

**Fair Work Commission**

**4 Yearly Review of Modern Awards**

***Supported Employment Services Award 2010***

**Matter No:** AM2014/286

**FURTHER STATEMENT OF PAUL CAIN**

I, Paul Cain, c/o PO Box [REDACTED] say as follows:

1. I am asked for my opinion in regard to the proposed draft determination, submissions, and associated witness statements provided by Australian Business Industrial and the NSW Business Chamber to the Fair Work Commission; and the supporting submissions of Greenacres Disability Services. In relation to these materials, I am asked several questions. These were;
  - 1.1. Is the system of work classification for Award covered work proposed by the draft determination necessary for wage setting purposes in ADE employment to take account of the effects of disability on work performed by ADE employees?
  - 1.2. Is the inclusion of competency criteria into wage assessment an element that is necessary in ADE employment compared with open employment to take account of the effects of disability on work performed by ADE employees?
  - 1.3. Do I have any comment about the content of the classifications proposed and the work skills definitions proposed in Annexure A and Annexure B?
  - 1.4. What are the benefits or disadvantages for wage assessment if the proposed tool were to be adopted?
  - 1.5. Whether and how the Supported Wage System addresses any defects that I may identify.
  - 1.6. Do I agree with the observations made by statements in support of the Draft Determination?
  - 1.7. Do I have any comment about the comparability of ADE employment and open employment that affects the appropriateness of the SWS as a wage assessment tool in ADE employment?

2. I have been provided with a copy of the Australian Business Industrial and the NSW Business Chamber draft determination, submissions, and various associated witness statements. I was also provided a copy of the supporting submission by Greenacres Disability Services.
3. I have already provided a statement to the Fair Work Commission in this proceeding.

#### **The WVCT classification system**

4. The classification system proposed by the draft determination is not necessary to determine a percentage of the rate of pay of the Award Grade 2 classification. My reasons for this view follow.
5. The Work Value Classification Tool (**WVCT**) proposed by the Australian Business Industrial and the NSW Business Chamber prevents employees with disability in ADEs from a fair comparative assessment to determine a rate of pay of the relevant award classification.
6. The WVCT prevents this comparison by inserting a sub-classification system for Grade 2 of the Award which;
  - 6.1. Diminishes the award value of the job tasks that workers with disability perform within the scope of Grade 2 of the Award,
  - 6.2. Precludes an assessment against the work value available to workers without disability doing the same job tasks within Grade 2 of the Award,
  - 6.3. Limits the possible wage outcome that can be achieved by many workers with disability via an assessment of comparative productivity,
  - 6.4. Includes an assessment of work and personal support, and supervision, in determining the value of work, when this cost is already funded by the Commonwealth, and,
  - 6.5. Provides employers with substantial control to determine pro-rata award rates of pay of employees who have a heightened vulnerability due to the nature of their disability.
7. The proposed assessment factors of the WVCT do not belong in a pro-rata award wage assessment. These factors are either taken into account by the productivity based wage assessment of the SWS, or relevant to other workplace processes.

8. The WVCT in essence *breaks* the principle of *fair* in determining a pro-rata award wage. The re-classification of Grade 2 job tasks below the Grade 2 rate of pay prevents access by workers with disability to the relevant award classification and rate of pay.
9. The sub-classification system is the core feature of the WVCT, and is a similar design feature of many wage assessment tools currently listed in the Award.
10. In contrast, a core principle of the Supported Wage System is that *disability* does not itself warrant a pro-rata award rate of pay. Workers with disability are able to presume that they have access to the same employment conditions as other Australian workers.
11. This presumption upholds the right of people with disability to the same rate of pay as any other Australian worker for doing the same job task(s) as classified in an Award. This principle is noted by J Buchanan in *Nojin v Commonwealth* (2012) 208 FCR 1:

“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.” (138)
12. Further, the WVCT classification system does not meet the comparison required by the SESA. The SES Award at 14.4(a) states that:

“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.”
13. The Award requires that a percentage is based on the rate of pay in clause 14.2 which sets out the weekly and hourly rate of pay for each Award grade.
14. The WVCT, as do many listed wage assessments under s.14.4 of the SESA, would not pay a worker with a disability a percentage of the rate of pay of the relevant grade, but instead devalues the award rate of pay for a worker with disability — as a starting point — even though such workers are performing the indicative tasks listed under Grade 2 of the Award.
15. The nature of work for the Award Grade 2, as for all Award grades, is fixed in terms of indicative tasks, supervision level, training level, and responsibility for work quality. The WVCT avoids this classification and replaces it with another that ascribes a lower value to jobs of workers with disability performing Grade 2 tasks than the Grade 2 Award rate of pay.
16. A worker with disability performing work that fits the current classification of Grade 2 is entitled to the full Award rate of pay, and if the employer is of the view that the worker

is unable to work at a productive capacity expected for the full award rate of pay due to their disability, then it is legitimate to determine a percentage of the rate of pay of Grade 2, using a fair and non-discriminatory wage assessment tool.

17. Comparative research<sup>1</sup> conducted by the Commonwealth and presented in *Nojin v Commonwealth* showed that people without disability, doing similar jobs in open employment as people with disability in ADEs, were earning in excess of the award rate of pay (**Attachment A**).
18. This comparative research highlighted that workers without disability, performing similar jobs in open employment as workers with disability in ADEs, had a similar average number of tasks per job (2.8) as workers with disability (2.4).
19. The research also found that workers without disability in open employment performing comparable jobs with only one job task were getting paid at least the relevant award rate of pay.
20. The WVCT proposes, however, to apply a different classification system of wage rates for workers with disability doing comparable tasks, and comparable number of tasks, as workers without disability in open employment. By doing this, the WVCT limits the capacity of many workers with disability to earn a higher wage via a comparative productivity assessment (i.e., the SWS) based on an agreed performance standard to achieve the full rate of pay of Grade 2 of the Award.
21. The WVCT also proposes a set number of job tasks in Annexure D when an employee with disability may perform more or less tasks in their job role. This treats employees with disability differently to employees without disability who are not subject to such a fixed number of job tasks to access the relevant award rate of pay.
22. The SWS provides an assessment of the performance of a worker with disability against an agreed performance standard for each job duty to earn the relevant Award rate of pay.

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<sup>1</sup> Department of Family and Community Services/CRS & Evolution Research. Business Services Wage Assessment. Modelling and Competency Matching

23. For example, a worker with disability performing a specialised packaging job duty under Grade 2 of the Award is entitled to a percentage of the current hourly award rate of pay of \$18.81.
24. Following a SWS assessment of a specialist packaging duty, such a worker may be deemed to have achieved a 70% performance rate against an agreed performance standard to earn the full award rate of pay for the same duty. The employee would be entitled to an hourly rate of \$13.167, which is 70% of the Grade 2 Award hourly rate of pay.
25. Under the proposed WVCT, if such an employee is classified in either Level A, B or C, their wage will be discounted by a further 45%, 30% or 15% (or discounted by \$8.46, \$5.64, or \$2.82). Only when such a worker is classified in Level D would they get more than a productivity-based wage assessment.
26. The WVCT would provide employers with a wage tool with the authority to decrease wage costs below what many workers with disability would be able to achieve via a comparative performance of their productivity against an agreed performance standard for the award rate of pay.
27. The WVCT inappropriately includes ongoing work support, personal support, and supervision as part of its system of classification and pay rates.

### **Support and Supervision**

28. Ongoing work support, personal care, supervision, work based personal assistance, training, counselling, and other supports are funded by the Commonwealth government to ADEs to deliver this support to employees with disability in ADEs.
29. According to the published ADE contract example<sup>2</sup> (**Attachment B**);  
“Employment Assistance should meet the support needs of people with disability in a supported employment service by providing practical supports in a suitable work environment including, but not limited to:
  - (a) assessments;
  - (b) preparation of Employment Assistance Plans;

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<sup>2</sup> Disability Employment Assistance Grant Agreement. Schedule - Comprehensive Grant Agreement.  
[https://www.dss.gov.au/sites/default/files/documents/10\\_2016/schedule\\_disability\\_employment\\_assistance\\_-\\_example.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2016/schedule_disability_employment_assistance_-_example.pdf)

- (c) training (social skills training, work readiness training, work preparation training, on-the-job training and other training);
- (d) supervision and other one-on-one support
- (e) interpreter assistance for interviews and/or work orientation;
- (f) counselling;
- (g) case management;
- (h) physical assistance and personal care; and
- (i) administrative duties such as documenting and managing client files”

30. Similarly, ongoing employment support is also funded by the Commonwealth to open employment providers to help meet the ongoing support needs of employees with disability and employers in the open labour market.

31. Support funding for employees in ADEs is considerable. Please see the tables below for the pricing amounts for 2017-18<sup>3</sup>. There is also supplementary funding for rural and remote locations (**Attachment C**).

**Case Based Funding Core Fees**

Core Fee – 2017-2018	Amount (GST exclusive)	
Intake Fee	\$634	
Employment Assistance Fee (or Pre-DMI Fee) (per month, for up to 12 months)	\$634 (up to a maximum of \$7,608)	
Employment Maintenance Fee:	Amount Per Month	Amount Per Annum
• Level 1	\$375	\$4,500
• Level 2	\$634	\$7,608
• Level 3	\$953	\$11,436
• Level 4	\$1,264	\$15,168

<sup>3</sup> Disability Employment Assistance Grant Agreement. Cased Based Funding 2017-18.  
<https://www.dss.gov.au/disability-and-carers/programs-services/for-service-providers/disability-employment-assistance/disability-employment-assistance-schedule-attachment-b/case-based-funding-price-2017-18>)

### Case Based Funding Additional Fees

Additional Fee 2017-2018	Amount (GST exclusive)		
Work Based Personal Assistance (2015-2018)	Either: • \$31.82 per hour where the work based personal assistance is provided by an Approved Support Worker from within the Outlet; or • \$40.91 per hour where the work based personal assistance is purchased from a second agency, is provided up to a maximum of 10 hours per week.		
	ARIA Classification:	Amount Per Month	Amount Per Annum
	• Highly Accessible:	Nil.	Nil.
	• Accessible:	\$1,509	\$18,108
	• Moderately Accessible:	\$3,017	\$36,204
	• Remote:	\$4,526	\$54,312
	• Very Remote:	\$6,029	\$72,348
Existing High Cost Worker's Payment	An amount in excess of CBF Employment Maintenance Fee Level 4, in accordance with Supplementary Condition 1.22 to 1.29.		

31. The SWS does not bring into the wage assessment the supervision or support provided to a disabled worker, whether by a Disability Employment Services provider or an ADE, as this is already funded by the Commonwealth. Indeed, the SWS requires the assessment of an employee's performance to be undertaken while receiving *the same level of support and supervision that would be reasonably available to other people who do not have a disability*. This ensures a fair and accurate assessment of productivity against an agreed performance standard to achieve an award rate of pay based on typical workplace expectations rather than introducing into the assessment disability related factors that are dealt with from other funding sources. To do otherwise, would distort the assessment in a manner that is unfavourable to the disabled worker.

#### **Wage assessment conducted by the employer**

32. The WVCT introduces a wage assessment that is undertaken by the employer. This raises significant concerns about the independence of the wage assessment, conflicts of interest, and potential for exploitation of a vulnerable workforce.

33. In contrast, the SWS provides an independent assessment conducted by an assessor who is a member of a national panel assessors managed by the Commonwealth. The cost of the SWS assessment is met by the Commonwealth.

34. The SWS Evaluation report noted that;

“Generally most employers were positive about the assessment process and the professionalism of assessors. The assessment process is seen as one of the great strengths of the SWS.

Of those interviewed as part of the evaluation process, a high percentage indicated that they were engaged by the assessor, that they were well informed and able to contribute to the negotiations with regard to the establishment of a suitable wage rate. **Many employers indicated that the assessment process relieved them of the burden of being seen to be potentially exploiting people with disabilities.”** (*Attachment D*) (My emphasis).

35. Independence of a wage assessment process is a critical factor in protecting and safeguarding the rights of workers with disability to a fair pro-rata award wage.

#### **Annexure A**

36. The WVCT assessment items included in Annexure A do not belong in a pro-rata award wage assessment, as they are either,

36.1. Implicitly considered in a productivity based wage assessment (i.e., the SWS), or

36.2. Relevant to other workplace processes.

#### **Annexure A: Work support, personal support, and supervision**

37. The level of work support and personal support required by a worker with disability is assessed by the ADE and funded by the Commonwealth. The level of support does not provide a measure of skill related to the job tasks performed by the employee.

38. The level of supervision is also funded by the Commonwealth. *Direct supervision* is also part of the existing Award Grade 2 classification. The level of supervision required by an employee does not provide a measure of skill related to the job tasks performed by the employee.

39. The SWS conducts its assessment under *the same level of support and supervision that would be reasonably available to other people who do not have a disability* (**Attachment E**).<sup>4</sup> Employees unable to perform their job well without additional support or supervision will unlikely achieve a high productivity assessment compared to an agreed performance standard. Conversely, an employee who is able to perform their job well under typical levels of workplace support and supervision for that classification

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<sup>4</sup> Supported Wage System Handbook, p. 21



is more likely to achieve a high productivity assessment compared to an agreed performance standard.

40. There is no need to assess support or supervision as part of a classification of work or to determine a pro-rata award wage. Such factors are already assessed and funded, and built into a productivity based wage assessment process and the resultant wage.
41. Work support and personal support are better suited to a consideration of an individual support plan with the worker in response to Commonwealth funding to meet these needs.

