

Australian Federation of Disability Organisations

National Council on Intellectual Disability

AED Legal Centre

Disability Advocacy Network Australia

People with Disabilities Australia

Down Syndrome Australia

Family Advocacy

Physical Disability Australia

Side by Side Advocacy



31 January 2014

A joint response from national peak consumer and advocacy organisations in response to questions from the Australian Human Rights Commission regarding the application by the Department of Social Services for an exemption from the Disability Discrimination Act 1992 to use the Business Services Wage Assessment Tool

For consideration of the
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*The BSWAT should not be used in any way, shape or form
in light of the successful Federal Court matter.*

*The Supported Wage System tool already exists.
That one can be used instead.*

Gordon Prior
Submission to the AHRC
Successful complainant in the
Nojin/Prior vs. Commonwealth
Federal Court Case

Executive Summary

On May 10 2013 the High Court of Australia refused to grant leave for the Commonwealth to appeal the decision by the Full Federal Court of Australia, saying that,

The Full Court of the Federal Court, by a majority, concluded that the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court.

On 4th October 2013 the Committee on the Rights of Persons with Disabilities for the United Nations Convention on the Rights of Persons with Disabilities recommended that Australia,

(a) Immediately discontinues the use of the BSWAT

(b) Ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support employment.

The High Court of Australia and the UN Committee acknowledge that the Supported Wage System (SWS) is a valid alternative. As stated succinctly by Gordon Prior, one of the successful complainants,

The BSWAT should not be used in any way, shape or form in light of the successful Federal Court matter . . . The Supported Wage System tool already exists. That one can be used instead.

The SWS is the national standard of pro-rata award wage assessments. It is an integral part of the Award system. It enables people with significant disability to work despite levels of productivity or need for ongoing support.

The SWS is consistent with international conventions and Australian discrimination law and was approved by the Full Bench of the Australian Industrial Relations Commission. The SWS system has been reviewed favourably and is a mature system of almost 20 years. It has been successfully used in the open labour market and ADEs across a wide range of industries and jobs for many years.

The SWS has some criticism. We have provided an analysis of this critique but conclude that this criticism is without rational basis. There is indeed room for improvement but this does not diminish the integrity of the tool nor its relevant application in ADEs.

We propose that the Commonwealth clearly indicate that the SWS is the single national standard pro-rata award wage assessment. A temporary redress of ongoing discrimination is to use only the productive score of the BSWAT. This can happen without delay. We also

recommend a national audit of SWS assessor capacity and the development of a national plan to roll out SWS assessments for employees with disability in ADEs.

We encourage the AHRC to request that the Fair Work Commission review the Supported Employment Services Award and certified agreements which contain alternative wage assessments. These should be amended to match the national standard of the SWS.

To address ADE viability concerns we propose that the Commonwealth undertake an ADE by ADE examination of viability to determine if the business requires temporary financial support to ensure commercial viability and job retention.

We recommend that the Commonwealth begin the development of a new national plan of employment assistance that builds a school to work and open employment program that is tailored to meet the needs of people with intellectual disability and other people with disability with significant ongoing support needs. This plan should be consistent with the UN CRPD and evidence based vocational research.

We have undertaken a brief review of the twenty eight other wage assessment tools against five principles drawn from the Federal Court decision and the Supported Wage System. We believe that these other wage tools in general do not meet basic threshold questions of validity and fairness.

The 2000 Business Service review found that 53% of ADEs were profitable. The 2013 ConNectia report indicates that this has dropped to 44% with another 24% borderline profitable. We estimate that productivity based award wages would increase annual wage cost in ADEs by \$78 million with a return on pension savings to the Commonwealth of \$34 million. It would cost the Commonwealth a maximum of \$44 million to guarantee fair award wages and the current level of jobs.

Given the availability of both temporary and long term redress, we do not believe it would be reasonable to grant an exemption. This would continue discrimination without any redress. We believe the AHRC must use its authority to uphold the basic right so well articulated by J. Buchanan who stated:

“...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 ... “[FCAFC 192, 138]

We have the tools to do this fairly, and we can do this now.

1. What are the arguments for and against the use of the Supported Wage System (SWS) as an alternative to the BSWAT?

Inclusion in the Industrial Relations Framework

The development of the Supported Wage System (SWS)¹, and the decision in 1994 by the Full Bench of the Australian Industrial Relations Commission (AIRC) to make provision for the operation of the SWS², is important in providing people with *significant disability*³ the opportunity to participate in employment on an equal basis with respect to their employment terms and conditions.

This development stemmed from the Commonwealth 1990/91 Budget announcement which sought further work on a supportive wages system for people with disabilities which had been recommended by the 1990 Report of the Labour and Disability Workforce Consultancy known as the *Ronalds Report*.⁴

Underlying this political leadership was compelling Australian and international demonstrations of employment assistance which successfully places and trains people with significant disability into paid work in the open labour market. This evidence shows that with the *right training and support* people with significant disability have the productive capacity to work in the general labour market.⁵

This evidence also shows that some, not all, people with significant disability are unable to meet the award level of productivity for a particular job following on-the-job training.⁶ Hence, the SWS ensures that this group of people with disability, notwithstanding productive capacity, are not excluded from participation in the labour market.

This demonstration of inclusion in the labour force has been achieved through funded employment assistance to people with disabilities via the *Commonwealth Disability Services Act 1986*. This provides people with significant disability with the support to work

¹ Dunoon, D. (1992). *Development of a National Assessment Framework for a Supportive Wage System. Report to The Wages Subcommittee of the Disability Task Force*. Department of Industrial Relations. AGPS, Canberra.

² AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION. Full Bench. 10 October 1994. *Dec 1831/94 S Print L5723*.

³ The term 'significant disability' is used to denote a group that will likely benefit from the Supported Wage System. It is a term used by the Wages Subcommittee of the Disability Task Force which developed the SWS. As noted by the Subcommittee's report, *Usually, these individuals have an intellectual disability, although they may have other disabilities as well.* (p.5).

⁴ Ronalds, C. (1991). *Report of the National Consultations with People with Disabilities. Labour and Disability Workforce Consultancy*. Commonwealth Department of Health, Housing and Community Services. AGPS, Canberra

⁵ Wehman, P. (1981). *Competitive Employment. New Horizons for Severely Disabled Individuals*. Paul H. Brookes: Baltimore. ". . . when severely developmentally disabled individuals are provided appropriate training, follow up, and support they can obtain and maintain competitive employment."

Mank, D. (2008). Alderbrook 2007. *Journal of Vocational Rehabilitation*, 29 (2008) 53–62. "The facts about mass unemployment or underemployment of people with disabilities are curiously juxtaposed to another set of facts and well documented research that has emerged across the last forty years establishing that people with nearly any sort of disability label can, in fact, work productively, when provided the environment, training, technology, or other supports tailored to the person."

⁶ For example, Jobsupport, a specialist employment service provider that places people with moderate intellectual disability (IQ < 60) in open employment, currently supports over 600 individuals in jobs. Forty percent (40%) are paid via the SWS model clause.

in employment who would otherwise have their options restricted to non-work day programs or sheltered workshops (now marketed as Australian Disability Enterprises, (ADEs)).

As noted by the Full Bench of the AIRC in its decision, the SWS model clause is *facilitative only*. The SWS is necessary but not sufficient in creating greater employment opportunities. It offers an industrial solution when an employee is unable to match the productivity required at the award level. It permits people with significant disabilities, service providers, and employers to freely engage and enter into employment contracts that otherwise would not occur. Notwithstanding, people with significant disability will still require specialist assistance to engage with employers, create jobs, receive on-the-job training, and ongoing support to keep the job.

The SWS model clause - in essence - provides a mechanism for *Supported Employment* to operate under the Australian industrial relations Award or minimum conditions framework. The *Disability Services Act 1986* states that *Supported Employment*,

means services to support the paid employment of persons with disabilities, being persons:

(a) for whom competitive employment at or above the relevant award wage is unlikely; and

(b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

When a person with significant disability is placed and trained in a paid job, but who may require the SWS and ongoing support, this is *Supported Employment*. This can and does occur in the open labour market and in some ADEs.

It is important that a comparative deficit in award level productivity, and the need for ongoing support, is not perceived as restricting individuals to segregated employment options or ADEs. As such, *Supported Employment* should not be conflated with models of *segregated employment* or ADEs.⁷

As noted by the Full Bench of the AIRC in 1994, the SWS model clause is applicable to employers who fulfil the *dual role of service provider and sheltered employer to people with disabilities* who meet the quality assurance provisions of the *Disability Services Act 1986*. All ADEs currently funded under the *Disability Services Act 1986* are able to access the SWS.

A key strength of the SWS is the provision of an industrial relations framework that includes people with significant disability despite being unable to work at the required productivity standard for the minimum award level wage. According to the Commonwealth evaluation of the SWS;

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

⁷ Dunoon, D. (1992). Development of a National Assessment Framework for a Supportive Wage System. Report to The Wages Subcommittee of the Disability Task Force. Department of Industrial Relations. AGPS, Canberra.

*stakeholder groups. All commented that it provides people with disabilities with employment opportunities that would not otherwise exist.*⁸

Coherence with International Human Rights & Australian Discrimination Law

According to the UN High Commissioner for Human Rights, The *Universal Declaration on Human Rights* recognises that *the right to work is a fundamental human right*. The High Commissioner states that this right includes a *free choice of employment, . . . just and favourable conditions of work, . . . and forms an inseparable and inherent part of human dignity.*⁹

Further, the UN High Commissioner for Human Rights states that Article 27 of the UN CRPD recognises the *right of persons with disabilities to work, on an equal basis with others, . . . freely chosen . . . in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.*¹⁰

The SWS gives (real) action and outcomes to the aspirational nature of the UN declaration and convention. The SWS provides people with significant disability with the opportunity to choose to work in the labour market, receive remuneration according to their productive capacity in relation to Award conditions, and receive the training and support needed to succeed for the term of the job. This industrial relations framework, together with specialist assistance, supports people with significant disability and employers to create an inclusive labour market without barriers.

The SWS assessment tool is a fair and valid assessment of the productive capacity of an employee with disability in comparison with employees in receipt of full award wages performing the same job tasks. The SWS's ability to conduct pro-rata award wage assessment and maintain consistency with discrimination law is considered to be a hallmark of the system.

According to the Commonwealth evaluation of the SWS;

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).

Integrity of assessment process

The assessment process of the SWS is accepted as a great strength by employees with disability, employers, unions and representatives of people with disability.

According to the Commonwealth review of the SWS;

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

⁸ Department of Family and Community Services (2001). Review of the Supported Wage System. Report prepared by KPMG.

⁹ Thematic study on the work and employment of persons with disabilities. 17 December 2012. Report of the Office of the United Nations High Commissioner for Human Rights

¹⁰ Thematic study on the work and employment of persons with disabilities. 17 December 2012. Report of the Office of the United Nations High Commissioner for Human Rights

have ensured the system's continuing appropriateness within the broad workplace relations and employment environment.

