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DISABILITY

Disability Employment Action Centre

SAFETY NET REVIEW 2003

WRITTEN SUBMISSION

18 February 2003

C2002/2281, C2002/5548, C2002/5547, C2002/5546, C2002/4268, C2002/5545,
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C2002/5693, C2002/5692

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Level 42 / Nauru House
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MELBOURNE VIC 3000

Workplace Relations Act 1996

TITLE OF MATTER

SUBMISSION TO THE 2003 LIVING WAGE CASE

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WORKPLACE RELATIONS ACT 1996

S.113 applications to vary awards

s.108 references of applications to vary awards

Australian Liquor, Hospitality and Miscellaneous Workers Union

CHILD CARE INDUSTRY (AUSTRALIAN CAPITAL TERRITORY
AWARD, 1998
(ODN C No. 03697 of 1985)
[Print Q2724 [AW772250CRA]]
(C2002/2281)

and

Others

Various employees

Various industries

JUSTICE GUIDUCE, PRESIDENT
VICE PRESIDENT ROSS
VICE PRESIDENT McINTYRE
SENIOR DEPTY PRESIDENT WATSON
SENIOR DEPTUY PRESIDENT HARRISON
COMMISSIONER LEWIS
COMMISSIONER HOFFMAN

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Submission by DEAC and NCID to intervene in the National Wage Case.

Legal context: S.43 Subsection 1 of the Workplace Relations Act.

Under s.43(1) of the Act, we ask that the Commission grant leave to Disability Employment Action Centre (DEAC) and National Council on Intellectual Disability (NCID) to intervene in this application by the Australian Liquor, Hospitality and Miscellaneous Workers Union and Others in the s.113 applications to vary awards and s.108 references of applications to vary awards. A person, body or organization may be given leave to intervene if the Commission is of the opinion that the person, body or organisation should be heard.¹

¹ **Background Information to DEAC & NCID:**

DEAC, Disability Employment Action Centre, as a community legal centre, is funded by the Commonwealth Department of Family and Community Services and was established in 1987. (Exhibit 2, 3 & 4) There is a genuine interest and expertise in promoting the rights of people with disabilities within the workforce. DEAC is based in Victoria and operates in both metropolitan and rural areas.

DEAC's Advocacy Department provides free legal advice to people through both systemic and individually. DEAC has over 100 individual clients whose issues range from discrimination to industrial matters within both the workplace and in education. The majority of these clients have industrial issues.

The Systemic Advocacy Department looks at the wider picture and represents the groups of employees or people with a disability on matters of public issue. One such situation is the poor wages and conditions within the business services. DEAC is dedicated in providing legal assistance and advocacy to employees with a disability who are amongst the most vulnerable group of people within society in gaining both conditions and wages on a par with all workers.

NCID The National Council on Intellectual Disability is the recognized national peak body representing people with intellectual disability in Australia. (Exhibit 5 & 6) The mission of NCID is to make the Australian community one in which people with intellectual disability are involved and accepted as equal participating members.

NCID has existed since the early 1950s and is the Australian member of Inclusion International which has direct input into the United Nations

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through the international committee on disability.

NCID is funded by membership subscriptions, donations, and a Commonwealth government grant from the Commonwealth Department of Family and Community Services.

NCID has a genuine interest in promoting the rights of people with intellectual disability.

DEAC and NCID are governed by their members and Management Committee. Both are comprised of people with an interest in the rights of people with disabilities and include as members and in the Management Committee people with a disability. DEAC is also responsible for a publication named Access which outlines issues of concern to raise public awareness. (Exhibit 7 & 8)

Both DEAC and NCID are presently representing a number of clients who are employed in various business services throughout Victoria and other states within Australia. Many of these cases consist of complaints of discrimination in relation to the wages and conditions. Their interests are being pursued in other forums.

Employees of DEAC and NCID are members of CAFEE (Coalition Action for Employment Equity) and have the full support from other members of CAFEE in preparing their submissions. CAFEE is an informal network of people with disabilities and Advocacy Organizations.

All members of CAFEE belong to organizations that work to promote the rights of people with disabilities, in particular, industrially.

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Preliminary Submission - Intervention

Introduction

It is clear that s. 43(1) of the Act is wide enough to empower the Commission to grant DEAC and NCID leave to intervene.²

We ask that the Commission exercise its discretion to allow us to intervene in this matter and therefore to make submissions in regards to the Safety Net Review being used to ensure that the objects of the Act are met for all workers including those with a disability.

We submit that many of the Enterprise Bargaining Agreements relating to Business Services as well as the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001 have been certified but fail to meet the Safety Net Standard and therefore the objects of the Act. Due to the large numbers of Business Services throughout Australia it is impractical to intervene in each individual matter so many of these Agreements are passing through the certification process without objection.

² *Mine Management Certified Agreement 183/99 print R2492, 25 February 1999, SDP Harrison.*(Exhibit 9)

In this case, when granting the ACTU leave to intervene, the AIRC had regard to:

- s.43(2) specifically prevents organization of employees intervening except to extent to represent an employee.
- Neither of the relevant unions had been instructed to represent any employees nor did they have a willingness to be bound by the Agreement.
- This case suggests that where the Act specifically limits the role of union and where the relevant union does act, then the union body cannot be heard, and
- That the Commission must exercise its functions to further the objects of the Act.

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To prevent this from continuing to happen we ask that the Commission set principles to regulate the process and it is our submission that the Commission in exercising its powers under s.106 (1) of the Act can make Orders to ensure that the Certification of Awards and Agreements meet the objects of the Act, the Safety Net Provisions and the Equal Rights of Workers with Disability.

We further submit that workers with a disability are being discriminated against in regards to the conditions and wages that they receive and that this is contrary to the objects of the Act as set out in s.3.

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Discretion Should Be Exercised In Our Favour

1. The matters before the Commission are clearly an issue between all the parties involved in this application. We do not seek to divert the Commission to a matter that would not otherwise be considered or that is irrelevant to the parties involved in the Safety Net Review. These matters pertain to the fundamental industrial rights of people with disabilities.
2. It is our Submission that it is not in the public's interest for workers with disabilities to be denied the right to the same safety nets that are enjoyed by all other workers.
3. This application is made in a climate where all supported employment enterprises are seeking coverage by Industrial Agreements as well as award and some of these Agreements have already been presented to the Commission that have been Certified without challenge. It is our Submission that many of these Agreements that are sneaking through are contrary to the objects of Acts. Therefore, there is a genuine need for the Commission to be informed as to the views of employees within the Disability Sector.
4. Many of the clients that we represent are in a situation where their workplace is comprised of people whose capacity to consent to an Agreement is an issue. There is also a question as to whether they have the ability to instruct a solicitor let alone pay for one. Both DEAC and NCID are committed to ensuring the rights of workers with a disability are recognized and then protected.
5. Many employees with a disability are not in a position to intervene on their own and most are also not in a position to instruct. Therefore, under these circumstances it is appropriate that rights-based organizations such as DEAC

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and NCID seek to provide input on both the mandatory and discretionary matters for the Commission's decision. Leave to intervene has been granted by the Commission to both DEAC and NCID in the past.

6. Whilst s.3 of the Act clearly places primary responsibility for determining matters affecting the employment relationship on employers and employees it also provides that one of the Act's objectives is the prevention and elimination of discrimination including discrimination based on disability.³ We submit that the issues at stake here justify departure from the outlined principle in s.3 (b).

³ Section 3(j) *Workplace Relations Act 1996*

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Workers with a Disability are Employees

Under the *Workplace Relations Act* 1996 (Cth), “employee” is defined to include any person whose usual occupation is that of employee, but does not include any person undertaking a vocational placement. A “vocational placement” is where the person is placed in an education or training course where they are not entitled to remuneration. Where workers with a disability are paid for their services, they are employees under the Act.

Business services are regarded as employment service providers for people with a disability. Under the *Disability Services Act* 1986 (Cth) these employees are recognized as 'employees at law'. For funding the Business Service must meet certain standards. In many of the Services, these standards such as employment conditions are not being met.

It is apparent therefore that employees within the Business Services are entitled to minimum terms and conditions whether it be by Schedule 1A *Workplace Relations Act* 1996 (Cth), relevant awards, enterprise bargaining agreements or Australian workplace agreements. To ensure this occurs, it is essential that the Commission exercises its powers to rectify this situation.

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Need for Principles Relating to Enterprise Bargaining Agreements

Awards are the basis for the certification process for enterprise bargaining. Employees with a disability are entitled to the same rights as those being claimed by the ACTU in this application.

DEAC and NCID have received a large number of concerns raised by both employees and parents of employees working within the business services. It is apparent that there is the increasing concern relating to the poor wages and conditions within these enterprises as becoming an issue of public concern.

There are a number of Business Services Enterprise Bargaining Agreements that have been certified already. It is our understanding that many of these Agreements presented were certified un-opposed. Many of these fail to meet the standards. It is expected that there will be a number of applications made for certification during the next eighteen months as Business Services attempt to reach the accredited standard by December 2004. There will be more opposition by interveners who are representing clients to ensure that the industrial rights of these people are met. Advocates, representing clients with a disability, are being given leave to intervene in individual cases. This is not practical. We submit that there is a need for principles so the rights of all workers are met.

