

MATTER NO. AM2014/286

SUPPORTED EMPLOYMENT SERVICES AWARD 2010 – FOUR YEARLY REVIEW OF  
MODERN AWARD

FURTHER SUBMISSION TO THE FAIR WORK COMMISSION ON BEHALF OF THE USERS  
(50+) OF THE SKILLSMaster© SYSTEM WAGE ASSESSMENT TOOL FOR  
DETERMINING A PRO-RATA AWARD BASED WAGE FOR PEOPLE WITH A DISABILITY  
WORKING IN AN AUSTRALIAN DISABILITY ENTERPRISE (ADE).

8<sup>th</sup> NOVEMBER 2017

1. Reference is made to the previous submission from Practical Workplace Relations on behalf of the users of the SkillsMaster© System, Pro-Rata Award Based Wage Assessment Tool (the 'SkillsMaster System') for people with a disability, dated 5<sup>th</sup> May 2017, and documents provided to the Fair Work Commission (the 'FWC') pursuant to *Fair Work Act 2009* (the 'Act') s590(2) order dated 11<sup>th</sup> September 2017 in regard to the s160 application to vary the Supported Employment Services Award 2010 (the 'Award').
2. This further submission should be read in conjunction with and supplementary to the initial submission dated 5<sup>th</sup> May 2017 and the documents provided as a consequence of the Order.
3. This submission addresses three (3) key issues we consider are relevant for the FWC when determining the merits of the application and subsequent decision to either remove the SkillsMaster System or all of the wage assessment tools from the award or to retain SkillsMaster System or all or some of the wage assessment tools or include any new tools in the Award.
4. The three (3) key issues are:
  1. The provisions of the *Fair Work Act 2009* as it applies to Modern Awards, and an application to vary the Modern Award pursuant to s160 of the Act under which the application in this matter was made; and
  2. The provisions of the *Fair Work Act 2009* as it applies to Modern Awards, 'Modern Award Reviews' to vary or revoking modern award minimum wages which should include consideration of:
    - (i) The Award provisions relevant to the determination of Minimum Wages for employees covered by the Award;
    - (ii) Award Minimum Wage provisions and the history of Wage setting decisions to establish provisions, for the payment of Pro-rata Award Based Wages for people with a Disability working in an (Australian Disability Enterprise (ADE); and
    - (iii) The provisions of the *Fair Work Act 2009* as it applies to the Modern Awards, discriminatory provisions contained in the Award.
  3. The Federal Court decision, (*Nojin v Commonwealth of Australia [2012] FCAFC 192*) and is this decision an authority to be applied to determine if any or all of the Wage Assessment tools contained in the Award contravene the provisions of the Act.
5. **(1) Modern Awards and application to vary pursuant to s160 of the Fair Work Act 2009.**

As the s160 application currently before the FWC is to remove all of the wage assessment tools contained in the Award at *Sub-clause 14.4(b)*, and the application is made as an addendum to the Four (4) yearly review of modern awards, there is in our view, two issues the FWC should consider when making any decision that in any way supports the application.
6. Firstly, the provisions of s160 - *Variation of modern award to remove ambiguity or uncertainty or correct error*, which states:
  - (1) *The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.*
  - (2) *The FWC may make the determination:*

- (a) *on its own initiative; or*
- (b) *on application by an employer, employee, organisation or outworker entity that is covered by the modern award;*
- (c) *on application by an organisation that is entitled to represent the industrial interests of one or more employees that are covered by the modern award; or*
- (d) *if the modern award includes outworker terms – on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.*

7. Without challenging the application on jurisdictional grounds, although from the information available but not verified to date, would support a challenge, the provision specifically relates to an application to vary a modern award to remove any ambiguity, uncertainty or error.

8. In our view, there has been no submission or evidence presented to the FWC in support of the application that a reasonable person would interpret to establish that the terms of the award at *Sub-clause 14.4* in regard to the SkillsMaster System is in any way ambiguous uncertain or in error, and more notably based on an error of the FWC to include the tool in the Award.

9. Further, it is our view that the inclusion of the various wage assessment tools for people with a disability in the Award at *Sub-Clause 14.4* and particularly the SkillsMaster System is supported by the various reports and submissions over many years and decisions of the FWC, more notably the decision of the *Australian Fair Pay Commission – Wage Setting Decision October 2006*.

**(Refer: Attachment 'B' - Australian Fair Pay Commission – Wage Setting Decision October 2006).**

10. Having regard to our view, that no submissions, or evidence has been presented to the FWC, or consensus of the parties covered by the Award to support the *s160* application, or further to establish the requirements of the Act to give the power to the FWC to vary the modern award we would respectively request the FWC to dismiss the application.

11. Secondly, if the FWC dismissed the application to remove the SkillsMaster System or all of the wage assessment tools contained in the award at *Sub-clause 14.4*, pursuant to *s160*, it is our view, any removal of the SkillsMaster System would constitute a variation to the 'Minimum Wage' provisions of the Award, and as such, the powers of the FWC to vary minimum wages are contained at *s156* and in particular *ss156(3),(4)* and *(5)*.

