



Australian Government

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Response to

**Preliminary hearing discussion
papers**

10 October 2016

MEDIUM-TERM TARGET

1. Taking into consideration the powers of the Panel to set national minimum wages and modern award minimum wages under s.285(2) and the minimum wages and modern award objectives set out in ss 284 and 134 of the Fair Work Act 2009, does the legislative framework allow the Panel to adopt a medium-term target (or target range) for the NMW or modern award minimum wages?

The legislative framework

Part 2-6 of the *Fair Work Act 2009* (Fair Work Act) provides for minimum wages. Section 285 requires that the Fair Work Commission (FWC) conduct and complete an annual wage review each financial year. As an outcome of this review, paragraph 285(2)(c) provides that the FWC must make a national minimum wage (NMW) order. NMW orders come into operation on the 1 July following the making of the order (subsection 287(1)), unless there are exceptional circumstances justifying a later commencement (subsection 287(4)). Subsection 295(1) requires the NMW order to express the NMW and special NMW in a way that produces a monetary amount per hour. As an outcome of the annual wage review, the FWC must also review modern award minimum wages and may make a determination setting, varying or revoking of modern award minimum wages (subsection 285(2)).

Subsection 284(1) sets out the minimum wages objective. Subsection 284(2) provides that the minimum wages objective applies to the performance or exercise of the FWC's functions or powers under Part 2-6 and Part 2-3, so far as those functions or powers relate to the setting, varying or revoking of modern award minimum wages. If the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective as set out at section 134 also applies.

Implications of the legislative framework

Part 2-6 and Part 5-1 of the Fair Work Act gives the FWC control over its procedure and broad discretion to inform itself as it considers appropriate in conducting the annual wage review. This includes by holding hearings and calling for submissions. However, any procedure the FWC adopts for the conduct of an annual wage review must be clearly anchored to the legislative framework, which imposes on the Expert Panel ('the Panel') a requirement to determine only the next financial year's NMW. In this process, the Panel must have regard to the minimum wages objective (as well as the objects of the Act and the modern awards objective, if relevant) and the fact that the NMW must be expressed in a way that produces a monetary amount per hour. Adopting a medium term target or a predetermined formula for arriving at the NMW is inconsistent with this annualised review process. Further, the Australian Government is of the view that adopting a target range is inconsistent with the requirement to express the NMW in a way that produces a monetary amount per hour. The NMW order is designed to be the result of consideration of the elements of the minimum wages objective, conducted each year to determine the appropriate NMW for the upcoming financial year.

2. Should a medium-term target be set for the NMW or both the NMW and modern award minimum wages?

This is a matter for the Panel to determine, taking into account the legislative parameters under the Fair Work Act.

3. What are the reasons for or against setting a medium-term target?

Noting the legislative parameters referred to above, setting a target may not effectively address concerns from some stakeholders about uncertainty regarding future minimum wages. This is because a future Panel would be free to adopt an alternative medium-term target, or no target, or to make a decision inconsistent with the target that had been set. As the 2016 Panel

indicated (for example, paragraph 107 of the 2016 decision) the approach to each annual wage review process is a matter for the new Panel constituted in that year.

In addition to the legal factors arising from the requirements of the Fair Work Act, the Government also notes that there are a range of policy issues associated with setting a medium-term target. In addition, the various models for a medium-term target discussed in the background paper may be difficult to implement practically in the Australian workplace relations context.

A narrow or 'hard' target reduces the flexibility to respond to changing economic conditions. Conversely, if the target is too broad it will not address some stakeholder concerns and reduce uncertainty for employers and employees. If economic conditions change, or forecast wage and price growth does not eventuate, the expectations set by the target would need to be balanced against new economic developments, with the resulting uncertainty imposing a non-monetary cost on employees and employers.

The Government also considers that the target adopted in the United Kingdom would be difficult to replicate within the Australian policy framework. The Government of the United Kingdom retains direct control over both the setting of the minimum wage and the tax-transfer system, and the target adopted (60 per cent of median earnings for the National Living Wage in 2020) is designed explicitly as a trade-off for reductions in tax credits provided to low-paid workers. The United Kingdom Government is also free to direct the Low Pay Commission to set out a pathway to 60 per cent by 2020, whereas the *Fair Work Act 2009* explicitly envisages an annual process for minimum wage setting. The existence of 122 modern awards incorporating a wide range of different wages would further complicate adopting a target along these lines for the minimum wage in Australia. In some awards, the lowest rate of pay is already more than double the national minimum wage.