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Objects of the Workplace Relations Act 1996

The Honorable Mr Reith MP, Minister for Industrial Relations during the second reading of the Workplace Relations and Other Legislation Amendment Bill 1996 stated “that the role of the Commission, the scope of Awards, and arrangements for their adjustment need to be consistent with and reinforce the role of awards as a genuine Safety Net. This is important for the viability of the wage system to ensure its capacity to provide Safety Net protection to encourage agreement making and to meet overall economic objectives.”⁴

From this Statement it is clear that the Government intended that the *Workplace Relations Act* 1996 gives the Australian Industrial Relations Commission the power to make and to vary existing Awards. These Awards are restricted to the twenty allowable matters⁵ with the focus of Awards being the Safety Net of minimum wages and conditions therefore allowing the flexibility and needs of individual enterprise and workplaces being negotiated through enterprise bargaining.⁶

Section 89A (2) (b) of the Act relates to rates of pay and includes specifically rates of pay for employees under the supported wage system. It is clear from this section that the supported wage system is an allowable matter and therefore should be included in all Awards. In considering the hundred Awards most commonly used throughout Australia, sixty-one of these Awards have the

⁴ Proof Hansard: Friday, 13 December 1996 (Exhibit 10)

⁵ S.89A of the Workplace Relations Act 1996

⁶ *Textiles, Clothing and Footwear Union of Australia v Givoni Pty Ltd* [2002] FCA 1406 (15 November 2002): (Exhibit 11)

Awards must be strictly complied with. Failure to pay Award entitlements; Case confirmed that role of Awards as a Safety Net. Flexibility need to be achieved through Agreements. In many cases employees with a disability do not even have the Award for use as a Safety Net.

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supported wage clause, the remaining does not.⁷ It is also interesting to note that the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001 is one of the Awards that does not have the clause. The Australian Liquor, Hospitality and Miscellaneous Workers Union who is responsible for this award, is one of the Unions making this application for varying a number of their Awards for the Safety Net increase, but does not include the Business Services Award in their application.

⁷ Index of the Most Commonly used Awards (Exhibit 12)

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Public Interest

We further submit that under Section 90 of the Workplace Relations Act the Commission must take into account public interest.⁸

It is an accepted community standard that Australians with disability have the same rights as other Australians. This community standard is reflected in Commonwealth law including the Disability Services Act 1986, the Disability Discrimination Act 1992, and the Workplace Relations Act 1996. Australia has thus set a standard for an inclusive society where individual human difference is valued and given equal status under the law. It is therefore in the public interest to ensure that our system industrial relations, its objects and processes accommodate the equal rights of jobseekers/workers with disability. The intervention by DEAC and NCID recognizes that the current wages and employment conditions of workers in the business services industry are not in the public interest. Rather it is in the public interest to ensure that wages and employment conditions of workers are non-discriminatory and are determined according to the safety net. The individual difference of disability is not a justifiable reason to treat a worker differently.⁹

The most relevant of these standards is Standard 9 which refers to employment conditions within the Business Services. Each person with a disability enjoys

⁸ s.90 In the performance of its functions, the Commission shall take into account the public interest, and for that purpose shall have regard to:

- (a) the objects of the Act and in particular the objects of this part; and
- (b) the state of the national economy and the likely effects on the national economy of any award or order that the Commission is considering, or is proposing to make, with special reference to the likely effects of the level of employment and on inflation.

⁹ The Disability Services Standards, undated, outlines the minimum Standards expected for workers with a disability. (Exhibit 13)

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comparable working conditions to those expected and enjoyed by the general workforce.¹⁰ This is to ensure that all employees with a disability are getting the same things as other workers. This means that all workers with a disability are given the same opportunity to learn new things and to get better jobs, to have the same sorts of things such as pay, holidays, and sick pay as other workers. It is also to ensure that these workers receive a wage that is worked out using the same rules that is used for all other workers.

We submit that many business services fail to abide by these Standards and with the failure to include the supported wage clause within many of the awards it is difficult to ensure these Standards will be met by January 2004 when they come into effect.

¹⁰ Disability Services Standards as Appendix 3 of Assuring Quality (Exhibit 14) Disability Standards 2002 (Exhibit 15) Disability Standards 2002 Explanatory Statement (Exhibit 16)

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Discrimination

It is also submitted that the Commission under Section 93 of the Act the Commission is to take into account the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1985 and the Disability Discrimination Act 1992 relating to discrimination in relation to employment.

In the failure of all Awards to include the supported wage system, we further submit that workers with a disability are being discriminated against by the failure to provide minimum standards in both wages and conditions. The scheme of the Workplace Relations Act is to focus on Awards as a Safety Net of minimum wages and conditions the failure to do this in Business Services is a failure of society to protect a group of employees who are amongst the most vulnerable. In the past issues relating to equal wages for female employees has been addressed through the Safety Net cases.

The National Wage Case Review is the appropriate venue to address the concerns of the 17,000 workers with a disability throughout Australia. Section 88B of the Act states that the Commission must ensure that a Safety Net of fair minimum wages and conditions of employment is established and maintained. This Safety Net needs to provide the fair minimum standard in context to living standards, economic factors, levels of productivity and inflation. The needs of the lowly paid must be taken into account as well as any alteration to wage relativities between Awards to be based on skills, responsibility and conditions.

All employees are entitled to equal pay for work of equal value.¹¹ In the Seventies there was acceptance of the concept of equal pay for women. The forum used for these arguments was the National Wage case. Wage fixing

¹¹ National Wage & Equal Pay Cases 1972 (exhibit 17)

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Principles have also been set down in the National wage Case.¹² Both these factors are relevant therefore we are applying for equality for another group of workers, those with a disability. A fair wage for a fair days work for everyone.

¹² Wage Principles – Dec 1408/94 S Print L4700: (Exhibit 18)

- Taking into effect the amendments of the Act
- Encourage and facilitate Agreements
- Protection of wages and conditions
- Providing a framework of rights and responsibilities for parties – non-union represented = lack of knowledge for vulnerable group.
- Preventing and eliminating specified forms of discrimination again – no-union representation (freedom of Association).
- Minimum wages, equal pay for work of equal value etc.

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Power to Review

It our Submission that the Full Bench has the power to establish principles for making or varying awards in relation to each of the 20 allowable matters. Any variation in relation to these principles can be made by a single member of the Commission, however in other circumstances; the power to vary an award must be exercised by a Full Bench. We are asking that the Supported Wage clause be included in all awards which are in line with the principles handed down by a Full Bench of the Commission in the test case decision on the award simplification process.¹³ In considering s.143 (1C) (e) the Commission must ensure that the award provides for the Supported Wage Clause. Section 143(1C) (f) relates to discrimination. The Commission may take steps to facilitate the variation of the Award to ensure that it does abide by these sections.

The Commission must also review awards against Items 51(7) (e) & (f)¹⁴ Item 51(7) (e) relates to the supported wage system and Item 51(7) (f) discusses discrimination aspects.

It is our Submission that many of the Awards failed to have regard to fairness relating to provide for the Safety Wage System within the Awards allowing for discrimination against a group of employees.

It is our Submission that the Commission must take into account Section 88, 89, 90 and 93 of the Workplace Relations Act.

¹³ Print P7500

¹⁴ *Workplace Relations and other Legislation Amendment Act 1996*, Table A, Item 51 Variation of awards after the end of the interim period.

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Freedom of Association

Many workers with a disability do not belong to a union. Under the *Workplace Relations Act* 1996, one of the principle objects of the Act, s.3 (f), is to ensure the freedom of association. This includes the rights of employees and employers to join an organization or association of their choice, or not to join an organization or association. This aspect must be taken into account thus ensuring the welfare of workers with a disability.

Alternative Argument

If it is found that the Commission does not have the power to set down principles for enterprise bargaining agreements for Business Services, we ask that the Commission takes s.133 into account.¹⁵ – Consultative Committee

¹⁵ Section 133 Industry consultative councils

- (1) The Commission must encourage and facilitate the establishment and effective operation of consultative councils for particular industries.
- (2) The Commission must encourage the participants in an industry to use relevant consultative council:
 - (a) to develop measures to improve efficiency and competitiveness in that industry; and
 - (b) to address barriers to workplace reform in that industry.
- (3) In order to promote the effective operation of a consultative council for an industry, a Presidential Member may, if the President consents:
 - (a) chair meetings of the council; or
 - (b) take part in the council's discussions; or
 - (c) nominate another member of the Commission to chair meetings or take part in its discussions.
- (4) The President may consent under subsection (3) only if he or she is satisfied that the council properly represents organisations and associations of employers and organisations of employees in the industry.

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OUTCOMES SOUGHT

- Safety Net Adjustment as per ACTU proposed application
- That all awards are varied to include the Supported Wage System model clause (as amended – Appendix 1))
- Requirements of statutory declarations of applications for certification of agreements. (Appendix 2)
- That in the Public's interest, principles are settled relating to Enterprise Bargaining Agreements within Business Services. There are a number of problems with the consultative and representation processes such as capacity to pay, consent as well as inclusion of those s.13 Services that are exempt under the original clause.
- In the alternative, that the Commission under s.133 establishes an Industry consultative council. It is submitted that this council be chaired by a Member of the Commission and is to include representatives from DEAC, NCID, DFACS, DWRSB, ACROD, ACCI, ACTU. Matters would be arbitrated when agreement can't be reached.

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SUMMARY

WORKERS WITH DISABILITY, EQUAL PAY FOR WORK OF EQUAL VALUE, ELIMINATING DISCRIMINATION, CONSENT AND COERCION¹⁶

1. Section 88B (2) (d) and (e) provide an obligation to ensure the safety net adheres to principles of equality and anti-discrimination.
2. We submit that workers with disability currently under the provisions of the safety net are currently subject to unequal and discriminatory provisions in Awards and workplace agreements.
3. It is our submission that due to the characteristics and needs of workers with disability, especially congregate groups of workers with intellectual disability in the business service industry, that the current industrial relations processes of certification significantly disadvantage workers with disability.
4. Most workers with disability are not members of a union. S.3(f)
5. A significant proportion of workers with disability in the business service industry have intellectual disability. Their involvement in the process of enterprise bargaining renders them powerless and vulnerable. We realize that the nature of intellectual impairment covers a wide range of capacity. Yet we consider it to be immoral, if not contrary to the spirit of the Act, to certify a workplace agreement that has involved an employer bargaining directly with a group of workers who have intellectual impairment.