### **Annexure A: Stay on task**

42. The ability of an employee, with or without disability, to stay on task is an important work behaviour, as this will have an impact on productivity.
43. Specialist disability employment providers receive funding to train and develop the work capacity of individuals with disability to maximise their productivity, including skills and strategies to stay on task. An assessment of this behaviour does not help to measure job skills or determine classification. It does, however, have an impact on productivity.
44. The ability to stay on task is implicitly captured and included in an SWS assessment. If an employee has difficulty staying on task, then it is more likely that the productivity outcome will be relatively low compared to an agreed performance standard. And this will be reflected in a low percentage of the award rate of pay.
45. Conversely, if an employee is capable of staying on task, then it is more likely that that the productivity outcome will be relatively high compared to the agreed performance standard, assuming that the employee is well matched to the job task. And this will be reflected in a high percentage of the award rate of pay.
46. There is no need to separately assess this behaviour to determine a pro-rata award wage. The development of “staying on task” can be addressed via training and development as a part of individual support planning resourced by Commonwealth support funding.

### **Annexure A: Checking the quality of work**

47. An employee at Grade 2 of the Award “understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality

deviation/faults.” This is part of the award classification for indicative job tasks at Grade 2.

48. The Award states that,

“B.2.1 This level of skill has been achieved following at least three months’ structured training so as to enable them to perform work within this scope of this level.”

49. The WVCT does not require an employee to understand or undertake basic quality assurance procedures or recognise faults at any level. Instead, the WVCT is focused on the frequency that an employee’s work is required to be checked by others. This is not a measure of worker skill performing their job tasks. Instead it is a measure of a level of supervision and support. This activity is already funded by the Commonwealth.

50. The SWS assessment includes a required level of quality, and what a worker is required to do to check the quality of work, in an agreed performance standard for a job task. When quality requirements are clearly defined in performance standards, the ability to consistently meet the required standard will be reflected in SWS result.

51. An employee that produces low quality work, or needs to spend additional time correcting faults, will tend to receive a low productivity assessment rate against an agreed performance standard of quantity and quality. Conversely a worker with disability that produces quality work, checks quality, and spends little time correcting faults, is more likely to achieve a higher rate of productivity against an agreed performance standard, presuming that the worker is well matched to the job task.

52. The development of the capacity of a worker to check the quality of their work and to recognise and address faults can still be undertaken as a matter of training which is funded by the Commonwealth. Applying this skill in actual work performance against an agreed performance standard for the award rate of pay is, however, a matter for a wage assessment.

#### **Annexure A: Organising their own work**

53. Assessing the capacity of a worker to organise their work, is dependent on the relevance of such an assessment to a worker’s actual job task at a Grade 2 classification. An employee at Grade 2 of the SES works under direct supervision. An employee whom exercises discretion within their level of skills and training is first listed within Grade 3 of the Award.

54. There may indeed be a range of capacity among employees at a worksite to be able to organise their own work. An ADE is however funded for direct supervision and support for workers with disability, and the funding is graded across four funding bands to take into account different levels of support and supervision need.
55. In every level of the WVCT there is some expectation that the staff and/or supervisors will need to assist workers with disability to organise their own work to some degree. This range of support or supervision is, however, within the bounds of the current Grade 2 classification of the Award.
56. The SWS can include in a performance standard for a job task what the employer requires of the worker with disability to do to organise their own work if this is part of their major duties — taking into account that direct supervision is required within the Grade 2 classification.

#### **57. Annexure A: Pace of work**

58. The pace of work is one factor of job performance, and is captured in a SWS assessment in comparison to an agreed performance standard for a job task.
59. If a worker goes fast in their pace of work, but in so doing makes many errors of quality, the worker will not achieve as high a percentage of the performance standard than if they were to work at a pace to achieve the highest volume of *quality* work.
60. There is no need to set or assess the pace of work to qualify for a classification of work. The classification is based on the type of work as set out by the award — not the pace of work.

#### **Annexure A & B - Base Work Skills**

61. It is important for the Commission to note that the taskforce that developed the SWS decided it was important to distinguish between *task* and *skill* when designing a wage assessment system.
62. The SWS taskforce stated that;
- “ - the term skills carries with it some potential for confusion as to whether the term refers to the requirements of the position or the knowledge and abilities of the

individual. The term tasks is less ambiguous when referring to job requirements” (**Attachment F**).<sup>5</sup>

63. This is an important distinction as it ensures that only the job tasks performed by the employee are the subject of wage assessment. This avoids an assessment of skills or competencies that are not part of the actual job tasks of the employee.
64. It also acknowledges that skills or competencies that are directly related to the employee’s actual job are part of job performance in terms of applied skills, and captured during a productivity based assessment of job tasks.
65. The Base Work Skills of WVCT listed at B.3 of the Draft Determination repeat some of the same factors listed in the sub-award classification structure in Annexure A — including, pace of work, stay on task, quality of work, supervision. I have already noted that these factors are already captured in a productivity based wage assessment (i.e., the SWS), and supervision is funded by the Commonwealth.
66. Other Base Work Skills listed by the WVCT include, *follow instructions, remain at an employee’s workstation or area, be punctual, and alternate between tasks*. These are work behaviours that can be assessed via the Supported Wage System without requiring a separate or specific assessment in a sub-classification structure.
67. For example, a productivity assessment can observe if an employee chooses to leave their workstation or area. The assessors ‘stopwatch’ keeps running during the assessment which means that it is likely that the employee’s productivity result will be low in comparison to the agreed performance standard. If an employee leaves the work space they are not being productive.
68. Remaining at a workstation or area for an employee is obviously important if the employee is going to be a productive employee. Conducting an assessment of how frequent and for how long an employee leaves her/his work space is useful for an employment provider that is looking to design training or support to increase an employee’s capacity to stay on task and stay in the work space. But such an assessment is irrelevant in determining the performance of an employee in doing their

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<sup>5</sup> Development of a National Assessment Framework for a Supportive Wages System. Report to the Wages Subcommittee of The Disability Taskforce. Report prepared by Don Dunoon and Jennifer Green for the Department of Industrial Relations.

actual job tasks in comparison to an agreed performance standard of the award rate of pay.

69. Other factors listed by the WVCT, including *being punctual, following instructions, and alternating between tasks*, are behaviours which will impact upon an employee's productivity. The SWS measures how an employee applies such behaviours to perform their job duties and tasks.

### **Annexure C - Indicative Task Schedules**

70. Annexure C, as per Annexure A, is designed to prevent employees with disability from access to a percentage of the rate of pay aligned to Grade 2 of the award.

71. Much of Annexure C does not provide a schedule of (actual) indicative job tasks, but offers more factors that are not measures of job skill or description of job task. For example, whereas the specifics of work health and safety issues vary across job tasks, these are equally important across all jobs, and should not be used as a factor to discount award wage rates.

72. The Award classification of Grade 2 is sufficient to capture the indicative tasks that are performed by workers with disability in ADEs.

73. If there is any differentiation of the level of tasks in Grade 2, this can be addressed by the SWS through the setting of an agreed performance standard. It should be recalled that the agreed performance standard is based on what is required to achieve the rate of pay in performing a duty or task under the relevant Award grade.

### **In response to the statement by Bradley Raymond Burridge- paragraphs 52-61**

74. I do not agree with the observations made by Mr. Burridge in paragraphs 52-61. These paragraphs misrepresent the Supported Wage System, the current SES Award, and the Disability Support Pension.

75. The description of how the Supported Wage System operates at Centacare by Mr. Burridge does not accurately reflect the SWS assessment.

76. The Supported Wage System is an assessment of *the performance of a particular individual in a particular job*. The SWS assessment steps include

- List the major duties of the position.

- Agree on a basic standard for each duty at the full rate of pay for the job as prescribed in the relevant industrial instrument
- Compare the employee's achievement on the job with agreed basic workplace standard for each duty
- Specify the time spent on each duty
- Calculate the appropriate wage level

77. The SWS is an assessment of the major duties of an individual's job.

78. The SWS is not an assessment of a deemed single task to be applied to all workers with disability in a workplace. The SWS is not an assessment of *output for one particular type of skill* as stated by Mr. Burrige at paragraph 54.

79. The athletic analogy used by Mr. Burrige in paragraph 55 is incorrect as the SWS assessment conducts an assessment of the major job duties of an individual's position, rather than a selection of one of an employee's job tasks.

80. If SWS assessments are being conducted at Centacare as described by Mr. Burrige, then it is important that Mr. Burrige lodge a complaint with the Commonwealth Department of Social Services' Supported Wage Management Unit (SMWU) which can conduct a review on the grounds *that the assessment was not conducted in accordance with the SWS Handbook and that it would result in significant disadvantage to the employee and/ or the employer (Attachment E)*.

81. In Mr. Burrige's statement at paragraph 57, there is a description of an employee with Down syndrome whose performance is regressing due to the effects of ageing upon the individual's disability.

82. 14.4(f) of the Award addresses this type of situation. The SES Award at s.14.4(f) currently permits a decrease in the rate of pay a result of a wage assessment due to the regression of an employee's disability.

83. The Statement by Mr. Burrige at paragraphs 58-61 does not accurately reflect how the Commonwealth Disability Support Pension (DSP) system operates.

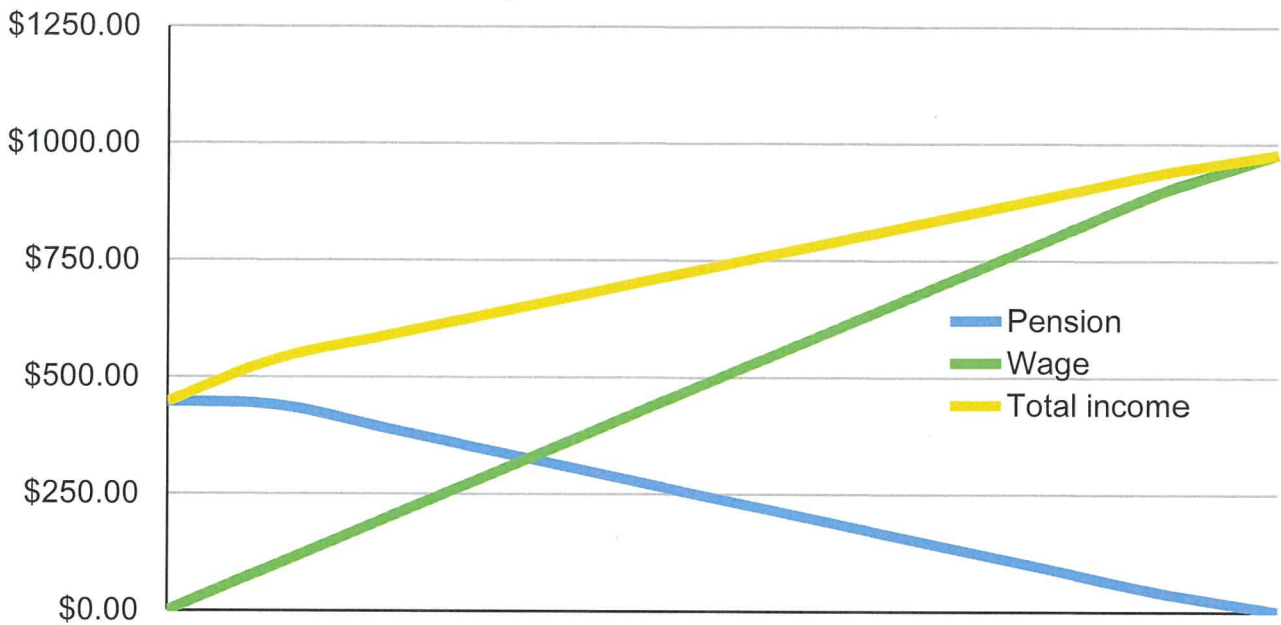
84. Under the DSP income test, participants can currently earn up to \$84 per week in wages without any impact on pension income. For every dollar earned above \$84 per week, 50 cents is withdrawn from pension income.

85. The table and graph below show that a DSP recipient under the Supported Wage System is better off in terms of total income when wages and hours of work are maximised. This information is based on the current pension rates for singles aged 21 and over.
86. A DSP recipient is better off in terms of total income (i.e. part pension plus wages) when accepting to work more hours and/or earn more wages, (Department of Human Services, Payment rates for Disability Support Pension, <https://www.humanservices.gov.au/individuals/enablers/payment-rates-disability-support-pension> (**Attachment G**).
87. A Centacare employee would have to earn \$978.40 per week or more for the Disability Support Pension to be reduced to \$0.
88. Further, DSP recipients who work, and have their wage determined by the Supported Wage System, are not limited by the number of hours per week they may work in order to maintain eligibility for the DSP. (Guide to Social Security Law, 1.1.I.95 Independently of a program of support, <http://guides.dss.gov.au/guide-social-security-law/1/1/i/95>) (**Attachment H**).

**Effect of Weekly Wage on Weekly Disability Support Pension & Total Weekly**

Pension	Wage	Pension Withdrawal	Total income
\$447.20	\$0.00	\$0.00	\$447.20
\$439.20	\$100.00	\$8.00	\$539.20
\$389.20	\$200.00	\$58.00	\$589.20
\$339.20	\$300.00	\$108.00	\$639.20
\$289.20	\$400.00	\$158.00	\$689.20
\$239.20	\$500.00	\$208.00	\$739.20
\$189.20	\$600.00	\$258.00	\$789.20
\$139.20	\$700.00	\$308.00	\$839.20
\$89.20	\$800.00	\$358.00	\$889.20
\$39.20	\$900.00	\$408.00	\$939.20
\$0.00	\$978.40	\$447.20	\$978.40

### Effect of Weekly Wage on Weekly Disability Support Pension & Total Weekly Income



89. It is incorrect to tell employees with disability or their families that they would either lose their DSP or be worse off, if they were to accept more hours of work, or earn higher wages (unless they were to be paid at least \$978.40 per week). There is no need for an employee to cut hours of work per week under the DSP rules for either eligibility or income reasons.



