wages are adjusted. As mentioned above, this minimum was originally determined with reference to the Income Test Free Area for the DSP. Initially, it was set at \$45 per week.³¹ Since then, the minimum amount payable has incrementally increased to \$62 per week maintaining its equivalence to the Income Test Free Area for the DSP.

Business Services

- 11.79 As previously outlined, business services have generally not been regulated by state or federal workplace relations systems. However, agreement was reached in August 2005 between representatives of business services, the LHMU and the ACTU, to incorporate pro-rata award wages into the LHMU Award, and to extend the coverage of the Award to most other business services in the sector. This agreement was supported by the Australian Government. The LHMU Award was subsequently varied to include pro-rata award wages, but its coverage was not extended prior to the commencement of Work Choices.
- 11.80 The wage arrangements in the LHMU Award now constitute a preserved APCS. Whether the industry agreement to apply the pro-rata wage arrangements to other business services should continue to be implemented is now a matter for the Commission.

³¹ Supported Wage Management Unit Commonwealth Department of Human Services and Health, *Supported Wage System General Guidelines and Assessment Process*, 7 June (1994) p 32. The joint ACTU, ACCI, Commonwealth written submission to the SWS test case stated that "no worker is to receive less than \$45 per week for full time work, irrespective of the assessed percentage."

11.81 The Australian Government supports the introduction of pro-rata minimum wages to the business services sector, and supports continued implementation of the agreement reached last year.

11.82 The agreement could be implemented in full by an APCS that:

- includes all wage tools that have been agreed by industry parties, including those agreed since the variation to the LHMU Award ; and
- eventually covers all business services in the sector.

11.83 In keeping with the process that produced the original agreement, the key industry parties have held discussions about how the agreement can be best implemented under the Commission's jurisdiction, and have reached a common position on the action that needs to be taken. The Australian Government also supports the position agreed by the industry parties as follows:

Further Wage Assessment Tools

11.84 The original agreement included a process to add more wage tools to the LHMU Award. Since the AIRC varied the LHMU Award,³² another 11 tools have been approved by the industry parties, including the relevant employers and the LHMU. These are identified at Appendix C11. Each of those tools determines the rate of pay for employees with a disability by reference to their relative capacities, consistent with the definition of pro-rata disability pay methods in the WR Act.³³ Each tool has been found to satisfy the Government's quality assurance standards.

11.85 However, the industry parties have agreed that certain wage assessment tools are not to be available for use in the sector generally, but can only be used by those employers specified as currently using them. These are also identified in Appendix C11.

11.86 The industry parties propose that these 11 additional agreed tools be included in an APCS for employees of business services, with their use restricted as indicated. The Australian Government supports this position.

³² Australian Industrial Relations Commission, *s.113 applications for variations*, C2004/4617 and C2005/1405, PR961607.

³³ *Workplace Relations Act 1996*, section 178.

Coverage provisions of an APCS for employees of business services

- 11.87 The coverage provisions of an APCS specify the classes of employees covered by the APCS.³⁴ An APCS must include coverage provisions³⁵ and the Commission is able to adjust them.³⁶
- 11.88 To reflect the original agreement in full, the industry parties propose that the coverage provisions of the APCS for employees of business services should include all those employers in the business services sector that are using a tool that is recognized by the APCS (including those tools identified above).
- 11.89 This is proposed to include business services that have not yet implemented pro-rata wages, but instead are covered by an agreement with FaCSIA concerning the phase-in of pro-rata award wages. These business services would be able to continue to phase in pro-rata wages in accordance with their agreement because the proposed APCS for employees of business services would include Clause 14A.10 of the LHMU Award, which is now included in the preserved APCS. This provision effectively exempts business services covered by such an agreement from complying with the full pro-rata wage requirements until 11 May 2008, provided they continue to abide by the phase-in agreement. This provision is included in the preserved APCS as a result of the operation of Regulation 7.4 of Chapter 2 of the Regulations.
- 11.90 The industry parties propose that business services that are not currently using a wage tool recognized by the APCS would be excluded from the APCS until 11 May 2008. These business services would have until then to either adopt a tool that is recognised by the APCS or make other arrangements that ensure they are subject to appropriate minimum wages. FaCSIA has been advised by 25 business services that they are in this category. However, all of these business services satisfy the requirements of the Government's quality assurance standards, in that they are paying award-based wages in accordance with the standards or are phasing-in full award-based wages in accordance with an agreement with FaCSIA. A list of all business services that are in this category and that the industry parties propose would initially be excluded from the extended APCS is at Appendix D11.

³⁴ Ibid, section 178, Definition of *coverage provisions*.