¹⁶ Letter dated 6 July 1999 to Ms Maree Ireland from Corrs Chambers Westgarth Lawyers (Exhibit 19)

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6. The presence of intellectual impairment in a large proportion of a workforce raises a range of implications for certification including the assessment of genuine consent and the determination of no disadvantage and anti-discrimination tests.

7. It is also worrisome that there is no independent bargaining agent assisting workers in business services. This places workers at great risk of exploitation. Our limited industrial relations experience has found that where there is independent representation it is more likely that the test of fairness will be examined more appropriately by employers and the commission.

8. Our experience and analysis to date, leads us to believe that without independent safeguards and support in relation to bargaining and negotiation, development of agreements, information and understanding, voting, and in the determination of pro-rata award wages, that it is more likely that workers with disability, especially workers with disability in business services, will be subject to misrepresentation, disadvantage, discrimination and coercion.

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INTRODUCTION

The Safety Net Review needs to ensure that the objects of the Act are met for workers with disability without discrimination.

We submit that many workers with disability, particular those workers who are employed within the industry known as “business services” (also historically known as sheltered workshops), have been made subject to award and agreement decisions which have certified wages and conditions below the safety net.

As a result, many workers with disability are subject to wages and conditions of employment which give rise to questions about the ability of current certification processes to ensure that the safety net is applied to prevent and eliminate discrimination and disadvantage for this group of workers.

We believe that the Commission must consider using its powers to make orders which ensure that the certification of awards and agreements meet the objects of the Act, the safety net provisions, and the equal rights of workers with disability.

With the prospect of many more employers in the business services industry expected to seek certification of agreements, it is imperative for the Commission to set down principles for agreements within the Business Services area taking into account the objects of the Act, the anti-discrimination sections as well as the no-disadvantage tests.

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THE LAW

1. The Act provides that workers with disability have the right to be treated on the same basis as workers without disability. This is supported by:
 - 1.1. A principal object of the Act to prevent and eliminate discrimination - s. 3 (j).¹⁷
 - 1.2. The function of the Commission to ensure a safety net of minimum wages and conditions of employment – s. 88B (2)¹⁸ – *which applies equally to workers with disability.*
 - 1.3. The function of the Commission to provide a supported wage system for workers with disability as a feature of the safety net – s. 88B (3).^{19,20}

¹⁷ s. 3 (j)

“respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;”

¹⁸ s. 88B (2)

“In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained..”

¹⁹ s. 88B (3) (c)

“the need to provide a supported wage system for people with disabilities;”

²⁰ A model clause for a Supportive Wage System was determined by the Full Bench of the Commission. Dec 1831/94 S Print L5723 (Exhibit 20)

“These matters came before the Commission as a result of joint applications under section 113 of the Industrial Relations Act 1988 (the Act) by the ACTU (acting on behalf of the relevant unions) and employers to vary the above awards by consent to include a model clause (annexured to this decision) which makes provision for the operation of the “Supported Wage System”. The matters were heard by the Commission on 20 July 1994, when joint submissions were presented by the ACTU, employers and Commonwealth Government in support of the applications.”

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1.4. The obligation of the Commission to take into account the principles of the Disability Discrimination Act 1992 in relation to employment - s. 93^{21 22}

2. The Act provides powers and features designed to prevent and eliminate discrimination and disadvantage.

2.1. The Commission established a model anti-discrimination clause in the Full Bench decision 9 October - Print M5600.²³

²¹ s. 93

"In the performance of its functions, the Commission shall take account of the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 relating to discrimination in relation to employment."

²² Disability Discrimination Act 1992 s.15 Discrimination in employment

"(1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability or a disability of any of that other person's associates:

(a) in the arrangements made for the purpose of determining who should be offered employment; or

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability or a disability of any of that employee's associates:

(a) in the terms or conditions of employment that the employer affords the employee; or

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

(3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

(4) Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

(a) would be unable to carry out the inherent requirements of the particular employment; or

(b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer."

²³ Print M5600 - Model anti-discrimination clause

1. It is the intention of the respondents to this award to achieve the principal object in section 3(g) of the Industrial Relations Act 1988 by helping to prevent and eliminate discrimination on the

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2.2. The Commission has the power to make orders to ensure that there will be equal remuneration for work of equal value - Part VIA, Division 2 – Minimum entitlements of employees. This power gives effect to international anti-discrimination conventions.²⁴

basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

2. Accordingly, in fulfilling their obligations under the disputes avoidance and settling clause, the respondents must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.

3. Nothing in this clause is to be taken to affect:

3.1 any different treatment (or treatment having different effects which is specifically exempted under the Commonwealth anti-discrimination legislation;

3.2 until 22 June 1997, the payment of different wages for employees who have not reached a particular age;

3.3 an employee, employer or registered organisation, pursuing matters of discrimination in any state or federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission; or

3.4 the exemptions in sections 170DF(2) and (3) of the Act.

²⁴ The International Covenant on Economic, Social and Cultural Rights. (Exhibit 21)

Article 3 relates to gender equity. Article 7 states that:

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”

International Labour Organisation. Convention Concerning Discrimination In Respect of Employment and Occupation (Exhibit 22)

“affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and considering further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights, adopts this twenty-fifth day of June of the year one thousand nine hundred and fifty-eight the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958.”

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2.3. The Commission has the power to set aside or vary awards – s. 111 (f) – and to remove discrimination – when referred by the Sex Discrimination Act 1984 – s. 113²⁵

2.4. The Commission must ensure that Awards where appropriate provide a supported wage system and do not discriminate against workers with disability - s. 143 - Making and publication of awards (1C) (e) and (f).²⁶

2.5. The Commission is obliged to refuse to certify agreements if the agreement does not pass the no-disadvantage test – s. 170LT and s. 170XA.²⁷

United Nations. Convention on the elimination of all forms of discrimination against women (Exhibit 23)

International Labour Organisation. R90 Equal Remuneration Recommendation, 1951. Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Exhibit 24)

International Labour Organisation. R111 Discrimination (Employment and Occupation) Recommendation, 1958. (Exhibit 25)

²⁵ s. 113 (2A)

If:

(a) an award or certified agreement has been referred to the Commission under section 50A of the Sex Discrimination Act 1984 ; and

(b) the Commission considers that the award or agreement is a discriminatory award or agreement; the Commission must take the necessary action to remove the discrimination, by setting aside, setting aside the terms of, or varying, the award or agreement.

²⁶ s. 143

(e) where appropriate, provides support to training arrangements through appropriate trainee wages and a supported wage system for people with disabilities; and

(f) does not contain provisions that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

²⁷ s. 170LT (2)

“The agreement must pass the no-disadvantage test (see Part VIE).”

Part VIE, s. 170XA

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2.6. The Commission is obliged to refuse to certify agreements it thinks discriminate against workers with disability – s 170LU²⁸

2.7. The Commission must not certify an agreement if the explanation of agreements have not taken place in ways that are appropriate having regard to the persons' particular circumstances and needs – s. 170LT (7).²⁹

“When does an agreement pass the no-disadvantage test?”

(1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.

(2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:

(a) relevant awards or designated awards; and

(b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.”

s. 170XB

“Special case—employee eligible for the Supported Wage System

If an agreement provides for the payment of wages to an employee who is eligible for the Supported Wage System at a rate that is not less than the rate set in accordance with that System for the employee, the approval or certification of the agreement is not to be taken to result in a reduction of the employee's wages.

Note: The Supported Wage System was endorsed by the Commission in the Full Bench decision dated 10 October 1994 (print L5723).”

²⁸ s. 170LU (5)

“Despite section 170LT, the Commission must refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee, whose employment will be subject to the agreement, because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”

²⁹ s. 170LT (7)

“The explanation of the terms of the agreement to persons as mentioned in paragraph 170LJ(3)(b), subsection 170LK(7) or paragraph 170LR(2)(b) must have taken place in ways that were appropriate, having regard to the persons' particular circumstances and needs. An example of such a case would be where the persons included:

(a) women; or

(b) persons from a non-English speaking background; or

(c) young persons.”

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2.8. The Commission must ensure that workplace agreements have been made with the support of a valid majority of employees and this agreement is genuine – s. 170LT ((5) and (6)).³⁰

2.8.1. Valid Majority is defined under s. 170LE

2.9. The Commission must make sure that agreement as been reached without coercion – s. 170NC³¹, Refer also to Wesley case decision by SDP Drake.³²

³⁰ (Exhibit 26) In PR900645, Coffs Harbour Challenge Inc., SDP Drake relied on: *“In a decision of Ross VP - Toys ‘R’ Us (Australia) Pty Ltd [Print L9066] he said: “In my view the requirement that a majority of employees ‘genuinely agreed’ to be bound by the agreement implies that the consent of the employees was informed and there was an absence of coercion.”*

and;

“In Gibbons the High Court confirmed that the extent of capacity which must be established depends on the nature of the transaction under scrutiny.”

