

Extract

This extract of Wage-Setting Decision 1/2006, which created special Federal Minimum Wage No. 2, is sourced from: The Australian Fair Pay Commission, *Wage-Setting Decision and Reasons for Decision October 2006*, The Commonwealth of Australia 2006, pp. 18, 24-27, 112-121.

The text of the full decision can be accessed at:

<http://fairpay.hosts.network/fairpay/WageSettingDecisions/General/2006/Documents/>

Wage-Setting Decision No 1/2006

On 6 October 2006 we, Ian Harper (Chairman), and Hugh Armstrong, Patrick McClure, Mike O'Hagan, and Judith Sloan (Commissioners), collectively comprising the Australian Fair Pay Commission, acting pursuant to the powers conferred on the Australian Fair Pay Commission by sections 196, 197, 214, 216, 218, 220 and 864 of the *Workplace Relations Act 1996* (the Act) make the following decision to be known as Australian Fair Pay Commission wage-setting decision No.1/2006. This decision takes effect from 1 December 2006.

Interpretation

In this decision:

“takes effect from 1 December 2006” means commences midnight 30 November 2006

“Pay Scale” means an Australian Pay and Classification Scale

“AIRC” means the Australian Industrial Relations Commission

“adult basic period rate of pay” means a basic periodic rate of pay that does not explicitly apply to a class of employees with a disability or employees to whom a training arrangement applies or junior employees.

New special Federal Minimum Wage No.2 - Employees with a disability who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity – and are not currently covered by a Pay Scale

1. Interpretation

In this special FMW:

Accredited Assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System;

Assessment instrument means the completed form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System;

Commission means the Australian Fair Pay Commission;

Employee with a disability has the same meaning as in section 178 of the Act;

special FMW means special Federal Minimum Wage;

standard FMW means standard Federal Minimum Wage under section 175 of the Act;

Pay Scale means an Australian Pay and Classification Scale;

Supported Wage System means the Commonwealth Government System to promote employment for people who cannot work at full wages because of a disability, as documented in "Supported Wage System: Guidelines and Assessment Process".

Training arrangement has the same meaning as in section 178 of the Act.

Special Federal Minimum Wage

2. Coverage of this special FMW

- 2.1 This special FMW applies to an employee with a disability:
- a) who is unable to perform the range of duties to the competence level required of an employee within the class of work for which the employee is engaged because of the effects of a disability on their productive capacity;
 - b) who meets the impairment criteria for receipt of a Disability Support Pension; and
 - c) whose employment is not subject to a Pay Scale or a special Pay Scale.
- 2.2 This special FMW does not apply to an existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation.
- 2.3 This special FMW does not apply to employers in respect of their facility, program, undertaking, service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of business service provider and sheltered employer to people with disabilities who are receiving or are eligible for a disability support pension.
- 2.4 This special FMW does not apply to an employee with a disability who is a junior employee or an employee to whom a training arrangement applies.

3. Supported wage rates

- 3.1 The minimum hourly rate payable to an employee covered by this special FMW is the greater of the hourly rates calculated in accordance with the method specified in clause 4 and the method specified in clause 5.

4. **Assessed capacity method**

- 4.1 The minimum hourly rate payable to an employee in respect of whom an assessment has been made is the percentage of the standard FMW (\$13.47 per hour) that applies to the employee in accordance with the following table:

Assessed productive capacity	% of standard FMW
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

- 4.2 The productive capacity of the employee is to be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:
- a) the employer and an employee representative, in consultation with the employee; or, if desired by any of these
 - b) the employer and an accredited Assessor from a panel agreed by the employer, the employee's representative and the employee.
- 4.3 An assessment instrument must be agreed to and signed by:
- a) the employer; and
 - b) the employee; or
 - c) the employee and the employee's representative; or
 - d) if the employee so chooses, the employee's representative.
- 4.4 A copy of the completed assessment instrument must be given to the employee and, if the employee requests, to the employee's representative.

5. **Minimum rate method**

- 5.1 The employee will be paid the amount worked out according to the following formula:

$$\$64 \div x$$

where x is the actual number of hours worked by the employee per week, or 38 whichever is the lesser.

6. Review of Assessment

- 6.1 The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

7. Trial period

- 7.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person for a trial period not exceeding an aggregate of 16 weeks in order to determine the appropriate percentage of assessed capacity.

- 7.2 The minimum hourly rate payable to the employee during the trial period shall be the greater of \$1.68 per hour or

$$\$64 \div x$$

where x is the number of hours the employee works per week or 38 whichever is the lesser.