**In response to the statement by Stephen Burgess of Flagstaff Group- paragraphs 87 & 92-98**

90. In paragraph 6 of Mr. Burgess' statement, it is stated that *Flagstaff employs Supported Employees who have significant barriers to securing employment in the open employment market.*
91. There are indeed people with disability who have significant barriers to getting a job in the open labour market, however, this does not mean that this group *can't* get a job in the open labour market.
92. It is important the Fair Work Commission (FWC) is not inadvertently misled by statements about the capacity of people with significant disability to work in the open labour market — as if this group is limited to **only** work in ADEs.
93. The international and Australian research and demonstration is clear that people with significant intellectual disability have the capacity to work in the open labour market when they get the *right level and type of support.*
94. This was reported by the Evaluation of Disability Employment Services (DES) 2010-2013 when considering the outcome results of participants with moderate levels of intellectual disability (i.e., IQ  $\leq$ 60, a group with significant intellectual disability) which stated that;
- “Research and practice in the field has shown that with the right level and type of support, people with significant intellectual disability can achieve more substantial employment.”
- and,
- “There is no doubt that this is a group of job seekers with exceptionally high needs, who face considerable odds in the open labour market. What appears to set them apart is the body of evidence of their potential to succeed given the right type of service” (**Attachment I**).
95. Whereas ‘intellectual disability’ is a significant barrier to getting and sustaining a job in the open labour market, there is a support technology that exists and demonstrates high rates of job placement and retention.
96. The statement by Mr. Burgess at paragraph 87 infers that there is a proposal before the Fair Work Commission for the payment of “close to, or actual, minimum wages” for employees with disabilities in ADEs.

97. My understanding is that there is no such proposal being put to the Commission.
98. The statement at paragraph 87 suggests that the jobs of employees with disability are not part of a "complete job". This is not so.
99. The Award classification does not demand employers and employees to agree on a specific number of job duties or tasks within an award classification to be paid the award rate of pay.
100. It has been a frequent consideration put by some in wage assessment design that there should be a minimum number of tasks or competencies that an employee with disability should be assessed upon. The argument being that a person without disability is (supposedly) required to demonstrate performance across a minimum number of job tasks and competencies to be paid the award classification.
101. This wage assessment design, however, was shown in the Federal Court's examination of the Business Services Wage Assessment Tool (BSWAT) in *Nojin v Commonwealth* to be incorrect and disadvantages employees with and without disability.
102. For example, the BSWAT required an employee to be assessed on a minimum of four industry competencies, whether or not an employee with disability's job actually related to at least four industry competencies. If an employee had less than the minimum four industry competencies, an employee's wage would be discounted by 6.25% for each missing competency. Such a requirement was shown to disadvantage both employees with and without disability.
103. Comparative research of matching jobs in open employment and ADEs found that workers in 'open employment' had a similar average number of job tasks to workers in ADEs (i.e., 2.8 vs 2.4). This research showed that workers with and without disability would have had their wages unreasonably discounted under a wage assessment tool that set a standard of four industry competencies.
104. The research also found that four of the work roles reviewed in open employment for people without disability were covered by a single job task, but still attracted at the least the award minimum rate of pay. If BSWAT were to be applied to workers without disability in open employment, the Federal Court concluded that workers without disability would have received less than the award rate of pay. This showed the award comparator used by BSWAT to be unfair to all workers.

105. The SES Award requires an employee with disability to be paid a percentage of the rate of pay of the relevant grade. The award comparison used by a wage assessment tool should not be undermined by a standard which is not applied to workers without disability performing the same indicative job tasks in the relevant classification, whether that is one job task or many job tasks.<sup>1</sup>
106. At paragraph 92 of Mr. Burgess' statement it is put that the productivity of a single individual can have a significant adverse flow on implications for the next stage in the manufacturing/production process, and that this adversity does not apply to open employment organisations, particularly those organisations reliant on automation.
107. Any productivity bottleneck or slowness - be it due to a person or machine — has an adverse effect on the next stage of a manufacturing/production process. Automation bottlenecks may also have disadvantages in production efficiency when a machine is limited to specific tasks, or bottlenecks are caused by machinery getting damaged or worn out.
108. It is the matching of employee strengths to particular job tasks of a production/manufacturing process that is the best design to maximise productivity. An employee who is not productive in performing their job task as part of the overall production process would most likely not achieve a high pro-rata award pay rate when assessed against an agreed productivity standard for that particular task. Whereas this would be a fair wage assessment, it is not in the best interests of the employee and the business to support a person in a job that is not well matched.
109. The statement by Mr. Burgess at paragraphs 58-82 provides a description of the ongoing system of support provided to employees with disability to get ready for work, travel to work, do their work, and return home.
110. I acknowledge that this level of support varies across employees with disability so that they can participate in jobs in ADEs.
111. I do, however, wish to note that people with significant disability in jobs in open employment, including people with intellectual disability, are also provided a similar range of ongoing support so that they can get ready for work, travel to work, do their work and return home.

112. This includes considerable ongoing support from family; co-workers and supervisors at their workplace; and from employment providers for the term of their job — some having now worked for 30 years with ongoing support since the introduction of open employment support by the Disability Services Act in 1986.
113. Whereas people with significant disability need ongoing support to do typical activities such as going to work, the issue of wage assessment is relevant to the performance of the employee with disability in doing their actual job in comparison with an agreed performance standard linked to the award classification and associated rate of pay.
114. The support provided to an employee to prepare to go to work, travel to work, and travel back home, is important support, but irrelevant to fair pro-rata award wage assessment. To include this support in a wage assessment tool would result in people with disability paying for their support through reduced wages.
115. The statement by Mr. Burgess at paragraph 96 & 98 is made without any data evidence to support what is being concluded.
116. It is unclear what comparative testing was performed by Flagstaff between the wage assessment tool it is currently using, and the WVCT.
117. It is unclear what data or feedback Flagstaff has received from other services using the SWS to conclude that the SWS results in discriminatory wage outcomes, artificially inflates wages, and cannot be applied in ADEs.
118. These assertions are made without any data or transparent evidence, which are contrary to independent evaluation findings of the SWS (**Attachment D**).<sup>6</sup>

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<sup>6</sup> Commonwealth Department of Family and Community Services (2001). Evaluation of the Supported Wage System. Report prepared by KPMG.

## In response to the statement by Chris Christodoulou- paragraphs 23-27

119. Paragraphs 23 to 27 of Mr. Christodoulou's statement misrepresents the history and nature of the Supported Wage System.
120. At paragraph 23 the statement claims that the SWS was designed for people with mild disabilities who could perform low level duties. This is not an accurate account of the design and purpose of the SWS and therefore could inadvertently misled the Commission
121. To provide an accurate account I have put together a (very) brief outline below based on the report, Development of a National Assessment Framework for a Supportive Wages System. Report to the Wages Subcommittee of The Disability Taskforce. This report was prepared by Don Dunoon and Jennifer Green for the Department of Industrial Relations. I will refer to this report as the *Dunoon report* (**Attachment F**).
- The development of the SWS was part of the 1990/91 Commonwealth Government budget initiative known as the Disability Reform Package.
  - The Dunoon report referred to the eligible group for the SWS as people with *severe disabilities* which included people with a physical, intellectual, or psychiatric impairment eligible for the Disability Support Pension (**Attachment F**).
  - The Dunoon report recognised that some people with severe disability, including people with intellectual disability, may work for full award rates of pay in unsupported or supported jobs. The purpose of the SWS is, however, to improve access of people with severe disability to the labour market who are unable to work at full award wages (**Attachment F**).
  - The Dunoon report recognised that jobs may be redesigned to accommodate the abilities of the worker (**Attachment F**).
  - The benchmark for the SWS is the full award wage.
  - Individuals with severe disabilities are employed under a variety of arrangements including supported employment<sup>7</sup>, competitive employment, and sheltered workshops

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<sup>7</sup> *Supported employment* was not originally intended to include sheltered workshops or ADEs. The Disability Services Act 1986 definition of *supported employment* was intended to include a range of

122. A critical part of the development of the SWS was the experience and involvement of *Jobsupport* as one of the employment providers used to pilot test the SWS. Jobsupport is a specialist (supported) open employment provider for people with significant intellectual disability (IQ  $\leq$ 60) and was a demonstration provider for the Disability Services Act in 1986.
123. Jobsupport currently supports over 700 individuals with significant intellectual disability in jobs in the open labour market. All jobs were created or customised jobs (i.e., not advertised vacancies). Fifty-nine percent of these individuals earn full award rates of pay, and Forty-one percent of these individuals earn an award rate of pay determined by the SWS (*Attachment J*).<sup>8</sup>
124. The key point that the Commission should note is that the SWS was developed and trialed with people with severe disability including people with significant intellectual disability in customised job positions.
125. The development of the SWS was not developed for people with mild disability as asserted by Mr. Christodoulou.
126. At paragraph 26, Mr. Christodoulou states that the SWS is inappropriate to assess the wages of people with disabilities particularly those with intellectual disabilities. This statement is without any reasonable basis.
127. The SWS was designed for people with severe disability, including people with intellectual disability.
128. The key finding of the SWS evaluation was,
- “The SWS promotes the participation of employers, employees and unions equally and has at its core, values of integrity and transparency in decision-making. These values have ensured the system's continuing **appropriateness** within the broad workplace relations and employment environment. (My emphasis)

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supported employment models for people with severe disabilities, including people with intellectual disability. This included open employment with ongoing support, enclaves, mobile work crews and small businesses.

<sup>8</sup> Phil Tuckerman (2016). IASSID World Congress, Melbourne 2016. Using data to achieve better employment outcomes for people with an intellectual disability

A core strength of the SWS is its capacity to assist people with disabilities gain and maintain employment within an industrial framework consistent with the requirements of the Disability Discrimination Act 1992 (Clth) (**Attachment D**).

The opportunities that the SWS provides by enabling access to employment for people with disabilities through the use of productivity based wages, is recognised by all stakeholder groups. All commented that it provides an opportunity for employment for people with disabilities that would not otherwise exist. Stakeholders also view the SWS as the preferred industrial mechanism for the determination of productivity based wages.”<sup>9</sup>

129. The SWS has been successfully used to determine the pro-rata award wages of people with severe disability, including people with intellectual disability, since 1994 in open employment and in ADEs.
130. The SWS evaluation reported that the majority (68%) of SWS employees had intellectual and learning disability as at June 2000 (5.2.4 Primary disability, SWS Review, KPMG) (**Attachment D**). The Department of Social Services reported in 2013-14 that most SWS assessments (68%) continue to be for people with intellectual disability \* (**Attachment K**).<sup>10</sup>
131. Mr. Christodoulou states at paragraph 26 that the SWS is inappropriate to assess the wages of people with disabilities because it is a system based on productive output (that is, time piece work) that does not distinguish between the complexities of the task/s. This statement is incorrect.
132. First, the SWS is not based on timed piece work.
133. A piece rate is where an employee gets paid by the piece of work produced instead of the hourly award rate of pay. For example, a worker may get paid \$5 for each box of apples packed. The worker may pack 30 boxes on Monday and get paid \$150, but pack 25 boxes on Tuesday and get paid \$125.
134. In contrast, the SWS is based on a percentage of the Award hourly rate of pay for the relevant classification of work. For example, an Award may fix an hourly rate of pay of

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<sup>9</sup> SWS Evaluation, 2001. Executive Summary. 1.1 Key Findings.

<sup>10</sup> Trish James. Director Disability Employment Services Participants Section, Department of Social Services, 2 December 2014

\$20 for packing boxes. An SWS assessment may determine a performance standard of 4 correctly packed boxes of apples per hour to get the Award rate of pay.

135. If the SWS assessment finds that, on average, a worker with disability packs two correct boxes of apples per hour, the worker with disability will get an award hourly rate of pay of \$10. This is half of the four correct boxes of apples required to earn the full award rate of pay of \$20.
136. The agreed SWS hourly rate of pay does not change if an employee with disability packs more or less boxes of apples each day at work following the agreed rate of pay. The employee with disability gets paid the assessed SWS hourly rate for the number of hours worked each pay period. The agreed SWS hourly rate of pay remains in place until the next SWS assessment review.
137. Second, the SWS does distinguish between the complexities of job tasks.
138. Each major duty and its tasks are set an agreed performance standard. The performance standard will implicitly take into account the level of skill required to complete each job task, as the performance standard is set by a *comparator* with the skill necessary to complete the job task.
139. The SWS assessment also requires consideration of the appropriate classification of the job.

“The appropriate classification for the position is determined by the provisions of the relevant industrial instrument. The classification is identified by comparing the duties to be undertaken by the employee with the classifications and associated definitions in the industrial instrument.

Where an employee performs duties that span more than one classification, any specific provisions dealing with this situation should be applied, or if there is none, the industrial practices generally applying under the relevant Pay Scale should be used.”  
(SWS Handbook, p. 19)(**Attachment E**).

140. If an employee carries out duties of greater complexity which are classified in a higher award level then the SES Award covers this situation.