“The principle which the case supports, and for which Boughton v. Knight (1873) LR 3 P & D 64, at p 72; Jenkins v. Morris (1880) 14 Ch D 674; Birkin v. Wing (1890) 63 LT 80 and Estate of Park (1954) P 112 may also be cited, appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. As Hodson LJ remarked in the last-mentioned case, ‘one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case.’ (Gibbons at p.438)

³¹ In PR900645, Coffs Harbour Challenge Inc., SDP Drake stated; *“Given that I have concluded that there was not an informed consent, I do not have to consider the question of coercion. However I have concluded that the pressure on intellectually disabled employees, to vote “yes” to please other persons, is capable of amounting to coercion. I do not wish any inference to be drawn that there was any attempt to coerce by CHC but rather, to indicate that my observation of these employees caused me to conclude that they preferred to answer in the affirmative if an affirmative answer was what they perceived would please the questioner. This is a situation fraught with difficulty for all parties seeking a valid majority in these business services.”*

³² Print 922335 Wesley Mission Supported Employment Business Service Certified Agreement Decision 2001 (Exhibit 27)

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2.10. The Commission has the power - s. 123 - to provide special rates of wages.³³

³³ s. 123

Where the Commission, by an award, prescribes a minimum rate of wages, the Commission may also provide:

(a) for the payment of wages at a lower rate to employees who are unable to earn a wage at the minimum rate; and

(b) that the lower rate shall not be paid to an employee unless a particular person or authority has certified that the employee is unable to earn a wage at the minimum rate.

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RECENT HISTORY OF WAGES AND CONDITIONS OF WORKERS WITH DISABILITY IN SHELTERED EMPLOYMENT³⁴

1. **1985.** The Report of the Handicapped Programs Review, *New Directions*, indicated that people with disability wanted wage-generating work with guaranteed minimum wage levels and conditions according to industry standards covering sheltered settings as well as open employment. “*Much criticism was directed at the unchallenging and inappropriate work frequently found in workshops and at the low level of wages paid*”.³⁵

1.1. The *New Directions* report recommended; “*establishing a productivity-based minimum wage for people working in long term supported employment on a pro rata basis keyed to prevailing able bodied rates for that industry.*”³⁶

1.2. As a result of *New Directions*, The Disability Services Act was legislated in 1986.³⁷

³⁴ The Commonwealth provides funding to the Business Services Industry (Sheltered Employers) as part of a program of employment assistance to people with disability.

³⁵ Commonwealth of Australia. Report of the Handicapped Programs Review. *New Directions*. (1985) Australian Government Publishing Service: Canberra. p. 34. (Exhibit XX)

³⁶ Commonwealth of Australia. Report of the Handicapped Programs Review. *New Directions*. (1985) Australian Government Publishing Service: Canberra. p. 39. (Exhibit 28)

³⁷ “(1) The objects of the *Disability Services Act 1992* are:

- (a) to replace provisions of the *Handicapped Persons Assistance Act 1974*, and of Part VIII of the *Social Security Act 1947*, with provisions that are more flexible and more responsive to the needs and aspirations of persons with disabilities;
- (b) to assist persons with disabilities to receive services necessary to enable them to work towards full participation as members of the community;
- (c) to promote services provided to persons with disabilities that:
 - (i) assist persons with disabilities to integrate in the community, and complement services available generally to persons in the community;
 - (ii) assist persons with disabilities to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community; and

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2. **1987.** The Commonwealth Parliament approved the *Principles and Objectives of the Disability Services Act 1986*³⁸, which were published in the Commonwealth of Australia Gazette, (No. S 118. Tuesday, 9 June 1987). This gave effect to the principle that people with disabilities have the same rights as other Australians.

3. **1988.** The Social Security Review reported on income support for people with disability in *Issues Paper No. 5 Towards Enabling Policies: Income Support for People with Disabilities*. The paper developed the concept of “active strategy”³⁹ for people with disabilities which would encourage them through assistance to return to the labour force to the extent of their capacity.

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- (iii) are provided in ways that promote in the community a positive image of persons with disabilities and enhance their self-esteem;
 - (d) to ensure that the outcomes achieved by persons with disabilities by the provision of services for them are taken into account in the granting of financial assistance for the provision of such services;
 - (e) to encourage innovation in the provision of services for persons with disabilities; and
 - (f) to assist in achieving positive outcomes, such as increased independence, employment opportunities and integration in the community, for persons with disabilities who are of working age by the provision of comprehensive rehabilitation services.
- (2) In construing the objects and in administering this Act, due regard must be had to:
 - (a) the limited resources available to provide services and programs under this Act; and
 - (b) the need to consider equity and merit in accessing those resources.

³⁸ Principle 2. (2) “*People with disabilities, whatever their origin, nature, type, and degree of disability, have the same basic rights as other members of Australian society.*”

³⁹ Commonwealth of Australia. (1988). *Issues Paper No. 5. Towards Enabling Policies: Income Support for People with Disabilities*. AGPS (Exhibit 29)
“The fundamental underlying objective of the proposals is to introduce new income support programs which provide the conditions for economic security and dignity without foreclosing on opportunities for greater levels of employment;..” (p. 197)

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4. **1990.** The Commonwealth published the report *National Employment Initiatives for People with Disabilities* by Chris Ronalds.⁴⁰ A major purpose of this report was to address the issue of appropriate wages for workers with more severe disabilities.

4.1. The Ronalds report states that; "*People with disabilities must be given the opportunity to work in the general labour market with adequate support for a living wage. This in line with the objects, principles and objectives of the DSA to achieve integration of people with disabilities.*" (p. 7)

4.2. And that; "*It is recognised that some people with disabilities will not be able to work at the same level of skills or that level for the same periods as workers without disability.*" (p. 7)

4.3. The Ronalds report canvasses the importance of the development of a productivity based wage system as; "*central to the issue of achieving increased integrated employment opportunities for some people with more severe disabilities.*" (p. 23)

4.4. An assessment of wage assessment systems in Sheltered Workshops concluded that: "*All the formal systems are time consuming and cumbersome and deliver little to the worker in terms of the potential for substantially increasing their wage levels.*" (p. 41)

4.5. The report recommended the development of one comprehensive national wage assessment process within the industrial relations system that would replace any existing State or Commonwealth system. (p. 51)

⁴⁰ Commonwealth of Australia. (1990). *National Employment Initiatives for People with Disabilities*. A Discussion Paper. Report of the Labour and Disability Workforce Consultancy. Chris Ronalds. AGPS. (Exhibit 30)

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5. **1990.** The Senate conducted a public inquiry into the employment of people with disabilities. The report, *Employment of People with Disabilities: Report of the Senate Standing Committee on Community Affairs*⁴¹ recommended, “*That the Commonwealth government implements a wage system to meet the income needs of people with disabilities unable to work full-time at or above award wages.*” (p. xxix)

6. **1992.** The Commonwealth established a Wages Committee to advise on a supportive wage system for people with disability. The Wages Committee produced the report, *Development of a National Assessment Framework for a Supportive Wages System* by Dunoon.⁴²
 - 6.1. The Dunoon report provided principles of a pro-rata award wage assessment that would become the Supportive Wage System.

 - 6.2. Dunoon (p. 8 & 9) found that wage fixing in sheltered workshops had the following characteristics:
 - Determined by a variety of means
 - Informal assessments to elaborate systems
 - Some systems attempt to measure productivity against an able-bodied rate whereas others are determined against an ability to pay
 - Wage determination is not covered by awards

⁴¹ The Parliament of the Commonwealth of Australia. (1992). *Employment of People with Disabilities: Report of the Senate Standing Committee on Community Affairs* (Exhibit 31)

⁴² Commonwealth of Australia (1992). *Consultancy on the Development of a National Assessment Framework for a Supportive Wages System*. Report to the Wages Subcommittee of the Disability Task Force. Don Dunoon, Department of Industrial Relations. AGPS. (Exhibit 32)

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- Wages are adjusted on basis of attitudes and general behaviour – this practice is subjective and reflects a conflict between the dual role, and.
- Wages are very low

6.3. Dunoon states that the extension of the SWS to Sheltered Workshops raised a number of issues including the need to define the employment relationship in workshops, and capacity of Workshops to pay wages.⁴³

7. **1993.** The Commonwealth Government introduced the Disability Service Standards to assist Sheltered Employers meet the principles and objectives of the Disability Services Act 1986.

7.1. Standard 9 of the Disability Service Standards is about *Employment Conditions*, and states that: “*Each person with a disability enjoys comparable working conditions to those expected and enjoyed by the general workforce.*”⁴⁴

8. **1994.** The Full Bench of the Australian Industrial Relations Commission (1831/94 Print L5723) gave effect to a system of pro-rata award wage assessment to “*promote employment for people who cannot work at full award wages because of a disability*”. The decision provided a model clause

⁴³ This issue remains unresolved. Many business service employers have submitted workplace agreements that describe enterprises as not being ‘employment’. The ALHMWU Supported Employment (Business Enterprises) Award 2001 (AW814307) also contains similar descriptors. For example: “It is acknowledged that the organisations and services covered by this award do not, as a general rule, operate pure employment services in a strictly commercial sense. Rather, the organisations operate in an employment-like environment “. Such descriptors attempt to obfuscate right of workers with disability to fair minimum wages and conditions. Thus this award does not contain a fair form of wage assessment for pro-rata wages which results in the employer setting wages arbitrarily.