**12. (2) Modern Awards, 'Modern Award Reviews' to vary or revoking modern award minimum wages.**

The *Fair Work Act 2009* at *s134* provides the objective the FWC must ensure Modern Awards provide.

13. The provisions that have the greatest impact on people with a disability working in an Australian Disability Enterprise (ADE) are those at *s134(1)(a),(c),(d),(e)* and *(f)* which states:

***s134 The modern awards objective***

*What is the modern awards objective?*

*134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*

- (a) ***relative living standards and the needs of the low paid;*** and
- (b) *the need to encourage collective bargaining;* and
- (c) ***the need to promote social inclusion through increased workforce participation;*** and
- (d) ***the need to promote flexible modern work practices and the efficient and productive performance of work;*** and
- (da) *the need to provide additional remuneration for:*
  - (i) *employees working overtime;* or
  - (ii) *employees working unsocial, irregular or unpredictable hours;* or
  - (iii) *employees working on weekends or public holidays;* or
  - (iv) *employees working shifts;* and
- (e) ***the principle of equal remuneration for work of equal or comparable value;*** and

- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*'.

14. s134(2) refers to the modern award objectives as they apply to the performance or exercise of the FWC's modern award powers, and at s134(2)(a) states:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's function or powers under Part 2-6 so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)'.

15. More relevant to the current application and the powers and responsibilities of the FWC is s284 - *The Minimum Wage Objective* which states:

'(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

- (a) The performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) Promoting social inclusion through workforce participation; and
- (c) Relative living standards and needs of the low paid; and
- (d) The principle of equal remuneration for work of equal or comparable value; and
- (e) Providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply, and employees with a disability'.

This is the *minimum wage objective*.

16. The objective application is contained in s284(2) which states:

'The minimum wage objective applies to the performance or exercise of:

(a) The FWC's functions or powers under this Part; and

(b) The FWC's functions or powers under Part 2 – 3, so far as they relate to, setting, varying or revoking modern award minimum wages'.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see s134).

17. For clarification, the meaning of modern award minimum wages is contained at s284(3) of the *Fair Work Act 2009* which states:

'Modern award minimum wages are the rates of minimum wages in modern awards including:

- (a) Wage rates for junior employees, employees to whom training arrangements apply, and employees with a disability; and
- (b) Casual loadings; and
- (c) Piece rates.

18. The Act also provides for the meaning of setting and varying modern award minimum wages and is contained at s284(4) which states:

'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 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.**

19. In the context of *s284(4)* the application currently before the FWC is attempting to vary the current rate of a modern award minimum wage as it applies to an employee with a disability.
20. Taking into consideration the objectives of the Act at *s284(1)*, the application of the objective at *s284(2)*, the meaning of modern award minimum wages at *s284(3)* and the meaning of setting and varying modern award minimum wages at *s284(4)*, it is our view the FWC only has the powers and responsibility to vary the modern award minimum wages during the 4 Yearly Modern Award Review pursuant to *s156(3)* which requires the FWC to be satisfied that the variation of modern award minimum wages is justified by **work value reasons**.
21. With reference to the current submissions and evidence submitted by the applicant in the form of vague and unrelated witness statements, and statements of unqualified opinion only (Paul Cain), and their misinterpretation of the provisions of *s153(3)* there has been no real attempt by the applicant to support the application by providing the FWC with any evidence that would establish the SkillsMaster System wage assessment tool or any other tool contained in the Award are firstly in breach of the Act, or has advocated a work value reason for justification to remove the SkillsMaster System or any of the wage assessment tools from the Award.
22. There has been no evidence submitted by the applicant that would indicate or determine that the objectives of the Act have **not been met** with the inclusion of the SkillsMaster System in the Award.
23. Notwithstanding a decision of the FWC in regard to the *s160* application we consider the removal of the SkillsMaster System contained in the Award at *Clause 14 – Minimum Wages, Sub-clause 14.4 – Wage Assessment – Employees with a disability*, to be a variation to the minimum wages of the Award and therefore are subject to the powers of the FWC to vary or revoke Award minimum wages as contained in *s156 - 4 Yearly Reviews of Modern Awards to be conducted*, and in particular *ss156(3) and 156(4)* of the *Fair Work Act 2009*.
24. To vary the Award minimum wages the FWC must be satisfied that the variation is justified by **work value reasons**.
25. **WORK VALUE IS THE VERY INSTRUMENT AND PROCESS THE SKILLSMASER SYSTEM USE, TO DETERMINE WAGE OUTCOMES FOR EACH EMPLOYEE WITH A DISABILITY WORKING IN AN ADE.**
26. The *Fair Work Act 2009* at *s156* and in particular *ss156(3),(4)* and *(5)*, states:

*Variation of modern award minimum wages must be justified by work value reason*

*156(3) In a four (4) yearly review of modern award, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.*

*156(4) Work value reasons are reason justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following;*

  - (a) The nature of the work;*
  - (b) The level of skill and responsibility involved in doing the work;*
  - (c) The conditions under which the work is done.*

