



28 November 2022

FWC DECISION [2022] FWCFB 203 Sydney, 10 November, 2022

## 4 yearly review of modern awards – Supported Employment Services Award 2020 (AM2014/286)

Pursuant to this Decision, and in accordance with the directions there-in, we provide our submission on behalf of our ADE employee members, and their family advocates/carers

1. We have not provided a separate marked up Draft Determination because our only suggested variation is a transitional end date of **May, 2028**. We request a transitional time frame of 5 years, and not the 3 years contained in the Decision. We do not have the resources to provide a marked-up Draft Determination, as requested.
2. In accordance with [2022] FWCFB 203, Para [277] (2) and the *provisional* views expressed there-in, and in response to Para [279] we request permission to make an oral submission on **7 December, 2022**.

Based on our lived experience we need to ensure that the FWC wage determination timeframe and implementation phase provide for the three key limitations expressed at *Page 9 – Points 1, 2 & 3* of the ARTD Report on the Trial. Those limitations were that:-

*2(i) Wage outcomes for supported employees may be different to those in the Trial.*

*(ii) The limited nature of the financial modelling and other factors which may influence the financial risk for ADE's.*

*(iii) The lack of understanding by the more marginalised ADE employees and their family advocates and carers (where necessary) of how their current wages are determined- let alone quickly understand a totally new, national system.*

The key limitations within the Report must be aligned with the expressed “90% of CEO’s/management representatives who estimated that the new system would impact viability”.

That will depend on Government funding, NDIS adjustments, entitlements, pricing, on the change management phase, the recruitment, cost and training of SWS assessors, internal and external cultural changes, the implementation phase, the monitoring, reviewing and adjustment processes and how effectively all this is communicated (“sold”) to the employees, their family advocates/carers and the broader “community”. Despite the current anti-ADE campaigning by the advocacy Peak Bodies, the Australian community holds their local ADE service as a valuable thread in the social fabric of their individual communities. The retrenchments in Western Australia have confirmed that.

The lives of 16,000 vulnerable employees at 161 sites depend on ADE’s successfully overcoming or adjusting for these “key limitations”. The time frame in which all these separate issues must be successfully addressed is, therefore, critical.

Based on our lived experience, and the fact that it is family advocates/carers who are now (in Western Australia), and will be in the future, picking up the pieces should the new wage system force closures, we know the implementation time frame (transitional arrangement) is one of the most critical elements. Possible closures could result from some of those key limitations previously cited. These elements of the new wage system need to be in a time frame which allows successful monitoring and implementation of all of these phases.

There is little doubt that the new wage process will be subjected to ideological and possibly political pressures as ongoing NDIS, Disability Royal Commission, and Disability Policy rest with a newly elected Federal Government. Policy reviews, and their outcomes, are combined with whatever political commitment there is to appropriately fund the extent of the new wage system as one item in a Federal budget encompassing high inflation, rising interest rates and global unrest.

***We do, therefore, strongly re-iterate that five (5) years, even with the concessions in SWS assessment processes, which the FWC has now provisionally determined, is essential for a successful transition.***

**We do not advocate that those 5 years should be seen as a “blanket approval” for the sector to “go slow” because the end date is 5 years away. That 5 year transition plan must have stated goals, milestones, stakeholder reporting and independent oversight which also includes stakeholder representation.**

In making our case for a 5 year transition period (**May 2023 to May 2028**) we do not need to re-write history, but we should be guided by it. The 2015 transition away from the Business

Services Wage Assessment Tool (BSWAT) provides a history for implementing the new reformed wage system. The BSWAT transition was, for the most part, back to already existing legislatively approved wage assessment tools. In house ADE assessors didn't need additional training because they understood the tools, and the processes to which the majority of former BSWAT employees reverted. It only covered those providers using the BSWAT wage system. As we know, many of the employees didn't understand how their wages were calculated then. This won't change under the new system. It's far more complex, it's national, and it involves ALL employees and employers – not just some.

The BSWAT transition involved approximately 8000 employees. This new system will impact on twice that number. That transition was plagued with a lack of SWS assessors and didn't happen fast enough for the *AEDLC Camp* who challenged the time frame with their claims of discrimination.

The subsequent AAT Appeal decision (*AAT [2018] 2016/0187 & 2016/1854*) did not support the challenged time-frame and claims of discrimination against the employees. The sector needed an extension of time from the Human Rights Commission to effect an efficient and effective transition away from the BSWAT back to their employer choice of other industrially approved assessment tools. The oversight of the FWC, in that transition, couldn't have been more vigilant, but it did not save us all from unnecessary legal costs, time and waste of personal resources when the transition time frame was legally challenged. The biggest problems were assessor availability and the tyranny of distance to service the diverse geography of Australia – especially the regions. Those problems have been ameliorated somewhat by the FWC approach and timing- but it doesn't solve the inherent problems which we have identified.