⁴⁴ Commonwealth of Australia. Disability Services Act 1986. Determination of Standards for the Purpose of Section 9C. DSA 1 – 1992. 7th October 1992

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that could be inserted into awards and agreements to address wage rates of workers whose productive capacity was diminished by the effects of their disability. Eligibility to the SWS by workers with disability in sheltered employment was dependent on the employer achieving 'enhanced' or 'eligibility' service standards regulated by the Disability Service Act 1986.⁴⁵

9. **1993.** The Commonwealth announced a strategic review of the Commonwealth Disability Services program and in 1995 published the report of the review, *Working Solution*.⁴⁶

9.1. *Working Solution* found that 15, 381 employees in sheltered workshops worked on average 32 hours per week for an average of \$49 per week. 19% of employees were paid full or pro-rata award rates. The review stated that; "*No valid reason has been presented to the Reviewers as to why all services should not pay at least pro-rata award wages for all employees such payment would not exclude people with severe disability because payment is according to productivity*". (p. 87)

9.2. *Working Solution* recommended that; "*By June 1996, all DSP-funded services should be paying employees under an award or certified agreement and should be paying at least pro-rata award wages consistent with the principles of the Supported Wages System*." (p. 87)

⁴⁵ Australian Industrial Relations Commission, 1831/94 Print L5723. (Exhibit 20 in Folder 3) "The award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the Disability Services Act 1986 and fulfills the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or under s.12A of the Act, or if a part only has received recognition, that part."

⁴⁶ Commonwealth of Australia. (1995). Baume, K., & Kay, K. *Working Solution*. Report of the Strategic Review of the Commonwealth Disability Services Program. AGPS (Exhibit 33)

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10. **1995.** The National Caucus of Disability Consumer Organisations conducted a consultation of people with disability as to the direction of the Disability Services Quality Council to improve Commonwealth funded disability services. In respect to wages and conditions of employment, people with disability indicated they wanted:

10.1. “Consumers receive a decent and honest wage, and employment conditions commensurate with other members of the Australian workforce.” And that: “A major issue of concern for consumers was ‘wages’. Many expressed that a person without a disability would not suffer the employment conditions that people with a disability are expected to endure.”⁴⁷

11. **1995.** The National Council on Intellectual Disability provided the Commonwealth with a report on a consultation with jobseekers/workers on matters relating to integration and wages in employment services⁴⁸. This report was prepared for a Commonwealth working party established to respond to recommendations of *Working Solution*. People with intellectual disability indicated strong support for the receipt of award wages but were cautious about the idea pro-rata assessments that would result in less wages.

12. **1996.** The Australian Law Reform Commission conducted a review of legislation administered by the Department of Health and Family Services. This included a review of the Disability Services Act 1986. The Report of this review, No. 79, *Making Rights Count*, states that,

⁴⁷ National Caucus of Disability Consumer Organisations. (Dec, 1995). “*All I want is a job ..*” Report on consultations regarding the Disability Services Quality Council Strategic Plan. (Exhibit 34)

⁴⁸ National Council on Intellectual Disability June 1995. *Consultations with consumers on aspects of the discussion papers relating to integration and wages in employment services*. Not published. (Exhibit 35)

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12.1.1. *“The new legislation should promote the concept of equal pay for equal work. In the Commission’s view the pay and working conditions of people with a disability should specifically be protected in disability services legislation. Traditionally people with a disability in supported or sheltered employment have not been regarded as employees. This has often resulted in poor wages and working conditions.”⁴⁹*

12.2. The ALRC agreed with the recommendation of *Working Solution* that all employment services should ensure that employees are paid under an award or certified agreement and should be paying at least pro-rata award wages consistent with the principles of the Supported Wage System.

13. **1996.** *A report for the Department of Industrial Relations on the effects of enterprise bargaining on workers with disabilities* by Ron Joachim, March 1996⁵⁰ found in a small sample of enterprises that:

13.1. *“In no enterprise did workers with disability have any significant say in setting the bargaining agenda, nor were they involved in any consultative or negotiating committees. No specific arrangements were made for workers with disability to have input into the bargaining process. For the most part workers with disability had little knowledge of skills in industrial relations.”* (p. 2)

13.2. The sample for the above report was of enterprises where workers with disability were a part of a diversity of workers (as opposed to a congregation of workers with disability which is a feature of business

⁴⁹ Commonwealth of Australia. (1996). *Making Rights Count. Services for people with a disability.* Review of legislation administered by the Department of Health and Family Services. Australian Law Reform Commission. Report No 79 p. 233. (Exhibit 36)

⁵⁰ Department of Industrial Relations; *A Report on the Effects of Enterprise Bargaining on Workers with a Disability* (Exhibit 37)

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services industry). Whereas there was little involvement and understanding of the industrial process or particular 'disability' provision in agreements, workers with disability received the same outcomes and benefits of workplace agreements.

13.3. The report notes that at a particular workplace, five workers with intellectual disability had participated in five meetings as part of the development of an agreement. The report states that: "*They tended not to participate as they did not understand what was being discussed.*" "*Their non-disabled peers, on the other hand, participated vigorously at union meetings, the input from which fed directly into the negotiations with management.*" (p. 23 & 24)

13.4. The report does not, however, canvass workers with disability in the business service industry. There is no discussion on the effects of enterprise bargaining on congregate workplaces with a large percentage of workers with intellectual disability.

14. **1997.** The Commonwealth conducted an *Evaluation of the Barriers to the Implementation of the Disability Services Standards*⁵¹ conducted by Service Quality Australia. This report consulted jobseekers and workers with disability about the implementation of service standards. On the issue of wages and conditions the report states that:

14.1. "*Unfair wages and employment conditions are a major issue for people using business services / sheltered employment. This treatment*

⁵¹ Service Quality Australia. February 1997. Evaluation Of The Barriers To The Implementation Of The Disability Service Standards. A Report To The Disability Service Standards Review And Quality Assurance Working Party (Exhibit 38)

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fails to meet either the spirit of the Standards of their requirements. Consumers consider that this is discriminating and unfair.” (p. 28)

14.2. The report also stated that: *“The payment of adequate wages is seen as one outcome area that continues to be side stepped by both government and in the business service / sheltered employment environment.” (p. 52)*

15. **1999.** The National Council on Intellectual Disability and the National Caucus of Disability Consumer Organisations complained to HREOC seeking that reform to Commonwealth funding assistance is based on workers receiving award based wages through a legal industrial agreement. The then Minister for Family and Community Services, the Hon. Senator Jocelyn Newman agreed with worker representatives and wrote:

15.1. *“My preference is to allocate trial funding to services that have an award based wage system in place. This recognises my concerns that appropriate employment outcomes are a key element of Government policy and that people with a disability need to have the same rights, protections and responsibilities as other people in the workforce.”⁵²*

16. **2000.** The Business Services Review – a joint initiative of ACROD (Employer Representative) and the Commonwealth Department of Family and Community Services – was reported by KPMG – *A Viable Future*.⁵³ This report indicated the lack of consistency and fairness in wages and conditions of employees in business services (p. 21). The report recommended wages

⁵² Correspondence from the Commonwealth to the National Caucus of Disability Consumer Organisations, 8 July 1999. (Exhibit 39)

⁵³ Commonwealth of Australia. (2000). *A Viable Future*. Strategic imperatives for Business Services. Joint initiative of ACROD and the Commonwealth Department of Family and Community Services. (Exhibit 40)

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be linked to productivity and an agreed industry assessment of general work competencies (p. xii).

16.1. The report indicated that of 14, 142 employees, the medium wage was between \$41 and \$60 and that these figures remained unchanged from the 1995 and 1997 FaCS Census figures (p. 9). There was no analysis by the consultant of links to the safety net, awards or the principles of the supported wage system.

16.2. The National Caucus of Disability Consumer Organisations was contracted by the Commonwealth to consult with employees in business services about the business services review report and recommendations. The report⁵⁴ states that:

16.2.1. *“Consumer Consultation participants also indicated that employment conditions in Business Services were generally sacrificed to the need to keep the organisation afloat. That is, as reported in the Report of the Review and associated papers, the median wage level of between \$41 and \$60 with no system in place to ensure that there is an established relationship between:*

- *individual productivity;*
- *the remuneration paid to individuals within the context of a commercially viable business enterprise and pricing policy, and*
- *the requirement for providing quality employment conditions and remuneration to employees.*

⁵⁴ Report of consultations held with people with disability regarding the recommendations of the Business Services Review: A viable future - strategic imperatives for Business Services. National Caucus of Disability Consumer Organisations. June 2000. Funded by the Commonwealth Department of Family and Community Services

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17. **2000.** The Review of the Supported Wage System by KPMG⁵⁵ found that the system: "*Promotes the participation of employers, employee and unions equally and has at its core, values of integrity and transparency in decision making.*" The report concludes that: "*Radical reform is not required, rather a considered approach that will ensure that the SWS can remain relevant, responsive and flexible in a changing and dynamic environment.*"

17.1. Recommendation 3 of the Review of the SWS states: "*That FaCS modify the guidelines and associated mechanisms of the SWS to enable its adoption in Section 13 Business Services*".

17.2. The review says that: "*The SWS assessment process is seen to have relevance and application within business services while other elements of the system are seen to require modification⁵⁰ before they could be applied within such a setting. Up until now, the emphasis of the SWS has been on open employment. It is seen that consideration should now be given to the potential application of the existing or a modified version of the SWS for business services. The use of the SWS has the potential to usefully inform the development of an industry wide mechanism for assessing wages within business services. It is intended that this be implemented as part of the Award Based Wages Strategy being undertaken by FaCS.*"

17.2.1. The footnote in the above quote refers to: "*The minimum wage rate, the means by which productivity links to an appropriate wage rate especially for those with a low productive capacity.*"

⁵⁵ Commonwealth of Australia (2000) *Evaluation of the Supported Wage System* KPMG. Department of Family and Community Services (Exhibit 41)

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18. **2001.** Report of the *Having a Say Conference*. This is the annual conference by the Victorian Advocacy League for People with Intellectual Disability (VALID).⁵⁶ This conference of people with intellectual disability made key recommendations that the: *“Government needs to address wages concerns for people with disability to ensure that they are not being exploited”* and *“The Federal Government should address issues of exploitation, discrimination and service quality, through adequate support for employees with disability to assist them resolve obtain equity and negotiate workplace agreements.”*

19. **2002.** The President of the ACTU, at the ACTU Workers with Disability Conference stated that wages and conditions of workers with disability are a major issue.