- 7.3 Work trials should include induction or training as appropriate to the job being trialled.

8. Workplace Adjustment

- 8.1 An employer wishing to employ an employee with a disability to whom this special FMW will apply shall take reasonable steps to make changes to the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of the job duties, working time arrangements, provision of reasonable aids and equipment and work organisation in consultation with other workers in the area.

9. This FMW not to operate as a minimum for any Pay Scale

- 9.1 This special FMW does not operate as a minimum standard for any pay Scale.

Reasons for Decision

Section 8

8. Employees with a disability

The *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) preserved pre-existing disability wage arrangements in both federal and state systems in the form of preserved Australian Pay and Classification Scales (Pay Scales).

Prior to 27 March 2006, the regulation of rates of pay for employees with a disability contained gaps in the coverage of statutory minimum rates of pay and access to pro rata wage arrangements in both open and business services employment.

Work Choices does not legislatively fill these gaps. It does, however, oblige the Australian Fair Pay Commission (Commission) to examine these matters with a view to filling gaps in coverage of disability wage provisions.

8.1 The legislation and the definition of an employee with a disability

An 'employee with a disability' has a specific meaning for the purposes of the Commission's determination and is defined by s. 178 of the WR Act as follows:

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

Qualification for the Disability Support Pension (DSP) under the Social Security Act 1991 (SS Act) is met under s. 95 where a person who has turned 16 is permanently blind. The SS Act provides qualification for other impairments and states at s. 94(1):

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

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

8.2 Employment of employees with a disability

There are two types of employment where wages are specific to employees with a disability:

- open employment; and
- business services (also known as 'supported employment services' or 'sheltered workshops').

Open employment exists where employees with a disability are engaged in the mainstream workforce and compete with fully productive employees in a commercial setting.

There are two sub-types of open employment:

- employees with a disability who are able to earn full adult, training or junior wages (with reasonable adjustment as appropriate⁽¹⁾) as their disability does not impair their productive capacity; and
- employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged because of the impact of their disability on their productive capacity.

The Supported Wage System (SWS) was established for employees whose disability affects their productive capacity. A model award clause provided for a system to assess the productivity of disabled employees to determine a specified pro rata wage rate. The model clause now forms part of the Pay Scales where it was included in pre-reform wage instruments.

The Australian Government submission estimates that there were almost 3,500 participants in the SWS in the 2004-05 financial year.

Business services are charitable not-for-profit organisations and have traditionally operated outside of the federal and state systems of employment regulation through a lack of specific coverage (federal) or statutory exemption (state). Business services are subject to federal government funding and accreditation through the *Disability Services Act 1986* and are required to meet specified standards.

The Australian Government submission estimates that 17,500 people with a disability are employed by 224 business services operating at 380 locations across Australia.²

¹ The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

² Australian Government, *Submission to the Australian Fair Pay Commission 2006*, 28 July 2006, p. 346, para. 11.18.

Pay Scales covering business services are derived from the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001 [Fed] (LHMU Award).³ These Pay Scales are specific to the business services sector. However, there are gaps in coverage within the sector.

8.3 Gaps in coverage of disability wage arrangements

. . .

8.3.2 Employees with a disability who are who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity

Open employment

The SWS model clause was developed with the expectation that it be extended to all areas of open employment.⁵ However, for various reasons, the insertion of the SWS model clause into federal and state awards has not delivered comprehensive coverage.

Employees with a disability in open employment who are covered by a preserved Pay Scale but are without access to the SWS model clause are subject to full adult, junior or trainee rates of pay. This represents a gap in coverage, since employees with a disability that affects their productive capacity are required to be paid full rates of pay, potentially impairing their competitiveness in the labour market.

A further gap in coverage exists where employees with a disability in open employment are not covered by a Pay Scale. Since they are also excluded from coverage of the standard FMW, such employees are without access to any statutory minimum wage or pro rata assessment method.

Slow worker permits

Some employees with a disability engaged in the open employment sector have been employed under various alternative arrangements through federal and state laws that provide reduced rates of pay due to an assessed impairment. These arrangements are commonly referred to as 'slow worker permits' or 'special wage permits'.

These arrangements are pre-reform wage instruments and are preserved as Pay Scales.⁶ However these preserved Pay Scales will cease to have effect at the end of two years from the commencement of Work Choices. The expiry of the various arrangements represents an anticipated gap in coverage for employees covered by these arrangements.

. . .

3 The Supported Employees Industry Award 1998 [WA] does not contain rates of pay and so did not translate into Pay Scales for employees covered by the award. However, some of these business services may be covered by either federal or state registered agreements.