*Each modern award to be reviewed in its own right*

*156(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.*
27. Having regard to the Act at *s156* it is our view the FWC should consider the work value reasons at *s156(4)(a),(b)* and *(c)* as they relates to the work undertaken by employees with a disability working in an ADE together with the wage assessment process contained in the SkillsMaster System before determining if the tool is contrary to the objectives of the Act.
28. The FWC may also vary a modern award refer *s135(1)(b)* which states:

*s135(1)(b) Modern award minimum wages can be varied under section 160 (which deals with variations to remove ambiguities or correct errors) or section 161 (which deals with variations on referral by the Australian Human Rights Commission)*

29. As there has been no application or referral by the Australian Human Rights Commission to vary the modern Award the provisions of the *Fair Work Act 2009* at *s135(1)(b)* or *s161* have no application in this matter.

30. **(2)(i) – The Award Provisions**

The Supported Employment Services Award 2010 provides the terms and conditions of employment for all employees working in ADE's throughout Australia and employed by a National System Employer.

*(Refer: Attachment 'C' - Supported Employment Services Award 2010)*

31. Clause 4 – Coverage states:

*4.1 - This industry award covers employers throughout Australia who operate supported employment services and their employees working in the classifications listed in Schedule B—Classifications to the exclusion of any other modern award.*

32. The Award at Clause 3 – Definitions and Interpretations, defines an employee with a disability as:

*Employee with a disability means a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the Social Security Act 1991 (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act.*

And Supported Employment Services as:

*Supported employment services means a service as defined in section 7 of the Disability Services Act 1986 (Cth).*

33. Having regard to the Coverage and Definitions clauses of the Award, those provisions establish, employees with a disability working in an ADE that meet the requirements of the provisions are covered by the Award.

34. The **Minimum Wages** paid to employees pursuant to the Award are contained in *Clause 14 – Minimum Wages* which states at *Sub-clause 14.1*:

*14.1 - Upon appointment, an employee will be graded by the employer in one of the grades in Schedule B—Classifications having regard to the employee's **skills, experience and qualifications**.*

There is no provision in the Award that would exempt an employee with a disability from this provision therefore an employee with a disability would be classified under the same terms as an employee without a disability.

35. The Award at Schedule 'B' Classifications, provides a description of the role and responsibilities of an employee at each grade within the structure together with the **indicative tasks** an employee would be required to perform within each work stream within each grade.

36. For an employer to determine the appropriate grade for an employee in accordance with *Sub-clause 14.1* the employer must identify the skills, experience and qualifications of the employee to perform the required job (**Whole Job**) within each work stream at each grade within the structure.

37. As the indicative tasks contained in Schedule 'B' – Classifications determine the task to be undertaken by an employee to be graded within the structure within a work stream, (to complete a '**Whole Job**') have a direct link to Skills ('**Units of Competence**'), **it would be incorrect and a misinterpretation of the Award provision to suggest that competency has no role to play in determining the wage outcomes for employees (including employees with a disability) in accordance with the provisions of Clause 14 – Minimum Wages.**

38. Notwithstanding the definition of the term '**Skill**' and '**Competence**' which is:

***Skill** – the ability to do something well; expertise. Difficult work, taking great skill.*

*Synonyms: expertise, skilfulness, expertness, adeptness, adroitness, deftness, dexterity, ability, prowess, mastery, **competence, competency**, capability, efficiency, aptitude, artistry, art, finesse, flair, virtuosity,*

*experience, professionalism, talent, cleverness, smartness, ingenuity, versatility, knack, readiness, hardiness, informal know how, 'once again he demonstrated his skill as a manager'*

*Antonyms: **incompetence**'.*

**Competence** – *the ability to do something successfully or efficiently.*

*Synonyms: capability, ability, competency, capacity, proficiency, accomplishment, adeptness, adroitness, knowledge, expertise, expertness, **skill**, skilfulness, prowess, mastery, resources, faculties, talent, bent, aptitude, artistry, virtuosity; informal savvy, know how.*

*Antonyms: inadequacy, **incompetence**'*

all structured training qualifications within Australia require the person undertaking the training to obtain competence in the qualification or the relevant '**Unit of Competence**' required to obtain the qualification. An example of a gardening qualification may include;

#### **'AHC20316 Certificate II in Production Horticulture**

*Core Units*

*AHCWHS201 – Participate in Work Health and Safety Processes.*

*Elective Units – (7 in total)*

*AHCCHM201 – Apply chemicals under supervision*

*AHCMOM203 – Operate basic machinery and equipment*

*MEM18001C – Use hand tools'*

39. Many modern Award have specific reference to 'Units of Competence' when determining the classification and grade of an employee covered by the Award.