“Employees will be paid at a higher grade if carrying out the duties of a higher grade for two or more hours in any shift. They will be paid at the higher grade for the time so worked. This clause will not apply whilst an employee is carrying out work in a higher grade for training purposes only.” (14.5 Higher Duties)



141. As the Award classification has already determined a hierarchy of work value based on skill, tasks, training, supervision, responsibility etc., the SWS assessment automatically takes this into account when determining the wage against the relevant award classification for the job tasks being assessed
142. The SWS also has an expectation that the employee with disability has received specialist training and reached a reasonable stable level of job performance before a SWS assessment is conducted (SWS Handbook, p. 18) (**Attachment E**).
143. This expectation extends to considerations of a good job match between the strengths of the employee and the needs of the business. The SWS requires pre-assessment checks to ensure the suitability of the employee with the job design (SWS Handbook, p. 17) (**Attachment E**).
144. The SWS has the capacity to deal with the assessment of different levels of tasks and ensure that a comparison is made against the award classification of tasks used to determine the wages of employees without disability.
145. At paragraph 26, Mr. Christodoulou states that the SWS favours employees with disability carrying out the easiest work. This statement is incorrect.
146. The SWS assessment is aligned with the award classification level of job tasks and rates of pay. As all SWS assessments are based on the award classification, it is not possible for the SWS to favour one employee over another.
147. The majority of job tasks performed by workers with disability in ADEs are basic, routine, manual work that are classified under the lower grades of the SES Award.
148. SWS wage outcomes are based on a productivity based assessment against an individual's job tasks against an agreed performance standard to achieve the full award rate of pay for the relevant classification of work.
149. For example, a person who is able to perform a Grade 2 packing task consistently with precision may do very well on a comparative basis with a performance standard for award rates of pay. Yet a person who is not able to perform a Grade 2 packing task effectively due to a difficulty with staying on task, is unlikely to do very well on a comparative basis for award rates of pay.
150. The purview of a disability employment provider is to assist a person with disability to get a job in which they receive training and support to perform the job well, and which matches their strengths and interests, and fulfills a valued business role.

151. If a person with disability is placed in a packaging task in Grade 3 that requires the operation of more complex machinery, but struggles to perform the task well, it is unlikely that such a person will achieve a high productive output, and the SWS would more than likely determine a low percentage pay rate against an agreed performance standard.
152. The employee and employer would need to consider if the job task is best matched with the ability and strengths of the employee if the productivity is very low. If the employer and employee wish to persist with such an arrangement, despite the poor job match, then the SWS assessment remains valid as it based on a comparison with what is expected for the full award classification rate for that duty. The fact that the job task is in a higher award classification of work does not by itself guarantee a higher wage outcome for an employee. It is still necessary to perform well against the agreed performance standard for the full award rate of pay.
153. In contrast, an employee who is performing a job task which is well matched to their strengths, and achieving high levels of productivity in comparison with the agreed performance for award rates of pay — such a person is fully entitled to be paid at their assessed rate for the work time they spend on that job task.
154. The complexity of job tasks is already defined within the grading of the SES award classification, and the SWS assessment is made against the relevant classification and rate of pay for the employee's job tasks.
155. At paragraph 27 Mr. Christodoulou' statement, it is asserted that GDS wishes to pay their employees with disability the same as other employers using a classification based on skill, initiative, level of support and supervision, and complexity of work.
156. First, the level of supervision required for employees is already contained in the SESA classifications and funded by the Commonwealth.

<b>SESA Grade</b>	<b>Level of Supervision</b>
Grade 1	Direct Supervision
Grade 2	Direct Supervision
Grade 3	Routine Supervision

157. Second, the level of support for individual employees is also funded by the Commonwealth government. The cost of supervision and support is not a factor for

wage assessment, otherwise this would be 'double dipping', as it is a cost already met generously by the Commonwealth.

158. Support funding for employees in ADEs is considerable. Please see below the pricing amounts for 2017-18<sup>11</sup>. These funding amounts are for work support, and there is additional funding for personal assistance, supplements for rural and remote locations, and payments available above the highest level if needed.

**Table 1 – Case Based Funding Core Fees**

<b>Core Fee – 2017-2018</b>	<b>Amount (GST exclusive)</b>	
Intake Fee	\$634	
Employment Assistance Fee (or Pre-DMI Fee) (per month, for up to 12 months)	\$634 (up to a maximum of \$7,608)	
Employment Maintenance Fee:	Amount Per Month	Amount Per Annum
• Level 1	\$375	\$4,500
• Level 2	\$634	\$7,608
• Level 3	\$953	\$11,436
• Level 4	\$1,264	\$15,168

**Table 2 – Case Based Funding Additional Fees**

<b>Additional Fee 2017-2018</b>	<b>Amount (GST exclusive)</b>		
Work Based Personal Assistance (2015-2018)	Either: • \$31.82 per hour where the work based personal assistance is provided by an Approved Support Worker from within the Outlet; or • \$40.91 per hour where the work based personal assistance is purchased from a second agency, is provided up to a maximum of 10 hours per week.		
	ARIA Classification:	Amount Per Month	Amount Per Annum
	• Highly Accessible:	Nil.	Nil.
	• Accessible:	\$1,509	\$18,108
	• Moderately Accessible:	\$3,017	\$36,204
	• Remote:	\$4,526	\$54,312
	• Very Remote:	\$6,029	\$72,348
Existing High Cost Worker's Payment	An amount in excess of CBF Employment Maintenance Fee Level 4, in accordance with Supplementary Condition 1.22 to 1.29.		

<sup>11</sup> Department of Social Services. <https://www.dss.gov.au/disability-and-carers/programs-services/for-service-providers/disability-employment-assistance/disability-employment-assistance-schedule-attachment-b/case-based-funding-price-2017-18>

159. Third, the level of skill, complexity and initiative for job tasks is already contained in the SESA award classification. Each SESA classification lists indicative job tasks on a hierarchy of training level, skill level, and responsibility for the quality of their work.

<b>SESA Grade</b>	<b>Skill Level</b>	<b>Initiative/Responsibility</b>
Grade 1	B.1.2 An employee at this level performs basic routine duties essentially of a manual nature and to their level of training.	B.1.2 Persons at this level exercise minimal judgment and work under direct supervision whilst undergoing structured training to Grade 2.
Grade 2	B.2.1 An employee who has completed at least three months' structured training so as to enable them to perform work within the scope of this level. B.2.2 An employee at this level: (a) performs work above and beyond the skills of an employee at Grade 1 and to the level of their training;	B.2.2 An employee at this level: (b) works under direct supervision either individually or in a team environment; (c) understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviation/faults.
Grade 3	B.3.1 An employee who has completed relevant training so as to enable the employee to perform work within the scope of this level. B.3.2 An employee at this level: (a) performs work above and beyond the skills of an employee at Grade 2 and to the level of their training;	B.3.2 An employee at this level: (b) is responsible for the quality of their own work subject to routine supervision; (d) exercises discretion within their level of skills and training.

162. All the factors that GDS wish to base how they pay their employees are already available in the SESA or funded by the Commonwealth.

### **In response to the statement by Greenacres- paragraphs 13-17**

163. The Greenacres submission contends that the SWS is inappropriate for ADEs. In paragraph 13 of the submission by Greenacres it is stated that;

“GDS believes that determining wages based on how fast a person works is archaic and the FWC would not adopt this approach for workers without disabilities in ADE.”

164. The Greenacres submission is incorrect as the SWS is not based on how fast a person works.

165. The SWS is based on an agreed performance standard to achieve the full award rate of pay for each major duty of an employee’s job. The SWS requires that:

“Employers and assessors should specify performance standards that incorporate both quality and quantity components.”

166. The performance standard can set a volume and quality of the work to be achieved for the award classification rate of pay.

167. The performance standard may also include safety work practices that have been part of job training to ensure the employee is carrying out the work according to occupational, health and safety standards utilised in the workplace.

168. The SWS assessment is only used for employees with disability unable to work at full productive capacity for the award rate of pay.

169. The SWS is not used for workers without disabilities as they are paid according to the relevant classification of work and rate of pay. It is not permitted to use the SWS for employees without disability, or employees with disability in general, as the presence of disability in itself does not justify a pro-rata award wage.

170. In paragraph 14 of the submission by Greenacres it is stated that the SWS is inappropriate in ADEs;

“In particular because the SWS only measures against the task that a supported employee can safely carry out and not all the duties of a position it makes the SWS more perverse”.

171. The Greenacres submission is incorrect as the SWS measures the performance of all the major duties that make up the job of the employee with disability.

172. The first step of the SWS assessment is to;

“List the Major Duties of the Position. Briefly Describe the Major Tasks of Each Duty” (*Attachment E*).

173. It would highly inappropriate and negligible for an employer, employment provider, or SWS assessor to conduct an assessment of an employee if there was any indication that the employee could not perform one of their duties safely.
174. The SWS assessment expects that the employee has reached a “reasonably stable level of job performance” before an assessment is conducted. It is expected that an employee has received specialist training and support to gain the skill and confidence to perform their job tasks safely and achieve the job task outcome they are employed to do.
175. The purpose of the SWS assessment is determine the employee’s performance of each their duties against an agreed performance standard to receive the full award rate of pay for that classification of work.
176. In paragraph 14 of the submission by Greenacres it is stated that;

“The SWS may be appropriate in circumstances where an employee can generally carry out most of the duties associated with a whole job, but because of their disability, may work slower as they take more care to complete the job to a quality standard.
177. The Greenacres submission is incorrect as the SWS is regularly and successfully used in open employment and in ADEs for jobs that have been created or customised for the mutual benefit of employees and employers.
178. There is no such standard in the award structure of a “whole job”. The Award classification does not demand employers and employees to agree on a specific number of job duties or tasks within award classifications to be paid the award rate of pay, or to be considered a “whole job”.
179. The SES Award requires an employee with disability to be paid a percentage of the rate of pay of the relevant award grade for their work time.
180. The award comparison rate of pay used by a wage assessment tool should not be undermined by a standard which is not applied to workers without disability performing the same indicative job tasks in the relevant classification, whether that is one job task or many job tasks.

181. The notion of the “whole job” should be dismissed as it is a concept not applied to workers without disability, and therefore something that would be unfair to apply to workers without disability in determining a percentage of an award rate of pay.
182. In paragraph 16 of Greenacres’ submission it is stated in relation to the SWS that;  
“GDS contends that it is inappropriate particularly for supported employees with intellectual disabilities in ADE who in many circumstances have limits on the types of work they can do safely. Such employees carry out low skill tasks and in many cases as a consequence can work reasonably quickly at different periods of time with ongoing support and training”
183. This statement by Greenacres is incorrect. The SWS was designed for people with severe disability, including people with intellectual disability.
184. A low-level skill task has a low-level classification within the Award. If a person is able to perform well at these tasks then they are entitled to a wage reflecting their performance aligned with the relevant classification. Many employees without disability perform low level tasks and this is reflected in a lower wage classification.
185. People with intellectual disability were a key target group and trial population in the development of the SWS; and have always been the majority disability type of employees with disability that have benefited from the SWS in open employment and in ADEs.
186. The large body of vocational research, extending over many decades, on the work capacity of people with intellectual disability, emphasises that this is a group of people that do have significant barriers to work, but with the right level and type of support, have the capacity to perform productive and valued work in the labour market.
187. The research and demonstration of this support and outcome is well documented. Many such employees with intellectual disability have enjoyed long careers due to the introduction of the SWS.
188. The performance of low skill tasks that are basic and routine is not a reason for an employee with disability not to have access to fair award wages — whether performing this in open employment or in an ADE.
189. In paragraph 17 of the Greenacres’ submission it is stated that;  
“The SWS was originally developed for open employment, and as such has not been embraced by the sector because of its inherent flaws.”

190. The decision by the Australian Industrial Relations Commission included eligibility for employees in ADEs. The decision only excluded ADEs yet to achieve the eligibility requirements of the Disability Services Act, which is no longer a barrier as all ADEs in receipt of funding meet the requirements of the Act.
191. There have also been ADEs that have used the SWS successfully for many years.
192. The Evaluation of the SWS did not find any inherent flaws, but rather in contrast, found the SWS to have integrity, to be appropriate, and meet the requirements of disability discrimination law. The report stated that,

“The SWS promotes the participation of employers, employees and unions equally and has at its core, values of integrity and transparency in decision-making. These values have ensured the system's continuing appropriateness within the broad workplace relations and employment environment.

A core strength of the SWS is its capacity to assist people with disabilities gain and maintain employment within an industrial framework consistent with the requirements of the Disability Discrimination Act 1992 (Cth).

The opportunities that the SWS provides by enabling access to employment for people with disabilities through the use of productivity based wages, is recognised by all stakeholder groups. All commented that it provides an opportunity for employment for people with disabilities that would not otherwise exist. Stakeholders also view the SWS as the preferred industrial mechanism for the determination of productivity based wages.”

**In response to the statement by Anne Lynette Constable- paragraph 51**

193. At paragraph 51 of the statement by Anne Constable it is stated that:

“As the Supported Wage System (SWS) was not originally set up for Supported Employment, rather for open employment, it is not suitable to measure the competencies of our complex supported employee.”

This statement is not correct.

194. The Supported Wage System, from the original decision by the Australian Industrial Relations Decision in 1994, has been available for employees with disability working in the open labour market, and for employers known as ADEs, (previously sheltered



workshops, and business services), to determine productivity based wages for employees.

195. At the time of the AIRC decision in 1994, sheltered workshops (i.e., ADEs) were required to transition from section 13 to section 12a and then to section 10 of the Disability Services Act 1986 (DSA).

196. Sheltered workshops were required to make this transition to meet the principles and objectives of the DSA. The SWS model clause deemed employees working for sheltered workshops (i.e. ADEs) funded under section 12a or section 10 eligible for a wage assessment conducted by the SWS.

197. The SWS model clause stated that;

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

198. Ms. Constable’s statement also states that the SWS is “not suitable to measure the competencies of our complex support employees.” This statement is also not correct.

199. The SWS has demonstrated in open employment and in ADEs since 1994 that it is an appropriate pro-rata wage assessment for people with significant disability who require ongoing support.

200. The SWS does not directly assess competencies or skills. It is the purview of the employment support provider to provide the training and support to assist an employee with disability gain the necessary competencies or skills of the job.

201. The purview of the SWS assessment is to test the performance of the employee with disability against a performance standard for each major duty of their job. The employee with disability applies their skills or competencies to do their job. It is the outcome of this performance against agreed performance standards for the full award rate of pay that is the focus of the SWS assessment.