The Government remains of the view (as discussed in its submission to the 2015-16 annual wage review) that the minimum wage is a less effective mechanism for addressing inequality than the tax-transfer system. Many low-paid workers are not in low income households. Australia's highly targeted tax-transfer system is more efficient at directing resources to where they are needed most. Furthermore, any loss of jobs resulting from a higher minimum wage could exacerbate inequality.

6. Would parties be assisted if the Panel decided on whether it ought to set a medium-term target prior to initial submissions made to the Annual Wage Review 2016–17?

Yes, as it would provide clarity on the nature of the process and inform the Government's submission to the Panel.

TRANSITIONAL MATTERS

Instruments of general application

1. Given the operation of s.113 of the Fair Work Act, can the long service leave awards be terminated?

Yes. Section 113 of the Fair Work Act deals with 'applicable award-derived long service leave terms', an expression which is defined in subsection 113(3). If this is what is meant by 'long service leave awards' then the operation of section 113 of the Fair Work Act appears to enable such awards to be terminated as the entitlement to long service leave terms would be calculated at the relevant 'test time'.

Unless an exception in subsection 113(2) applies, subsection 113(1) provides that if there are applicable award-derived long service leave terms in relation to an employee, the employee has a long service leave entitlement in accordance with those terms. The terms refer to those provided for under an award, or State reference transitional award, that *would have* applied at the 'test time' based on the employee's current employment circumstances. Subsection 113(3A) provides that the 'test time' is immediately before commencement of the National Employment Standards (NES) in that jurisdiction.

Accordingly, section 113 of the Fair Work Act preserves the effect of long service leave terms in pre-modernised awards (i.e. awards in place before commencement of the NES). The long service leave terms apply to existing employees as at the transition time, as well as new employees. This formulation means that even if the awards are terminated at a later time, an employee can receive the benefits of long service leave entitlements if he or she would have been entitled to such terms as at the 'test time'.

Given the effect of section 113, even if such awards were terminated, employees will still be able to derive the benefits of applicable award-derived long service leave terms if they would have had an entitlement as at the commencement of the NES, based on their current employment circumstances.

Note that some further consideration may need to be given to making sure those covered by award-derived long service leave terms in terminated instruments understand their rights and obligations. The modern award objective requires a 'simple, easy to understand ... award system' (s. 134(1)(g)).

Amending the long service leave provisions in the NES is not a priority for the Government. The Government tasked the Productivity Commission (PC) with reviewing the entire workplace relations framework, including long service leave laws, in 2015. In its Final Report, the PC noted some minor difficulties with long service leave for businesses operating across state lines. However, it did not make a formal recommendation for a uniform national standard, noting that 'for once, a national issue is not really the responsibility of the Commonwealth Government' (page 528).

Outstanding issues

3. Do the parties agree that when the modernisation processes have been completed, the modernisable instruments in Appendix 1 should be terminated by the Commission?

No. Some of the instruments in Appendix 1 may continue to be preserved as Division 2B Awards.

Apprentices and trainees for whom competency-based wage arrangements apply**4. Are there any other transitional instruments not listed above that are preserved by the Transitional regulations for the purposes of providing for competency-based arrangements and provision of tools?**

The FWC decision of Spencer C in All Trades Queensland Pty Limited [2016] FWC 2832 (All Trades) considered if the Queensland State Awards and Orders listed in the Table below were the correct reference instrument for the application of the Better Off Overall Test (BOOT).

1	AN140045 - Building Products, Manufacture and Minor Maintenance Award – State 2003
2	AN140043 - Building Construction Industry Award – State 2003
3	AN140061 - Civil Construction, Operations and Maintenance General Award – State 2003
4	AN140103 - Electrical Contracting Industry Award – State
5	AN140107 - Engineering Award – State 2002
6	AN140128 - Furniture and Allied Trades Award – State 2003
7	AP789529 - Metal, Engineering and Associated Industries Award 1998 – Part 1
8	AP790899 - National Training Wage Award 2000
9	AP792354 - Plumbing Industry (QLD and WA) Award 1999
10	AP824308 - The Vehicle Industry – Repair, Services and Retail Award 2002
	(above collectively, the State Awards)
11	AN140326 - Order – Apprentices’ and Trainees’ Wages and Conditions (Excluding Certain Queensland Government Entities) 2003 (the One Big Order or OBO) and the QIRC Order – Supply of Tools to Apprentices (the Tools Order).