³⁵ Ibid, section 202(1)(c).

³⁶ Ibid, section 216.

- 11.91 The industry parties envisage that by 11 May 2008, the proposed APCS would be able to be extended to cover all business services that are not otherwise covered by appropriate minimum wage arrangements. This will ensure that all employees with a disability that are employed by a business service are subject to an appropriate safety net of minimum wages. It will therefore also obviate the need for the making of a special FMW for the business service sector under section 197 of the WR Act.
- 11.92 The industry parties propose that the new APCS should be made as a special APCS made under section 220 of the WR Act. Such an APCS has the advantage that it would prevail over any other applicable APCS that does not specifically include pro rata wages for workers with a disability who are employed by business services. It is desirable that the APCS for business services prevail over such APCSs because there may be cases where employees of some business services are inadvertently covered by APCSs that are derived from State common rule awards. Not all States included a provision in their legislation explicitly exempting business services from award coverage. Technically these APCSs would require the payment of the applicable full minimum wage, not a pro-rata wage. The use of section 220 has the advantage of enabling any such inappropriate minimum wages to be overridden by the special APCS.
- 11.93 The Australian Government emphasises that the establishment of a special APCS for business services which includes these provisions would give effect to key requirements of the WR Act. In particular, they would extend a safety net to all employees with a disability in the business services sector, consistent with the need to ensure the continued viability of business services. The special APCS would provide pro-rata pay methods for employees with a disability, and would implement minimum wages that ensure employees with a disability are competitive in the labour market. The Australian Government therefore supports the establishment of a special APCS as proposed by the industry parties.

Mandatory use of the SWS is inappropriate for business services

- 11.94 The Disability Employment Action Centre (DEAC) and the National Council on Intellectual Disability (NCID) are two organisations that represent people with a disability. These organisations have argued that all business services should be required to use the SWS to implement pro-rata wages for their employees.

11.95 Although DEAC and NCID participated in the conciliation proceedings before the AIRC that led to the agreement outlined above, they were not able to convince other participants in the proceedings that the SWS should be imposed throughout the sector. There are strong reasons why the SWS is not appropriate to be mandated as the sole assessment tool for the entire sector.

11.96 First, the SWS was specifically designed for use only in open employment. This was acknowledged at the time the SWS was being developed. The joint submission to the AIRC proposing the SWS in 1994, states that the SWS is to apply to open employment only.³⁷ The then President of the ACTU, Mr Ferguson also strongly asserted during hearings that:

*Sheltered workshop employment will remain a separate and distinct area of activity. The model clause will not apply with respect to people who are engaged in such an environment...*³⁸

11.97 Second, the SWS is inappropriate for the business services sector because it tends to significantly overvalue workers in particular jobs. In many situations it produces wage outcomes that make employees with a disability uncompetitive in the labour market. This is because the sole determinant of pro-rata wages under the SWS is the single measurement of productivity. This does not suit the unique character of employment in the business services sector, as generally, these jobs are redesigned to narrow the range of tasks performed by employees. This is in response to the often limited capabilities of employees in the sector. Productivity alone is not a good proxy for the value of an employee who is working in a job that is much narrower than a job that attracts full wages in open employment. To properly assess an employee's work value in such circumstances, it is necessary to measure the overall capabilities of employees rather than productivity alone.

11.98 For example, an employee in a business service doing a narrow job at 80% productivity, as assessed under the SWS, is not necessarily as valuable in work value terms as an employee who, though also only working to 80% productivity is able to do a wider range of work with little supervision. In the case of the latter employee, that wider range of capabilities provides the business with the flexibility to move the employee to different tasks according to operational need. However, if the SWS was used to assess both these employees, it would pay

³⁷ "Supported Wage System for People with a Disability: A Joint Submission by the ACTU, ACCI, Commonwealth Government", July 1994, p.25.

³⁸ Joint application to facilitate the implementation of the Supported Wage System, transcript of proceedings, p.24, lines 16-21.

them the same, even though the work value of the employee in the wider job is obviously higher. Therefore, the SWS is not a sufficient measurement of work value in these circumstances, as it compares the productivity measurement of two employees engaged in different jobs and can overvalue the work of employees with lower capabilities who are employed in narrow jobs.