Employers have indicated that the external SWS assessment provides assurance that the sub award wage has been determined fairly, and that employers cannot be accused of exploiting or discriminating against people with disabilities. According to the Commonwealth review of the SWS;

Many employers indicated that the assessment process relieved them of the burden of being seen to be potentially exploiting people with disabilities.

People with disabilities who have been assessed by the SWS have indicated that the assessment process is fair. According to the Commonwealth review of the SWS;

People with disabilities made similar positive comments about the assessment process with many commenting that they believed the assessment process was fair and objective.

Stood the test of time and review

The SWS has been in operation for almost two decades. We are unaware of any complaint from employees with disability in terms of disability discrimination in the assessment of their award based wages via the SWS.

The SWS underwent a rigorous development and public process which received approval and support from all stakeholders. The implementation of the SWS was brought before the full bench of the Australian Industrial Relations Committee in 1994 and received support from employers, unions, and peak body representatives of people with disabilities.

The SWS was subsequently listed as one of the twenty minimum conditions or *allowable award matters* in the Workplace Relations Act 1996, and formed part of the process to simplify federal awards.

A review of the SWS by KPMG in 2001 on behalf of the Commonwealth Department of Family and Community Services (FaCS) found that the SWS had *overwhelming* support and is perceived as the most *effective mechanism*. According to the report;

it has overwhelming support from the majority of stakeholders and is seen as a far more effective mechanism than previous and alternative systems for establishing productivity based sub-award wage rates for people with disabilities in the labour market.

The SWS Review found that the SWS,

- promotes the equal participation of employers, employees, and unions
- has integrity and transparency
- assists people with disabilities gain employment coherent with the Disability Discrimination Act 1992
- is recognised by all stakeholders as providing an opportunity for people with disabilities that would otherwise not exist

- is recognised by all stakeholders as the preferred industrial mechanism to determine productivity based wages

The SWS review did not question the validity or fairness of the SWS. The review did, however, offer a number of recommendations *to further improve and refine the operation of the SWS*. There were however no recommendations to change the fundamentals of the SWS assessment.

Modern Awards developed from 2008, and under the Fair Work Act 2009, typically contain the Supported Wage System clause. Employees with disability not covered by an Award or agreement have access to the SWS as part of the “special national minimum wage 2” for employees with disability.

The SWS system is a mature assessment framework and has become a key component of Australia’s industrial relations framework to enable people with significant disability enjoy employment together with fair award based wages.

Successfully used in ADEs

The Supported Wage System has been successfully implemented in Australian Disability Enterprises. According to research conducted by the Department of Social Services;¹¹

- Fifteen (15) ADEs are currently using SWS. This is eight percent (8%) of ADEs, and about 4% of ADE employees.
- Of the fifteen ADEs, three (3) are in NSW, two (2) in Queensland, and eleven (11) in Victoria.
- All are small to medium enterprises, ranging from 5 to 122 employees.
- All operate in different industries - of which the most frequent are packaging, grounds maintenance, cleaning, laundry services, and horticulture.
- Most of these 15 ADEs have low reliance on government funding to meet costs.
- Eleven are profitable, and four had negative operating results. Two are rated as high financial risk due to poor revenue, few assets, and significant liabilities.

Of the 769 workers,

- 53% had intellectual disability, and 20% had psychiatric disability, and 8% had physical disability
- Half are funded at the highest support level (level 4), 23% at level 3, 15% at level 2, and 6% at level 1.
- The age range is from 16 to over 70 years old. The majority (30%) are aged from 30-39.
- Most workers have been with their employer for many years. 46% started work at the ADE eight to nine years ago.

¹¹ ADE Vision Advisory Group Meeting Agenda Paper 25 October 2013. *Similarities in Organisations using Supported Wage System for employee wages (October 2013)*
Joint response regarding DSS exemption application

According to the report, ADEs which use SWS, indicate that the use of SWS is the 'right' thing to do.

It is important to note that the SWS is being used in a variety of industries, and with employees with diverse characteristics, whether one takes into account disability type, funded support level, age, or employment retention.

Further, the ADE businesses using SWS are - on average - more commercially viable, profitable, and less reliant on government funding when compared to the national average for all ADEs.

The evidence does not substantiate attributing commercial viability concerns to the use of the SWS. As noted by the Federal Court, the need to address business viability should not be achieved by imposing a disadvantage on employees with disability.

Directly addresses Federal and High Court Concerns - Theoretical vs. Actual

The Full Federal Court decision was critical of the competency assessment used by BSWAT. The Court acknowledged, however, that the productivity assessment used by BSWAT was not the subject of complaint and recognised this as being similar to the SWS.

The Court criticised the BSWAT competency assessment for being *abstract and theoretical* in nature. That is, the use of (predetermined) industry training packages mean that employees are assessed on matters not directly related to their actual job, and or general workplace competency assessments which workers without disability are not subject to.

This means that people with disability are assessed by BSWAT against requirements that are not part of their job. It also means that the comparative nature of BSWAT is undermined by not being based on the actual performance of full award employees - as these employees are not subject to such an assessment regime.

In contrast, the core strength of the SWS is that the assessment focuses (only) on the major duties or tasks of the job position. And the assessment is a comparative measure of a standard (quantity, quality and safety) required by a worker to earn a full award wage performing the same job tasks.

It was recognised in the development of the SWS that the use of the term "tasks" in place of "skills" was important for;

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

and

many of the jobs performed by people with intellectual disabilities are entry level positions organised around a number of relatively routine and readily identifiable tasks with unambiguous outcomes. For example the tasks in a grounds assistants job might

*include; raking leaves, sweeping up rubbish, emptying bins, weeding garden, watering lawns.*¹²

This distinction between “skills” and “tasks” is fundamental to ensuring that a pro-rata award wage assessment is measuring the *performance of actual work* as opposed to measuring *skills* contained in competency units for an industry training qualification.

An understanding of this distinction is vital to ensure that employees are only being measured on the work they are hired to perform in comparison to workers (with or without disability) performing the same tasks and earning full award wages.

Directly addresses Federal and High Court Concerns - Productivity vs. Competency

Further to the need to understand the distinction between theoretical and actual aspects of wage assessment, is an understanding of the distinction between “productivity” and “competency”.

The SWS does not preclude attention to competency *per se*. “Competency” in the SWS is best understood in terms of learning to perform the actual *tasks* of the job via on-the-job training. This is a strong feature of the SWS.

The SWS process expects that there will be a period of on-the-job training for most people before a wage assessment is conducted. The SWS model clause includes a trial period of up to 12 weeks with the option for an additional 4 weeks. The model clause expects that work trials, induction or training will occur in this trial period.

This period enables consideration of the suitability of the job placement. *The worker with disability should reach a reasonably stable level of job performance before a SWS productivity assessment is conducted.*¹³

Importantly here, is that the training is focused on the actual job tasks or duties. This makes (obvious) sense as the purpose is to teach/train the individual to perform the actual tasks required of the job position. It is not, however, focused on teaching or testing skills or knowledge which are not relevant to the actual job duties.

It is worth noting that evidence based employment assistance has shown that, through the use of systematic on-the-job training, people with significant disability are able to successfully complete many job tasks in the labour market.

The SWS productivity assessment is thus measuring the performance or outcome/output of the tasks by an individual who has been trained in the skills necessary to complete the tasks.

As the Full Federal Court noted:

*testing for, measuring or assessing competencies is not the same thing as testing for, measuring or assessing competency in a given task. **The latter endeavour relates to***

¹² Dunoon, D. (1992). Development of a National Assessment Framework for a Supportive Wage System. Report to The Wages Subcommittee of the Disability Task Force. Department of Industrial Relations. AGPS, Canberra.

¹³ Australian Government. Disability Employment Services. *Supported Wage System Handbook*. July 2013

skills, and the application of those skills. It may be expected to be reflected in some aspect of, or conclusion about, productivity. The former endeavour borrows from “industry standards”, so-called, usually found in training matrices or packages designed to provide increased recognition or avenues to higher pay. The idea of this kind of assessment is that an employee may be more “valuable” to an employer than a crude measure of productivity might suggest. [Buchanan 41, emphasis added]

In this respect, competency within the SWS is about learning to complete job tasks according to the requirements of the employer, and the *application of those skills . . . may be expected to be reflected in some aspect of, or conclusion about, productivity.*

An examination of the critique of SWS

Whereas the SWS has broad support and strong features, there is a range of critique of the SWS.

To assist the AHRC, our submission discusses four documents which canvass ideas on improving the SWS or which list advantages and disadvantages of the SWS.

These documents include;

- The 2001 *SWS Review* report by KPMG (funded by Commonwealth Department of Family and Community Services)
- The 2000 *A Viable Future. Strategic imperatives for Business Services* by Commonwealth Department of Family and Community Services and ACROD (now known as NDS)
- The 2001 *Guide to Good Wage Assessment* by HOI (funded by Commonwealth Department of Family and Community Services)
- The consultation document, *Inclusive Employment 2012–2022: A Vision for Supported Employment Future wage setting arrangements: a discussion guide* prepared by Commonwealth Department of Social Services in 2013.

It is our view that there are indeed opportunities to improve the operation of the SWS. The SWS Review provides a number of valid considerations to improve the quality of the SWS assessment process.

There is however other critique of the SWS which is without validity or evidence, and limited to comment from ADE organisations who have not implemented the SWS for employees.

Our view is that, while there is room for improvement, none of the critique presented in these reports highlight any substantive error or discrimination in the SWS assessment process or tool. More importantly, none of the arguments present a barrier to the use of the SWS by ADE employers.

The 2001 Review of the SWS by KPMG

Access

The 2001 SWS Review canvassed a number of ideas to improve the access of people with disability to the SWS. These include;

- Increasing employer awareness about using the SWS directly. Most people with disability access the SWS with the assistance of an employment service provider. An employer can however initiate such an assessment.
- Increasing awareness that other groups of people with disability may benefit from the SWS. It was suggested that some people with disability in mainstream labour market programs could benefit from the SWS.
- Developing a method to determine the productive capacity of people with disability whose productivity fluctuates widely over the course of a year. This has been suggested as a way of improving the SWS for people with episodic disabilities. The Commonwealth conducted a consultancy in relation to this issue in late 2011.
- Amending the definition of employment to include temporary or short term work.
- Amending the SWS minimum wage rate requirement (currently set at \$78 per week) to permit jobs with small hours and/or low productivity which would result in weekly wages of less than \$78 per week.
- Increase coverage of the SWS model clause in Awards. This has been addressed through the award review system. There is also now a provision for employees with disability not covered by any Award or agreement to access the SWS.
- Extending use of the SWS in business services (i.e. sheltered workshops, ADEs), with consideration given to modifying the minimum SWS wage rate condition. This was proposed by the SWS review due to the expectation that Business Services (i.e. ADEs) were expected to meet employer obligations to pay award based wages.

Employer assistance

The review included some specific ideas to assist employers. These included;

- Increasing the awareness of employers that they are able to access Workplace Modification assistance from the Commonwealth.
- Consideration of employer incentive payments to hire workers with disability who will need the SWS. There is a one off payment for employers that utilise the SWS without the assistance of Commonwealth funded employment providers.
- The need to recognise and adequately fund the initial placement and on-the-job training support and long term ongoing support to assist both the employee and the employer.