An appeal from Commissioner Spencer’s decision is scheduled to be heard by a Full Bench of the FWC on 3 November 2016. The discussion below is based on the reasoning of Commissioner Spencer and should be read in light of that appeal, as the outcome of the appeal might affect the law in relation to the status of some Queensland transitional instruments.

Of the State Awards listed in the above Table the Electrical Contracting Industry Award – State, Furniture and Allied Trades Award – State 2003, Plumbing Industry (QLD and WA) Award 1999 and The Vehicle Industry – Repair, Services and Retail Award 2002 do not appear at Appendix 1. In relation to the preservation of the State Awards in the Table that have not been referred to at Appendix 1, the aforementioned decision of Spencer C which provided authority for the proposition that those State Awards that are Division 2B State Awards are preserved in circumstances where they did not automatically terminate, or were otherwise terminated or ceased to operate in one of the ways listed in item 18(2) of Schedule 3A to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (TPA Act).

It is noted that paragraph [52] of the paper refers to Notional Agreement Preserving State Awards (NAPSAs) continuing in operation as award-based transitional instruments. Following the reasoning of Spencer C, item 20 of Schedule 3 to the TPA Act would act to terminate all NAPSAs.

5. Do parties agree that, regardless of the termination and modernisation of other transitional instruments, there will be an on-going requirement for the Commission to review Division 2B State awards, award-based transitional instruments and related APCs as part of the annual wage review?

In keeping with the reasoning in All Trades, in relation to the State Awards, the Australian Government agrees that the on-going review requirement will only apply to Division 2B State Awards that did not automatically terminate, or were otherwise terminated or ceased to operate in one of the ways listed in item 18(2) of Schedule 3A to the TPA Act.

The assessment on the balance of the Awards listed at Appendix 1 in relation to this question, in the Government's view, will be subject to the considerations outlined in the All Trades decision on the preservation of Division 2B State awards and award-based transitional instruments. This might be affected by the reasoning of the Full Bench on appeal.

6. Given the limitations under s.154, can instruments be made under the Fair Work Act to replace these instruments?

In relation to the State Awards set out in the Table above, these have already been displaced by Modern Awards. As the Modern Awards which replaced the State Awards were made in 2010 it is the Government's view that the ability of the FWC to include additional State based differences in the existing Modern Awards that replaced the State Awards in the Table is restricted by the operation of subsection 154(2) of the Fair Work Act. Any amendment will only be possible if subsection 154(3) of the Fair Work Act is capable of being met.

The Social and Community Sector Pay Equity Order

7. Given the 2012 ERO preserves the operation of transitional provisions and the Fair Work Act obliges Commission to terminate transitional instruments, 51 is there any reason why the Commission should not terminate the remaining transitional instruments related to the SACS modern award?

Clause 5 of the 2012 ERO seeks to preserve the operation of transitional instruments where the payment rate was higher than that of the SACS Modern Award. Consequently, there is a strong argument that any employees who are covered by these transitional pay rates will continue to be covered by these rates until 1 December 2020 when clause 5 of the ERO ceases to operate. This is because:

- Clause 5 uses the rates from the transitional instrument as a base before applying successive annual wage increases (cl 5.4) and the 'Transitional Equal Remuneration Payments' (cl 5.5)
- The relevant parts of clause 5 do not sunset until 1 December 2020 (cl 5.7)
- Where the transitional instrument was a NAPSA, the instrument would have already terminated automatically on 1 January 2014 (item 20 of Schedule 3 to the TPCA Act)
- Transitional arrangements in Schedule A of the SACS Award and the model transitional arrangements in other modern awards were also intended to continue to preserve higher rates from transitional instruments after the instruments were terminated.

Transitional Pay Equity Orders

8. Given these instruments continue to operate until 1 December 2020, should they remain as transitional instruments or can these entitlements be preserved for the affected employees in another Fair Work Act instrument?

Transitional Pay Equity Orders (TPEO) 1 and 2 operate to preserve the effect of an equal pay order made by the Queensland Industrial Relations Commission in 2009 and are intended to operate until 1 December 2020, at which point the payment rates should converge with the rates of the SACS Modern Award. TPEOs are orders taken to have been made by the FWC by operation of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. While increases to minimum wages in the SACS Modern Award apply to TPEOs, they are not generally characterised as ‘transitional instruments’ under that Act and it is the Government’s view that they are unlikely to be capable of being terminated by the FWC.