Perhaps it could be argued that the BSWAT transition involved 8000 ADE employees. Using numerical logistics, that was half of the now 16,000 ADE employees. Logistically that's twice the number of workers so it should take twice that time. This could justify the provisional 3 years- but our case for 5 years builds in provisions for elements that weren't part of the BSWAT transition and, therefore, require a longer transition time.

Using our lived family advocacy/carer experience, and advocating a 5year transition phase for our ADE employees, because no one else can, or will , we are at the “*pointy end*” of one of the longest, most controversial wage determinations in the history of Australian industrial action. We are dealing with Australia's most vulnerable group of employees in a market place that isn't the standard commercial “for profit” arena, but is subjected to the same competitive demands and expectations. Some, not many, of us have been on this journey through all its phases. The FWC has provided expert understanding of the facts over all that time. We cannot afford to endanger the outcome and create massive job losses because, on the factual history, we did not allow enough time for the various phases to be designed,

communicated, tested, managed, reviewed, monitored and adjusted, if and where necessary.

The FWC Determination now being considered began as *FWC AM2013/30* and rolled into *AM2014/286*. This industrial journey has taken us 9 years, to this point. It has included very expensive and time consuming diversions to the Federal Court, and to the Administrative Appeals Tribunal. More recently there has been a national employment summit because of the impact of low wages and a lack of productivity on all Australian workers -not just disabled employees.

Factually:

- Employment for people with a disability in “open employment” has not improved for the past **30 years**.
- This new wage structure is to combat low productivity and low wages in supported employment. That’s a phenomenon that plagues ALL Australian employees in ALL Australian work-sites and has done so for almost **10 years**.
- We have been addressing the ADE wage issue, industrially, since 2003. That’s **19 years**
- The ADE and business representatives (NDS & ABI) have requested **8 years** as a transition time frame.
- The *AEDLC Camp* has suggested they want the industrial issue resolved quickly and warned that any delay risks claims, by them, of discrimination.
- Our Voice Australia has taken a practical, middle road of **5 years** because our disabled family members are living all this. We need to get it right – for them. They are front and centre of this issue. We face a scenario where, just to survive, providers are now forced to employ the lesser disabled, rather than those with higher support needs. This is because wages are now productivity based and our family members have high support needs. That’s why ADE’s exist

**We submit that 5 years is necessary because of:-**

- **the existing insecurity,**
- **the need for consistency in all aspects of the transition,**
- **the lack of, and cost of external SWS assessors,**
- **the need for cultural change with so many aspects of the new system,**
- **the need for a change management plan which includes ALL stakeholders, including those unable to access electronic communication as a means of understanding the rationale of the changes.**
- **The lack of assistance, advocacy and deprivation of resources for family advocacy held by the Peak Bodies who claim they, and not family advocates, are the “employee party” in this wage issue.**

- **The lack of detail and a workable plan for closely monitoring the transitional phase of the new wage system.**
- **An assumption that external responsibility for assessment will free up time, cost, support and impact on service provision (and ADE workers) – in the long term.**

### 1. Insecurity

The insecurity in the sector has prevented all stakeholders from planning positively, even though we have all known the *suggested* parameters since December, 2019. Those 3 years have been plagued with legal intervention, with a pandemic, and global impacts beyond the control of any of us. More recently the loss of 750 jobs at ACTIV in Western Australia has exacerbated those years of insecurity. That insecurity is now coupled with fear of the future.

### 2. Consistency

There needs to be consistency in assessment practice, culture and application. This requires providers to ensure that their data, benchmarks and/or assessment information is nationally consistent, available in a format that suits all work-sites and appropriate for the ability and support needs of individual employees. Some inconsistencies have been noted in how the modified SWS is currently applied in both open and supported employment sites.

Unlike the transition away from the Business Services Wage Assessment Tool (BSWAT), there is no “*fall-back*” position in the new wage structure. This is a totally new system – for all stakeholders. It must adhere to key commercial change management principles, strategies, analyses – and a transition time frame that is effective, has stated goals, reporting and monitoring.

### 3. SWS Assessor availability

There are not enough SWS assessors available within the sector. Not only is this SWS assessor workforce not yet identified it is not financially accounted for – or appropriately trained. *“Currently there are no differences between SWS training in open and supported environments” - (ARTD Report Page 15 footer note 4).*

### 4. Cultural change

Cultural change is needed within the sector – at all levels. Providing the necessary culturally sensitive SWS assessor workforce, based on expressed opinions about that sector will require a change management phase – within that sector. It will then have to be extrapolated out to link into the necessary benchmarking, data elements of a full change management plan. (Refer 6.4.1-6.6.5- pages 131-134 - ARTD Evaluation & Report). That cultural change also extends to service provision, management, employees and their family advocates – where necessary

## **5. Stakeholder Communication and Inclusion**

The need for a change management plan must include all stakeholders This needs to overcome the digital divide which currently prevents many family advocates/carers and employees from participating in consultations delivered solely by phone/webinar/easy-read (with no physical support) and subject to geographical distance constraints because of the lack of public transport and higher support needs.