*(Refer: Practical Workplace Relations Submission dated 5<sup>th</sup> May 2017)*

40. As the Award does not contain any specific provision or procedure for an Employee to progress to a higher grade within the Award Schedule 'B' structure, the employee must be re-assessed by the employer as having the skill, experience and qualification and be performing the role and the indicative task at a higher grade. This assessment would be carried out in the same way as that described in *Sub-clause 14.1.*
41. The SkillsMaster System Pro-rata Award Based Wages Assessment Tool which was characterised in a report Commissioned by the Department of Social Services in 2001 '*A Guide to Good Practice Wage Determination*' as one of a number of 'Hybrid Model' wage assessment tools for wage determination in the Business Service Industry or (ADE) .
42. The report at *Section 2.4* determined the Hybrid Model, which assesses both 'Competence' and 'Productivity' was the most appropriate tool for determining wage outcomes for people with a disability working in an Australian Disability Enterprise.

*(Refer: Attachment 'E' - A Guide to Good Practice Wage Determination)*

43. The SkillsMaster System is designed to remunerate employees with a disability in a fair and equitable manner, is linked to the Award Classification structure, and is based on the acquisition, and use of '**Task Competencies**' (*skills*) to a standard of performance required by an employer. Performance is linked to pre-determined assessment criteria contained in each '**Unit of Competence**', including output or individual employee productivity.
44. For those employers using the SkillsMaster System they have the ability to document the provisions of Schedule 'B' Classifications, within the system by developing '**Job Models**' or (**Whole Jobs**) for each role or **Job** within each work stream and within each grade using the Award classification structure, duty statements and indicative task and characterizing them within the system as '**Units of Competence**'.
45. As each '**Unit of Competence**' (Work to be done) contains a number of '**Elements**' (individual tasks of the work to be done) and the '**Performance Criteria**' (Knowledge required to complete each task) the SkillsMaster System allows both the employee and the employer to fully understand the requirements of the '**Whole Job**'.

46. By comparing an employees' skills (**Competence**) against the documented '**Units of Competence**' within each '**Job Model**' the employer can quickly assess an employees' competence against the work required to be undertaken, at the same time identifying those skills deficiencies and training needs for future training and advancement through the Classification Structure, or grades for the employee.
47. The ultimate goal of this process is to increase wage level outcomes, and productivity for the employees' and greater efficiencies for the organisation.
48. This process should be, and is no different for an employee with a disability working in an ADE, where using the SkillsMaster System the employer first determines if the employee is competent to perform the required duties and task within each work stream and grade in the Award Schedule 'B' structure, (as referred to in the Award at *Sub-clause 14.1*) to determine the employees Award grade and then using the Pro-rata Award Based Wage Assessment Tool to determine the employees minimum wage in accordance with the Award *Clause 14 – Minimum Wages*.
49. By undertaking this process for an employee with a disability using the SkillsMaster System the employer is determining the employees wage outcome by assessment of the employees' ability to undertake all of the tasks in the '**Whole Job**' (as contained in the Award classification structure) and applying a '**Work Value Analysis**' to establish the reasons for the employees assessed wage.
50. What is significant in the Award, is that there is no requirement contained in *Clause 14 – Minimum Wages* or any other provision in the Award for an employee to demonstrate a level of measured productivity to be graded at a specific grade within the grading structure.
51. Generally, in an open employment environment, where an employee is not performing to the required level of performance and/or productivity established by the employer the employee may be disciplined in accordance with the employers' disciplinary policy and procedures which may lead to the termination of the employee.
52. In an ADE environment this process is very different, and where an employee is not performing to the required level of performance and/or productivity the employee is provided with additional support and/or training. It would be a very rare occasion for an employee working in an ADE to be terminated for poor work performance and/or productivity.
53. Employees with a disability using the approved wage assessment tool SkillsMaster System, have their wage rate determined using a combination of Skills, and Performance assessment and where a realistic measure of productivity can be identified and, the employee is able to influence the outcome, productivity assessment is also used.
54. It is important to understand the difference between performance and productivity when conducting an assessment of an employee to determine a wage outcome pursuant to the Award.
55. The definition of performance and productivity are:
 

**'Performance** - *The action or process of performing a task or function.*

*Synonyms: carry out, execution, discharge, conduct, accomplishment, achievement, completion, fulfilment, dispatch, implementation.*

*Antonyms: nonfulfillment, non-performance'.*

**'Productivity** - *the effectiveness of productive effort, especially in industry, as measured in terms of the rate of output per unit of input.*

*Synonyms: efficiency, production, work rate, output, yield, capacity*

*Antonyms: Unproductive'.*
56. Therefore to assess an employees' skill and/or competence an employer must take into consideration both the performance and productivity as they relate to the task to be undertaken.
57. For employees with a disability, the minimum wage determination is contained at *Sub-clause 14.4* which states:

(a) 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 under an approved wage assessment tool chosen by a supported employment service.