EMPLOYMENT ARRANGEMENTS FOR PEOPLE WITH DISABILITY

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?

Yes. Due to the effect of paragraph 294(3)(c) of the Fair Work Act, the National Minimum Wage does not cover employees with a disability. A special national minimum wage (special NMW) for employees whose disabilities do not affect their productive capacity is required to ensure minimum wage coverage for these employees.

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?

The vast majority of people with disability are employed under the same wage rates as anyone else.

There are, however, a relatively small number of people with disability within the Australian workforce, who receive differential wages specifically due to their disability. For these people, wages paid are adjusted for assessed lower productivity. This approach, the Supported Wages System (SWS), follows consideration in 1994 by the Australian Industrial Relations Commission of a joint submission from the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry, the Public Sector, Professional, Scientific Research, Technical, Communications, Aviation and Broadcasting Union, and the Federal Minister for Industrial Relations. The SWS was established "to promote employment for people who cannot work at full award wages because of a disability".

It is critical to note that the use of SWS is subject to agreement by the person who will be paid the adjusted wage, or their legal guardian or representative. For a SWS Agreement to be approved, the productivity rate and wage consensus must be reached by the employer, the employee or their representative, and an independent assessor. As such any person with a disability who does not wish to participate in the SWS can choose not to do so, and can seek to be paid a full wage set by the relevant industrial instrument, such as a modern award, an enterprise agreement, or the National Minimum Wage for award and agreement free employees. It is also the case that the SWS is only available where the person to be paid is eligible to receive the Disability Support Pension, which provides a higher level of income support and a more gradual reduction in benefits, than the most common types of income support for people seeking work – Newstart and Youth Allowance.

For those people with disability who receive income support related to their disability, overall incentives may be different, as the disability support pension has different payment rates and different rates at which it is reduced when a recipient receives other income from employment, than other forms of income support. However, this reflects government policy, and wages rates for people with disability should not be separately determined so as to vary or offset the incentives which flow from the taper rates for income support as set by government policy.

There are some thousands of people voluntarily participating in the SWS system, and the number has increased in recent years. It may be argued that increasing participation in SWS could indicate that for the specific group who are eligible, the current minimum SWS wage rates do provide an incentive for people to seek and achieve employment.

Table 1 and Chart 1 show the Agreed Assessed SWS Productivity rates by year, broken into deciles. SWS Productivity ratings are rounded to the nearest 10 per cent when used to calculate the participant’s productivity-based wage.

Table 1: Agreed Assessed SWS Productivity rates by calendar year

Productivity Decile %	2014	2015	2016(to 31 Aug)	Total
10%	43	136	48	227
20%	167	216	126	509
30%	321	440	201	962
40%	562	641	260	1463
50%	978	1018	358	2354
60%	993	1039	358	2390
70%	871	867	356	2094
80%	615	557	214	1386
90%	303	298	106	707

Chart 1: Agreed Assessed Productivity by year by percentage Productivity Decile

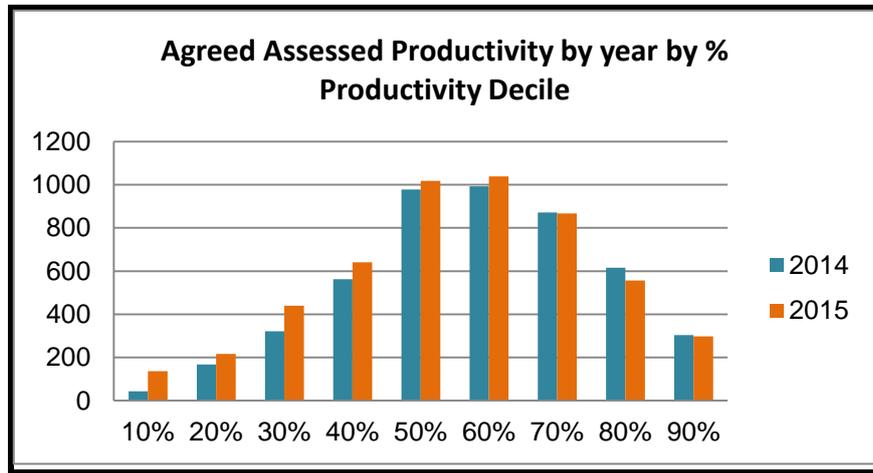
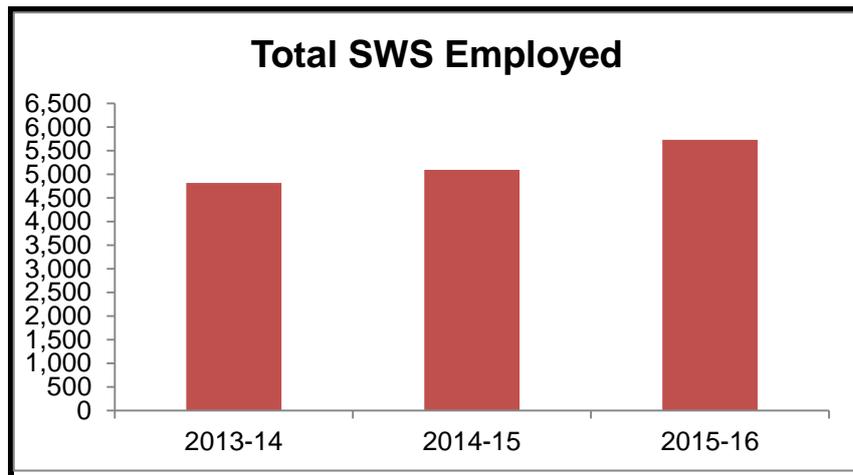