19.1. The ACTU President reported that: *“45,950 workers with a disability were recorded as using government employment services in June 2000 according to the Disability Services Census done by the Department of Family and Community Services. This found:*

- *41% earned less than \$60 per week*
- *15% earned between \$60 and \$100 per week*
- *16% earned between \$101 and \$200 per week*
- *10% earned between \$201 and \$300 per week*
- *8% earned between \$301 and \$400 per week*
- *10% earned more than \$400 per week.”⁵⁷*

19.2. In an outcome statement following the ACTU conference it was stated that:

⁵⁶ Building Partnerships. Report of the 2001 “Having a Say Conference” (Exhibit 42)

⁵⁷ ACTU, Workers With a Disability Deserve Better, Speech by ACTU President, Sharan Burrow, 11 July 2002 (Exhibit 8 Access Journal August – September 2002 pp.6-9)

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*“The Conference expresses its concern over examples of poor standard non-union bargaining in individual enterprises in the Business Services area. The Conference acknowledges the need for the Australian Industrial Relations Commission (AIRC) to carefully examine the content of enterprise agreements which are submitted for certification. The AIRC must ensure that there is evidence of informed consent from workers, that the content of the agreement is compatible with the “no disadvantage” test and that the employer is offering secure employment opportunities, skill development and a safe working environment to employees. **Further consideration should be given to the Australian Industrial Relations Commission (AIRC) establishing a set of principles which should apply to enterprise bargaining in the Business Services area.**”⁵⁸*

(Emphasis added)

20. **2002.** A consultation of workers with disability was conducted as part of the evaluation of new funding arrangements for employment assistance to jobseekers/workers with disability. This was conducted by Australian Health Care Associates for the Commonwealth’s evaluation of the *Case Based Funding Trial*. The evaluation report⁵⁹ found that workers in business services have significant concerns about wages, choice and support:

20.1. *“The differences were marked however between the level of satisfaction among workers in business services and workers employed in an open setting. Business service workers raised more concerns than open employment workers about lack of choice and variety in their work tasks, low hourly pay rates and wages, and lack of on-the-job support.*

⁵⁸ ACTU Workers with a Disability Conference. Outcomes and statement arising from the Workers with a disability conference held on July 11 - 12 2002. (exhibit 1)

⁵⁹ Commonwealth of Australia. (2002). *Evaluation of the Case Based Funding Trial*. Australian Healthcare Associates. Department of Family and Community Services. (Exhibit 43)

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These findings were common amongst CBFT and block grant funded business service workers."

20.2. It is important to note that the differences between the quality of employment outcomes between open employment services and business services is not due to differences of the support needs of jobseekers. The report noted that:

*"the lower wages rates paid to supported employment workers overall (\$2.01 per hour) compared to open employment workers (\$11.12), is not the result of supported employment workers being classified to relatively higher funding levels. While supported employment workers are classified to **marginally** higher funding levels than open employment workers ..., the disparity in wage rates exists across all funding levels."*

21. **2001.** Senate Committee Inquiry into amendments to the Disability Services Act 1986. In September 2001, the Senate Committee on Community Affairs Legislation Committee conducted a committee hearing regarding the Disability Services Amendment (Improved Quality Assurance) Bill 2001. The terms of reference stated: *"To consider whether this legislation will safeguard the basic employment rights of people with disabilities, and to examine the concerns with the level of standards of the draft set of key performance indicators, and in particular, the ability to address the current non-compliance; issues of the development of the QA system; and the issue of those people, primarily with an intellectual disability, who are employed under inappropriate employment terms and conditions, in non-viable business enterprises, which result in poor wages and institutionalisation."* The Senate Committee heard submissions but did not report to Parliament due to an election being called and the dissolution of parliament.

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22. **2001.** The Commonwealth contracted Health Outcomes International to conduct research on pro-rata award wage assessment with the purpose to advise the Commonwealth on setting criteria for compliance under the Disability Services Act.⁶⁰
23. **2002.** Commonwealth Parliament approved legislation amending the Disability Services Act 1986. This legislation gave effect to a new quality assurance system for Commonwealth funded disability employment services.
24. **2002.** Commonwealth begins development of specific pro-rata award wage assessment tool for business services. This work is currently kept secret to a small reference group who has been required to sign deed poll of confidentiality. Members of the reference group cannot share information with their constituents in order to discuss the merits of this initiative. Furthermore, the Commonwealth announced a tender to outsource administration and assessment of the new wage tool and the SWS.
25. **2002.** Parliament approved new regulations for the Disability Services Act i.e. New Standards for Employment Conditions. The new regulations place reliance on quality assurance auditors to determine wage assessment systems' compliance with the law.

Representatives of people with disability vigorously opposed the regulation on 'employment conditions' for maintaining the means by which employers could achieve legitimacy despite poor employment conditions.

⁶⁰ Commonwealth of Australia. 2001. *Research into Pro-rata Wage Assessment Tools for People Working in Business Services*. (Exhibit 44)

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26. **1999 – 2003.** Business Service employers have increasingly sought certification of workplace agreements with congregate groups of workers with disability. The need to have a legal industrial agreement is motivated by the explicit link between eligibility of Commonwealth funding contracts to meeting the rights of workers with disability.

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(BELOW) THE SAFETY NET

How the safety net is not being maintained and why there is a need for the Commission to act.

The Workplace Relations Act 1996 provides specific functions of the Commission with respect to a safety net of fair minimum wages and conditions of employment.

SECT 88B Performance of Commission's functions under this Part

(1) The Commission must perform its functions under this Part in a way that furthers the objects of the Act and, in particular, the objects of this Part.

(2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;

(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

(c) when adjusting the safety net, the needs of the low paid.

(3) In performing its functions under this Part, the Commission must have regard to the following:

(a) the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed;

(b) the need to support training arrangements through appropriate trainee wage provisions;

(c) the need to provide a supported wage system for people with disabilities;

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(d) the need to apply the principle of equal pay for work of equal value without discrimination based on sex;

(e) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

This submission addresses each of the obligations of the Commission in relation to the safety net with particular reference to workers with disability in the business services industry. This includes consideration of fair minimum wages and conditions of employment, with consideration of productivity, the low paid, living standards, the need to provide for a supportive wage system for people with disability, and the need to apply principles of equality and anti-discrimination.

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FAIR MINIMUM WAGES AND EMPLOYMENT CONDITIONS

- 1. We are seeking the Commission ensure that the wages and conditions of employment of all workers with disability, particularly workers with disability who receive Commonwealth employment assistance, are governed by the safety net of fair minimum wages and conditions of employment as per section 88B (2).**
2. The Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained – s. 88B (2).
3. NCID and DEAC seek that the safety net be equally applied to the wages and employment conditions of workers with disability without discrimination in the determinations of awards and workplace agreements.
4. NCID and DEAC wish to present evidence to the Commission that many thousands of workers with disability, particularly those employees in the business service industry, receive wages and employment conditions well below the safety net, without regard to the minimum rates of pay and conditions in relevant awards.

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Summary of wages and conditions of employment for workers with disability receiving Commonwealth employment assistance.

1. The Commonwealth Disability Services Census 2000 by the Commonwealth Department of Family and Community Services presents national data on wages and employment conditions of workers with disability receiving employment assistance funded by the Disability Services Act. (The data does not include the employment data for workers with disability who access other employment assistance or simply participate in the workforce independently.)
2. The 2000 Census found that of 31, 380 workers with disability;
 - 41.3% earned less than \$60 per week
 - 14.6% earned between \$60 and \$100 per week
 - 16.4% earned between \$101 and \$200 per week
 - 10% earned between \$201 and \$300 per week
 - 7.9% earned between \$301 and \$400 per week
 - 9.6% earned more than \$400 per week
3. The 2000 Census found that of the 31, 380 workers with disability;
 - 1.5% worked less than 8 hours per week
 - 19.2% worked between 8 and 15 hours per week
 - 29.1% worked between 16 and 30 hours per week
 - 49.4% worked between 31 and 40 hours per week
 - 0.9% worked over 40 hours per week
4. The 2000 Census found that of the 31, 380 workers with disability;
 - 38.6% are paid under a full award wage;
 - 8.5% are paid in accordance with the Supported Wage System (SWS);
 - 6.8% are paid some other pro-rata productivity wage; and

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- 10.1% are paid under an enterprise or certified agreement;
- 4.2% are paid under an individual workplace agreement;
- 31.9% are paid a wage not based on an award.

The wages of workers in the business services industry are significantly below the safety net. There are also substantial differences in the wages and conditions of employment between workers with disability in the open labour market and workers with disability in the business services industry.

1. The Disability Census 2000 shows workers assisted by open employment service outlets received higher wages than workers assisted by business services, with approximately 82% earning more than \$100 per week compared with 9% of business services.

Workers with disability in the open labour market

2. Of 13, 955 workers with disability employed in the open labour market;
 - 18% earned \$1-\$100 per week;
 - 46% earned \$101-\$300 per week;
 - 36% earned more than \$300 per week.
3. 5, 522 workers with disability, (38.5% of workers in the open labour market), work over 31 hours per week. Of this group 47% earn more than \$400 per week; 76% earn more than \$300 per week; 90% earn more than \$200 per week; and
4. 4, 518 workers with disability, (31% of workers in the open labour market), work between 16 and 30 hours per week. Of this group 61% earn more than

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\$200 per week; 21% earn more than \$300 per week; and 6% earn more than \$400 per week.