Assessor Quality

The review included several ideas to improve the training and accreditation of SWS assessors. The SWS Review expressed a strong desire for quality assurance measures to maintain the quality of SWS assessors and assessments.

Assessment Process

The SWS review found that negative comments about the SWS assessment process were rare. These tended to be about individual assessors and related to their attitudes and approach to the task.

Employers and people with disabilities reported that the assessment process was fair and objective.

Assessment Tool

The Review made comments about when the assessment tool may not be suitable. These comments were qualified by the statement:

Much of the criticism about the assessment tool tends to encompass issues related to the way the tool has been applied and the approach taken by the individual assessor rather than the tool itself.

Notwithstanding, the SWS review reported feedback that the tool may not be suitable for assessing:

- jobs that require problem solving and planning skills
- jobs that frequently change job tasks
- performance over extended periods of time

It is worth noting that the jobs performed by people with significant disability are invariably basic jobs at an entry award level. This is not to denigrate the value of such jobs but to indicate that the jobs performed by people with disability in ADEs are typically not *jobs that require problem solving and planning skills*. This was a relevant point in the Federal Court's decision on a discussion about the value of work. This point was also reflected in the discussion and development of the SWS.

It is also worth noting that the SWS guideline provides assessors with guidance on how they can assess *jobs that frequently change job tasks*.

Where the job involves considerable variation in duties on a day to day basis, it may be desirable to create a simulated work routine for the purpose of establishing performance standards and assessing achievement against these standards.

In this approach the performance standard and subsequent assessment of the individual's achievement would be based on a representative sample of tasks drawn from the range of duties the worker would typically perform in the job.

The SWS has a review mechanism which can make adjustments due to changes in productivity or job design on an annual basis. Yet there isn't a clear method of addressing frequent variance in productivity due to episodic disability conditions. In 2011 the

Commonwealth conducted a consultation on how to improve the SWS to address this issue. This was part of a range of federal budget mental health reforms announced by the Commonwealth. The Commonwealth has not made a report of this review publicly available.

A solution offered by AFDO representatives to the Commonwealth review is for productivity data to be collected by the support provider during ongoing support and used by the SWS assessor and employer to determine an averaged productivity rate over an extended period of time. Of course, the external assessor should audit this data during the annual review to ensure fairness and validity. This use of vetted historical productivity data has been used by some SWS assessors to overcome the problem of episodic performance, and also to address any atypical performance on the day of assessment for both the employee and the comparator benchmark.

In contrast, the SWS Review questioned the need for annual review when an employee's performance had plateaued. It was suggested that a review should be triggered only if there were changes to the position or noticeable increases or decreases in performance.

Wage calculation

The assessed SWS wage percentage can be adjusted up or down within the percentile band. For example, an assessed rate of 67% can be rounded up or down between 60 and 70%. This feature was provided to allow room for negotiation when considering factors not included in the assessment (e.g. any additional supervision provided by the employer).

The SWS review proposed that this adjustment could either be restricted to the actual percentage, or restricted to an adjustment of a plus/minus 5 percentage points only.

A Viable Future. Strategic imperatives for Business Services

This report was prepared by KPMG on behalf of NDS and the Department of Family and Community Services.

This report notes that:

- *A number of Business Services have successfully used the Supported Wage System as part of their general operations.*
- *FaCS is continuing to provide training to individual Business Services in the use of this tool.*

The report does note concerns by some ADEs about the applicability of SWS to *the unique nature of the work undertaken by Business Services*. The report however admits that this concern may be *due to the unfamiliarity with the use of the assessment tool in the determination of productivity*.

We would also make the point that the comparative research conducted by Health Outcomes International, and discussed in the Federal Court, indicates that both the type of work, and the number and range of "competencies" of ADE jobs is not dissimilar to jobs in the open labour market.

The report also admits that some of the hybrid competency-productivity wage assessments included in ADE certified agreements *have simply been formulated based on the capacity of an organisation to afford the proposed arrangements.*

The report states a number of advantages of hybrid competency-productivity wage assessments. This statement is qualified by stating that *pro-rataed productivity/competency based wages are fairly new for the Business Service industry and remain highly dependent on the financial viability of an organisation (emphasis added).*

This statement belies the “motivation” behind alternative wage assessment tools used in ADEs. That is, wage assessment is “tuned” to fit ADE viability concerns rather than employee rights to a fair award based wage.

A Guide to Good Practice Wage Determination (Guide)

A Guide to Good Practice Wage Determination (Guide) is based on a consultation of business service employers (i.e. sheltered workshops, or ADEs). This document was originally prepared as a document to advise the Commonwealth to develop the BSWAT as the best option for introducing pro-rata award wages in ADEs. The document was later re-badged as a *Guide* to good wage practice as part of the amended 2002 Quality Assurance system for the Disability Services Act 1986.

Considerable caution must be taken in reading this document. Much of the comment reported as research in this document is actually comment from ADE employers with little if any experience in implementing the SWS.

As representatives of people with disability, we feel it is important to address the comments listed as “disadvantages” of the SWS in the Guide, as we believe there is little substance to most of these claims. Yet these comments are likely to be repeated and therefore need to be addressed.

We have listed each ‘disadvantage’ followed by a short response.

Cost likely to increase significantly due to increased wages

The increase in employer wage costs due to the use of the SWS is listed as a disadvantage in the Guide. Yet the payment of an award wage, based on an assessment tool that is a core element of the industrial minimum conditions framework is not a wage increase, but rather an accurate indication of (basic) wage cost.

The notion of an increase in wage cost due to valid assessment can only be sustained if it is understood that employees with disabilities should continue to be paid wages less than what they should be. In this respect, an increase in wage cost is not a disadvantage of the SWS unless the intent is to continue to underpay employees, or paying fair award wages is an inconvenience.

As noted by the Federal Court, the business viability of ADEs should not be achieved through wage practices that disadvantage or discriminate against employees with disability.

Cost of assessment is prohibitive unless subsidised by FaCS

The Commonwealth subsidises the cost of SWS assessments. There is no cost to employers for the SWS assessment.

Anecdotal reports that assessors may overstate worker productivity.

The SWS process and tool is considered to be valid as reported by the SWS review. Employers using the SWS have not reported any concern about an overstatement of productivity by assessors. In short, there is no evidence that assessors overstate the productivity of workers in making an SWS assessment.

SWS able to be manipulated by workers or assessors i.e. productivity displayed during the assessment is not representative of usual activity.

Such criticism is without evidence. The SWS provides assessors with guidance on how to avoid bias, methods of gathering information, how to address variability in work duties, and how to apply rounding to take into account any factors not accounted for in the assessment.

The SWS assessment is concerned with the actual job duties of the employee and is highly likely to be relevant and representative of “usual” activity in the workplace.

Difficult to administer and costly to administer where there are many workers and/or many jobs across varied industries.

The SWS has been tested for two decades. There is no indication that it is “difficult” or “costly” to administer. There is no evidence that it is unable to apply to many workers, and many jobs across varied industries. The SWS review identified a wide and varied distribution of jobs and industry types.

Difficult to gauge activities of co-worker or develop benchmarks due to the ‘tailored’ nature of some jobs.

There is no evidence of this. The SWS Guide provides simple solutions to determine benchmarks of productivity.

Information on co-workers’ performance should normally be used in setting performance standards.

In cases where co-workers cannot contribute to the setting of performance standards (such as where the position is new, or there is no-one else performing those duties), it may be useful for the wage assessor to perform the duty to develop reasonable expectations of performance.

If a co-worker is involved in a standard determination exercise, the person should be competent in the task but, preferably, have a similar length of experience on the job as the person who is the subject of assessment. The performance of workers who have been doing the same job for many years could be unusually high.

If co-workers are being monitored to develop performance standards, they should be advised of this. It should be noted that the very fact of providing this information could improve the co-worker’s achievement.

Information gained over too short a period may over-estimate the performance that can be sustained over time.

Gathering information to set standards should be made under conditions closely approximating those normally applying to the workplace.

Naturally, provision should be made for rest breaks and personal time, consistent with the needs of the worker or the general operating standards of the workplace.

There is a wide variation in the performance of workers without disability, just as there is in the performance of workers with disability. Variations in performance reflect a wide range of workplace factors, not only the capabilities of the individual (e.g. supervision and work design).

Where the job involves considerable variation in duties on a day to day basis, it may be desirable to create a simulated work routine for the purpose of establishing performance standards and assessing achievement against these standards.

In this approach the performance standard and subsequent assessment of the individual's achievement would be based on a representative sample of tasks drawn from the range of duties the worker would typically perform in the job.

Does not assess people against all components of the job, only the tasks that are being undertaken (this tends to overstate productivity).

This 'disadvantage' is somewhat contorted, and an indication of the direction that led to the discriminatory nature of the BSWAT.

A wage assessment based only on what you are expected to do - is not an overstatement - but a mark of accuracy and validity.

Assumes basic competencies are held by the worker, less suitable for people with high support needs.

This is a misunderstanding of the distinction between competency and productivity.

The SWS process is focused on ensuring training focused on the actual job tasks. This is to establish basic competency in the performance of the job.

According to the SWS guide:

The worker may require additional training or time in the workplace to meet the basic requirements of the job. This has been addressed by the inclusion of a Trial Period in the relevant industrial instrument containing SWS provisions. The type of industrial instrument the worker is operating under will determine the provisions for the Trial Period.

The SWS schedule contained in most modern awards allows up to 12 weeks as a training or settling-in period, before the initial assessment is required to be conducted. The Trial Period may be extended by up to four additional weeks to a maximum period of 16 weeks, but only if there is agreement that the trial worker could further improve their work performance significantly in that time.

A productivity assessment would not be appropriate if an employee had not been properly trained and thus not competent in performing the job duties.

This is relevant for workers with significant disability who have high supports. Indeed, the SWS was purposely designed and implemented for this group of people.

10% payment increments under the SWS may be too broad, 5% increments suggested.

The SWS review also made this suggestion as an improvement to the SWS final wage calculation to limit any negative impact caused by rounding of the wage score. This is however not a disadvantage as such that precludes the use of the SWS in an ADE. It is a recommended refinement to continuously improve the SWS.

Need to re-assess workers when moving between jobs.

The SWS Guide already addresses this variance in job duties and provides strategies to conduct an assessment.

Where the job involves considerable variation in duties on a day to day basis, it may be desirable to create a simulated work routine for the purpose of establishing performance standards and assessing achievement against these standards.

In this approach the performance standard and subsequent assessment of the individual's achievement would be based on a representative sample of tasks drawn from the range of duties the worker would typically perform in the job.

Knowing that a minimum rate of pay is required may influence employee recruitment to those only capable of 'earning' \$50 per week. This may reduce accessibility to the service.

The minimum SWS wage rate is currently \$78.

The SWS review addressed this issue by looking at alternatives to the minimum rate for when an employee has low hours or low productive rate and therefore may find it difficult to achieve a wage of \$78 per week.

This issue needs to be balanced with the need for service providers to consider the suitability of position when placing a person with disability in a job, any workplace adjustments, and the provision of systematic on the job training to maximise productivity.