202. At paragraph 105 of Anthony Rohr's statement it is stated in reference to the SWS that;

"The speed at which the supported employee (or non-supported employee) completes these task are measured against a fully able employee in the workplace, in order to establish a comparison and rate of pay."

This is not a complete or accurate description of the SWS.

203. Whereas the SWS includes 'speed', or rather volume of work, this is only considered in relation to a performance standard which includes quality and safety job task requirements.

204. The SWS is based on an agreed performance standard to achieve the full award rate of pay for each major duty of an employee's job. The SWS requires that:

"Employers and assessors should specify performance standards that incorporate **both quality and quantity components.**" (My emphasis).

205. The performance standard sets a volume and quality of the work to be achieved for the award classification rate of pay.

206. The performance standard may also include safety work practices that have been part of job training to ensure the employee is carrying out the work according to occupational, health and safety standards utilised in the workplace.

207. At paragraph 106 of Anthony Rohr's statement it is stated that;

". . . the SWS provides no consideration to the overall job or jobs, or to the nature of how jobs have been created for supported employees."

This is statement is incorrect.

208. The SWS assessment is required to make an assessment of the major duties of an individual's job.

209. The first step of the SWS assessment is to list the major duties of the position, as this determines the next steps of setting performance standards and conducting a performance assessment of the worker with disability.

210. The SWS assessment is also familiar with undertaking assessment of jobs that have been created or customised for people with disabilities.

211. According to the Evaluation of the Supported Wage System most employers of employees with disability using the SWS had created positions rather than filling advertised vacancies.

“None of the employers interviewed had sought out the SWS. Most were approached for employment on the basis that they were able to create a position that could be tailored to the needs of the person with disability seeking employment. It was only through the creation of such a position, and as a result of the needs of the individual, that employers became aware of the SWS<sup>44</sup> (6.2.1.1 Employers' awareness and knowledge of SWS) (*Attachment D*).

<sup>44</sup> Of the employers interviewed as part of the evaluation process the far majority of the positions held by people with disabilities were positions that had not been advertised. The majority of employers interviewed created the job specifically for the person with a disability and as a consequence of a direct approach for employment from either the disability employment service or the person with disability themselves. Of the employers interviewed most had only one person on supported wage within their employ. A number had had previous employees on the SWS, but only one at a time. A small percentage had more than one employee receiving SWS at a time. It is interesting to note that of those interviewed the sustainability of the employment was mixed but generally very durable. Some people interviewed had only recently commenced whilst many others had been employed for 2 - 6 years.” (footnote is original)

212. At paragraph 106 of Anthony Rohr's statement it is stated that the tasks performed by employees at Mai-Wel “produce low value to the overall output”.

213. The SWS assessment ensures that an employee receives the same rate of pay for the same volume of work output of a worker performing the same tasks at the same award grade.

214. For example, if an agreed productivity standard for a duty is to produce 100 quality products in 1 hour to receive the award rate of pay of \$20, and the worker with disability is assessed at achieving this standard in 2 hours, both workers would receive wage income of \$20 for the same productive output. The difference is how long it takes for the worker with disability to produce the same volume of work.

215. The wage of an employee with disability assessed by the SWS is not inflated, as it is a fair comparison of volume of work against a performance standard that addresses both quantity and quality. The value to the overall output is equitable and fair.

216. At paragraph 106 and 107 of Anthony Rohr's statement there is a confusing argument put in relation to the number of tasks, complexity of task, and skills and competencies.

217. It must be reiterated that the SWS is not a speed test. The SWS assessment determines an agreed performance standard which takes into account both quality and quantity of work to be achieved to earn the full rate of pay for a job task for the relevant classification of work.
218. The SWS assessment is an assessment in which an employee applies the skills or competencies gained by specialist training to complete their job tasks. The SWS assessment is not a discrete assessment of skill, but rather of the performance outcome of the job. The job task must be completed according to the performance standard for it to be counted.
219. It must also be reiterated that the SWS has an expectation that the employee with disability has received specialist training and reached a reasonable stable level of job performance before a SWS assessment is conducted (SWS Handbook, p. 18) **(Attachment E)**. It would be inappropriate to assess a job task that the employee cannot complete as this would score a zero, and raise questions as to the appropriateness of the job match.

**In response to the statement by Heath Dickens— paragraphs 49-57**

220. At paragraph 49 of Mr. Dickens' statement it is stated that;

“Employees working in open employment have their wages assessed and set by the SWS”

221. It is important to correct this statement to ensure the Commission is not inadvertently misled.

222. Obviously, employees without disability are not subject to the SWS.

223. Employees with disability are not, as a group, subject to the SWS. Only those employees with disability unable to work at the full award rate of pay may have their wages set by the SWS.

“Only when it is clear that a person with disability is unable to work at full productive capacity compared to that of another employee without disability, who performs the job at the Basic Performance Standard, is a SWS productivity or pro-rata wage to be used. The presence of disability in itself does not justify a pro-rata award wage” (SWS Handbook, p. 4) **(Attachment E)**..

224. Employees working in open employment and in ADEs are eligible for the SWS if a wage assessment is required.

225. At paragraph 50 of Mr. Dickens' statement it is stated that;

"In my experience the roles that open employment employees undertake are often jobs that already exist and are performed by other employees who do not have a disability. Sometimes there are modifications to the job implemented to accommodate for the person's disability."

226. Whereas most people with disability in open employment jobs do seek and gain advertised vacancies which would typically be performed by employees without disability, many people with *severe disability* working in open employment require the SWS to be able to access the open labour market. The SWS is targeted to assist a particular group of people who due to the severity of their disability may not be able to work at the full award rate of pay, across a range of employment settings.

227. The SWS was designed for people with *severe disability* who are eligible for the Disability Support Pension. This does not represent all people with disability. Many of this group, but not all, require access to the SWS in order to receive an award based wage due to the impact of their disability on their work capacity.

228. As reported by the SWS Evaluation many of the jobs obtained by people with disability employed in open employment who receive a rate of pay determined by the SWS have been created by the employer (**Attachment D**). The SWS Evaluation stated that;

"None of the employers interviewed had sought out the SWS. Most were approached for employment on the basis that they were able to create a position that could be tailored to the needs of the person with disability seeking employment. It was only through the creation of such a position, and as a result of the needs of the individual, that employers became aware of the SWS.<sup>44</sup> (6.2.1.1 Employers' awareness and knowledge of SWS) (**Attachment D**).

<sup>44</sup> Of the employers interviewed as part of the evaluation process the far majority of the positions held by people with disabilities were positions that had not been advertised. The majority of employers interviewed created the job specifically for the person with a disability and as a consequence of a direct approach for employment from either the disability employment service or the person with disability themselves. Of the employers interviewed most had only one person on supported wage within their employ. A number had had previous employees on the SWS, but only one at a time. A small percentage had more than one employee receiving SWS at a time. It is interesting to note that of those interviewed the sustainability of the employment was mixed but generally very durable. Some

people interviewed had only recently commenced whilst many others had been employed for 2 - 6 years." (footnote is original)

229. At paragraph 52 of Mr. Dickens' statement it is stated that;

"In my experience the SWS primarily measures is how fast the employee performed a task compared to another person without a disability."

230. There is a common misconception that should be corrected so the Commission is not inadvertent misled.

231. The SWS is not about speed, but rather about the volume and quality of work. (Please refer to earlier comments made on this issue at paragraphs 213 to 217)

232. The SWS is based on an agreed performance standard to achieve the full award rate of pay for each major duty of an employee's job. The SWS requires that:

"Employers and assessors should specify performance standards that incorporate both quality and quantity components."

233. The performance standard sets a volume and quality of the work to be achieved for the award classification rate of pay.

234. The performance standard may also include safety work practices that have been part of job training to ensure the employee is carrying out the work according to occupational, health and safety standards utilised in the workplace.

235. At paragraph 53 of Mr. Dickens' statement it is stated that;

"A distinct difference I have observed between open employment and supported employment is that tasks that supported employees undertake are modified to a far greater extent, in order to cater for the employee's disability."

I do not agree with this statement.

236. The creation or modification of jobs in open employment can design jobs from small to many job tasks depending on the strengths of the worker and the needs of the employer.

237. Many customised jobs in open employment can be basic and routine, from being responsible for the facing of products in one aisle of supermarket, to being responsible for simple photocopying in an office setting, to assembling surgical kits via matching in a hospital.

238. Job customisation was acknowledge by the DES Evaluation has a critical component of assisting participants with intellectual disability obtain jobs in the open labour market.

“The importance of job customisation is also emphasised because people with more severe intellectual disability are rarely able to fill advertised vacancies:

“This approach is designed to result in employment where job tasks are carved from an existing job, or created to match the skills and accommodation needs of the job seeker so that the employer’s operation is helped in a specific way. Thus, the individual has a ‘customised’ job description that did not exist prior to the negotiation process, along with other negotiated conditions of work, such as productivity expectations or work schedules” (Luecking 2011: 262) (**Attachment L**).

Job customisation requires a much deeper level of interaction between disability employment initiatives and employers. This is employer engagement at a local, often personal, level.

“Employers cited the value of competent disability employment professionals who helped identify operational improvements as a key reason for hiring and retaining employees with intellectual disability and multiple disabilities, in spite of the fact that their employment was contingent on significant customization of job duties and conditions of work...Continuing campaigns to ‘raise employer awareness’ will have limited effect on actual employer hiring behaviour without simultaneous improvements in connecting employers to actual applicants with intellectual disability” (Luecking 2011: 265)<sup>12</sup> (**Attachment I**).

239. Contrary to paragraph 54 and 55 of Mr. Dickens statement, jobs in open employment are being modified to the same extent as ADEs, and that there are a range of basic and routine job tasks in open employment that can be customised to assist businesses. This is essential if people with a similar severity of disability who work in ADEs can be successful in open employment settings.

240. At paragraph 56 of Mr. Dickens’ statement it is stated that;

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<sup>12</sup> Evaluation of Disability Employment Services 2010-2013, Final Report, p. 122

“In my experience supported employees on average also require significantly more support to assist them to manage their employment roles that have already been significantly modified to accommodate them.”

241. Many workers with disability in open employment who have jobs that have been modified, and have had their wage determined by the SWS, frequently qualify for the highest levels of ongoing support funding.
242. Ongoing support, in open employment or ADEs, is funded by the Commonwealth. The determination of a pro-rata award wage however is concerned with the performance of the employee while receiving *the same level of support and supervision that would be reasonably available to other people who do not have a disability*<sup>13</sup>. This ensures a fair assessment of productivity against an agreed performance standard to achieve an award rate of pay.
243. At paragraph 57 of Mr. Dickens’ statement it is stated that;
- “I understand the modifications to the SWS to date were aimed at trying to capture or measure the differences between open employment and supported employment.”
- This statement is not accurate.
244. The agreed SWS modifications addressed common concerns by all parties, including concerns that the independent SWS assessment may not pick up variances of productivity over time. The agreed modification to the SWS permits valid employer collected productivity data to be included in the SWS assessment.
245. Agreed modifications also addressed concerns that the previous SWS minimum weekly wage was a barrier for the employment of some employees and unfair to employers to pay a wage greater than the assessed rate of pay. The agreed modifications also addressed concerns about rounding to the ten percentile so that the exact assessed percentage rounded to a whole percentage would determine the pro-rata award rate of pay.
246. The modifications were not made to address differences in employment setting but to seek an agreed single national pro-rata award wage system to address the disadvantage and discrimination highlighted by United Voice and the Health Services Union following the findings in *Nojin v Commonwealth*. The unions identified that many

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<sup>13</sup> Supported Wage System Handbook



other wage assessment tools in the SES Award also contained similar defects to that contained in BSWAT.

Dated: 21 November 2017

Paul Cain

## **List of Attachments**

The attachments can be viewed via the following links:

1. [Attachment A](#)
2. [Attachment B](#)
3. [Attachment C](#)
4. [Attachment D](#)
5. [Attachment E](#)
6. [Attachment F](#)
7. [Attachment G](#)
8. [Attachment H](#)
9. [Attachment I](#)
10. [Attachment J](#)
11. [Attachment K](#)

**Fair Work Commission**

**4 Yearly Review of Modern Awards**

***Supported Employment Services Award 2010***

**Matter No:** AM2014/286

**STATEMENT OF ROBERT MACFARLANE**

I, Robert MacFarlane, c/o Po Box [REDACTED] say as follows:

1. I have been provided with the Australian Business Industrial (ABI) and NSW Business Chamber SES Award Review Draft Determination and submission along with the witness statements of nine Australian Disability Enterprise (ADE) representatives (including consumer and family/carer statements) and additional submissions from National Disability Services (NDS), Greenacres Disability Services (GDS) and Our Voice.
2. I was asked, after reading this material, to compose a report or witness statement that addresses a number of questions:
  - 2.1 Can the Supported Wage System (SWS) be applied, and has it been applied, as a wage assessment tool in ADE employment?
  - 2.2 Does the ADE work setting adversely affect the relevance and effectiveness of the SWS as a wage assessment tool as opposed to open employment environments?
  - 2.3 Is the proposed "tool specific system of work classification" (the WVCT) necessary for wage setting in ADE employment?
  - 2.4 What are the benefits or disadvantages for wage assessment if the WCVT is adopted in comparison to the SWS?

**BACKGROUND**

3. I set out my experience and qualifications below:
4. 22 years as an accredited Supported Wage Assessor, since the second round of SWS Assessor training offered by the Department (DFACS at the time) in early 1995 with over 1500 assessments completed in a wide range of occupations and industries both in the open labour market and "supported employment" environments.