- 11.99 It is for this reason that the Australian Government commissioned the development of the BSWAT, a tool specifically designed for the business services sector. In addition to productivity measurement, the BSWAT incorporates the assessment of core and industry specific competencies, such as autonomy, flexibility and the ability to perform a range of tasks.
- 11.100 Although there are a small number of business services that do use the SWS to determine the wages of employees, these business services tend to have a preponderance of jobs that are similar in breadth of work value to those in open employment. These business services generally have a high proportion of employees whose capabilities are not limited by a disability, and who have the competencies to undertake the full range of tasks of jobs in open employment. The employees' productivity levels are therefore able to be directly compared with employees undertaking such jobs and relative productivity is a good measure of the relative value of an employee. In these circumstances, it is entirely appropriate that the SWS be used. It is not appropriate however, that it be used in circumstances where jobs have had to be redesigned and narrowed to fit the skills levels of employees.
- 11.101 The extent to which the SWS would overvalue employees of business services is demonstrated by the labour cost impact of implementing the SWS throughout the business services sector. FaCSIA estimate that mandatory implementation of the SWS would increase the total wage bill for the sector by approximately \$45 million (59%) above the cost of implementing the BSWAT.³⁹
- 11.102 Despite its broad acceptance in open employment and the possible appeal of a simple, one-size-fits-all approach for all employees with a disability, the mandatory imposition of the SWS on business services would seriously undermine the viability of the sector, and reduce job opportunities for people with a disability.

³⁹ FaCSIA derived this estimate from its estimate of the cost impact of the implementation of BSWAT. It was able to do this because the BSWAT assessments include a productivity component. The productivity component of the BSWAT is modelled on the SWS and therefore provides a reliable approximation of the wage impact on the disability employment sector, in the event that the SWS were the sole means of determining sector wages.

Conclusion

11.103 Employees who are unable to earn the full minimum wage for their job due to disability tend to be excluded from employment unless they can be paid pro-rata wages that reflect their lower productive capacity. Therefore, to ensure that adequate employment opportunities are offered to people with a disability, current pro-rata wage arrangements could be extended to employees with a disability that cannot currently access these arrangements. This would be consistent with the requirements of the WR Act to have regard to the need to provide a safety net for the low paid and to ensure that employees with a disability are competitive in the labour market.

Open employment

11.104 In open employment, the employment of people with a disability who are unable to earn the full Award rate for their job is effectively prevented wherever an APCS does not make provision for the SWS. The Commission could ensure that the SWS is available to facilitate the employment of people with a disability in all areas of open employment. The Commission could achieve this objective by two interventions.

11.105 First, for those employees with a disability covered by an APCS that does not provide access to the SWS, the Commission could establish a special APCS that provides such access. This special APCS could fill gaps in coverage by applying the SWS methodology to the full minimum rates in all APCSs that do not currently provide for the SWS.

11.106 Second, the Commission could establish a special FMW for employees with a disability that are APCS-free. This could be achieved by determining a special FMW that provides:

- rates determined by applying the SWS to the FMW for those employees with a disability unable to earn the full rate of pay in open employment; and
- a rate equal to the FMW for those APCS-free employees with a disability that are not employed under the SWS.

Business services

11.107 In setting and adjusting minimum wages for employees of business services, the Commission could implement the agreed position reached by the industry parties, as outlined earlier in this chapter and supported by the Australian Government. The Commission could achieve this by establishing a special APCS under section 220 of the WR Act which reflects the provisions of the Business Services APCS, but which also:

- includes the new wage assessment tools that have been mutually agreed by the parties;
- applies to any business service that is either using one of the tools allowed by the APCS or is in the process of transition to use such a tool; and
- applies to any other business service once it implements arrangements that meet in full the requirements of the APCS, as advised by the industry parties.

Appendix A11: Supported Wage System Model Clause

1.1 Workers eligible for a supported wage

(a) This clause 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 agreement/Award. In the context of this clause, the following definitions will apply:

(i) "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 "[Supported Wage System: Guidelines and Assessment Process]".

(ii) "Accredited 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.

(iii) "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.

(iv) "Assessment instrument" means the form 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.

1.2 Eligibility criteria

(b) Employees covered by this clause 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 agreement/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 clause 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 agreement/Award relating to the rehabilitation of employees who are injured in the course of their current employment).

The Award does not apply to employers in respect of their facility, program, undertaking service or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are receiving or are eligible for a disability support pension, except with respect to an organisation which has received recognition under Section 10 or under Section 12A of the Act, or if a part only has received recognition, that part.

1.3 Supported wage rates

(c) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award/agreement for the class of work which the person is performing according the following schedule:

**Assessed capacity
(sub-clause (d))**

% of prescribed award rate

10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$62 per week).

* Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.

1.4 Assessment of capacity

(d) For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award/agreement, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

(i) the employer and a union party to the Award/agreement, in consultation with the employee or, if desired by any of these;

(c) the employer and an accredited Assessor from a panel agreed by the parties to the Award and the employee.