While peak bodies are prepared to consider an amendment to the SWS minimum rate - on the basis of the principle of inclusion - there would need to be some safeguards to prevent providers placing people with disability in low-hour-low-wage jobs for the benefit of the service provider in terms of outcome achievement reporting and funding.

Inclusive Employment 2012–2022: A vision for supported employment future wage setting arrangements: a discussion guide.

This discussion guide was produced by the Commonwealth as part of their brief consultation following the High Courts affirming of the decision by the Full Federal Court that BSWAT discriminates against workers with intellectual disability.

The discussion guide provides a table of advantages and disadvantage of the SWS.

Advantage: Puts supported employment on the same standards of wage setting as mainstream employment.

We agree.

People with significant disability unable to work at full award level wages, and who need ongoing support (i.e. supported employment), should be able to access the SWS in both the open labour market and in ADEs, as a national standard of equality and safeguard against exploitation and discrimination.

Given the vulnerability of the workforce in terms of intellectual disability and other significant disabilities, and the relative powerlessness to negotiate agreements on an equal footing with their employers, it seems propitious to ensure that their basic industrial and human rights are protected at the highest level to minimise any room for exploitation or discrimination.

Implementing the SWS across ADEs would provide this level of assurance.

Advantage: SWS is already accepted by the Australian community as a fair and transparent way of working out [pro-rata award] wages for people with disability.

We agree.

There is already a pro-rata award based wage assessment tool available that is a national award standard that is accepted by the Australian community as fair.

Disadvantage: Does not reflect the pared back nature of some jobs in supported employment that may not exist in a mainstream setting meaning it could result in extra wages being paid to people with disability which may impact on ADE viability.

This is a misunderstanding of how people with significant disability are supported in jobs in regular businesses.

The most successful job search and placement strategy for people with significant disability is what is known as “customised employment”. Customised employment strategies accept that a person with significant disability will not match the job requirements of typical advertised employment positions.

As an alternative, *customised employment* strategies seek to match a jobseeker with disability with the needs of an employer. This achieved by looking at the “job tasks” that an individual is capable of performing and matching this with employers and industries that need these tasks performed as part of their business. *Customised employment* is an employment strategy in which the mutual needs of the jobseeker and the employer are met.

This employment strategy will often result in jobs that have been created or designed as opposed to “off-the-shelf” advertised positions with predetermined duties and requirements. Customised employment strategies provide “flexibility” to how employers and people with significant disability can engage with each other to meet their mutual needs.

It is usual and indeed best practice to accommodate jobseekers with significant disability in the labour market by adjusting job tasks to fit both the jobseeker and the employer. This has provided economic advantages to employers by addressing solutions to free higher skilled workers from having to perform basic or routine tasks.

Wage assessment in this regard is concerned with assessing only the job tasks that have been agreed to constitute the job rather than a theoretical notion of what a “mainstream” job should entail.

Varying or adjusting jobs to match the strengths of employees is not mutually exclusive to ADEs and is a common practice to include people with significant disability in the open labour market.

Furthermore, comparative evidence presented in the Full Federal Court decision, indicates that the average number and range of competencies (i.e. tasks) performed by workers without disability in similar jobs in the open market are not dissimilar to the average number and range of competencies of workers with disability in ADEs. Health Outcomes International conducted this research. It was this research that indicated to the Court that if BSWAT was applied to workers without disability it would result in some workers receiving less than the minimum award level of pay.

The notion of “pared back nature” jobs in ADEs is not a valid disadvantage in the use of the SWS. The decision as to what duties is included in a job, and the amount of time the person is employed to perform these tasks, is a matter of employee and employer negotiation, and employer/business need.

An employee with disability is not getting “extra wages” if they are being paid for their productive output of the job tasks they are hired to perform. They are in fact being paid appropriately.

Disadvantage: Would take time to implement as would require more assessors to be trained etc.

This is not a ‘disadvantage’ but rather a matter of what needs to be done to meet the fair wage assessment needs of employees with disability who need this assessment to participate equally in the labour force. It is not, however, a disadvantage of the SWS as a tool or a process.

Our original submission to AHRC set out a solution for the Commonwealth to temporarily use the BSWAT productivity assessment score, utilise the current SWS capacity for new wage assessments, and enhance the capacity of the SWS to undertake new wage assessments for all employees currently paid by BSWAT as quickly as current and new capacity permits.

Putting resources into building such a capacity for the SWS provides a long term solution that would address - with a high degree of certainty - any concern about discrimination caused by future wage assessments.

The development of a new wage assessment tool would take considerably longer to design, test and implement, including the training of wage assessors for such a tool from 'scratch'.

- 2. What steps/processes would need to be undertaken to implement the SWS immediately?**
- 3. How long would these steps take?**
- 4. What are the arguments for and against using only the productivity part of the BSWAT?**
- 5. What steps/processes would need to be undertaken to use only the productivity part immediately?**
- 6. How long would these steps/process take?**

We have responded to questions 2, 3, 4 and 5 as a group.

In our original submission we set out a redress whereby;

- an immediate but temporary address can be provided by using the productivity assessment component of BSWAT,
- and that this temporary measure can provide time for the Commonwealth to determine and build the future capacity of the SWS required to conduct an expected increase in SWS assessments.

Using only the productivity component of BSWAT

Employees currently paid on the basis of BSWAT, can have their wages amended to the productivity score of their BSWAT assessment. This immediately removes the discriminatory element of the competency assessment. The productivity assessment information is available to the Commonwealth, employers and employees and could happen without further process or delay.

The advantages of this step is that it recognises that the productivity component of the BSWAT is similar to the SWS assessment of productivity, and recognised by the Federal Court as not the subject of discrimination complaint.

Use of the BSWAT productivity score realises:

- A cessation of the use of competency based wage assessment and its negative impact on the rights and wages of people with disability
- An acceptable transitional step towards a valid productivity based wage assessment system that is embedded in the national industrial relations framework (i.e. Supported Wage System)

We cannot perceive any disadvantage in taking this step. It offers an immediate redress by stopping the ongoing discrimination.

Any impact on business viability should be determined on an ADE by ADE basis. As recommended in our original submission we have proposed that the Commonwealth underwrite any increase in wage costs for at least one year where the implementation of fair award wages threatens business viability.

Implementing the SWS

The core redress is to provide employees with disability in ADEs with an assessment under the SWS.

This provides confidence in meeting the object of the DDA to eliminate as far as possible discrimination against people on the grounds of disability in the area of work.

This confidence can be assisted through Commonwealth leadership to set a policy direction in which the SWS is deemed as the national industrial standard for pro-rata award wage assessment in all forms of employment - be it supported or open employment.

With this policy direction, Commonwealth planning should focus on building the future capacity of the SWS to meet assessment demand.

- The Commonwealth currently contracts a national panel of assessors to deliver a range of assessment services, including SWS assessments. We need to know the capacity of this national panel - as it stands - and how much more capacity it is able to take on. Can the current national panel take on more business? How much more?
- We have received anecdotal evidence from members of the National Panel of Assessors which indicates that they are not operating at full capacity and could take on more assessment work.
- The Commonwealth also currently contracts CRS to conduct BSWAT assessments, which includes a productivity assessment component. This contract currently meets the BSWAT wage assessment demand of about 50% of ADE employees. It is possible to re-train CRS assessors to conduct SWS assessments. Consideration should be given to CRS assessors being trained and mentored by the national panel of assessors currently delivering the SWS.

According to the 2001 SWS review, the training of SWS assessors involves the following.

A three-day course is provided for potential assessors. As part of the training program all assessors receive an Assessor's Guide which outlines and provides all the necessary tools for them to conduct an effective assessment. The program addresses assessment techniques and processes and provides input on workplace relations, how to determine a suitable wage, performance standards and a general overview of the SWS.

At the completion of the course a test is undertaken by participants to assess their suitability as assessors. If the assessor satisfactorily completes the test they become an accredited SWS assessor.

This three day course for SWS assessors was subsequently replaced in 2006 with online training modules.

The SWS review also included two pertinent recommendations

Recommendation 14: That FaCS develop performance standards for the SWS that encompass:

- *the minimum entry requirements for assessors;*
- *the nature of training to be undertaken by assessors specifically in relation to assessment, workplace negotiation and workplace relations;*
- *mechanisms for ensuring the independence of assessors from employment placement;*
- *mechanisms for updating assessors' skills and knowledge;*
- *quality assurance mechanisms; and*
- *performance reporting arrangements.*

Recommendation 15: That FaCS undertake market testing of potential new purchasing arrangements (based on the performance standards developed in response to Recommendation 14) for securing the necessary skills and resources that are required to undertake assessments for the SWS within each jurisdiction.

In this current environment, it would be appropriate for DSS to pursue these recommendations as part of a plan to build the capacity of the SWS to meet the future wage assessment needs of people with disability in ADEs and in the open labour market.

A national audit of SWS assessor capacity should determine if there is a need for additional SWS assessor capacity and to develop a recruitment and training plan. We are, however, in a position to build assessor capacity of the SWS from a firm foundation.

Time and process considerations

The SWS is already available in the award system and the relevant supported employment award (Supported Employment Services Award 2010). There is no time or process considerations for employers or employees to access the SWS.

There may need to be time for ADEs, unions and the Fair Work Commission to make appropriate amendments to industrial agreements to ensure the SWS is clearly set out in all agreements as the national standard for pro-rata award wages.

There should also be time to prepare amendments to the QA system to ensure that the standard in relation to employment conditions reflects the requirement of the SWS for any employee who requires a pro-rata award wage assessment.

There needs to be a plan by the Commonwealth to monitor the viability of ADEs on a case by case basis and to provide temporary financial support to protect viability and jobs of employees as part of a change strategy.

There would be some time required to build the extra capacity of the SWS to meet the assessment need of all ADE employees.

The amount of time to build needed SWS capacity depends on the current capacity of the national panel of assessors, whether current contracted CRS assessors can be re-trained to become accredited SWS assessors, and what extra capacity this adds to the national panel of assessors.

There may need to be time to recruit and train additional assessors if the capacity of the national panel of assessors and re-trained CRS assessors is shown to be insufficient to meet assessment need. A training system for new SWS assessors, however, exists.

We suspect that the current national panel of assessors is capable of meeting the SWS assessment of any new employees in ADEs. This should be done to ensure that there is no new BSWAT wage assessment and therefore no new acts of discrimination.

Once an audit of current assessor capacity is determined, and what future assessor recruitment and training is required, a national plan should be developed by the Supported Wage Management Unit (SWMU) to progressively roll out new SWS assessments of ADE employees who previously were assessed by BSWAT.