5 Australian Government, 2006, p. 359, para. 11.65; AIRC, *Supported Wage Decision* [Print L5723, (10 October 1994)].

6 Workplace Relations Regulations 2006, Part VII, Division 2, Regl. 7.2 & 7.3.

8.4 Agreements to fill coverage gaps in disability wage arrangements

The regulation of wages for employees with a disability has historically been characterised by a substantial level of agreement making among stakeholders.

8.4.1 Prior to 27 March 2006

This agreement making approach characterised wage regulation both in open employment and the business services sector.

Open employment

The SWS model clause was inserted following a consent application to the Australian Industrial Relations Commission (AIRC) by the Australian Council of Trade Unions (ACTU), Australian Chamber of Commerce and Industry (ACCI) and the Australian Government (supported by bodies representing people with a disability).

...

The parties to this application submitted that:

To provide a mechanism for a wages system for workers unable to work at full productive capacity, several options exist.

Pro-rata wages could be provided for by way of a general exemption to pay the minimum rate, with wages determined by agreement at the workplace. Alternatively the Commission could set an appropriate rate of pay for such workers upon application on a case by case basis.

However, the parties to this application, and disability groups more generally, consider that there are shortcomings with each of these options and consider that in order to provide the necessary safeguards and to ensure equity in outcomes wages should be determined on an assessment of the productive capacity of the individual in the particular job that they are performing.⁷

The AIRC approved the model clause to be inserted in federal awards.⁸ It provides the basis for paying pro rata wages based on an assessment of an employee's skills and productive capabilities. Parties could include the model clause in an award on application to the AIRC. There remain gaps in coverage.

...

8.4.2 After 27 March 2006

After 27 March 2006, parties can no longer apply to vary awards to extend disability wage arrangements. Rather the Commission decides such matters. Many submissions argue that the Commission should extend disability wage arrangements consistently with pre-existing agreements for both open employment and business services:

'ACCI continues to strongly support the use of the SWS to support the employment of persons with a disability in open employment. This successful approach, agreed on a bipartisan basis, should be maintained by the AFPC as the key minimum wage for persons with a disability working in open employment.'¹⁴

⁷ Australian Government, 2006, p. 349, para. 11.30 quoting *Supported Wage System for People with a Disability: A Joint Submission by the ACTU, ACCI, Commonwealth Government*, 20 July 1994.

⁸ AIRC, *Supported Wage System for People with a Disability*, Dec. 1831/94, [L5723, (10 October 1994)]

¹⁴ ACCI, 2006 *Minimum Wage Review: ACCI Submission*, July 2006, p. 452, para. 20.49.

'The parties should be allowed to continue the agreed approach as reflected in the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005, including the acceptance of agreed and compliant wage assessment tools (that were not inserted into the Award prior to Work Choices) as minimum wages for people with a disability working in Supported Employment Services.

There is an industry, union, parent and disability group consensus in support of the agreed terms of the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005, which was finalised only last year. This enjoys continued support as the way forward for the industry during this time of transition and modernisation and should be maintained.¹⁵

'Given the widespread acceptance of the SWS and its ability to set the minimum wages for employees with a disability that ensure they are competitive in the labour market, the Commission could consider determining a special APCS that provides universal access to the SWS under APCSs by filling all gaps in its coverage.¹⁶

. . .

The ACTU reiterates the agreed approach to disability wage arrangements prior to the implementation of Work Choices:

'The Supported Wage System was developed on a multipartite basis by government, employer, trade union, and disability peak bodies and specialised employment agencies for people with disability. The SWS was introduced to create job opportunities for people with disability...

On July 20, 1994 a Full Bench of the AIRC heard an application jointly made by the ACTU, ACCI and Commonwealth Government for the insertion of a model clause covering the employment of workers with disability into a range of Federal Awards. Since that time the SWS model clause has been inserted into virtually all federal awards.¹⁹

'The ACTU endorses that part of the submission of ACROD which relates to supported employment. Our support for a special APCS for this sector is distinguished on the basis that the proposal is to create a special APCS which would apply across a legislated area; the legislated area as defined by the Disability Services Act.²⁰

In addition, the ACTU notes the preferences of employees with a disability:

The wages and conditions of employees eligible for and employed under the SWS are located in most industry or occupational awards (up to 27 March 2006). This reflects the strong preference of employees with a disability to be employed under the relevant industry or occupational award, as opposed to a disability Award'.²¹

ACROD Ltd, the National Industry Association for Disability Services (ACROD) comprehensively describes how prior agreements can be incorporated into the new legislative scheme.