58. As the relevant grade within the Award is established by comparing an employees' (including an employee with a disability) **skill, experience and qualifications** against the role description, responsibilities and the indicative tasks of each work stream within each grade of the Award Schedule 'B' the employer must first assess the employees ability to undertake each of the indicative tasks to complete the '**Whole Job**' as described within each grade and work stream of the Award Schedule 'B', to place the employee at the appropriate grade.
59. For those employers using the SkillsMaster System they have the facility to compare an employees' ability to undertake each of the required skills documented as '**Units of Competence**' within each '**Job Model**' (or '**Whole Job**') relevant to each work stream within each grade to determine the employees competence to undertake each of the tasks, including (**Performance and Productivity**) and at the same time, identify skill deficiencies and training needs for the employee.
60. In the SkillsMaster System an example of a '**Unit of Competence**' that may be included in a '**Job Model**' for an employee with a disability to determine a wage outcome:

Work Stream

GROUNDS & LAWN MAINTENANCE (GLM)

Unit

GLM-E03 Maintain Turfed Areas (Enterprise Unit)

Element

02 Maintain grassed areas

Performance Criteria

2.1 Collect and remove rubbish and weeds following supervisors' instructions and workplace rules.

2.2 Mow and trim grass to the standard of presentation expected by the supervisor and customers instructions.

2.3 Clean, maintain and store tools and equipment following manufacturers' instructions and workplace rules.

61. By reference to the '**Unit of Competence**' both the Employer and the Employee have a very clear and documented evidence guide to determine if an employee has the skill to undertake each task, and a **reference point to challenge any assessment undertaken by the employer.**
62. Where an employee is able to demonstrate they can meet the requirements contained in the **Unit of Competence**, and the **Performance Criteria**, the employee is determined as competent in the skill. This process is no different to the requirements of any structured training program undertaken by employees to gain a recognised qualification.
63. The productivity of the employee is measured against predetermined criteria established by the employer. Again this process is no different for an employee without a disability doing the same role.
64. Approved wage assessment tools for determining wage outcomes in accordance with the Award *Clause 14 – Minimum Wages* are those contained at *Sub-clause 14.4 Wage Assessment-Employees with a Disability*, paragraph (b) which states:  
  
*For the purposes of this clause, an approved wage assessment tool means and is limited to: (i) to (xxx).*
65. The SkillsMaster System is an approved tool and is listed at *Sub-clause 14.4(b)(x)*.
66. **(2)(ii) Award Minimum Wage provisions and the history of Wage setting decisions to establish provisions, for the payment of Pro-rata Award Based Wages for people with a Disability**



67. The issue of wages for employees with a disability working in open employment and ADE's has been of ongoing concern for many years and the subject of countless reports and reviews all of which, have had to some degree, an impact on the wage outcomes for people with a disability.
68. Prior to the mid 1990's wage determination for people with a disability was managed by each State Industrial jurisdiction, For example, in New South Wales this was done by the issuing of 'Slow Worker Permits'.
69. The matter of wage outcomes for employees with a disability was addressed by a full bench of the Australian Industrial Relations Commission in a major decision dated 10<sup>th</sup> October 1994 where the 'Supported Wage System' and the '**Model Clause**' was inserted into a number of Federal Awards.

*(Refer: Attachment 'B' - Matter No. 1831/94) (President O'Connor, Vice President McIntyre and Commissioner Gay) pursuant to the then Industrial Relations Act 1988, s113 Application for Variation).*

70. The decision at paragraph three (3) states:

*The "Supported Wage System" facilitates the employment of workers with disabilities in Open Employment at a rate of pay commensurate with the employee's assessed productive capacity. The system is an important social and industrial advance.*

71. Although this decision did address the employment and wages paid to employees with a disability working in an open employment environment, the decision specifically excluded those employees with a disability working in what was then known as a 'Sheltered Workshop'.
64. The model clause contained in the decision at *Clause 1 – Workers Eligible for a Supported Wage, Sub-clause (b) Eligibility Criteria, paragraph three (3)* states:

*'The award does not apply to employers in respect of their facility, programme, 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 in receipt of or are eligible for a disability support pension, except with respect to an organisation which received recognition under s10 or under s 12A of the Act, or if a part only has received recognition, that part.*

65. The decision of the Full-Bench clearly determined on the evidence provided, and by consensus of the parties, the model clause was not intended to be used as a wage assessment process (tool) for people with a disability working in what is now known as an ADE.
66. The issue of wage outcomes for employees with a disability was further addressed in another major decision by the *Australian Fair Pay Commission, Wage Setting Decision of October 2006* where it specifically addressed the issue of wage determination for employees with a disability.

*(Refer: Attachment 'B' – Australian Fair Work Commission - Wage Setting Decision October 2006)*

67. The Australian Fair Pay Commission (Wage Setting Decision – October 2006) established the framework and authority for the future payment of wages for employees with a disability.
68. The *Australian Fair Pay Commission Decision October 2006* at *Section 8 – Employees with a Disability*, provides a history, and comprehensive review of the wages paid to employees with a disability, the way wages are calculated and the future direction of wages for this class of employee.
69. **The consensus reached by all parties during the review, the reasons for the decision and the information provided in submissions for this decision are still relevant to the current application and in particular the calculation of wages for employees with a disability.**
70. In particular *Section 8.2 Employment of employees with a disability* and *Appendix 'B'* clearly identifies the two types of employment for people with a disability, Open Employment and Business Services Sector (now known as an Australian Disability Enterprise (ADE)).