5. 10 years as a Workplace Modifications Assessor under the Employment Assistance Fund (EAF) managed by Job Access/Work Focus for the Commonwealth.
6. 7 years as an Ongoing Support Assessor responsible for reports/recommendations for Disability Employment Service (DES) provider funding to assist and support workers with disability (including those under SWS) with job maintenance and skill development.
7. 34 years experience in the disability and employment industries, including
  - 7.1 Four years (1983-1986) as an employment/specialist disability officer in the former Commonwealth Employment Service in Adelaide and Melbourne,
  - 7.2 Four years (1987-1990) working in Community Housing for people with intellectual or dual/multiple disability coming out of institutional care in Melbourne & Sydney,
  - 7.3 Ten years (1991-2001) with a DES provider predominantly in the area of marketing and job development in Melbourne, and
  - 7.4 Sixteen years (2001- ) operating my own IR/HR/EEO consultancy in Melbourne offering a range of services with a focus on equity and access for workers with disability to community, public and private sector organisations (including accreditation as a National Panel of Assessors provider).
8. A range of generic and specialist qualifications including a BA (majoring in History), a Post Graduate Diploma in Human Resources and Industrial Relations Management, and a Certificate 4 in Workplace Training and Assessment.
9. A familiarity and involvement with Sheltered Workshop/Business Service/Australian Disability Enterprise (ADE) workplaces as an advocate for community housing residents (late 1980s/early 1990s), a DES employment consultant liaising with ADE staff and assisting “supported employees” transition to open employment (1990s), and a Supported Wage Assessor in a variety of ADEs since the late 1990s.
10. A long-standing interest and involvement in the historical development of wage assessment tools in the Australian Industrial Relations system that pre-dates the 1994 introduction of the SWS, including
  - 10.1 Negotiating “Slow & Infirm Worker” permits or certificates of exemption from minimum wages.

- 10.2 Submissions and focus group involvement/input to the development of the SWS after the recommendations of the Ronald and Dunoon Reports in the early 1990s as well as to the only major independent SWS Evaluation (commissioned by DFACs, delivered by KPMG) in 2001 (**Attachment A**).
- 10.3 Articles (Access, DEAC's National Journal for people with a disability) and local/international conference presentations (for example, ACE National, now DEA & EUSE, European Union of Supported Employment) about the origins/achievements/possible reforms of the SWS and the history/development of wage assessment tools in ADEs.
- 10.4 Submissions (e.g. DFACS 2005, HREOC 2010) and commentary about the now defunct Business Services Wage Assessment Tool (BSWAT) pre- and post-implementation, and after the final High Court discrimination adjudication.
- 10.5 Wage assessment project work comparing wage outcomes between SWS and in-house ADE wage assessment tools (Scope Victoria, Sunnyfields NSW, Clearwater Geelong).
- 10.6 Involvement with the design and implementation of the mini (3 ADE) and major (20 ADE) trials of the Modified SWS tool that has recently been inserted in the Supported Employment Services award.
- 10.7 Two Churchill Fellowship applications to study the interface between pro-rata wage determination for workers with disability and tax transfer/social security systems in Europe in light of the UN Convention on the Rights of Persons with Disability (in particular the right to an adequate income) and the inadequacy of the current situation of workers with disability on pro-rata assessed wages in Australia.

## INTRODUCTION

11. *"The Greenacres Disability Service (GDS) believes that determining wages based on how fast a person works is archaic and the FWC would not adopt this approach for workers without disabilities in ADEs. In particular, because the SWS only measures against the task that a supported employee can safely carry out and not all the duties of a position it makes the SWS more perverse. The SWS may be appropriate in circumstances where an employee can generally carry out most of the duties associated with a whole job, but because of their disability may be slower as they take more care to complete the job to a quality standard. GDS contends that it is inappropriate particularly for supported employees with intellectual disability in ADEs who in many circumstances have limits on the types*

*of work they can do safely. Such employees carry out low skills tasks and in many cases as a consequence can work reasonably quickly at different periods of time with ongoing support and training. The SWS was originally developed for Open Employment, and as such has not been embraced by the sector because of its inherent flaws.” (GDS Submission, Paragraphs 13-17)*

12. The above extract from the GDS Submission to the Fair Work Commission’s Review of the SES Award highlights some errors in the criticisms of the Supported Wage System (SWS).
13. SWS assessments have never been just about speed or pace of work, but also the quality of work expected. SWS employees must use their skills and competencies to undertake their designated tasks safely and to the required standards, and this requirement is captured in the quality component of any SWS assessment.
14. Use of the SWS or productivity-based wage assessments for employees without disability is not appropriate or relevant, as they are entitled to the full award rate of pay for performing tasks of the relevant classification.
15. A fundamental principle of the SWS is that it is a measure of performance in actual jobs by people with disability assessed after adequate training, job design, and reasonable workplace adjustments have confirmed productivity shortfalls.
16. The majority of SWS employees since its inception through a Full Bench decision of the AIRC in 1994 have been employees with intellectual disability or cognitive impairments. The figure given in the 2001 Supported Wage System Evaluation Report (p.27) was around 75% and I doubt if this has changed much since then **(Attachment B)**.
17. Most SWS job placements have been created or redesigned positions, not advertised pre-existing “whole jobs”. The same 2001 SWS Evaluation Report had this to say: *“Of the employers interviewed....by far the majority of the positions held by people with disabilities were positions that had not been advertised. The majority of employers interviewed created the job specifically for the person with a disability”* (p.34). This is still the case **(Attachment B)**.
18. Most SWS employers in the open labour market tailor jobs, usually basic, to meet the individual capabilities of their disabled employees, and consider these “low skill” jobs to be valuable in inputting to overall business operations.
19. There has always been a significant minority of ADEs that have embraced the SWS firstly as s.10 services under the Disability Services Act (DSA) 1986 and then post-2003 when the SWS was opened up to all ADEs via the

Commonwealth Government's Disability Employment Reform Package Award Wages Strategy and the DSA Disability Services Standards Quality Assurance/ Accreditation process. Statistics (taken from the Australian Government Disability Services Census in 2008, Table 4.26, p. 94) concerning numbers of "supported employees" assessed under the SWS indicate a figure of 12% (or 2,227 individuals). After the recent deletion of BSWAT from the SES Award, I expect this number to now be higher (**Attachment C**).

20. In the next four sections of my statement I will endeavour to flesh out the operation of the SWS and its applicability in the ADE sector before tackling the subject of the comparative worth of the Supported Wage Assessment Tool (SWAT) and the proposed Work Value Classification Tool (WVCT).

### **SWS METHODOLOGY: SIMPLE & COMPLEX JOBS, THE ISSUE OF COMPETENCY**

21. *"In my experience...the SWS tool is not an accurate measure of a supported employee's overall capability. The SWS simply measures output for one particular type of skill, not an employee's overall capacity or ability to contribute to multiple tasks" (Catholic Care Sydney, Paragraph 54).*

22. The SWS assessment tool (SWAT) and process is very flexible, relying on negotiation and collaboration amongst the stakeholders to analyse the job, and agree on the number of duties/ tasks to be assessed, the unit of measurement (i.e. time taken to complete task, or units produced in a set time interval), performance standards, and the time weighting between tasks. Consequently, it can be used effectively on both simple and complex duties/tasks. Some examples can best illustrate this.

23. Take a kitchen-hand role (typically a Grade 1 or 2 award position). An assessment may involve a basic task or two such as dishwasher operation involving rinsing kitchen utensils and loading them into dishwasher or a rack to be placed in a dishwasher, and maybe also once the wash cycle is over putting the "dishes" back in their correct storage locations. Some SWS employees might not have the capability to check and set up the dishwasher beforehand, others might be able to learn this. Some SWS employees might struggle with remembering where everything is stored and need assistance with some or all of this task component. Some larger pots or trays might also need to be hand washed/scrubbed. Some SWS employees might have poor discrimination skills and need someone to check a load for any still unclean dishes, others may be able to learn this skill. A much more complex kitchen-hand job might just involve food preparation and basic cooking tasks, or could involve dishwashing as well. How such more complex kitchen-hand jobs are assessed is usually to select an

agreed range of representative (and maybe more commonly undertaken) tasks, perhaps dishwasher operation, one or more food preparation tasks (e.g. particular vegetable preparations, or making up sandwiches/rolls or salads or preparing a quiche), or one or more kitchen cleaning tasks (e.g. emptying bins, sweeping and mopping floors at the end of a shift, or wiping down benches or equipment). There is usually not enough time to assess absolutely every task in more complex roles. But the idea is to negotiate and agree on a range of representative tasks that are reflective of an individual's overall productivity/performance.

24. Or take a warehouse assistant role. I undertook one new job SWS assessment recently where the individual's primary role in a part-time position was to unload stock from detached freight containers onto pallets in a plastics packaging wholesaler. This SWS employee usually worked alongside another employee without a disability who determined the pattern of carton loading on the pallet and then used a pallet jack to move each full pallet as necessary into the warehouse. While this was happening, the SWS employee's other task was to position a new pallet in front of the container. Other more complex warehousing SWS assessments have involved a much wider range of tasks: picking and packing orders manually or with a forklift or cherry picker, checking off incoming stock against order invoices, computer data entry, loading or unloading trucks and manoeuvring stock around the warehouse using a forklift, setting up and operating a shrink wrap machine for outgoing pallets of stock.
25. An SWS assessment does not just involve a "speed test". When analysing a job and designing the assessment methodology with an employer, attention is given to establishing acceptable comparative performance standards. Each task must be completed competently with the required skill and knowledge to ensure the acceptable quality standards are achieved. In a units per "x" minutes approach, this could mean removing defective products from the count. In a time per task approach, any additional time needed to rectify an incorrectly produced or assembled item or to fully complete a task to the required standard is added into the observational timings.
26. Another one-off critique of the SWS wage assessment process (Centacare Submission Paragraphs 56-57) suggested that it was unable to reduce an employee's wage if their performance had deteriorated due to age and the nature of their disability. This is just incorrect. Clause 14.4(f) in the SES Award covers the situation: *"a wage assessment that determines a lower percentage than an earlier wage assessment is of no effect unless the reduction in percentage is solely due to the regression of the employee's disability"* though the onus is on the employer to *"exhaust all other reasonable training options and options to allocate the employee new tasks to avoid the regression"*.



## THE QUESTION OF CUSTOMISED EMPLOYMENT OR JOB CARVING

27. *"In my experience the roles that open employees undertake are often jobs that already exist and are performed by other employees who do not have a disability. Sometimes there are modifications to the job implemented to accommodate for the person's disability.... A distinct difference between open employment and supported employment is that the tasks that supported employees undertake are modified to a far greater extent in order to cater for the employee's disability. Typically, a job modified in this way would not ever exist in a mainstream employment setting. It is for this reason that the modified SWS's ability to achieve a like for like comparison is unsound"* (Disability Services Australia submission, Paragraphs 49-55).
28. The majority of SWS positions in the mainstream labour force are specially created or "job carved", often after a specialist DES provider has introduced the concept and a suitable jobseeker to an employer. This, as I have previously mentioned, was my specialty in the decade when I was a DES provider employee and was responsible for setting up many SWS placements, predominantly for jobseekers with intellectual disability or cognitive impairment. My approach and rationale when negotiating with employers to redesign or create jobs tailored to individual capabilities was to point out that multi-skilling is not always cost-effective and that job carving manufactured a win/win situation, a mutual benefit arrangement: the employer gets essential basic tasks done often allowing other workers to spend more time on more complex tasks equally important to business efficacy, the employee with a disability is gainfully employed and fairly remunerated under the SWS in a job matched to his/her abilities.
29. Again the point is best illustrated with a variety of examples.
30. One of the first redesigned positions I sourced was for a young man with Down Syndrome, quite significantly cognitively impaired, with limited initiative/problem-solving skills, and basic often difficult-to-understand verbal language. A local KFC franchise was convinced to create a largely back-of-house position packing/date stamping/storing potato & gravy containers, collecting cartons of drink from the cool-room to refill fridges behind the counter and emptying/relining bins. Interestingly it came to my attention not long ago that this man had recently retired after 24 years KFC service and his retirement had been acknowledged with a special in-store celebration, attended by the original franchisee, ex-managers, co-workers, ex-DES provider trainer/support workers, former SWS assessors and his parents, and involving speeches, a cake and the classic gift of a watch!

31. Another successful customised employment example was at a Spotlight store in Niddrie where I convinced the manager to create three part-time store tidying positions for job candidates who I knew wanted to work in retail but really did not have the customer service skills or intellectual capacity to undertake a full range of shop assistant tasks. These were 15 hour positions across three different store departments (Manchester, fabrics, haberdashery/craft accessories) and involved primarily the refolding and repositioning stock with occasional assistance to colleagues filling displays with new stock. This freed up more skilled shop retail staff to serve customers and undertake the more complex aspects of their roles. This then set a great precedent for approaching other Spotlight stores with this job carving idea.
32. Both major Australian retail giants, Coles and Woolworths, have engaged in job re-engineering as well with the creation of many dedicated SWS face-up positions that involve people predominantly with intellectual disabilities tidying stock on shelves throughout the supermarket. Sometimes individuals are designated a few aisles or a section of the store, or sometimes they are trained to work across the entire store. I know of one Coles store that, at the instigation of a local DES provider, created an enclave with 4-5 workers with intellectual disabilities permanently trained and supervised by a job coach recruited and paid for by the DES provider. This arrangement continues on to this date though to a lesser extent: the original DES provider was defunded, some of the employees moved on and the current Coles store manager convinced his Area Manager to redeploy a Coles employee to offer constant support to the two remaining employees from the original enclave who have now worked there for over 10 years. Some Coles and Woolworths stores who have not outsourced their trolley collecting services, have hired jobseekers with intellectual disabilities to collect trolleys and sometimes have up-skilled those capable of more to complete some basic in-store tasks (especially important for rainy days) such as collecting & restocking & even cleaning shopping baskets, restocking plastic bags at registers, stock face-up, filling drink fridges near the cash registers or helping to re-shelve "loose" or misplaced stock from around the store.
33. I recently did an SWS review assessment of a Bunnings employee in a tailored position. His primary job role was to display and move stock around in the gardening /nursery section using a palette jack under the close supervision of a co-worker with regard to the order of jobs across a part-time shift. His other main function was to work in a pair with a co-worker as a "spotter", an OH&S requirement in Bunnings stores when a forklift driver is elevating stock on palettes into upper shelves. Basically this just involved blocking off both ends of an aisle and standing guard to ensure no customers entered the aisle. The employer agreed that this spotting task should be factored into the assessment at

100% for 15% of his weekly hours, and I observed and assessed him and a co-worker in the other duties.