Table 2 and chart 2 shows the total number of people employed under SWS Agreements by year.

Table 2: SWS Agreements by Year

Year	2013-14	2014-15	2015-16
Total employed	4,820	5,095	5,729

Chart 2: Total SWS Employed

The FWC set the National Minimum Wage and the SWS Minimum Wage for the past two years as follows (taken from Annual Wage Review 2015-16 [C2016/1]). Tables 3 and 4 show the Rates:

Table 3: The National Minimum Wage Rate

Year	National Minimum Wage
2014	\$651.72
2015	\$656.90

Table 4: The SWS Minimum Wage Rate

Year	SWS Minimum Wage
2014	\$80.00
2015	\$81.00

3. Would any increases to wages for employees with disability impact employees' access to employment?

The Government supports a strong safety net and fair wages for people with disability. However, as discussed in the Government's submission to the 2015-16 annual wage review (Chapter 6), a range of empirical research supports the conclusion that excessive increases in minimum wages may reduce employment, particularly for vulnerable groups.

As is generally the case in social policy, it is not possible to conduct a definitive experiment to test the counterfactual. However, it is known that some offers of employment are made conditional on payment of an adjusted wage, and so it is reasonable to conclude that there may be people in work who are paid an adjusted wage, who would not be in that work if they had to be paid at a higher rate.

The Government recommends that the Panel should carefully consider the potential risks to employment opportunities for people with disability in making any revisions to wage arrangements.

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?

For single recipients, the current maximum rate of DSP is \$877.10 per fortnight (\$438.55 per week). The current DSP income threshold amount before DSP is reduced is \$164 a fortnight, or \$82 a week. The DSP reduces in payment \$0.50 for every dollar earned over \$164.

Setting the minimum wage for SWS employees at the income-free DSP threshold amount has two key advantages:

- 1) It ensures that people on the SWS have, as a minimum, a gross income of their maximum achievable rate of DSP plus 100 per cent of their SWS earnings.
- 2) It avoids interactions between government policy on how DSP should be adjusted for other income, and National Minimum Wage policy for people on SWS.

In respect of this last point, were the minimum wage for SWS employees to be set above the income-free threshold for DSP, then for every additional dollar above that threshold set by the FWC, the person would receive only 50 cents. This means that SWS minimum wage increases may be only partially effective at boosting the total incomes of employees with disability, where those employees are also in receipt of DSP. On balance, aligning the SWS minimum wage to the income-free threshold maintains complementarity of wage setting and government policy on income support.

DSP is designed to support people who have disability and are genuinely unable to fully support themselves through paid work. The payment has regard to community standards through indexation of the rate to wage movements, meaning recipients share in productivity improvements and rising living standards of the rest of the population.

Currently, the minimum weekly rate is \$82 per week on SWS, with 16 per cent of all SWS agreements in 2015-16 set at \$82 per week. The minimum weekly hours for SWS employment is set at 8 hours per week, which equates to a minimum of \$10.25 per hour. Table 5 shows average wage and employment hours for people currently participating in SWS.