15 ACCI, 2006, p. 473-4 para. 21.52-3.

16 Australian Government, 2006, p. 360, para. 11.71.

'In keeping with the process that produced the original agreement, the key industry parties have held discussions about how the agreement can be best implemented under the Commission's jurisdiction, and have reached a common position on the action that needs to be taken. The Australian Government also supports the position agreed by the industry parties as follows...¹⁷

17 Australian Government, 2006, p. 363, para. 11.83.

19 ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 142.

20 ACTU, 2006, p. 146.

21 ACTU, 2006, p. 144.

Generally, there is widespread support for the SWS model clause:

'The Supported Wage System Model Clause should be incorporated in every Australian Pay and Classification Scale not already containing it to allow those people with disability in the target group (as defined in the Model Clause) to access productivity-based wages in industries or with employers not previously covered by the Supported Wage System Model Clause.'²²

'The Supported Wage System is the appropriate way to deal with wages and productivity issues related to disability.'²³

However, there is some limited opposition to extending SWS coverage:

Given the narrow application of the Supported Wages System and the increased complexity of industrial relations and income support legislation and policy, AFDO does not support the extension of the Supported Wages System to all Awards.²⁴

Some submissions also raise the matter of the establishment of statutory wage protections for employees defined by the legislation as employees with a disability, who are able to earn full adult wages. For example, the Human Rights and Equal Opportunity Commission (HREOC) states:

However, working within the regime of the Act, HREOC believes that the appropriate course for the AFPC is to set a Special FMW equal to the FMW. This approach is necessary to protect workers with disabilities from discrimination who may otherwise not be covered by the FMW.²⁵

The minimum weekly payment for employees under the SWS system has historically been determined by reference to the income-test free threshold for the DSP.²⁶

This amount has been set, and varied each year, based on the Disability Support Pension income test free amount which employees may earn without the loss of pension and benefits. The ACTU and ACCI have for some years agreed to increase this minimum SWS payment in line with increases in this inflation indexed amount announced by the Minister for Community Services. This has been a cooperative initiative, which ACCI continues to support.²⁷

However, ACROD has raised concerns that maintaining the minimum payment may represent a barrier to employment:

An additional issue is that the SWS minimum wage (at present \$62) is applied regardless of hours worked. It is the minimum for an employee working a 38 hour week or for an employee working an 8 hour week. People who can only work 8 hours a week tend to be those with the highest support needs and the lowest productivity. In these cases \$62 can pose a significant barrier to employment. In ACROD's view, the minimum should apply pro rata.²⁸

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22 People with Disability and NSW Disability Discrimination Legal Centre, *Minimum Wage Determinations: Spring 2006*, p. 2.

23 HREOC, *Submission to the Australian Fair Pay Commission for Consideration in Determining the First National Wage Decision*, July 2006, p. 9, para. 34.

24 AFDO, *Supplementary Briefing for the Australian Fair Pay Commission*, July 2006, p. 2.

25 HREOC, 2006, p. 9, para. 36.

26 currently \$64.00 per week.

27 ACCI, 2006, p. 452, para. 20.47.

28 ACROD, *Submission to the Australian Fair Pay Commission in respect of Disability Employment Services Sector*, 2006, p. 17, para. 49.

8.5 Extending coverage of disability wage arrangements

The Commission notes the consensus advocating the consistent filling of gaps in coverage to ensure that:

- employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate³²) as the effects of their disability do not impair their productive capacity have access to a statutory minimum wage; and
- employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity have the protection of statutory minimum wages that include pro rata arrangements.

This is consistent with the direction and approach taken by the key stakeholders prior to 27 March 2006 and reflects an intention to provide employees with a disability, who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, minimum rates of pay based on productivity that lead to greater opportunities to enter and remain in the labour market.

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³² The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

Open employment not covered by Pay Scales

Decision

The Commission will establish a new special FMW that extends coverage of the SWS pro rata wages to previously award free employees with a disability.

Coverage will be limited to employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity and who:

- work in open employment; and
- are not covered by a preserved Pay Scale.

Supported wage system minimum weekly payment

Decision

The supported wage minimum weekly payment for the new special FMW and the new special Pay Scale will be \$64.00 per week. Where a preserved Pay Scale specifies a supported wage minimum weekly payment, this will be increased to \$64.00 per week.

This retains the historical nexus with the income-test-free threshold for the DSP, which is currently the equivalent of \$64.00 per week.

To conform with legislative requirements to express this as an hourly rate of pay a 'method' has been included in the instruments to provide for the minimum weekly wage. This method will be included in the adjustment of preserved Pay Scales.