Proposed steps

Actions	Time	Outcomes
1. Declare national policy direction to bring all employees with disability in ADEs under the SWS	immediate	industrial rights of employees with disability will be protected
2. Amend the Supported Employment Services Award and ADE certified agreements	immediate	removal of unlawful BSWAT & other wage alternatives - and replaced by SWS model clause
3. Employees currently paid via BSWAT to have wages amended to only the BSWAT productivity score.	immediate	redress of ongoing discrimination
4. Review of ADE viability on a case by case basis to determine whether the Commonwealth should provide temporary financial assistance to protect jobs	concurrent with implementation of temporary measure of productivity-only BSWAT wages	assist ADEs to cope with increased wage cost
5. Audit SWS capacity incl.; national panel of assessors, retraining CRS assessors, what need there is to recruit & train additional assessors	immediate start - report in 4-6 weeks	report on current SWS capacity & future SWS capacity needed
6. Plan from the SWS Management Unit on how to roll out SWS assessments for all ADE employees	immediate start - plan report in 6-8 weeks	report on how the SWS can provide new assessments for all employees
7. Roll out of SWS assessments for employees with disability in all ADEs	<ul style="list-style-type: none"> • immediately for new employees • roll out based on reports in actions 3 & 4 	fair non-discriminatory award wages for all employees

Actions	Time	Outcomes
8. Develop a national plan to provide people with intellectual disability and other significant disability with support to work in the open labour market	begin now - requires substantial planning and development	Development of national school to work & open employment support program tailored for people with intellectual disability and other significant disability to access the open labour market

7. What tools are currently used to assess the 50% of employees of ADEs that are not assessed by BSWAT?

According to the Supported Employment Services Award 2010 there are 30 wage assessment tools that can be chosen by an ADE.

1. Supported Wage System;
2. Business Services Wage Assessment Tool;
3. Civic Industries Supported Employees Wage Assessment Tool;
4. Elouera Association Wage Assessment Tool;
5. FWS Wage Assessment Tool;
6. Greenacres Association Competency Based Wages System;
7. Hunter Contracts Wage Assessment Tool;
8. Phoenix Wage Assessment Tool;
9. PHT Wage Assessment Tool;
10. Skillmaster Wage Assessment Tool;
11. Yumaro Wage Assessment Tool;
12. Woorinyan Wage Assessment Tool;
13. RVIB Enterprises Wage Assessment Tool;
14. Koomarri Competency Based Wages System;
15. Valmar Support Services Wage System;
16. Sunnyfield Association Wage Assessment Tool;
17. New Horizons Wage Assessment Tool;
18. Cumberland Industries Wage Assessment Tool;
19. Endeavour Wage Assessment Tool;
20. Wangarang Industries Wage Assessment Tool;
21. Bedford Employee Wage Assessment Tool;
22. Blue Mountains Employment Services Wage Assessment Tool;
23. Ability Options Wage Assessment Tool;
24. Blueline Laundry Inc Wage Assessment Tool;
25. Caloola Vocational Services Inc Wage Assessment Tool;
26. GDP Industries Wage Assessment Tool;
27. Kurri Contracting Service Wage Assessment Tool;
28. Mai-Wel Group Wage Assessment Tool;

29. Merriwa Industries Limited Wage Assessment Tool;
30. Waverley Helpmates Wage Assessment Tool.

8. What are the arguments for and against the use of these other tools in place of the BSWAT?

In order to conduct a brief analysis of the other tools used to assess the 50% of employees in ADEs that are not assessed by the BSWAT, we have prepared a “heuristic” analysis using critical factors that emanate from the Full Federal Court decision and the principles of the Supported Wage System.

We have excluded the SWS from the list. This leaves a list of twenty-eight wage assessment tools other than the BSWAT or the SWS being used in ADEs.

Our analysis is limited to information about each of these tools published by the Commonwealth. We are unaware of any other research documents that have been published which describe, discuss or evaluate these other wage assessment tools. We ask:

1. Is the wage assessment focused directly and only on the actual job tasks performed by the individual worker? (Actual Tasks)
2. Is the assessment measure based only on a comparative productivity standard of a worker being paid the full award wage for the same job tasks? (Equality / Fairness)
3. Has the assessment conducted comparative research indicating wage outcomes equivalent or better than the SWS? (No disadvantage)
4. Does the assessment have external or independent features to minimise conflict of interest and safeguard against exploitation? (Safeguard)
5. Is training provided to the worker to learn the job tasks and ensure appropriate job match before a wage assessment? (Evidence based training and assistance)

Is the wage assessment focused directly and only on the actual job tasks performed by the individual worker? (Actual Job Tasks)

Under this criteria our examination looks at whether the wage assessment tool is or isn't focused directly and only on the actual job tasks of workers.

- Five of the twenty-eight other wage assessment tools (PHT, Yumaro, Woorinyan, Ability, & Waverley) are focused directly, and only on, the actual job tasks of the individual worker.

Four of these wage tools are primarily productivity-based (i.e. PHT, Woorinyan, Waverley, Ability) but some do include competency-based components. The Yumaro assessment, however, is purely competency based.

- Twelve of the twenty-eight other wage assessment tools (Civic, Elouera, FWS, Greenacres, RVIB, Sunnyfield, New Horizons, Endeavour, Wangarang, Bedford, Blue Mountains, and GDP) assess a combination of productivity, job specific competencies,

and general work related competencies. This wage assessment content is similar to the BSWAT.

As per the criticism made by the Federal Court against the BSWAT, all twelve of these hybrid assessments (i.e. competency and productivity) contain theoretical aspects of wage assessment that go beyond the assessment of actual job tasks.

- Eight of the twenty-eight other wage assessment tools (Hunter, Skillsmaster, Koomarri, Valmar, Cumberland, Caloola, Kurri, Mai-Wel,) place greater emphasis on the assessment of job-related competencies, but also include wage assessment features that assess other factors not directly related to the job task (i.e. general competencies, training and support, or behaviour management).

Despite these variations of content and structure these wage assessment tools include theoretical wage assessment components which are not directly related to the job tasks of workers.

- Three of the twenty-eight other wage assessment tools (Phoenix, Blueline & Merriwa) do not include an assessment of job-related competencies. Blueline and Merriwa emphasis the assessment of productivity but also include an assessment of general work related competencies. The Phoenix wage assessment appears to be an assessment of only general work related competencies.

These wage assessment tools include theoretical wage assessment content not concerned directly with the job tasks of workers.

- Nine of the twenty-eight other wage assessment tools (Civic, Elouera, Hunter, Phoenix, SkillsMaster, Valmar, Cumberland, Caloola, Kurri, Mai-Wel) include training, support, or behaviour management in their wage assessment as wage deductions.

Non-job related behaviours should be dealt through training and support interventions rather than through wage fixing mechanisms. The inclusion of non-work factors means that these wage assessment tools are not directly related to the actual job tasks and productivity performance of workers.

It should be recalled that the Commonwealth provide ADEs with ongoing funding for the training and support of individuals with disability in employment. This funding is provided at four different levels where higher support needs attract higher levels of funding. Similarly, open employment providers are provided with ongoing funding to provide training and support to workers with disability.

In summary, twenty-three of the twenty-eight other wage assessment tools do not focus solely on the actual job tasks of a worker.

There is a wide range of variability among these 23 wage assessment tools which use different combinations of productivity, job-related competency, general work competency, support and training need, and behaviour management support need content.

Competency-based assessment varies widely from the use of national industry training standards to the use of competency criteria developed in-house by ADEs.

The prevalent use of competency based assessment to determine pro-rata award wages often moves the focus of wage assessment away from the actual job tasks.

Some of these wage assessments include measures of support, training or behaviour modification which immediately creates measures which are not directly related to a measure of actual job performance.

Competency assessments, and training, support and behaviour assessments, would be better suited for guiding training (which may or may not be directly related to the worker's current job duties), career development strategies, or individual service support plans.

For example, a competency element such as "Use of basic tools" is better treated as part of the training of a job task. If a job task requires the use of a basic tool then this would be reflected in a worker's performance of the job task. The ability of the employee to complete the job task is dependent on using the basic tool and this would affect the quantity and quality of work achieved. Of course, it would be inappropriate to conduct a wage assessment of a job task if the worker did not know how to use the basic tool required for the job. The assumption of wage assessment is that the worker has been appropriately trained in the skills required to do the work required.

The same can be said for general competencies such as "Follows basic safety procedures". In the training of a job task we should expect that a worker has been instructed to perform the task according to safety procedures relevant to the job task. The use of a basic tool, for example, may involve using the tool consistent with workplace safety rules. These requirements can be set out in a standard for a job task i.e. output (quantity), quality of output (error tolerance), conducted as per safety requirements (safety rule). In this respect, the job trainer understands that s/he must teach the worker to perform the task in a particular way to achieve the standard required.

It is worth noting again Justice Buchanan's critical insight into the distinction between testing competencies per se, versus testing competency in a given task.

*testing for, measuring or assessing competencies is not the same thing as testing for, measuring or assessing competency in a given task. **The latter endeavour relates to skills, and the application of those skills. It may be expected to be reflected in some aspect of, or conclusion about, productivity.** The former endeavour borrows from "industry standards", so-called, usually found in training matrices or packages designed to provide increased recognition or avenues to higher pay. The idea of this kind of assessment is that an employee may be more "valuable" to an employer than a crude measure of productivity might suggest. [Buchanan 41, emphasis added]*

In this regard, the role of a pro-rata award assessment is to observe the job task according to the job requirements. A measure of "productivity" is sufficient. It should not be the role of the wage assessor to assess particular skill knowledge against industry qualifications or criteria lists. Wage assessment is not the same as an assessment for a qualification or measuring discrete skill criteria.

The role of an employment service agency (be it open employment or ADE) is to ensure that the individual is appropriately trained to the requirements of the job tasks they are

employed to perform. The role of the wage assessor is to assess the end result - i.e. the performance of the actual job in relation to the required standard as defined by the employer.

Is the assessment measure based only on a comparative productivity standard of a worker being paid the full award wage for the same job tasks? (Equality)

A key principle or validity test of a pro-rata award wage assessment is whether the wage assessment provides a comparison with a worker being paid full award wages performing the same job asks at the same Award level.

Our analysis, limited to the information published by the Commonwealth, is that there are three out of the twenty eight other assessment tools (PHT, Woorinyan & Waverley) that provide a clear and valid comparison with the productive capacity of workers performing the same job tasks as workers with disability.

The PHT wage assessment is productivity based assessment which collects time data for each assembly task using 3 or more non-disabled workers. The Woorinyan wage assessment is also a productivity based assessment tool and the assessment is “required to have clear baselines for measuring productivity for work tasks . . . [which are] the expected productivity of a worker at the full Award Rate (i.e. 100%)”

The Waverley wage assessment is based on “the output that a staff member without a disability can achieve working a 38 hour week at the minimum adult wage rate of pay”. This is different from a strict productivity based wage assessment and uses a tally of completed tasks and each task is allocated a pay amount. It would be important to compare this method to the SWS to ensure this method does not provide any disadvantage, however, it does meet the principle of a comparative productivity standard.

The other twenty six wage assessment tools are hampered by a range of wage assessment features and wage calculation methods which do not provide a direct comparison of productivity between a worker with disability and worker (with or without disability) that is being paid the full award wage at the same award level.

Instead of undertaking an analysis of each wage assessment tool we have prepared a list of wage assessment features that prevent a fair award wage comparison.

Sub Award levels

Some of the other wage assessment tools (e.g. Civic, Greenacres, Koomarri, Skillsmaster, Sunnyfield, Endeavour, Bedford, Blue Mountains, Mai-Wel) have designed sub levels of pay within the award level. These levels take the form of complex ‘matrices’ where jobs, skills or tasks are allocated to several sub levels of the award classifications. Each of these levels are then assigned a set percentage of the award level.