71. *Section 11 Discrimination* deals with the issue of discrimination in the establishment of wages for employees with the information provided in submissions contained in the decision at *Appendix 'D'*.
72. We believe this decision is still relevant to the current application and to fully understand the complexities of wage determination for employees with a disability, we would encourage the FWC to refer to this decision, the reasons for the decisions, and the many submissions lodged from all interested parties to assist in the determination of the current application.
73. Although the SkillsMaster System had been embedded into a number of enterprise agreements made under the *Industrial Relation Act 1988(NSW)* and the *Workplace Relations Act 1996 (Federal)* (in excess of twenty (20)) and had been used by those organisations covered by the agreements over a number of years prior to the *Australian Fair Pay Commission Decision of October 2006*, as a consequence of that decision the SkillsMaster System was inserted in the Award.
74. The operation of the Skillsmaster System is contained in the systems manuals provided to the FWC as a consequence the *s(590(2))* order.
75. As demonstrated in the manuals the Skillsmaster System uses a combination of skills, experience and qualification as required by the Award together with elements of individual employee performance and productivity measured against predetermined criteria, where that criteria has an impact on, not only the performance and productivity of the individual employee, but other employees and the organisation as a whole, to assess an employees' wage outcome.
76. There many other benefits for those organisations and their employees who use the SkillsMaster System for wage determination, that are not available to those organisations using other approved tools.
77. Those benefits include:
- Provide employees with a hard copy document of the '**Wage Assessment**' outcome;
  - Provide employees with a hard copy document of skill deficiencies, identified '**Skills Gap**' against the employees allocated Award Grade and Work Stream or '**Whole Job**';
  - Provide employees with a hard copy document '**Job Profile**' against the employees allocated Award Grade and Work Stream or '**Whole Job**';
  - Provide employees with a hard copy document of the employees desired '**Career Path**' identifying skill deficiencies against '**Job Models**' other than the employees allocated '**Job Model**' or '**Award Grades and Work Streams**;
  - Provide employees with a hard copy '**Resume**' of qualifications, and skills held (Units of Competence) to assist in obtaining employment in the open employment market;
  - The ability to identify training deficiencies and training needs by job or global for employees of the organisation;
  - The ability to conduct '**Job Matching**' and/or '**Job Comparison**' for individual employees or all employees of the organisation.
78. **(2)(iii) Fair Work Act 2009 as it applies to the Modern Awards, discriminatory provisions contained in the Award**
79. The Fair Work Act 2009 at *s153 – Terms that are discriminatory*, states:
- 153(1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex' sexual orientation, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*
- Certain terms are not discriminatory*
80. Terms that are not discriminatory as they relate to minimum wages are contained in *s153(3)* which states:

153(3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:

- (a) All junior employees, or a class of junior employees; or
- (b) All employees with a disability, or a class of employees with a disability; or
- (c) All employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

81. The inclusion of the SkillsMaster System in the award and the matter of discrimination was dealt with extensively by the Australian Fair Work Commission in the Wage Setting Decision – 2006 at Section 11 – Discrimination and Appendix ‘C’.

(Refer: Attachment ‘B’ Australian Fair Work Commission – Wage Setting Decision – 2006)

82. The argument advanced by the applicant that a wage assessment tool used to determine a wage outcome for an employee with a disability should only be based on the individual productivity of the employee and not on the competence (skills) of the employee, is in our view:

- (a) an ideological argument;
- (b) in conflict with the AFPC Decision of 2006;
- (c) not based on any real facts or evidence;
- (d) in conflict with current training requirements and assessment;
- (e) a misinterpretation of Act; and
- (f) a misunderstanding of the award provisions regarding Modern Award Classification Structures, and employment requirements and expectations in general.

83. (c) The Federal Court decision, (*Nojin v Commonwealth of Australia [2012] FCAFC 192*)

84. In this decision (*Nojin v Commonwealth of Australia [2012] FCAFC 192*) the Federal Court determined the Business Services Wage Assessment Tool (BSWAT) and the way it was applied breached s15 of the *Disability Discrimination Act 1992* and accordingly was not an acceptable tool for establishing a Pro-rata Award Based Wage for people with a disability with particular reference to employees’ with an Intellectual Disability.

(Refer: Attachment ‘D’ - BSWAT Decision *Nojin v Commonwealth of Australia [2012] FCAFC 192*)

85. This tool has since been removed from the Award by consent of all parties.

86. Notwithstanding the fact that the Court found the BSWAT to breach s15 of the *Disability Discrimination Act 1992* it is our view and submission, had the Court been directed to s47 – *Acts done under Statutory Authority* of the *Disability Discrimination Act 1992* there may well have been a different outcome.

87. This view has been taken as the decision does not refer to any evidence with a direction to s47 of the *Disability Discrimination Act 1992*.

(Refer: Attachment ‘E’ - *Disability Discrimination Act 1992, s47*)

88. As the current application is not to determine if the SkillsMaster System or any other wage assessment tool is in breach of s15 of the *Disability Discrimination Act 1992* we submit that notwithstanding the arguments and submissions of the applicant the SkillsMaster System is not in breach of the *Disability Discrimination Act 1992*, with reference to s47.