5. Wages for workers with disability in the open labour market appear to be influenced by award rates of pay, hours of work, and productive capacity.

Workers with disability in the business services industry

6. Of 14, 689 workers with disability employed by the business services industry;
 - 41% earned \$1-\$40 per week;
 - 44% earned \$41-\$80 per week;
 - 14% earned \$81-\$300 per week.
7. The low wages of workers with disability in the business service industry is not relative to less hours of work or part-time status. The typical business service worker is employed on a permanent basis between 31 and 40 hours per week.
8. The Disability Census 2000 found that 10, 107 (60% of all workers in business services) work more than 31 hours per week of which 8, 364 earn less than \$80 per week and.
9. It is difficult to determine, with accuracy, the hourly wage rates of business service workers because figures in the Disability Census 2000 are presented in terms of ranges of hours against ranges of pay rates. However it is possible to extrapolate hourly wage rates by using the maximum wage rate in a range together with the minimum hours of work in a range. The following hourly pay rates thus overestimate the level of hourly pay rates of workers who work between 31 and 40 hours per week. They are, however, indicative of the low wages generally received by workers in business services.

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- Eight (8) workers with disability working between 31 and 40 hours work for no wage.
- Nine hundred and seventy seven (977; 5.8%) working between 31 and 40 hours work for 65 cents per hour.
- Two thousand, three hundred and seventy nine (2,379; 14.3%) working between 31 and 40 hours work for \$1.29 per hour.
- Three thousand, four hundred and seventy eight (3,478; 21%) working between 31 and 40 hours work for \$1.94 per hour.
- One thousand five hundred and twenty five (1,525; 9.1%) working between 31 and 40 hours work for \$2.58 per hour.
- Only 17% of those working between 31 and 40 hours earn more than \$2.58 per hour and only 1% earn more than \$400 per week

10. The low wages of workers in the business services industry, and the substantial difference in the level of wages when compared to workers with disability in the open labour market, are characteristics consistent with other recent and historical data sources on wages and employment conditions.

11. The ***Evaluation of the Case Based Funding Trial (CBFT), 2002***, found substantial differences in the wage rates of workers with disability between those employed in the open labour market and the business services industry. The report also indicates that these differences are highlighted by the low wages received by employees in the business service industry.

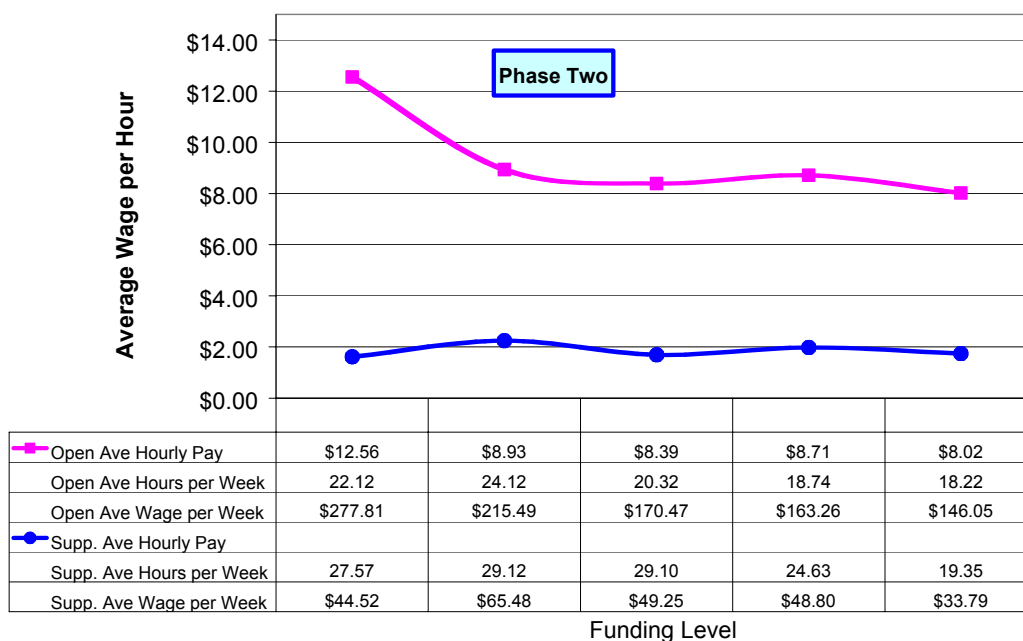
12. The CBFT report stated that: *“the lower wages rates paid to supported employment workers overall (\$2.01 per hour) compared to open employment workers (\$11.12), is not the result of supported employment workers being classified to relatively higher funding levels. While supported employment workers are classified to **marginally** higher funding levels than open*

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employment workers ..., the disparity in wage rates exists across all funding levels.”

13. Chart 26 of the CBFT evaluation report: *Hourly Pay Rate for Phase Two Workers by Funding Level*, illustrates the low fixed pay rates of workers with disability, the substantive differences in pay rates with workers with disability in other industries, and the lack of individual differentiation due to disability, support need, or productivity for wage rates in the business service industry.



14. Chart 26 from the CBFT Evaluation Report indicates that for workers in open employment, there is an apparent relationship between the hourly pay rate and level of assessed support need. Open employment workers in Levels 1 and 2 tend to receive higher wages per hour than workers with greater support need, i.e. those in higher funding levels. Workers in higher funding bands tend to have relatively lower hours worked per week, lower hourly pay rates and lower total wages per week.

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15. For workers in business services there is no clear pattern. In particular the hourly pay rate does not appear to be influenced by the workers level of support need. It has been hypothesised that the lower wages received by business service workers, may be the result of the lower productivity level of such workers. However the funding classification process is designed to measure support need, not worker productivity. In the absence of a measure of productivity, the existence of any link between lower wage rates and worker productivity cannot be validated.
16. Chart 26 also highlights that the disparity in wage rates between open and supported employment workers exists across all Phase Two funding levels. For example for Level 5, open employment workers (\$8.02 per hour) are paid over four times more per hour than supported employment workers (\$1.75).
17. The lower wages rates paid to supported employment workers overall (\$2.01 per hour) compared to open employment workers (\$11.12 per hour), is not the result of business service workers being classified to relatively higher funding levels. While business service workers are classified to marginally higher funding levels than open employment workers, the disparity in wage rates exists across all funding levels.
18. The Business Services Review – a joint initiative of ACROD and the Commonwealth Department of Family and Community Services confirms the low wages of workers in business services:
“The majority of Business Service employees (12, 332 or 87%) earned less than \$80 per week with the median wage being between \$41 and \$60. This remains unchanged from 1995 and 1997 Census figures”. (p. 9)

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19. **Conclusion:** For many workers with disability employed in the business service sector, the facts indicate that wages and conditions of employment are well below the safety net established by the Commission, and have been for many years. The current wage and employment conditions of workers with disability require that the safety net be applied to prevent further exploitation of a group of employees who due to disability have been vulnerable to exploitation for many years. The low fixed rates of wages, which are characteristic of the business services industry, are not coherent with the anti-discrimination and no disadvantage features of the Act.

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PRODUCTIVITY - THE NEED TO PROVIDE A SUPPORTED WAGE SYSTEM FOR WORKERS WITH DISABILITY

1. The safety net requires the Commission to provide a supported wage system for workers with disability – s. 88B (3) (c).
2. The Supported Wage System was decided upon by the Full Bench of the Commission in 1994 (1831/94 Print L5723). The Supported Wage System is an allowable award matter and meets the no-disadvantage test as per the Act.
3. We are seeking that the AIRC ensure that the Safety Net be strengthened by ordering that all awards be varied to include the amended Supported Wage System model clause.
4. We are seeking that the Supported Wage System become the measure of the Safety Net in conjunction with the relevant or designated award when determining tests of no disadvantage and anti-discrimination.

The Supported Wage System should be made available to all workers with disability in as fundamental to their basic employment rights and protection against exploitation and disability discrimination.

1. The Full Bench of the Australian Industrial Relations Commission (1831/94 Print L5723) gave effect to a system of pro-rata award wage assessment to "*promote employment for people who cannot work at full award wages because of a disability*". The decision provided a model clause for the Supported Wage System that could be inserted into awards and agreements

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to address wage rates of workers whose productive capacity was diminished by the effects of their disability. Eligibility to the SWS by workers with disability in sheltered employment / business services was dependent on the employer achieving 'enhanced' or 'eligibility' service standards regulated by the Disability Service Act 1986.

2. The insertion of the Supportive Wage System model clause has not achieved an adequate coverage in Commonwealth and State Awards. This situation creates a barrier for workers with disability having access to a fair system of pro-rata award wage assessments and in many cases renders workers vulnerable to inappropriate mechanisms of wage determination (i.e. slow workers permits and arbitrary systems that have no safeguards against exploitation).
3. There is also the current inappropriate situation of the business service industry developing alternative systems of below award wage assessment in an enterprise bargaining environment where the workforce are often characterised by cognitive impairment and are vulnerable to acquiescence and disadvantage in bargaining processes.
4. In 1995, the review of the Commonwealth Disability Services Program, *Working Solution*, recommended that; "*By June 1996, all DSP-funded services should be paying employees under an award or certified agreement and should be paying at least pro-rata award wages consistent with the principles of the Supported Wages System.*" Of course the Commonwealth failed to introduce this recommendation and to this day most business services do not pay pro-rata award wages consistent with the principles of the Supported Wage System.