Before an assessment takes place, a worker’s job can be pre-assigned to one of these sub levels and significantly limit the rate of pay an individual can receive. This changes the notion of “award-based” to “below-award-based”.

This appears to have the effect of “controlling” the cost of wages by pre-discounting the award rate of jobs performed by workers with disability before any wage assessment is conducted.

As noted by the Federal Court, the jobs performed by people with intellectual disability are often basic routine jobs that are classified at the entry and lowest levels of an Award. Such a classification is sufficient.

To add sub levels to the lowest award levels, and pre-allocate percentages of the award, provides employers with “controls” to ensure wages will be constrained or kept low.

The classifications under the award should not be perverted in this manner. It is possible and reasonable for a wage assessor to determine that a worker’s job fits within the award classification structure without resorting to subdividing the classification levels. The wage assessment of productive capacity should proceed on the basis of determining a proportion of the full Award wage.

The sub award level design is a feature in a number of ADE certified agreements and seeks to be an extension of the Award classification structure. This feature appears to be intended to prevent workers with disability from having a wage assessment that is compared against the award classification and pay provided for workers without disability.

The Full Federal Court noted “the award required a comparison to be made with the rate of pay for a Grade 1 worker under the award”. In our analysis of the other wage assessment tools, this simple comparative principle is regularly undermined by other wage assessments which pre-determine a rate of pay below the award classification.

Assessment features which prevent a fair comparison to the Award

Many of the other wage assessments have features of competency assessment that prevent a fair comparison with workers paid at the full award level of pay.

The features noted by the Full Federal Court in its analysis of the BSWAT competency assessment are also characteristic of some of the other wage assessments. This includes:

- matters which are not part of the actual work performed by the worker
- abstract matters in the assessment which would otherwise be implicit in an assessment of productivity

Some of the other wage assessments include wage discounts for the support, training, supervision or behavioural support provided by the ADE. All these activities are funded by the Commonwealth government and shouldn’t be a part of a pro-rata award wage assessment.

Some of the other wage assessments use the “all or nothing” competency wage assessment feature that was noted by the Full Federal Court decision to be unreasonable. One wage assessment description mentions that the Commonwealth instructed the ADE to use the “all or nothing” assessment method.

Some of the other wage assessment tools use a wage calculation which multiplies the assessment scores of different assessment elements which discounts the wage even more severely than warranted.

Some of the other wage assessment tools include a continuum of wage assessment that they claim fits with the Supported Wage System when workers reach higher competency or productivity levels. Yet there is no research or evidence provided which demonstrates that this is a valid fit. Such a claim would need to demonstrate that workers would receive a similar wage under the SWS as they do under the in-house ADE wage assessment.

Has the assessment conducted comparative research indicating wage outcomes equivalent or better than the SWS? (No disadvantage)

None of the 28 other wage tools have conducted or provided evidence of any comparative assessment research with the Supported Wage System (or with any other wage assessment alternative). There is no indication as to whether these 28 other wage assessment tools offer workers an advantage or disadvantage as compared to the SWS - or at least offer any information to be able to consider their options in choosing or negotiating which award wage assessment they would like to have at their workplace.

Some of the other wage tools assessment have, however, drawn from the principles of the Supported Wage System (e.g. Woorinyan) and sought to implement those principles within their own wage assessment, without including competency or other assessment features.

Some of the other wage assessment tools (e.g. FWS, Ability, Merriwa) which have multiple assessment features (competency, productivity, training, supervision, support, behaviour) include an assessment of productivity similar to the Supported Wage System.

It has been a long standing view of the consumer movement that in the development or consideration of alternative wage assessment tools - other than the SWS - that an assessment of productive capacity by the SWS should be used as a control standard to undertake an analysis of the effect of different wage assessment tools on the impact on the wage process and outcomes.

It is difficult to claim that an alternative wage assessment offers something better or some kind of advantage when the employer or the employee has not had the benefit of the national standard (i.e. SWS) to evaluate and substantiate stated claims.

As we witnessed in the development, use of, and ultimately in the opinion of our highest courts, the BSWAT had the *effect of discounting even more severely than would otherwise be the case*, . . . [142].

We suspect that many, if not most, of the 28 other wage assessment tools may also have the same detrimental impact due to the inclusion of assessment features, like the BSWAT, that are artificial and theoretical, and fail to maintain a focus on a simple measure of productive capacity in relation to the award classification level.

To be sure, and to safeguard against discrimination, it should be a minimum requirement for alternative wage assessment tools to conduct comparative research using the SWS as the control standard.

Deeming the SWS as the national standard for all Australian workplaces including ADEs would prevent any “grey” or lingering concerns and exclude the possibility of exploitation and discrimination from this area of employment.

Does the assessment have external or independent features to minimise conflict of interest and safeguard against exploitation? (Safeguard)

The twenty-eight other wage assessment tools are administered internally by the employer. There is no independence of the assessor as a safeguard against exploitation by employers.

There are some independent features noted by some of the wage assessment tools.

The Yumaro wage assessment claims to use independent assessors that are appointed in consultation with the union. However, the description also includes mention that Yumaro wage assessors are now employed. It is unclear whether the Yumaro wage assessment tool is indeed conducted by independent assessors.

Some of the other wage assessment tools claim that employees deemed to have a capacity above ‘in-house’ below award pay levels, are assessed by independent assessors of the SWS. There is no indication of what proportion of their employees are assessed by the SWS.

The need for independence of the assessment is critical, particularly due to the heightened vulnerability of the workforce due to their significant disability.

Is training provided to the worker to learn the job tasks and ensure appropriate job match before a wage assessment? (Evidence based training and assistance)

A few of the other wage assessment tools (Greenacres, Hunter, Merrriwa) explicitly refer to job training as a pre-assessment step before wage assessment, although this is not necessarily linked to the full award classification or directly related to the job.

Whereas *links to training* is a common feature among all of the twenty-eight other wage assessment tools, most of the tools do not explicitly set out a discrete training component as a pre-assessment step before wage assessment.

One of the significant research breakthroughs (1950s - 1970s) about productive capacity and people with intellectual disability was the development of systematic training methods in teaching job tasks. The use of this training technology demonstrated it was possible to train people with significant intellectual disability to be productive in many jobs in the labour market.

This research evidence influenced the inclusion of the 3 to 4 month trial period in the SWS to enable specialist employment services to conduct a job analysis and systematically begin training the individual to perform the job tasks to the standard required by the employer. The SWS wage assessment occurs after this pre-assessment period, and ongoing support is provided to the employee and employer.

In contrast, training in many of the 28 other wage assessment tools is an indirect outcome of the wage assessment process and included as part of the workers’ future training

needs. For example, one wage assessment states: *Employees have an annual appraisal and the wage assessment information is used in identifying training needs.*

There is a cycle in many of the other wage assessment tools whereby the wage assessment is seen as a time of review which produces information on future training needs.

It is unclear however if the training that is referred to is effective in achieving its goal of greater competency or increasing wage rates. Whereas some of the other wage assessment tools claim such change, the evidence is not substantive or transparent.

A criticism of BSWAT is the poor average results of the competency element of the BSWAT. For example, a report in 2008 showed that the average competency score of people with intellectual disability was just 5.7%. This had dramatically fallen from the time of the first implementation of BSWAT which drew serious questions about the promise of competency assessment leading to better wages and qualifications.

It begs the question, that if competency based wage assessments contain *links to training*, national training standards and qualifications, why is it that we see little transparent evidence of increasing competency, wages and qualifications of workers with disability in ADEs?

Few, if any, of the published descriptions of the other wage assessment tools provide any substantial longitudinal data tracking change in terms of skill and pay rates.

Summary

Our analysis is not meant to be exhaustive and definitive. It does show, however, that there are major concerns about the use of other wage assessments used in ADEs. It also highlights the vulnerability of employees with disability who can easily be subject to wage assessments that have not undergone rigorous review and analysis.

It is also important to note that industrial authorities and QA auditors are being placed in difficult positions when having to determine whether such wage assessments are fair and non-discriminatory. Such a vetting system has not protected the rights of people with disability.

As we discovered through the Federal Court case, BSWAT was approved by industrial authorities, quality assurance auditors, and “independent” consultants. How easy it is for ADE employers and the Commonwealth to achieve legitimacy of wage assessment tools that are inherently unfair.

It is our view that a single national pro-rata award system - i.e. the SWS - would protect and safeguard ADE employees from the broad ad-hoc range of wage assessment tools that have been generated by maintaining “grey” guidelines about what is valid and what is fair.

9. What evidence or analysis is available, or has been done, to support the submission that ADEs would close as a result of the increased wages?

10. What consideration has been given to providing additional support to ADEs to assist them manage the additional costs resulting from increased wages?

ADE Viability

We are unaware of any financial analysis of the impact of increased wages on the viability of ADEs on a business by business case. We are aware, however, of two reports which set out average figures on the viability of ADEs as an industry.

In 2000 as part of the Strategic Review of Business Services (i.e. ADEs), the *A Viable Future* report jointly prepared by ACROD (now NDS) and the Department of Family and Community Services (now DSS) stated that:

Slightly more than half (53%) of the Business Services record positive profits.

The *A Viable Future* report claimed that Business Services had the purview of providing *supported employment and the operation of a commercially viable business.*

(It is somewhat of a tautology to speak of providing employment *and* operating a viable business when an offer of employment presumes that a business is viable and able to meet its costs, including that of its employees wages.)

Nonetheless, the *A Viable Future* report sets out a series of recommendations and strategies to build an industry to meet its obligations to provide employment and pay award based wages to its employees.

According to the report *Australian Disability Enterprises: Building Better Business Opportunities* prepared by ConNectia for the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) in June 2013,

44% of enterprises are described as profitable, 32% unprofitable and 24% as 'too close to call'

On this basis it would appear that since the 2000 Business Service Review and its implementation, fewer ADEs are profitable (44%), with about a quarter (24%) breaking even, and about a third (32%) unprofitable.

The ConNectia Report is silent on the issue of wage cost, despite the Full Federal Court decision of December 2012, nor the High Court decision in May 2013. The ConNectia report is concerned with providing advice on;

the opportunities to increase the volume of business being transacted between Government, Big Business and ADEs, with a view to improving the viability and sustainability of these enterprises into the future.

It would be propitious, given the claims made by DSS in its application, to provide a transparent report on progress of the implementation of the strategies and assistance to ADEs to achieve the goal of 'viability' and meeting employee entitlements, 14 years after the Business Services Review and the implementation of its recommendations.

The *A Viable Future* report sets out a range of performance monitoring and reporting. This includes financial indicators (profitability, return to equity, debt to equity ratio); business customer indicators, internal business indicators (management & reporting systems, investment strategies, cash-flow management, & quality assurance systems), and learning and growth indicators including employee conditions of employment (i.e. wage rates, hours of work, superannuation, leave conditions, OH&S).

These indicators are listed in detail in the *A Viable Future* report (p. xvi & 44-48).