89. We also submit that the FWC does not have the jurisdiction to make a determination in regard to s15 of the *Disability Discrimination Act 1992* nor is the application currently before the FWC or the four (4) yearly review of modern awards to make this determination.

90. The Federal Court declared:

*“The Second Respondent unlawfully discriminated against the Applicant in contravention of s15 of the Disability Discrimination Act 1992 by imposing on the Applicant a requirement or condition that in order to secure a higher wage the Applicant undergo a wage assessment by the Business Services Wage Assessment Tool”.*

91. On our interpretation of the decision, the Federal Court took the view that the BSWAT tool and the way it was applied, both the assessment process (***oral questioning***) and the content of the assessment which

in part assessed an employees' competence on non-work related tasks, tasks that had no relationship to the Award classification structure, and an award grade that was not the appropriate grade for the two employees being assessed was discriminatory and in breach of *s15 of the Disability Discrimination Act 1992*.

92. The Court further determined that the way the assessment was conducted (50% competency and 50% productivity) disadvantaged the two employees as a consequence of the nature of their disability.

93. The decision at paragraph 127 states:

*127 - On the evidence to which I have referred, disabled people who are not intellectually disabled are more likely to achieve results on BSWAT to their advantage, than intellectually disabled people like Mr Nojin and Mr Prior. That is so in two senses. First, they are not at the same risk of having their productivity score effectively reduced through an inability to score at least as well on competencies. Secondly, they have the realistic possibility of enhancing their productivity score, if it is low due to a physical disability, by demonstrating knowledge and understanding which is not reflected in actual work performance. In either case, their prospects of achieving higher pay are enhanced. By contrast, as the evidence **in this case** (including the evidence about Mr Nojin and Mr Prior) clearly shows, the prospects for intellectually disabled people are worse because they cannot take advantage of either aspect available to disabled people without intellectual disabilities.*

94. This disapproval was further emphasised in Paragraphs 131, and 132 which states:

*131 - In each case, the productivity scores obtained by Mr Nojin and Mr Prior were effectively reduced by taking into account their competency scores. It is not to the point that in Mr Nojin's reassessment there was only a modest difference between his productivity and competency scores. The fact that disabled workers without intellectual disabilities might enhance their overall scores by showing greater competency than productivity, whereas an intellectually disabled worker was unlikely to be able to do so, shows the disadvantage to which intellectually disabled workers were subject by the use of BSWAT".*

*132 - In my view, this consequence is not ameliorated by the fact that over 75% of persons employed by ADEs have intellectual disabilities. The overall economic outcome of the use of BSWAT might assist ADEs in the (doubtless) difficult job of budgeting, but that benefit comes only at the price of imposing a comparative disadvantage on the intellectually disabled".*

95. The decision which only examined the BSWAT, and two applicant employees' further determined the (Competency and Productivity) requirements used in the BSWAT assessment did not represent the tasks and/or work undertaken by the employee applicants nor did it apply an appropriate award wage level to the classification relevant to the work.

96. It further mentioned, the system was flawed in so far as, it applied the award base rate of pay to all assessments (Classifications - Jobs) and the award base rate used to establish the employees Pro-rata Award Based Wage was not demonstrative of the work undertaken by the employee applicants being assessed.

97. This discrepancy and the impact on the two employee applicants is referred to in the decision at paragraph 43:

*43 - In the current proceedings BSWAT was defended as directly applicable to the task of comparing the work value of an individual disabled worker in an ADE with that of an average Grade 1 worker, for the purpose of fixing a wage that was some fraction of the Grade 1 benchmark wage in the award. It is in that context that the matters at present in dispute must be resolved.*

98. The decision at paragraphs 134, 135, 137 and 138 summarised the decision of the Court in the terms of **Reasonableness** and why the Court considered the BSWAT and the way it was applied, to the two applicant employees unreasonable:

*134 - This is a more difficult question. In the end, after considerable reflection, I have come to the view that, despite the widespread support for its use, assessment of the wages of Mr Nojin and Mr Prior using BSWAT was not reasonable. There are four principal reasons for my conclusion".*

135 - First, the regime established by the award required a comparison to be made with the rate of pay for a Grade 1 worker under the award. That comparison could not leave out of account either the nature of the work for which the Grade 1 rate was fixed or the nature of the work being done by the person whose wage was being assessed. In that comparison it was not, in my view, reasonable to introduce an examination or assessment of matters which play no part in the evident range of work for which a Grade 1 rate is fixed. Yet that is precisely what BSWAT does. Furthermore, the attempt to assess competencies distracts attention from the comparison required under the award and has the likely result (in the case of intellectually disabled workers) of penalising workers in an ADE in terms of the percentage score able to be achieved. The score is no longer based on a direct comparison of work done, skills used and results achieved. The score is based in significant part on other matters which play no part in the wage of a Grade 1 worker”.