1.5 Lodgment of assessment instrument

(e) (i) All assessment instruments under the conditions of this clause, wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.

(ii) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award/agreement, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

1.6 Review of assessment

(f) The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

1.7 Other terms and conditions of employment

(g) Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other workers covered by this Award/agreement paid on a pro-rata basis.

1.8 Workplace adjustment

(h) An employer wishing to employ a person under the provisions of this clause shall 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.

1.9 Trial period

(i) 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 clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

(ii) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(iii) The minimum amount payable to the employee during the trial period shall be no less than \$62 per week.

[or in paid rates Awards]

(iv) The amount payable to the employee during the trial period shall be \$62 per week or such greater amount as is agreed from time to time between the parties (taking into account the Department of Social Security income test free area for earnings) and inserted into this Award.

(v) Work trials should include induction or training as appropriate to the job being trialed.

(vi) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (c) hereof.

Appendix B11: Wage provisions of the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001

14. WAGE RATES

14.1 Upon appointment, an employee will be graded by the employer in one of the grades in Schedule A having regard to the employees skills, experience and qualifications.

14.2 Subject to clause 14A, the following minimum weekly rates of pay will apply for the grades set out below:

	Weekly	Hourly *
Grade 1	\$484.40	\$12.75
Grade 2	\$501.10	\$13.19
Grade 3	\$523.60	\$13.78
Grade 4	\$544.50	\$14.33
Grade 5	\$578.20	\$15.22
Grade 6	\$638.80	\$16.81
Grade 7	\$667.90	\$17.58

* Rounded to the nearest cent.

14.2.1 For the purpose of this Award, the hourly rate for all employees will be calculated on the basis of a 38 hour week.

14.2.2(a) Arbitrated safety net adjustment

14.2.2(a)(i) The rates of pay in this Award include the arbitrated safety net adjustment payable under the *Safety Net Review – Wages June 2005* decision [PR002005]. This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such above Award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Australian workplace agreements, Award variations to give effect to enterprise agreements and over Award arrangements. Absorption which is contrary to the terms of an agreement is not required.

14.2.2(a)(ii) Increases made under previous National Wage Case principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustment.

14A. WAGES ASSESSMENT - EMPLOYEES WITH A DISABILITY

14A.1.1 Subject to clause 14A.10, an employee with a disability will be paid such percentage of the rate of pay of the relevant grade in clause 14. 2 as assessed by a wage assessment tool nominated in clause 14A.4 chosen by a supported employment service.

14A.1.2 The use of the tools contained in clause 14A.4.4, 14A.4.6 and 14A. 4.11 shall be limited to those supported employment services using those tools as at 27 June 2005.

14A.2 No Decrease

14A.2.1 No employee with a disability will have their rate of pay reduced as a result of a wage assessment made pursuant to clause 14A.1.1 as at 11 May 2008, or any variation of the Award arising from the decision of the Commission in PR961607.

14A.2.2 Clause 14A.2.1 does not cover the circumstances where the wage of an employee with a disability may need to be reduced due to the regression of their disability.

14A.2.3 Regressions will only occur where an employee's competency has regressed purely due to their disability. The employer shall first exhaust all training or new tasks to avoid the regression. Where regression of wages is provided for in a wage assessment tool listed in clause 14A.4, regression shall only occur in the method provided for in that tool.

14A.3 Review of Assessment

For the purpose of clause 14A.1.1:

14A.3.1 Unless otherwise provided under the relevant wage assessment tool, the wage assessment of each employee with a disability will be reviewed within a period not exceeding three years service with the supported employment service since the last assessment, and the rate of pay adjusted accordingly.

14A.3.2 Unless otherwise provided under the relevant wage assessment tool, a wage assessment may be reviewed at the initiative of either the employee with a disability or the supported employment service, once every 6 months and not more than 4 times every three years, and the rate of pay adjusted accordingly.

14A.4 Wage Assessment Tools

It is desirable that a wage assessment tool sought to be included in this Award satisfy disability services standard 9 (Standard 9) and relevant key performance indicators as determined or approved under section 5A of the Disability Services Act 1986 (DSA KPI's) as amended from time to time. The wage assessment tools described in this clause satisfy Standard 9 and the DSA KPI's.

The following wage assessment tools can be chosen by a supported employment service to assess an employee with a disability:

14A.4.1 The Business Services Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;

- 14A.4.2** The Civic Industries Supported Employees Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.3** The Elouera Association Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.4** The FWS Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.5** The Greenacres Association Competency Based Wages System, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.6** The Hunter Contracts Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.7** The PHT Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.8** The Skillsmaster Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;
- 14A.4.9** The Supported Wages System, as described in the decision of a Full Bench of the Australian Industrial Relations Commission, 10 October 1994, Print L5723; and
- 14A.4.10** The Yumaro Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617.
- 14A.4.11** The Phoenix Wage Assessment Tool, as defined by reference to the material contained in Exhibits B2 and B3 in the Australian Industrial Relations Commission proceedings number C2004/4617.