DSS should provide AHRC and the community a transparent report on the basis of these performance monitoring and reporting indicators for each ADE that it is seeking an exemption from the DDA to continue to use an unlawful wage assessment with employees with disability.

Strategy to address viability

As stated in our original submission, it is important that

- the Commonwealth addresses the issue of business viability *on a case-by-case basis* after SWS assessments have been undertaken to establish the lawful wage cost of individual ADEs.
- The use of the productivity only BSWAT score as an immediate but temporary redress also provides a benchmark of productive capacity for employees and a benchmark for the Commonwealth and ADEs to determine the potential wage cost.
- The Commonwealth should temporarily (for up to one year) meet the cost of any increase in wage costs, to protect against the loss of jobs, as a result of implementing lawful pro-rata award wage assessment.
- This provides redress to discrimination, and gives time for the Commonwealth to work with ADEs to determine future business viability based on wage costs determined by lawful means.

Claims of business closure due to non-viability requires an indication of actual wage costs of each ADEs, and how this quantum of wage cost affects the business viability of each ADE. There is according to the 2000 review of Business Services a wide range of business viability in the ADE industry. It is therefore important that general claims of an inability to pay lawful wages be tested through the provision of transparent evidence.

Wage Cost

We have estimated what might be the overall increase in wage cost for the ADE industry. This estimation is based on available data on the wages of employees in ADEs, and available information on the difference in average competency and productivity scores.¹⁴

There are several limitations with such a projection due to the lack of current published data in terms of employee wages or BSWAT outcomes.

¹⁴ See Appendix 2.

- DSS Census data on the wages of ADE employees is about 6 to 7 years old. While this data is collected there has not been a public release of Census data since 2007-08.
- BSWAT data on average competency and average productivity scores were provided to Senate Estimates in October 2008. We are not aware of more recent data which is publicly available.
- A projection of increased wages factors in changes to the federal minimum wage since 2007 and the average BSWAT productivity rate.
- We have applied this projection to all ADE employees.

We estimate that if ADE employees were paid according to productivity only - the increase in ADE wage cost would be approximately \$78 million per year.

Of this increase, we estimate that the Commonwealth would receive an increase in annual pension savings of approximately \$34 million per year.

The net cost to the Commonwealth to underwrite the increase in wages could be in the vicinity of \$44 million in one year. Of course, this assumes that all ADEs are not capable of meeting a commercially viable business standard of paying employees award based wages.

The cost to the Commonwealth to temporarily underwrite the wage cost increase due to fair productivity based wages is modest.

11. Please provide full details of the 'steps to move towards a new wage setting approach' identified on page 4 of the exemption application, including proposed dates and timeframes?

12. What steps have already been taken and what were the outcomes of those steps?

13. If the exemption were granted, what steps would be taken to ameliorate the discriminatory effects on employees?

We consider that questions 11 & 12 are best left for the Commonwealth to respond to, as we have not been consulted on the detailed steps the Commonwealth is considering undertaking to move towards a new wage setting approach.

In relation to question 13, we believe strongly that it is unacceptable for employees to continue to be paid unlawful wages via BSWAT when an available and lawful pro-rata award wage assessment is available, and when there is a temporary redress via the productivity only component of the BSWAT.

Please also refer to our response to the recently announced Commonwealth BSWAT payment scheme at Appendix 1.

14. Please provide any comments in response to the submissions referring to the concluding observations of the CRPD Committee relating to the BSWAT on the initial report of Australia, adopted at its tenth session (2-13 September 2013).

Article 27 (1) (b) of the CRPD which requires nations to:

“Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;”

According to the UN High Commissioner on Human Rights, this right extends to alternative forms of employment.

“The right to enjoyment of just and favourable conditions of work applies to all workers with disabilities without distinction, whether they work in the open labour market or in alternative forms of employment.”¹⁵

The UN CRPD Committee concluded its review of Australia’s compliance with the CRPD on article 27 by recommending that Australia;

“Immediately discontinues the use of the BSWAT”, and
“Ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support[ed] employment.”¹⁶

The UN CRPD Committee has emphasised the “immediate” discontinuation of the use of BSWAT. This observation is coherent with the expectation of Article 27, particularly in light of the Full Federal Court decision and agreement of this decision by the High Court of Australia.

This observation is coherent with the interpretation of “just and favourable” conditions of work as highlighted by the CRPD itself, and by the analysis of this right as presented by the UN High Commissioner on Human Rights.

The UN CRPD Committee also emphasises the need for the Supported Wage System to be used as the right assessment of the wages of people in supported employment. We believe the use of the word “changed” is meant to convey a change from the use of BSWAT to the use of SWS.

This too is consistent with the Convention’s requirement for *equal remuneration for work of equal value*. This is the hallmark of the SWS in terms of its direct comparison of the volume of work by a worker paid full award wages doing the same job task.

Consistent with the CRPD and the CRPD committee’s concluding observation, the Commonwealth Government should:

¹⁵ Thematic study on the work and employment of persons with disabilities. 17 December 2012. Report of the Office of the United Nations High Commissioner for Human Rights

¹⁶ We believe the word “support” in the observation is meant to be “supported” and presume this to be a “typo”.

1. Immediately stop the ongoing impact of BSWAT by ensuring that only the productivity component of BSWAT is used to determine the wages of employees.
2. Immediately announce that it will declare the SWS as the single national pro-rata award wage assessment and begin preparations to roll out assessments to progressively safeguard the human rights of employees with disability in ADEs.

15. Please provide submissions as to the reasonableness of the exemption, given the discrimination that will occur if the use of the BSWAT is continued.

An exemption would be unreasonable because:

1. Unlawful discrimination would continue - as stated by the AHRC - without justification.
2. There is available redress - both temporary and permanent which is available to employers and the Commonwealth.
3. The basis for developing (yet another) wage assessment tool for employees in ADEs is not justified.
4. The exemption basis of considering, devising or establishing “alternative wage setting arrangements” is an *unknown* and we have no basis to evaluate if this *unknown* wage assessment meets the rights of employees.

In this respect, the AHRC is being put in a position of considering continued unlawful discrimination on the basis that DSS will do “something” that may or may not provide redress of employment discrimination in the determination of award based wages.

It would be of great concern if DSS and ADEs were once more permitted to design a wage tool. The history of past wage assessment design by DSS and ADEs suggests that giving the *green light* to go and build another one, is without strong references of past positive behaviour in upholding the employment rights of people with significant disability in ADEs.

16. Please provide any additional submissions, responding to the submissions provided to the Commission, or that you feel appropriate.

A matter of leadership and change

We have briefly reviewed the 101 submissions to the AHRC.

We have counted submissions either in favour or not of the exemption application and categorised submissions according to stakeholder groups, including ADEs, peak body and advocacy groups, legal advocacy, services and human rights commissions, individuals with disability and family members, members of parliament, wage assessors, and quality assurance bodies.

Peak body and advocacy groups, and legal based organisations concerned with human rights, are not in favour of granting a temporary exemption under the DDA to continue use of the unlawful BSWAT to determine the wages of employees with disability whilst an unknown wage tool is 'devised'.

These groups predominantly point out that continued discrimination is not necessary, and incoherent with the objects of the DDA. An alternative wage assessment tool is available (i.e. SWS) including temporary solutions through the use of the productivity assessment of BSWAT.

These groups also want support provided for people with disability so they may have the opportunity to be included in the general workforce to the maximum extent possible. This is consistent with the UN CRPD and with research and demonstration.

These groups also consider that concerns about ADE viability should be a matter of an

Stakeholders	Support	Not Support	Unknown
Individuals with disability & family members	12	24	10
ADEs	30	1	
Peak Body & Advocacy Groups		10	
Legal Advocacy, Legal Services, Human Rights Commissions		11	
Members of Parliament	1		
Wage Assessors		1	
QA Accreditation Body			1
Totals	43	47	11

ADE by ADE examination after temporary redress has been implemented. The Commonwealth should pay any increase in wage cost on a temporary basis to prevent business closure or job loss.

In contrast, ADEs and representatives want to continue to discriminate against employees with disability. They believe this is an acceptable interim solution to ensure that there is no closure of ADEs or job losses due to viability concerns.

Most ADEs want to participate in the development of a new unknown wage assessment tool. It is unclear what this means except that it involves a complex and lengthy process.

Some ADEs believe that people with intellectual disability are not capable of working in the open labour market and that segregated ADEs are *as good as it gets*. ADE representatives believe that the introduction of fair award based wages - too fast - will be counterproductive to the interests of employees.

ADE representatives also refer to international research to argue caution. Yet such international comparison is fraught, as the international discussion is mainly concerned with *eliminating* sub-minimum wages whereas we are addressing *fairness* in how we assess sub-minimum wages. And international minimum wages simply don't compare to Australia with the federal US minimum wage at \$7.25 compared to Australia's \$16.37.

JAS-ANZ, the organisation that accredits certification bodies to audit ADEs under the Disability Services Act, does not offer a view about the application except to tell us that they are having difficulty interpreting the law when auditing ADEs.

What is concerning is that JAS-ANZ argue that there are legal bases for certifying the continued use of BSWAT in determining the wages of people with intellectual disability in ADEs. If there were such legal bases these would have already been considered by the Full Federal Court and High Court. Is it not plain enough for JAS-ANZ that the High Court ruled that *the use of the BSWAT disadvantaged intellectually disabled persons, and, it was not reasonable?*

People with disabilities and families are torn.

Some are adamant that they are not paid according to their rights and it is time to stop this discrimination. Others are content to support the application concerned about the future of their job or the *respite* this provides family members to pursue real work. And there is a group of individuals and families that have provided a submission without a firm view either way.

There is a tension, if not an incoherency, between the employment rights of people with disability and the ADE model which groups people with disability in a business and apply wage assessments that severely discount award wages.

The one clear fact is that the High Court affirmed the decision of the Full Federal Court that the BSWAT was unlawful under the DDA and that this was a systemic disadvantage against employees with intellectual disability.

The Court's judgement exposed a discrimination that disability and advocacy organisations knew was deliberately contrived to achieve a 'false' legitimacy under the DSA, and in the industrial relations framework. We have seen the same contrivance in the development of many of the other alternative wage assessment tools.

Yet we see a determination by the Commonwealth to again find some avenue to keep applying BSWAT. And we also see a determination by the Commonwealth to develop yet another wage assessment tool that we anticipate will be undermined by the ADE industry to ensure it is severe. Any chance of a new fair award wage assessment will be constantly hampered by the constant fear refrain of closure and job loss. We have been at the 'table' and heard this many times before.

As a result of this desire to 'avoid doing the right thing' we have a complexity of avoidance.

- 29 other wage tools tied in an Award and certified agreements
- An ongoing systemic non-viability of many ADEs dependent on the government
- A constant stream of propaganda which *runs down* the productive ability of people with disability
- A QA system that has continually failed to address non-compliance of the DSA's objects of integration and principles of equality in employment
- A ten year plan that is out of step with best practice employment support for people with intellectual disability and other significant disability groups.
- The constant use of fear against individuals and families who feel as if they have no other option and must hold on tight to what they have got

We are dealing with a complex web of avoiding meaningful employment support that respects the rights of people with disability and the principle of inclusion as set out in the UN CRPD.