99. This statement clearly determines that skills (Competencies) that are not directly related to the task (Whole Job) undertaken by an employee should not form part of the assessment process and further an assessment of the tasks an employee is employed to undertake must have direct link to the Award Classification structure, including the work streams and grades.

100. This proposition is further emphasised in paragraphs 137, 138 and 139 which states:

137 - Secondly, disabled workers (whether intellectually disabled or not) in open employment are not subject to the risk that their wage might be reduced or discounted by reference to an assessment of abstract matters with which they are, on the expert evidence, more likely to have difficulty than other people, whether disabled or not. In my view, imposing such a requirement upon intellectually disabled workers in the ADE environment, when that subjects them to an accepted disadvantage, is another indication of lack of reasonableness”.

138 - Thirdly, the evidence was that, assessed in average terms, non-disabled workers on Grade 1 rates of pay would not, having regard to the nature of the work for which the rate of pay was fixed, achieve a 100% wage assessment if their wages were assessed using BSWAT. In my view this immediately betrays the theoretical and artificial foundations of BSWAT. Under the award, the comparison must commence with the Grade 1 rate of pay. The Grade 1 rate of pay cannot be divorced in this comparative exercise from the work (and the nature of that work) for which the rate of pay is fixed, and which is specifically identified by the award itself in Schedule A. The comparison should not begin with a less definite assumption about “core competencies” or “industry competencies” derived from training packages or so-called “industry” standards. The basic entitlement to a rate of pay fairly fixed is no less compelling in the case of an intellectually disabled worker than in the case of any other worker. As the award states the essential characteristics for which the rate of pay is to be fixed (by referring to Grade 1 work) the choice of a measurement tool which addresses other issues must be adequately justified. Even though the award itself contemplates that BSWAT and a range of other tools may be used, that does not carry the issue across the threshold presented by the Act”.

139 - Fourthly, part of the reason why, in my view, use of BSWAT is not reasonable is because it is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned. Such persons make up the bulk of workers in ADEs. As a class of people they have had imposed on them a tool to measure their work contribution, compared to that of a Grade 1 worker, which does not measure like for like and which subjects them to a disadvantage. The likely result in most cases, and the actual result for Mr Nojin and Mr Prior, is a calculation which understates their actual contribution relative to the work for which the Grade 1 rate of pay is fixed. Understatement of the value of the actual work contribution of an intellectually disabled worker is, in my respectful view, neither necessary nor reasonable”.

101. There was little mention in the decision regarding the application of other approved wage assessments tools contained in the Award other than reference to their existence.

## **102. Conclusion**

The SkillsMaster System Pro-rata Award Based Wages which meets the requirements of ‘A Guide to Good Practice Wage Determination’ has been used for many years and embraced by both Employers using the System and Employees being assessed by the system and therefore we would submit that for the many reasons contained in the submission and detailed further in this conclusion and based on the lack of evidence in support of the application before the FWC, the FWC could not make a determination to remove the SkillsMaster System from the Award.

### 103. Section 160 application

It is our submission, no evidence has been forthcoming, from the applicant to support the application or to substantiate the requirements of the Act, for the FWC to have the authority to remove the SkillsMaster System from the Award pursuant to *s160* of the Act, and therefore the FWC has no option but to dismiss the application.

### 104. 4 Yearly Review – Modern Awards

Based on the documents lodged by the applicant and the evidence presented to the FWC to date, there has been no sustainable argument mounted on the part of the applicant, or any determination in any other jurisdiction that lead the FWC to come to a decision that the SkillsMaster System contained in the award is discriminatory in the terms contained in the award or in the System Manuals, or is in breach of *s153* of the *Fair Work Act 2009*.

105. There has been no evidence presented by the applicant that the FWC could interpret as demonstrating a ‘Work Value Reason’ for the SkillsMaster System to be removed from the Award.

106. Further, as the applicant has not established a ‘Work Value Reason’ for the removal of the SkillsMaster System from the Award the FWC pursuant to the Act, has no authority to vary the minimum wage provisions of the Award.

107. Accordingly, it is our view the FWC must determine that the provisions of the award including the inclusion of the SkillsMaster System are not discriminatory and is an allowable term of a modern award in accordance with the Act.

### 108. Federal Court decision, (*Nojin v Commonwealth of Australia [2012] FCAFC 192*)

As the decision specifically refers to the application of the BSWAT, we submit, there was no determining factor in the decision that would establish an authority to support the current application before the FWC.

109. It is also our view, this decision and the evidence relied upon, by the Court was only relevant to the application of the BSWAT, the assessment of the two (2) employee applicants, and the way the two (2) employee applicants were assessed using the BSWAT.

### 110. Response to Witness Statements

In response to the witness statement of Peggy Eagles on behalf of her daughter Danielle Harris and lodged by AED Legal, I submit the Attachment ‘E’ correspondence from Ms. Harris employer, Wallarah Australia Ltd.

(Refer: Attachment ‘E’ – Correspondence Wallara Australia Ltd)

### 111. Rights Reserved

We reserve the right to make further submissions should documents be presented to the FWC that contain issues that require further investigation and a response.

Phil Amos

Practical Workplace Relations.