14A.5 Exhibit

The reference to Exhibit B2 in clause 14A.4 is a reference to the Final Report dated 16 February 2005 of Jenny Pearson & Associates Pty Ltd titled Analysis of Wage Assessment Tools used by Business Services. The reference to Exhibit B3 in clause 14A.4.11 is a reference to the Report of Jenny Pearson & Associates Pty Ltd titled Addendum to Final Report: Analysis of Phoenix Society Inc Wage Assessment Tool dated 16 June 2005.

14A.6 Documentation of Assessment

Any assessment made under clause 14A will be documented by the supported employment service and such documentation will be provided to the employee with a disability, or to the employee's authorised representative. If requested by

the employee with a disability or his or her authorised representative, such documentation will also be provided to the Union or other adviser or agent.

14A.7 National Wage Case

All rates will be subject to variation pursuant to National Wage Case decisions provided that a flat amount increase will be converted to a percentage having regard to the employee's rate of pay.

14A.8 Consultation and review

14A.8.1 Consultation will take place between the supported employment service and the Union to ensure that additional costs resulting from wage and superannuation increases for employees with disabilities do not jeopardise the operation of the supported employment service or prevent or restrict the recruitment of future employees.

14A.8.2 The parties acknowledge that there are additional costs incurred by supported employment services related to the ongoing support and training needs of employees with disabilities. These additional costs will be taken into account in future negotiations.

14A.8.3 Both parties will continue to negotiate with the relevant Commonwealth Departments to ensure that future wage increases do not negatively impact upon the total income package received by employees with a disability. In the interim, the Union and employers will ensure that no individual is financially disadvantaged by the introduction of this Award.

14A.8.4 All parties are committed to achieving the Principals and Objectives of the Disability Services Act 1986 (as amended).

14A.9 Long term objectives

All parties are committed to the long term aim of achieving full Award wages for employees with disabilities through improved employment opportunities, training, and the introduction where applicable of a wage subsidy paid by the Commonwealth.

14A.10 Transitional Provisions

If a supported employment service has entered into or enters into an agreement with the Commonwealth to phase-in increases in the rates of pay of its employees with a disability, compliance with the phase-in obligations of that agreement will be taken to satisfy the obligations of clause 14A.1.1. However, after 11 May 2008 clause 14A.10 will not be taken to satisfy the obligations of clause 14A.1.1.

Appendix C11: Industry agreed Wage Assessment Tools for inclusion in the Business Services APCS

Wage Assessment Tools provided in the Business Services APCS

1. SWS
2. BSWAT
3. Civic Industries
4. Eloura
5. FWS
6. Greenacres
7. Hunter Contracts
8. Phoenix
9. PHT
10. Skillmaster
11. Yumaro

Wage Assessment Tools proposed for inclusion in the Business Services APCS

1. Valmar Support Services
2. RVIB enterprises
3. Woorinyan
4. Cumberland
5. Koomari
6. New Horizons
7. Sunnyfield
8. Endeavour Industries*
9. Wangarang
10. Bedford
11. Blue Mountains Disability Services*

* Wage Assessment Tools restricted to those specific organisations.

Appendix D11: Business services using a Wage Assessment Tool not recognized by the Business Services APCS

1. Caloola Vocational Services Inc.
2. Challenge Armidale Ltd.
3. Glenray Industries Ltd.
4. Hastings Foundation Ltd.
5. Hunter Area Health Service - Hunter Joblink
6. Kurri Kurri Community Centre Inc.
7. Mudgee Foundation
8. OCTEC Inc.
9. Psychiatric Rehabilitation Association
10. Spinal Cord Injuries Australia Ltd.
11. Werrigal Inc.
12. Wheelchair and Disabled Association of Australia
13. Witmore Enterprises Inc.
14. HPA Inc.
15. The Uniting Church In Australia Property Trust (Queensland.)
16. Kingston Supported Employment Service Inc.
17. Blue Line Laundry Inc.
18. GDP Industries
19. Wallara Australia Ltd.
20. Waverley Helpmates Inc.
21. Westgate Community Initiatives Group Inc (WCIG)
22. Woodbine Inc.
23. Intework Inc.
24. Westcare Inc.
25. Paraplegic Quadriplegic Association of WA Inc.