34. Officeworks is another large employer that has re-engineered retail jobs to suit individual capabilities. One store in which I conducted an SWS assessment had a young man with autism dedicated to a two-task part-time position scanning, price-checking and replacing stock tickets throughout the store . A clear regulated routine was created so that he would scan one side of an aisle at a time, then check what tickets needed re-pricing to match current store-wide prices, print off new tickets using the office computer and printer, and finally display them on the correct shelving after removing and binning the old tickets. He had also been trained to re-direct any customer enquiries to other staff as this sort of customer service interaction was not his forte.
35. Some major fast food chains, such as McDonald's, KFC or Hungry Jacks, have delved into job redesign as well, usually by creating SWS restaurant cleaner roles that could include some or all of the following duties depending on the capabilities of the individual: bin emptying/relining, table and chair clearing/cleaning, tray collection/cleaning, spot sweeping of floor debris, floor mopping, toilet checking/cleaning, glass/metal/tile surface spot-cleaning, or car park rubbish removal. Typically, these tasks have been performed by counter or back-of-house staff at times when it was not so busy taking and filling customer orders. In my experience the majority, if not all, of the job candidates filling this type of customised position have been people with intellectual disability.
36. One DES provider in Melbourne, Jobs Support, who only work with people with moderate or severe intellectual disability, have a penchant for developing interesting SWS office support positions, often in or near the CBD, that might include a range of basic tasks such as setting up and tidying meeting rooms, filling up photocopying machines, cleaning and restocking the staff kitchen/tea room, and mail distribution. I have undertaken a number of these SWS assessments in a range of office-based businesses, for example, lawyers, engineering consultants, and financial advisors. These assessments always remind me of my days as a DES operative trying to place people with intellectual disability in federal government departments under the now-defunct Commonwealth Government's Intellectual Disability Access Program (IDAP) in the early 1990s whereby it was possible to bypass the standard public service entry test and place eligible individuals into by and large re-designed clerical assistant positions. I had success with the Department of Family and Community Services (DFACS) where I placed a young Vietnamese woman with a moderate intellectual disability in a full-time job we designed around her capabilities: filing, basic data entry, photocopying, mail sorting and internal deliveries.

37. Another employer that I enjoyed working with and who were open to job carving an SWS office assistant position was the Essendon Football Club. I was approached by a local special school, one of whose ex-students was a mad Bombers fan who religiously attended all training sessions and most home games, as they in turn had been approached by the club about the possibility of creating an employment opportunity for this particular young man. An office “gopher” job was created involving a variety of basic tasks. The success of this SWS placement then opened the doors to creating an SWS kitchen-hand job for another client with an intellectual disability in the Windy Hill Social Club that primarily involved dishwashing.
38. Another local Melbourne DES provider has been successful over the years in developing a range of basic SWS job positions in the Reservoir area in a group of aged care facilities. These were mainly re-designed positions in the kitchen and catering areas. The last SWS assessment of one of these clients that I undertook involved a young woman with Down Syndrome who cleared and set up tables in a resident dining room before and after morning tea and lunch as well as helping kitchen staff serve meals and drinks to seated residents.
39. Some of these specially created positions show great creativity and ingenuity by certain DES provider staff. One SWS job that I have assessed a few times over the years involves a man with quite severe cerebral palsy (an electric wheelchair user with reduced fine motor skills and slurred speech) working for a catering company that specialised in hospital cafe contracts. He worked between two hospital sites, including the one near to the catering company’s head office. His duties involved such tasks as wiping down tables after customers had left, collecting collapsed cartons from the cafes and other nearby retail outlets to deliver to the basement recycling area, and collecting/delivering mail and other paperwork from the head office across the road.
40. Some employers have gone down the job creation path on their own initiative, motivated by ideas of social responsibility, without the prodding of DES provider business development/ marketing staff. For example, for the last 19 years one printing company in a Melbourne bayside suburb that specialises in printing and collating school diaries and folders has employed a man with a significant acquired brain injury (ABI) and related physical disabilities in a redesigned position undertaking a few very basic tasks. I undertook his annual SWS review assessment recently. His main task was operating a simple press that cut ribbon used to make diary page markers. He also helped out making up despatch cartons and assembling folders.
41. Very few SWS jobs in open employment are advertised positions that workers without disability would normally perform, most have been significantly modified.

## **SWS ASSESSMENTS IN ADES**

42. *“As the SWS was not originally set up for Supported Employment, rather open employment, it is not suitable to measure the competencies of our complex supported employees” (Asteria Submission, Paragraph 51).*
43. I have undertaken SWS assessments in a variety of Melbourne and Geelong ADEs involving assembly and packaging, warehousing, ceramic manufacture and decoration, graphic design, gardening, window cleaning, commercial cleaning and catering. These have at times also involved group/team work and production lines.
44. Assessment results have usually ranged from 10% to 80%, though recently I undertook some assessments in a couple of old VATMI sites, now run by the Endeavour Foundation, where a number of higher skill employees (previously assessed under BSWAT and then the Greenacres tool) were transitioned to the SWS: two achieved outcomes of 90% (setting up, operating, dismantling, troubleshooting, cleaning computer numerated specialised food packaging machines and production lines) and two achieved 100% results (one a very experienced forklift driver, the other running and supervising an entire manual food packaging operation).
45. Mambourin Enterprises since 1998 have operated two types of ADEs in the western suburbs of Melbourne, a more traditional factory-based assembly and packaging operation and a mobile crew undertaking gardening maintenance work with a base at a “sensory garden” that they created and maintain and is open to the public. The majority of their employees have intellectual disabilities. Apart from a brief interlude using BSWAT, they have primarily used SWS to determine the wages of their supported employees. Myself and a few other SWS assessors over the years have assisted them develop an internal system of production records enabling them to take productivity timings (signed off by supervisor and employee) that could be used in the SWS assessment if there was a clear case of over-performance during an SWS assessment. This is the sort of SWS best practice that has subsequently been formalised, after three trials and the FWC conciliation process, into the recently sanctioned modifications of the SWS tool. I have also used this approach in open employment situations where fluctuating performance can obviously be an issue. One example comes immediately to mind: a press machine operator in a large manufacturing firm whose variable performance was a consequence of a cognitive impairment and a chronic episodic mental illness (paranoid schizophrenia). To gain a fair and equitable

assessment outcome we established a reasonable machine output benchmark and then utilised this operator's own production logbook (signed off after each shift and cross-signed by his supervisor) for the 3-month period preceding the SWS assessment in addition to a series of timings across a few hours on the day of the actual SWS assessment.

46. Mambourin have also chosen to approach SWS assessments in their assembly and packaging operation by utilising duties from two larger and more regular contracts such that assessments involve two representative duties with up to a total of seven tasks depending on the skill level of the individual employee. Tasks include collecting "raw materials" and setting up the work bench, labelling/erecting/stacking cardboard mail trays, sub-assembly and assembly of plumbing products, packing and sealing such product, quality control and weighing, packing into cartons and palletising cartons. Performance benchmarks have been established for these tasks, and validated internal productivity data is collected in the 1-3 months before an SWS assessment to be used if necessary. If this work is not available at the time of a scheduled SWS assessment, then other assembly, labelling, collating or packaging duties can be used, and benchmarks set as necessary.
47. Clean Force Property Services was set up by a Northern Suburbs DES provider in 2001. It is now run by Wise Employment and based in Preston. It is funded as an ADE but is in the process of transitioning to a social enterprise model by hiring workers without disability in some of their various operations. The majority of its workforce have traditionally been people with psychiatric disability (sometimes with cognitive impairment) and mental health conditions, though they do also hire people from other disability groups (ABI, intellectual disability). The philosophy behind this ADE's creation was that many people with psychiatric disability were not getting or retaining employment and a more supportive work environment would assist to create employment and training as well as the possibility for some employees to then transition into open employment. At their inception, pre Modern Awards and before the SWS model clause was in the relevant Cleaning Services Award, I assisted them through the process of developing and getting AIRC approval for an Enterprise Agreement with the model SWS clause to enable the use of SWS assessments as well as to create an intermediate pre-assessment training wage level. Presently they use the Cleaning Services Award to determine wages.
48. Myself and a couple of other SWS assessors have also helped Clean Force develop an internal assessment process whereby SWS employees are assessed by a supervisor over three full shifts (3-5 hours) in the immediate months leading up to an official SWS assessment. These internal assessments are signed off by the SWS employee in the knowledge that the results may be used in the official SWS assessment. Most often these assessments are used to validate a higher

level of productivity as sometimes their SWS employees with mental health conditions, due to stress and anxiety, under-perform during an assessment.

49. Clean Force SWS assessments can involve from one to four or five duties of varying degrees of complexity, again depending on the capabilities and skill sets of the individual employees: rubbish collection and disposal, vacuuming, toilet cleaning, hard floor dry and/or wet mopping, and detailing of desks and other office surfaces. Performance benchmarks have been set up, using certain tasks and routines at particular sites for each of the various cleaning crews that operate. Some staff members with cognitive impairment and less developed discrimination skills have in the past been given simpler cleaning roles on the larger contract sites that might just involve a bin run or vacuuming in set areas that need full attention rather than a spot-cleaning approach.
50. Wesley Fire and Clay in Lilydale have long had their “supported employees” assessed using the SWS. They manufacture a range of ceramic products including kitchenware, vases, bird baths, garden herb sticks and decorated bead assemblages. A range of tasks of varying degrees of complexity exist to cater to the mixed skill sets of the employees, such as pouring clay into moulds, removing items from moulds, fettling, glazing, hand creation of beads and other clay products, cleaning and decoration work using basic hand tools, geometrically-patterned moulds or paintbrushes. Currently a representative duty –decorative bead-making – consisting of three main tasks is used for SWS assessment purposes: collection of materials and work bench set-up, hand crafting clay beads using basic tools (skewer, decorative pattern mould), and packing up and cleaning the work area on completion.
51. The suggestion that the SWAT cannot cater for accurate assessments in group work or production line situations is not consistent with my experience.
52. If a person working in a team gets assistance with a particular task (e.g. lifting a lawnmower off or onto a trailer, carrying a heavy tray of assembled metal brackets to a packing work bench, collecting and stacking docked timber) then it is possible to include the assistance in the timings if this is a normal and accepted safe work practice, or to isolate the task and assess it individually.
53. Similarly, in a production line environment there are ways to ensure a fair and accurate assessment methodology. Often an automated conveyer-style production line is set at the speed of the slowest operative, and if that is the case then any SWS benchmarks established with a fully-waged comparator should for fairness’ sake be set with the conveyor operating at the same speed. For un-automated production lines working across a series of benches or tables, then workflow can be organised by having workers with different productivity levels working side by side or through judicious job rotation. In my experience it is not

difficult to get a fair assessment result in such a situation by ensuring there is an adequate workflow to compare like with like.

## **A SPECIAL AND UNIQUE WORK ENVIRONMENT?**

54. *“In my view people with disabilities should be treated like other employees, that is, they should have their wages determined by virtue of their level of supervision, responsibility, initiative, skills and the work they do. In a supported employment environment the level of support and supervision is a major factor that also needs to be considered” (Greenacres Submission, Paragraph 39).*
55. A sustained refrain in the ADE submission is that their status as a business and a service merits special dispensations in the area of wage determination. This underpins the creation of a new sub-award classification system that heavily emphasises a wide range of personal and work supports in addition to varying supervision levels, organisational and communication skills, quality control, focus, task complexity, and productivity.
56. It is not the case that employees in open employment have “their wages determined by virtue of their level of supervision, responsibility and initiative” so much as on the basis of the work they actually undertake within a certain skill level or job classification.
57. What has not been stated is that supported employment services are specifically funded by the government to provide additional support based on disability-related assessments of support needs. The higher the support need, the higher the funding.
58. The only way employers in the open labour market get compensation for any above-average levels of supervision or direction they provide is through the rounding process in an SWS assessment which has been historically disallowed in the ADE sector precisely because they are funded to provide extra levels of support.
59. For example, if someone is assessed at 48%, normally rounding is to the closest decile (50%) unless there are added costs associated with time taken to provide extra levels of support to achieve satisfactory levels of work performance. In which case the wage outcome, in this example, could be rounded down to 40%.
60. Some SWS employers, however, also benefit from the external support that can be provided by Disability Employment Service (DES) provider staff both onsite



(e.g. new task training, refresher training, development of memory aids or work routine flowcharts/checklists, reinforcement of OH&S requirements and acceptable work dress/grooming/behaviour, help accessing EAF funding for special equipment or structural modifications to the workplace) and offsite (e.g. travel training, provision or linkage into counselling or other services to address non-work personal issues with the potential to impact on work performance, liaison with family/carers).

61. People with significant disabilities, both in ADEs and mainstream employment, are eligible for National Disability Insurance Scheme (NDIS) plans which are presently or will in the future provide funding to purchase support services necessary to facilitate and enable workforce participation. The current DES Work-Based Personal Assistance scheme that funds up to 10 hours of support from a personal attendant for workers with significant disabilities to assist with using public transport, eating, toileting, or secretarial tasks like phone or internet access is being progressively moved across into NDIS as it rolls out across Australia. Employer Assistance Fund (EAF) dollars through Job Access are available for ADE employees if they require special equipment or structural modifications in the workplace to enable satisfactory work performance **(Attachment D)**.
62. To allow for support or supervision in a wage assessment process would result in the employer passing on these costs to the worker for the performance of the same class of work that if performed by a worker without a disability would not be discounted. Further, ADEs already have access to considerable funding for these costs.

