



BACKGROUND PAPER

Fair Work Act 2009

s.285—Annual wage reviews to be conducted

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

(C2017/1)

MELBOURNE, 19 SEPTEMBER 2016

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

Contents

Abbreviations	2
Overview	3
Introduction	4
Wage setting for employees whose disability does not impact on their productive capacity	7
Special NMW1	7
History and development of special NMW1	7
Scope and application of special NMW1	10
Wage setting for employees whose productive capacity is affected by their disability.....	11
The development and implementation of the Supported Wage System	11
History and development of special NMW2.....	11
Varying the Supported Wage System in modern awards.....	13
The operation of the Supported Wage System.....	16
Supported Wage System employee characteristics, wages and income	18
Key characteristics of SWS job seekers.....	18
Wages and disposable income of SWS employees.....	18
Additional costs associated with disability	20
Summary of questions for parties.....	22
Attachment A—Supported Wage System Schedule in the National Minimum Wage Order 2016.....	23
Attachment B—Supported Wage System Schedule in the <i>Supported Employment Services Award 2010</i>	26

Abbreviations

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

Overview

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

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

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

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

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

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

¹ Fair Work Act, s.285.

² Fair Work Act, s.294(1)(b)(iii).

³ [2016] FWCFB 3500 at para. 607.

⁴ [2016] FWC 5924.

Introduction

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

“a national system employee who is qualified for a disability support pension as set out in section 94 or 95 of the Social Security Act 1991, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.”⁵

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

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

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

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

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

⁵ Fair Work Act, s.12.

⁶ Social Security Act, s.94(1).

⁷ Social Security Act, s.94(2).

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

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

[10] And second:

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

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

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

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

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

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

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

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

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

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

¹² [2016] FWCFB 3500 at para. 607.

¹³ [2016] FWC 5924.

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

¹⁴ MA000103.

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

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

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

Special NMW1

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

History and development of special NMW1

Workplace Relations Act 1996

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

Workplace Relations (Work Choices) Amendment Act 2005

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] The AFPC further stated that:

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

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

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

²² Workplace Relations Act, s.194(3).

²³ Workplace Relations Act, s.197(b).

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

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

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

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

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

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

Fair Work Act 2009

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

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

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

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

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

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

²⁹ Fair Work Act, s.294(1)(b)(ii).

³⁰ Fair Work Act, s.294(3)(c).

³¹ Fair Work Act, s.294(4)(c).

³² [2010] FWAFB 4000, at para. 418.

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

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

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

³⁶ [2010] FWAFB 4000 at para. 422.

³⁷ Fair Work Act, s.617(1).

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

Scope and application of special NMW1

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

Question for parties:

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

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

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

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

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

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

The development and implementation of the Supported Wage System⁴¹

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

History and development of special NMW2

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

Workplace Relations Act 1996

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

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

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

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

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

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

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

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

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

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

Workplace Relations (Work Choices) Amendment Act 2005

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

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

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

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

[38] The AFPC also noted:

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

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

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

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

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

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

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

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

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

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

Fair Work Act 2009

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

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

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

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

Varying the Supported Wage System in modern awards

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

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

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

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

⁵⁴ [2010] FWAFB 4000 at para. 418.

⁵⁵ [2010] FWAFB 4000 at para. 365.

⁵⁶ [2010] FWAFB 4000 at para. 367.

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

⁵⁸ Fair Work Act, s.285(2)(b).

⁵⁹ Fair Work Act, s.284(3).

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

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

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

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

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

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

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

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

⁶⁰ Fair Work Act, s.284(4).

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

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

⁶³ [2012] FCAFC 192.

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

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

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

The operation of the Supported Wage System

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supported Wage System employee characteristics, wages and income

Key characteristics of SWS job seekers

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

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

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

Wages and disposable income of SWS employees

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

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

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

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

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

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

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

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

Source: Fair Work Commission modelling; [National Minimum Wage Order 2016](#).

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

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

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

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

Source: Fair Work Commission modelling; SES Award.

Additional costs associated with disability

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

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

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

⁷² ACOSS, [Poverty in Australia 2014](#), p. 27

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

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

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

Questions for parties:

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

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

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

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

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

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

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

Summary of questions for parties

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

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

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

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

Further research

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

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

Schedule A—Special national minimum wage 2

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

A.2 In this schedule:

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

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

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

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

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

A.3 Supported wage rates

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

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

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

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

A.4 Assessment of capacity

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

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

A.5 Lodgement of SWS wage assessment agreement

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

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

A.6 Review of assessment

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

A.7 Workplace adjustment

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

A.8 Trial period

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

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

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

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

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

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

Schedule D—Supported Wage System

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

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

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

D.2 In this schedule:

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

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

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

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

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

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

D.3 Eligibility criteria

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

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

D.4 Supported wage rates

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

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

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

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

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

D.5 Assessment of capacity

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

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

D.6 Lodgement of SWS wage assessment agreement

[D.6.1 varied by [PR542223](#) ppc 04Dec13]

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

[D.6.2 varied by [PR542223](#) ppc 04Dec13]

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

D.7 Review of assessment

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

D.8 Other terms and conditions of employment

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

D.9 Workplace adjustment

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

D.10 Trial period

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

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

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

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

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

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