Minister Andrews recently precipitated a discussion on the basis that the welfare budget is unsustainable. A major question for the Commonwealth is, can we continue to sustain an employment industry that struggles to achieve viability, pay fair award wages, or achieve inclusion in the regular labour market? It is an industry where employees are dependent on the pension and few earn a wage which significantly reduces such reliance.

The right of people with disability, including people with intellectual disability who comprise the majority of workers in ADEs, to be included in employment and treated equally as other Australians is a promise that remains unfulfilled after decades of reviews, reports and generous funding.

Many wanting change to happen are fearful that the granting of the exemption will lead to more procrastination and place people with disabilities, families and their representatives in powerless positions against an industry that has little intention other than maintaining the status quo. More consultations, processes and promises. More branding changes.

And yet we are all concerned for the many people with disability and their families who have been placed in this difficult position. They should not be put in such a position.

Leadership and change is required. We need a plan to ensure that we do something that actually achieves the rights of people with significant disability to participate in the labour market with *just and favourable working conditions*.

It might help if we consider the lessons of other human rights issues that required a change in both the attitude and practice of society.

In 1954, in *Brown v. Board of Education*¹⁷, the US Supreme Court struck down the “separate but equal” doctrine that was the foundation of school segregation in 17 US states and the District of Columbia.

Yet the decision posed a challenge for the Court. What orders should it make to achieve such a significant change to the many education systems and schools and effectively replace segregation with inclusive education?

In 1955 the US Supreme court made a decision which became known as *Brown II*. This decision is best known for its directive *to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed*.¹⁸

While the Court orders were made with the best of intentions, it assumed that state authorities shared the attitude of the Supreme Court on the detrimental affect of segregation. Many Southern US states, however, interpreted this decision as an opportunity to resist, delay and avoid integration of black and white students in public schools. A program of massive resistance was launched by the Southern States to avoid the integration of black and white children in public schools. Some States even closed down their public school systems and funded private schools to avoid having to integrate the education system.

Due to this resistance, racial equality in schools was not achieved for a number of decades. For example, racial balance in Kansas’ schools was not achieved until 1998, following several more court decisions to address elaborate policies designed to maintain inequity and segregation.

In the original *Brown* case, the legal team representing ‘negro’ children presented a theory of social change prepared by Dr Kenneth B. Clark whose psychology research was critical in demonstrating the detrimental impact of segregation on black and white people.

The theory of social change put forward stated:

*The data reveal that desired changes in the behaviour of individuals and groups can be brought about by a change in the social situation in which they are required to function. Changes in the social situation are effected and reinforced by individuals with authority, prestige, power and the control over the media of communication and important areas of life.*¹⁹

What this theory puts forward is the view that most people are looking to those in authority and power to determine the boundaries within which they should live and behave. This may or may not change attitude but it can and does change the actual behaviour and choices of behaviour. This theory of social change rejects the notion that attitude change must come first. The theory states that:

¹⁷ *Brown et al. v. Board of Education of Topeka et al.* 347 U.S. 483. Decided May 17, 1954. US Supreme Court.

¹⁸ *Brown v. Board of Education*, 349 U.S. 294, 1955.

¹⁹ *Journal of Social Issues*, 4, 1953. Issue Author. Dr Kenneth B Clark. *Desegregation: An appraisal of the evidence*.

The hypothesis that attitudinal and other subjective changes are necessary antecedents to behavioral changes is not supported by the empirical data . . .

From this perspective the legal team arguing desegregation advocated that change should happen swiftly to create a situational change of behaviour and achieve integration sooner. If we wait²⁰ for attitude change, change may be slow or never be achieved. Unfortunately the Supreme Court chose a compromise that made it difficult for black children to immediately enjoy their equal rights as decided in the 1954 decision.

We see this kind of situational social change often occur when a child with disability is placed in a regular classroom or an individual with disability is placed in a regular worksite. It offers the chance for children and adults without disability to experience “inclusion” and interact and get to know this person who they would otherwise not meet because of segregation. This challenges preconceived attitudes. It also forces us to develop strategies as co-workers, teachers and peers to figure out how to include the wider diversity of the community despite individual human differences.

To address the change needed to assist people with significant disability engage with the employment market, we need ‘authority’ to set a standard of treatment. This standard must be clear and concise and implemented quickly.

This is what we are asking the AHRC to do. Be the *authority* that we look upon to address discrimination and human rights. Be the *authority* that echoes the *judicial power* showed by the Justices of the Federal and High Courts of Australia.

What we are asking is that the AHRC,

- Be clear and set a high standard.
- Set a national standard of the SWS to remove any doubt or loophole.
- Awake the Fair Work Commission to act and amend awards and agreements to adhere to this high standard and remove disability discrimination
- The BSWAT should stop immediately. No more discrimination is warranted. That people with intellectual disability are still being paid wages based on BSWAT more than 12 months after the Court decision is unacceptable.
- We should move quickly. Effort and time should be put into doing what is right.
- Use the productivity score of BSWAT to temporarily address the discrimination.
- Plan and roll out the SWS to all employees who need a wage assessment.
- Build SWS assessor capacity to meet need.
- Business is business. It is a matter for the employer to operate within a clear national standard. Business contracts, pricing, planning, etc. must be conducted coherently with a national standard of fair award wage assessment.

²⁰ “This ‘Wait’ has almost always meant ‘Never’. We must come to see, with one of our distinguished jurists, that ‘justice delayed is justice denied’ ”. Martin Luther King Jr’s Letter from Birmingham Jail, April 16, 1963.

- Viability concerns due to change to a fair national standard should be examined on a case by case by the Commonwealth and supported with financial support if need be.
- A new national plan of employment support for people with significant disability with high ongoing support needs should be prepared to meet article 27 of the UN CRPD.

As noted by the Full Bench of the Australian Industrial Relations Commission in 1994, the SWS was recognised as being *facilitative* in creating an industrial framework to *facilitate* the inclusion of people with significant disability in employment by removing industrial relations barriers caused by minimum conditions. It did not try to solve all matters of inclusive employment needs.

Similarly, the opportunity for the AHRC is to make a decision which is *facilitative* by ensuring a standard of legal treatment in employment which respects the human rights of people with disability to *just and favourable conditions* in employment.

While not solving the appalling employment participation rate of people with intellectual disability²¹, or the appalling lack of specialist employment support²², it sends a clear message that programs of employment assistance - be they of whatever kind - must uphold the employment rights of all people with disabilities, including those with intellectual disability.

Granting an exemption will, however, uphold discrimination and leave the parameters of discriminatory behaviour open to those who have not shown evidence of attitude change. This is the cycle of discrimination that we have been in since the Disability Services Act was legislated in 1986. This is the unfortunate intent of the application for exemption.

If the AHRC is able to set a standard by which there is certainty of redress, and structures by which we can prevent such discrimination in employment from happening again, we believe this will provide a leadership of authority we are so desperately in need of.

²¹ Australian Institute of Health and Welfare. Disability Support Services. National Disability Agreement. 11.5% of all people with intellectual disability receiving disability support in Australia work in the open labour market.

²² Department of Education, Employment and Workplace Relations. (2013). *Moderate Intellectual Disability Loading*. There is just one specialist open employment service for people with significant intellectual disability in Australia, responsible for 72% of all employment outcomes for jobs greater than 15 hours per week. *Peak organisations recognise that few DES providers have the specialist skill sets and competencies required to support MIDL participants and the consultations highlighted a need for specialist services or units to better support these job seekers to obtain substantial employment.*

Appendix 1: BSWAT Payment Scheme

On 15 January 2014, Ministers Andrews and Fifield announced that the Commonwealth will make a one off payment to employees with intellectual disability paid wages determined by the Business Services Wage Assessment Tool (BSWAT).

Compensation for the loss of wages and associated benefits due to discrimination caused by BSWAT is welcomed. We are, however, greatly concerned about the process given the vulnerability of a workforce with intellectual disability, and that this group is not in receipt of independent support and advice.

It should be recalled that the Commonwealth provided ADEs several millions of dollars to seek legal advice following the High Court decision in May 2013.

Many in the ADE workforce are unable to read and comprehend messages made via email and letter. We are concerned that without support many will participate without informed or genuine consent, and will acquiesce to the interests of the Commonwealth and their employer.

The announcement was made with little detail and there has been no indication of including peak disability and advocacy organisations for people with disabilities in the design of the scheme.

It is our view that:

- This Scheme must recognise that the Full Bench of the Federal Court has determined that the Commonwealth has been responsible for disability discrimination against employees with intellectual disability.
- The BSWAT Payment Scheme must provide employees with intellectual disability and their families with independent legal advice and support.
- Acceptance or rejection of an offer must be based on all information being understood by the employee and genuine consent given. As the Full Bench of the Federal Court indicated, people with intellectual disability are at their most vulnerable when being provided with complex information.
- Participation in this scheme should not remove any right for people with intellectual disability to pursue current or future legal complaints against the Commonwealth.
- The BSWAT payment scheme should apply to all workers with intellectual disability who have been paid wages on the basis of BSWAT in the past, present and future.
- The calculation of economic loss must be based on productivity rate (only) of the BSWAT or an assessment by the Supported Wage System. The amount of loss can be determined by subtracting the gross wages paid from the gross wages that should have been paid.
- The calculation of loss must take into account denied superannuation payments and any interest.
- The compensation payment should be tax free and not reportable to Centrelink.
- All workers with intellectual disability assessed using a competency element in their assessment tool must be included in the scheme.

Appendix 2: Estimate of Increased Wage Cost

Employee Count	Wage Increase if Productivity Only	Minimum Wage Increase, July 2007 - July 2013	2008 Mid-Point of Wage Band	Minimum Wage Increase Adjusted Wages July 2013	Minimum Wage Adjusted & Productivity-only Wages July 2013	Pension Savings
3171	1.64	1.19	\$30.50	36.34	59.68	0.00
3254	1.64	1.19	\$50.50	60.17	98.81	10.40
3472	1.64	1.19	\$70.50	83.99	137.94	26.97
1994	1.64	1.19	\$90.50	107.82	177.07	34.62
2807	1.64	1.19	\$125.50	149.52	245.55	48.01
1227	1.64	1.19	\$175.50	209.09	343.38	67.14
590	1.64	1.19	\$225.50	268.66	441.21	86.27
255	1.64	1.19	\$275.50	328.23	539.04	105.40
145	1.64	1.19	\$325.50	387.80	636.87	124.53
59	1.64	1.19	\$375.50	447.38	734.70	143.66
40	1.64	1.19	\$425.50	506.95	832.53	162.79
15	1.64	1.19	\$475.50	566.52	930.36	159.94
68	1.64	1.19	\$500.00	595.71	978.29	145.35
	Average weighted wage adjusted for minimum wage Increases		\$110.43			
	Average weighted productivity based wage Adjusted for minimum wage Increases		\$181.35			
	Average additional pension saving		\$31.40			
	ADE employee population 2011/2012		21,352			
	Total annual wage increase		\$78,745,867.83			
	Additional annual pension savings		\$34,861,350.15			