#### **WORK VALUE CLASSIFICATION TOOL (WVCT) VS. SUPPORTED WAGE ASSESSMENT TOOL (SWAT)**

63. *“...a skills and competency based structure provides a fairer assessment for the employer and the supported employees’ range of tasks that he/she can undertake. A productivity only assessment on a task doesn’t provide the employer with all the inputs required to complete a finished product” (AID Submission, Paragraph 35).*
64. To me, the WVCT is not an appropriate measure of an employee’s work performance.
65. The WVCT concept of “work value” and “whole jobs” in fact devalues the worth of low skill employees by differentiating between low and high skill employees through the creation of a separate classification/assessment process for low skill employees which delivers wage outcomes below what is available for higher skill

employees through the SWS. There is a perverse logic in high skill employees with low productivity being guaranteed higher wages than low skill employees with high productivity when the jobs of all employees are as valuable to overall business performance regardless of levels of job re-engineering.

66. Competencies/skills should be used, as they are in the mainstream workforce, to determine job suitability and pay range through insertion at the requisite job classification level through the initial job selection process and for subsequent performance appraisals, promotion/re-classification or bonus/incentive rewards (e.g. for leadership, quality, dedication), and then a wage ought to be determined through a fair and equitable productivity-based assessment for actual work performed, whether in a re-engineered or standard position, in the recognition that award classification levels typically apply to a broad spectrum of skills and tasks. The “whole job” or “full suite of award competencies” terminology used in the ADE submission just serves to obscure this important distinction.
67. On my assessment of the WVCT, there are significant disadvantages with its adoption as a wage assessment option when compared to the SWAT.
68. The concession that Grade 3 and above jobs will be assessed using the SWS will apply to a minority of ADE employees.
69. Level D (70% -100%) employees, given the possibility of full award wages within the ADE or through transition to open employment, will also be in a minority, and the aim of the complicated four level Grade 2 classification structure is to institute a system of wage discounting with the potential to keep the majority of ADE workers at lower skill levels and lower rates of pay.
70. Reliance on unaccredited in-house assessors as opposed to externally-accredited independent assessors as in the SWS does not lend itself to fairness, and sidesteps the whole “conflict of interest” question. Access to a “qualified independent assessor” is only available if appointed by the FWC in the case of a dispute about employee classification at a skill level. Not many ADE employees will have the nous and confidence to appeal in-house classification determinations.
71. The methodology behind the design of the various skill levels, pay percentages and wage points within the “sub-award competence” job classification structure is not transparent or complete. Was it just a case of start at 12.5%, the newly sanctioned minimum SWS rate, and work up to 100%? What happened to the 60-70% range between Levels C & D? The numbers appear to be arbitrary and incomplete with no clearly delineated rationale.

72. The WVCT has its own inbuilt classification system separate to what already exists in the SES award and contains elements (such as work and personal support) that, as discussed earlier, are not relevant to pro-rata wage determination for ADE employees.
73. Whilst the 50/50 weighting between the competency and productivity assessments of BSWAT has gone, the potential for discrimination and inequitable wage discounting lives on with the complex definitions of skill levels, base work skills and indicative task schedules that are very much open to subjective and inconsistent interpretation by ADE classification and supervisory staff. For example,
- 73.1 The difference between requiring the quality of work to be “constantly checked” (Level A) and “routinely checked” (Level B) is not clear creating problems for practicable implementation.
- 73.2 An inability to set up or organise work ought to be a reasonable adjustment component of job design addressing the impact of disability rather than a way of penalising a less able employee.
- 73.3 Distractibility, going off task and/or leaving the work station are more appropriately incorporated into the timed observations of an SWS-like productivity assessment rather than be used as skill-level determinants.
- 73.4 It is not evident how “pre-determined output targets” or work pace for Level D employees are going to be established.
- 73.5 The difference between very basic and basic tasks or more complex tasks and complex tasks does not appear at all clear or easy to determine.
74. The WVCT is not purely a “skills and competency based structure” but also includes a poorly designed productivity assessment component:
- 74.1 There is no rationale for having 4 wage points within each skill band to be determined, as per the Output Guidelines at Annexure D, by a productivity assessment other than to have another way to keep wages low.
- 74.2 Similarly, there is no rationale for having four as opposed to one or two wage points per skill band.
- 74.3 Also it could be considered discriminatory to have ADE employee output determined only in relation to a comparator without a disability when surely the comparison should be with any employee familiar with the same work

and able to perform at award levels of productivity regardless of whether they have a disability or not.

74.4 There is no need for a pre-set procedure (2 hours, 4 tasks, 30 minute count per task) for this output assessment.

74.5 The more flexible SWS assessment methodology allows for 5 hours per assessment with the possibility, on application and justification to DSS, of up to an extra 4 hours (i.e. 9 hours maximum) for more complex jobs, and the assessment methodology is up for negotiation on each occasion depending on the nature of the job.

74.6 There should be time weighting between the various assessment tasks in order to factor in differential outcomes across all tasks when determining an output percentage as in a more equitable productivity assessment approach like the SWS.

## CONCLUSION

75. *"The SWS gives effect to the principles of the DDA and the protections it provides to people with disabilities whilst also taking into account market pressures affecting employers. Stakeholders consistently acknowledge the SWS as the most fair, reasonable and transparent workplace relations mechanism that enables exemption from minimum rates of pay."* (DFACS Supported Wage Evaluation 2001, p 17) **(Attachment B)**.

76. Recommendation 3 of the 2001 FACS Supported Wage Evaluation Report in 2001 was *"that FACS modify the guidelines and associated mechanisms to enable its adoption in section 13 Business Services"* **(Attachment B)**.

77. This same report also had this to say:

*"The SWS assessment process is seen to have relevance and application within business services while other elements of the system are seen to need modification before they could be applied"* (p 37) **(Attachment B)**.

78. An associated footnote outlined this necessary modification: *"The minimum wage rate, the means by which productivity links to an appropriate wage rate especially for those with a low productive capacity"*. Other sections of this 2001 SWS Evaluation critiqued the snap shot approach for those with variable performance and identified other areas for reform related to wage outcome rounding and frequency of reviews **(Attachment B)**.

79. The SWS has been modified to include best practice techniques with regards to factoring in episodic or fluctuating performance not captured in snap-shot approaches and removing such administrative defects as weekly minimum wages tied irrelevantly to DSP income thresholds, decile rounding of assessment scores and mandatory annual reviews.
80. The SWS can be, and has been, effectively utilised in ADE workplaces, and the recent modifications have removed various long critiqued defects in the ADE environment at least.
81. The ADE work environment does not impede the relevance or efficacy of the SWS.
82. The proposed WVCT is unnecessary for wage-setting purposes in ADEs, and has the potential to create another BSWAT-like wage assessment tool.
83. The SWS is a long-sanctioned affirmative action industrial relations measure that can deliver fair wage outcomes using a flexible, transparent and independent assessment methodology in all existing award job classifications and all workplaces.

Dated: 21 November 2017

Robert MacFarlane

## List of Attachments

The attachments can be viewed via the following links:

1. [Attachment A](#)
2. [Attachment B](#)
3. [Attachment C](#)
4. [Attachment D](#)

## **FAIR WORK COMMISSION**

### **4 Yearly Review of Modern Awards**

#### ***Supported Employment Services Award 2010***

**Matter No:** AM2014/286

### **STATEMENT OF LEIGH SVENDSEN**

I, Leigh Svendsen, c/o Po Box [REDACTED] say as follows:

#### **PERSONAL DETAILS**

1. I am the Senior National Industrial Officer of the Health Services Union (HSU). I have been employed in this capacity since early 2015, and employed as an industrial officer in the national office since August 2012.
2. Prior to working at the national office of the HSU I was employed as the Senior Industrial Officer in the Victoria No. 2 Branch, known as the Health and Community Services Union, Victoria Branch (HACSU) from around 2006. HACSU covers all workers employed in Mental Health Services and Disability Services, in the public and private, profit and not for profit sectors.
3. As a national industrial officer part of my principle responsibility has been the conduct of the 4-yearly review process into modern awards.
4. HSU members work in aged care, disability services, community health, mental health, private practices and hospitals. Members are health professionals, paramedics, scientists, aged care workers, nurses, technicians, personal care and support workers, clerical and administrative staff, disability support workers, managers, doctors, medical librarians and support staff.
5. The HSU has an interest in many of the health and welfare modern awards:
  - a. Aboriginal Community Controlled Health Services Award 2010
  - b. Aged Care Award 2010
  - c. Ambulance and Patient Transport Award 2010
  - d. Health Professionals and Support Services Award 2010
  - e. Medical Practitioners Award 2010
  - f. Nurses Award 2010
  - g. Pharmacy Industry Award 2010

- h. Social, Community, Home Care and Disability Services Award 2010
  - i. Supported Employment Services Award 2010 [SESA]
6. In December 2013, the HSU and United Voice [the unions] made an application to vary the SESA to remove the *Business Services Wage Assessment Tool* (BSWAT), in light of the Full Court of the Federal Court in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 (21 December 2012) which held that the BSWAT unfairly discriminated against workers with an intellectual disability.
  7. The 2013 application to vary a modern award (AM2013/30) also sought to remove all tools which contained competency based assessments.
  8. The unions have subsequently participated in extensive and exhaustive conciliation processes before Deputy President Booth, under both the AM2013/30 application and more latterly the 4-year review process for the SESA, AM2014/286.
  9. My following comments are limited by the confidentiality of the conciliation processes, and only made at all because some witnesses, especially Mr Christodoulou, have referred to the confidential trials arising from these conferences in witness statements filed in these proceedings.
  10. During the conferences, an agreed position was reached removing the BSWAT from the SESA. In addition, the parties agreed to a transitional phase to enable supported employment services (SES) using the BSWAT change from that to another approved tool. This position was published as a consent order on June 5 2015.
  11. In addition, as a part of the conciliation processes, and following some advice concerning possible changes to the current Support Wage System (SWS), some external work was initiated, agreed upon and undertaken.
  12. On behalf of HSU I attend the majority of these conferences. I was also the union nominated party to the sub-committee which oversaw the development, training and implementation of the major trial.
  13. It is a public fact that several SES already successfully utilise the SWS in its current unmodified form. It is also a matter of public record that some SES transitioned from the BSWAT to the SWS during the transition period June 2015 – February 2016.
  14. In early 2015 an observational study was conducted using possible modifications to the SWS, but which were not detailed or agreed at the time. It was later agreed to establish an externally reviewed trial using the agreed modifications to the SWS. And finally, a demonstration project was



undertaken involving three SES. The data, reports and outcomes of these projects and trial are confidential. The information gathered during these processes are not publically available.

15. The trial and projects led to the agreed position, currently the subject of a decision and final orders, to modify the SWS for use in SES. The changes agreed enable the following modifications to the SWS which have also been agreed to by the Department of Social Services [Fed], the owner of the tool:
  - a. Provision of trained external assessors to develop agreed benchmarks prior to undertaking collection of workplace data
  - b. Optional use of workplace data in addition to external assessor collected data to determine the productive capacity of an employee.
  - c. The removal of the minimum weekly rate [currently \$81.00] applicable to an employee, even if they work less hours per week
  - d. Removal of the rounding provisions for the assessed percentage
  - e. Allow reassessments to be conducted up to 3 yearly as opposed to annually where appropriate
16. The development of, and agreement to, the above modifications were a consequence of the projects and trial and the information garnered during those processes.
17. The first project was undertaken in the first half of 2015. The second, which was a substantial trial assessed and reviewed externally, using the modified SWS, was undertaken in 2016. And the final demonstration project was undertaken in early 2017.
18. In paragraph 35 of Mr Christodoulou's statement he states an opinion on the basis of an investigation of what he says "the SWS would do to GDS' financial position if implemented, in the best-case scenario there would be a 60% increase in overall wages costs, but this could be as high as 115%". In the next paragraph, he states:

"These estimates come from having trialled the modified SWS during the conciliation period which was overseen by her Honour Deputy President Booth and having other SWS assessors from LEAD assess a number of our supported employees"
19. I read this paragraph as saying that the assessments provided at Attachment F and therefore the calculations appearing at Attachment F1 emerge at least in part from the trials undertaken as part of the conciliation process. That cannot be the case because paragraph 1 of the advice from Lead

Employment indicates the assessments were conducted at Greenacres on 7 March 2014.

20. If Greenacres Disability Service is relying on other data to support Mr Christodoulou's claims that use of the SWS in either its current or modified form would result in significant increases in the wages bill at their facilities, this has not been provided as an attachment to this witness statement.
21. With reference to the change to union rules referred to in paragraph 17 of Mr Christodoulou's statement; these changes appear to refer to matters in NSW only rather than nationally. They do not apply in Victoria or Tasmania.
22. Prior to commencing with the national office in August 2012, I was engaged in negotiating Enterprise Agreements in the not-for-profit disability sector in Victoria. Among other services this included supported employment services and [disability] day services. These were joint negotiations with the Australian Education Union, who has coverage in Victoria in the [disability] day services and SES.
23. The negotiations in Victoria and Tasmania in the disability and SES sectors did not then, and still do not, include United Voice, the current incarnation of the previous Miscellaneous Workers Union.
24. The HSU works closely with United Voice in many areas of joint coverage. There is no demarcation between the unions, as the coverage of each union varies on state lines. United Voice or its predecessor does not have coverage, or does not exercise coverage in the disability or SES sectors in Victoria or Tasmania.

Dated: 21 November 2017

Leigh Svenden