Table 5: Average SWS wage and hours (as at 31 August 2016)

Average Weekly SWS Wage	\$174.51
Average SWS Hourly rate	\$11.45
Average weekly hours of employment	15.26 hours per week

These data indicate that on average, participants in SWS are earning greater than the DSP threshold amount. This means that most people employed on SWS are having their DSP reduced by some portion, and continue to participate in the workplace.

Case Study

Mary is 27, single, on DSP and has a significant disability impacting on her work productivity. Mary works the SWS average hours of 30.52 hours per fortnight and earns \$349.02 per fortnight from her SWS hours. She earns \$185.02 per fortnight over the DSP income threshold and therefore her DSP reduces by \$92.51 per fortnight. So Mary's income on DSP and working under SWS is:

DSP income:	\$ 877.10
SWS income:	\$ 349.02

Reduced as over threshold:	-\$ 92.51
Fortnightly income:	\$ 1,133.61

Therefore by Mary working for the average SWS hours, she can increase her income above the DSP by \$256.51 every fortnight.

As noted in the response to Q6 – the trial of a modified SWS for Australian Disability Enterprises (ADEs) is considering the removal of the minimum wage floor (which at that time was \$81 per week). The evaluation findings are due to be tabled in the FWC and information from the trial can be discussed after the FWC Conciliation process (see below for details). However, it should be considered that any decision about the minimum wage floor available within open employment may have an impact on the movement of people between open employment and supported employment.

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

A range of existing work is being done in this area. The Panel will be able to draw upon this material in making its decision, and any future research should build on this ongoing body of work.

The *Annual Wage Review 2016-17 – Review of existing wage arrangements for employees with disability*, explicitly excludes employment in Australian Disability Enterprises, under the *Supported Employment Services Award 2010*. However, it is worth noting the following, which may have implications that relate to the questions raised in this review about the SWS.

DSS is currently participating as an interested party in the matter in the FWC matter AM2013/30 – an application to remove all wage tools from the *Supported Employment Services Award 2010* except for the Supported Wage System.

Fair Work Commission Conciliation

The parties involved in the FWC process include the peak organisation representing ADEs (National Disability Services), ADEs, unions (the Health Services Union, United Voice and the Australian Council of Trade Unions), advocates (AED Legal and People with Disability Australia) and the Department of Social Services (DSS).

On 15 October 2015, FWC Deputy President Booth issued a statement, with the agreed shared objectives of the parties, including:

- a) a fair, equitable and non-discriminatory wage outcome to contribute to a living income for employees in supported employment;
- b) continued opportunity for employment in supported employment settings to build and maintain the self-esteem and sense of purpose of employees;
- c) sustainable employment opportunities in viable ADEs; and
- d) to provide security and confidence to employees, parents and carers for the future.

The parties have since been developing options, including modelling, to endeavour to meet these objectives. One of the options that DSS has progressed is a trial of a modified SWS, which is now complete.

The evaluation findings for the trial of a modified SWS are due to be tabled in the FWC on 19 October and further discussed on 14 November 2016. The FWC conciliation is subject to confidentiality, however the details below are in the public domain.

2016 Trial of a Modified Supported Wage System

The 'no-prejudice' trial of a modified SWS in ADEs, involved 191 supported employees across 20 ADES including:

- large and small ADEs;
- representation from all states;
- a mixture of metropolitan and regional based ADEs;
- a mixture of enterprise industries;
- a mixture of centre-based and crew-based ADEs;
- a spread of employee characteristics and disability (age, disability type and Disability Maintenance Instrument levels); and
- some ADEs with supported employees that have already transitioned to the NDIS.

The existing wage arrangements of supported employees participating in the trial did not change. For the purposes of the trial, supported employees had a trial wage assessment taken to determine a productivity result, but the wage outcome was not applied. An independent evaluator (ARTD Consultants) reviewed the trial wage assessment experiences and wage outcomes for the supported employees, to determine if the SWS can be appropriately modified for broader use in ADEs. The results will enable parties in the FWC to see what works and what can be improved and will inform any additional work to be considered in the FWC.

The key modifications to the SWS that were tested in the trial were:

- draft guidelines for the collection and use of workplace data in SWS wage assessments in ADEs. These guidelines will encourage ADEs to collect 'timings' of an individual's productivity in the lead up to the external SWS wage assessment and will be used to moderate the overall assessment outcome;
- removal of the minimum wage floor, currently \$82 per week;
- removal of the 'rounding' currently applied to SWS wage assessment outcomes; and
- training and support needs for assessors, ADEs and supported employees.