The need for family advocates to co-ordinate the changes in income for their family member extends to Centrelink, NDIS and other nominee provisions and requirements. Family advocates must now attend to these matters, electronically or physically, and Centrelink offices are not readily available in the regions.

## **6. Lack of Resources for Employees & Family Advocates:**

The lack of support by the Peak Body networks for the ADE model of supported employment denies access to the resources held by those Peak Bodies. With no resources family advocates/carers – as we have seen with the Western Australian ACTIV retrenchments – struggle to represent their own family members but are extending themselves to represent those employees who lack a family but need a community support network.

The new wage system will extend that need for effective communication, nationally, past a central “help” desk to the typical 1300 system that many of our family carers cannot handle with the existing Medicare, Centrelink, My Gov and NDIS portals.

How will all this stakeholder communication be funded?

How will it be rolled out? , by whom and

It won't happen, nationally, in a matter of weeks or months, as history confirms.

## **7 Monitoring the transition:**

We refer to [Para 266], Page 96 of the Determination and agree that the implementation of the new wage system needs to be “*carefully monitored (by the FWC) during the transitional period.*”. We have lived the impact of this not happening with the introduction of the BSWAT back in 2005. We have proposed a separate Industry Consultative Council (ICC) as an independent monitoring mechanism for the implementation of this new system.

It is a matter of history that the demise of the BSWAT resulted from the disbanding (contrary to commitment) of the then ICC with the implementation of the new BSWAT wage tool. We do not argue the merits or de-merits of the BSWAT, only that the process for its implementation at a specific site, as directed by the Full Bench of the AIRC, at the time, was

not followed. The implementation of the BSWAT, per se, was never monitored. Transcripts of the relevant cases have already been provided to support this history.

*AIRC - C2004/4617;C2004/5981:C2004/6012 dated 7 October 2004 and  
AIRC – C2005/1405: C2005/4617 dated 27<sup>th</sup> June, 2005*

We use these cases to support our contention that this new wage system must be monitored to prevent repeating the errors of history.

The demise of the BSWAT and subsequent compensation claims resulting from that amounted to over \$200m. The subsequent transition away from the BSWAT was then monitored by the FWC and a stakeholder group. The transition was diligent and subjected to regular reporting by providers to the stakeholder group, which included the AEDLC Camp and the DSS representatives.. It was another agenda item in a FWC conciliation/mediation process, presided over by DP Booth. The oversight of the FWC did not prevent legal intervention of the BSWAT demise.

The Determination at [**Para 266**] does not indicate how the FWC intends to “*closely monitor*” the implementation. We contend it needs to be a dedicated group which involves all stakeholders and the sub-groups (DES,NDIS, Carers Australia) whose roles interact with the FWC . It must have power to co-opt and ensure that the milestones for implementation are met.

To-day’s technology should reduce the historic costs of the then ICC – but whatever it costs in to-day’s terms, the historic cost of \$200m for not having it back in 2005 has to be a consideration with the new system.

## **8. The impact of external assessments**

We refer to [**269**](f). We submit that the sustainability of the ADE model as an option in a range of employment choices for our disabled ADE family members is a crucial issue for all ADE employees, their family advocates, carers and the Australian community.

Wage determination, by individual assessment, whether internally or externally by independent SWS assessors, is an industrial process which some ADE family members find stressful – as confirmed by the ARTD Report. Assessment time does impact on productivity. This is likely to be exacerbated with external assessments so the reduction in ADE operational costs of the regulatory burden with external assessment will depend on many things.

The issue and suggested solutions are well covered in the ARTD Report (*pages 16-17 and Pgs 43-51*). The provider might be relieved of the regulatory burden of physically doing the assessment but assessment time for the ADE workers is akin to a yearly performance review for the able-bodied.

It is, therefore, important that the transition time frame is long enough to ensure that the provider and the (as yet non-existent) SWS assessor/s can provide an environment, as suggested. That environment must allow for the assessor relationships to grow and for assessment time to become, over time, less stressful and simply part of the process – even though external.

There is no question about the commitment of the FWC, the Federal Government, providers, employees, their family advocates and carers for this new wage regime to provide the reforms needed.

The process should not be rushed to meet the needs of politics and/or ideology. It will be a bonus if we can all get it right in that 5 year time frame. Our Voice Australia, which is the voice of our ADE workers, their family advocates and carers, believes we can. For that to happen we need the support of the FWC and a continuation of the understanding they have shown for the employees, over the past 19 years.

Thank you, on their behalf, for the opportunity of providing this submission and our reasons for requesting a 5 year transitional time frame of **May 2023 to May 2028** for the implementation of the new wage assessment structure for Australian Disability Enterprises

Sincerely



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**FWC Representative**  
**Our Voice Australia**