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5. According to the key findings of the Evaluation of the SWS, the SWS is a system of considerable merit which supported by employer and employee alike, requiring only minor improvements.

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

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

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

Even with such support, there are a number of opportunities to further improve and refine the operation of the SWS.

6. The Evaluation of the SWS recommended its extension to the Business Service Industry:

Recommendation 3: That FaCS modify the guidelines and associated mechanisms of the SWS to enable its adoption in Section 13 business services.

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7. The evaluation emphasized that barriers to the extension of the SWS to business services related to the financial capacity of the industry to pay award-based wages and that need for some minor modifications:

“Access to the SWS in business services is limited.

The main reasons for this relate to the more general issues associated with the provision of employment conditions within business services.

As a result of the recent Business Services Review, and consistent with the policy directions of FaCS, business services will increasingly move to provide the full range of conditions associated with being an employer. This will by necessity include the provision of wages.

As yet no agreed system exists at an industry level for determining suitable wages within business services. The main mechanisms currently used within the industry involve workplace agreements and, to a much lesser extent, AWAs.

The SWS assessment process is seen to have relevance and application within business services while other elements of the system are seen to require modification before they could be applied within such a setting.

Up until now, the emphasis of the SWS has been on open employment. It is seen that consideration should now be given to the potential application of the existing or a modified version of the SWS for business services. The use of the SWS has the potential to usefully inform the development of an industry wide mechanism for assessing wages within business services. It is intended that this be implemented as part of the Award Based Wages Strategy being undertaken by FaCS.”

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8. According to the SWS model clause, the only real barrier preventing workers with disability in business services accessing the SWS is the compliance of business services to meet the enhanced (s. 12a) and eligibility (s. 10) criteria of the Disability Services Act 1986. The expectation of the model clause was that business services would become eligible under the Disability Services Act and thus eligible for the SWS. The failure of most of the business service industry to meet the principles and objectives of the DSA 1986 has in turn prevented workers with disability in business services from accessing the SWS, and hence the safety net.
9. The explanatory memorandum to the Disability Services Amendment (Improved Quality Assurance) Bill 2001 referred to the failure of Sheltered Workshops / Business Services to meet employment service standards, including employment conditions, over the 16 years since the enactment of the Act. It was stated that:
- “This process of change has met with limited success many of the supported employment services (many of which are the traditional sheltered workshops) have not made the expected improvements to meet the highest level of Standards. Currently, 341 services (39% of funded services) meet the Disability Services Standards at the minimum level.”*
- Compliance to minimum standards (i.e. s. 13 DSA 1986) does not provide workers eligibility for the SWS, despite the minimum standard stating that workers with disability have *“the same rights, protections and responsibilities as other people in the workforce.”*
10. The Commonwealth has amended the Disability Services Act to introduce a new quality assurance system and legislated new regulations⁶¹ which set out

⁶¹ The service provider ensures that people with a disability, placed in open or supported employment receive wages according to the relevant award, order or industrial agreement (if any) consistent with legislation. A wage must not have been reduced, or be reduced, because of

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indicators of compliance to meet employment service standards. This has repealed the three tiered levels of quality (s. 13, minimum; s. 12a, enhanced; s. 10, eligibility) and replaced it with one level of standards that all services, including business services, will have to meet by January 2005.

11. The question as to how the Commonwealth should measure compliance to the employment standards caused a major division of opinion between representatives of people with disability and representatives of business service employers. Representatives of people with disability sought that the SWS be made accessible to all workers for determining compliance with the law. Representatives of Business Service Providers opposed such a position.

12. In December 2000, FaCS commissioned research into pro-rata wage determination in Business Services. This research was conducted by Health Outcomes International (HOI) and produce *A Guide to Good Practice Wage Determination: Wage Assessment in Business Services*.⁶²

12.1. This report found (although a fact already known) that the business service industry was generally determining below award rates of pay without validity.

award exemptions or incapacity to pay or similar reasons and, if a person is unable to work at full productive capacity due to a disability, the service provider is to ensure that a prorata wage based on an award, order or industrial agreement is paid. This prorata wage must be determined through a transparent assessment tool or process, such as Supported Wage System (SWS), or tools that comply with the criteria referred to in the Guide to Good Practice Wage Determination including:

- compliance with relevant legislation;
- validity;
- reliability;
- wage outcome; and
- practical application of the tool.

⁶² *A Guide to Good Practice Wage Determination: Wage Assessment in Business Services 2001* (Exhibit 45)

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12.2. The research did not test any system or the SWS with workers with disability in business service sector. The research is largely based on opinion without any objective research. It describes current wage systems used in business services, reports on the views of business service employers, and reports on the advantages and disadvantages of wage assessment tools that do not exist.

12.3. The conclusions of the research regarding the SWS are in direct conflict with the official evaluation and conclusions of the SWS without explanation.

- The research states that the SWS is a costly system but does not provide any evidence of how the research establishes this claim.
- The research states that the SWS does not formally link to structured training and professional development strategies. A claim that fails to recognise the different purview of a wage assessment as opposed to a workplace training assessment.
- The research claims that business profitability is a key determinant with the use of the SWS. Such a claim is obvious, that is, a business needs to be viable.
- The research also falsely claims that cost of SWS assessments is prohibitive. The Commonwealth has a multi-million dollar budget for such costs. No employer has had ever had to pay for the SWS assessment

12.4. The research provides some basic analysis of other productivity wage assessment tools but admits that “*direct comparison of productivity-based assessment tools has not been formally conducted, it is impossible to determine whether alternative assessment tools are more or less efficient than the SWS.*”

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13. The Commonwealth has been developing a new and specific wage assessment tool specifically for workers with disability in business services.⁶³

⁶³ Commonwealth Department of Family and Community Services. Not dated and published on www.facs.gov.au. **Update: New Wage Assessment Tool** (Exhibit 46)

The Minister for Family and Community Services has recently announced that the Government will fund independent wage assessment for the new wage assessment tool that has been developed for people with disabilities working in business services.

FaCS will contract a suitable agency to provide a national service network using qualified assessors by March next year.

The new wage assessment tool for business services has been developed, trialed and is currently being refined with a final product due early next year. It will not be imposed on business services but many will want to adopt it.

It links competency and productivity to an award-based wage structure. Fair assessment of wage rates is a key component of the recently introduced quality assurance system for disability employment services and this tool will provide a way to achieve that.

The 2001 evaluation of the Supported Wage System and subsequent research established the need for a tool specifically tailored to the business service environment.

As a result, in July 2002 FaCS commissioned the development of an appropriate wage assessment tool for business services that would determine fair pay for work. This has been guided by a Reference Group, which has representatives from service providers through ACROD, from people with disabilities through the National Caucus of Consumer Organisations and the Disability Advisory Council, the ACTU and relevant government agencies.

The new wage assessment tool will:

- Provide a fair and transparent wage assessment;
- Provide for independent assessments by qualified assessors;
- Conform with the requirements of Standard 9 of the Disability Services Act;
- Measure both competency and productivity using new and existing employee information to provide a more comprehensive wage outcome;
- Provide pathways for training and career advancement;
- Be complemented by an accredited assessor training program, and supported by relevant administrative guidelines to help employees with disabilities, assessors and employers understand the operation of the new system;
- Apply to a variety of job and industry types; and
- Include formal conflict resolution, review and appeal mechanisms.

Over the next month or so, FaCS will be tendering for an agency to administer the new wage assessment system nationally, ensuring equitable access to business services in rural and remote communities.

The successful agency will also offer Supported Wage System assessments using the current SWS tool from July 2003. The new arrangements will provide an opportunity to address a number of the key recommendations from the 2001 evaluation of Supported Wage System.

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The draft tool is not publicly available. The report on the trials is not available. The Commonwealth has also announced that it will contract an external agency to conduct both SWS assessments and assessments for the new tool for business services. These decisions have been made before employees or their representatives can evaluate the appropriateness of the tool and system. We are unaware how such a tool will be independently validated in the industrial relations system. This process and development, without public transparency and discussion, underlines the great concern that NCID and DEAC have about the motivation of the Commonwealth Department of Family and Community Services in undertaking this initiative.

14. **Conclusion:** The Commission needs to provide a safety net with regard to pro-rata award wages for workers with disability.

- There is currently an uncertainty that continues to undermine the rights of workers with disability.
- The Act provides for the Supported Wage System.
- The Commission should require all awards and workplace agreements to include the Supported Wage System Model Clause (as amended).
- Any alternative pro-rata award system for workers with disability should be required to be brought before the Full Bench of the Commission to be transparently considered by all parties.

The new wage assessment tool will assist certification under the Quality Assurance system. The payment of an award-based wage determined through a fair and transparent mechanism for those people with disabilities, who due to their disability cannot be paid a full award wage, is pivotal to meeting the Disability Service Standards.

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- The current secret process of the Commonwealth continues to undermine resolution and advancement in protecting the rights of workers with disability in the business service industry.

- We also fear that alternative tools brought before the Commission on a case by case basis seriously undermines the needs of workers with disability who are placed in a powerless situation by reason of their disability which is often a cognitive disability.

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CHARACTERISTICS OF AWARDS AND WORKPLACE AGREEMENTS WHICH DEMONSTRATE THE NEED FOR PRINCIPLES TO PREVENT AND ELIMINATE DISABILITY DISCRIMINATION

1. The lack of insertion of the SWS model clause in awards, and the propensity of the business service industry to use alternative means for paying wages below award rates of pay has resulted in an industrial relations environment that lacks safeguards for workers with disability against exploitation and discrimination.
2. ***Awards do not adequately provide for the supportive wage system model clause***
3. The evaluation of the Supportive Wage System found that the exclusion of the SWS model clause was preventing its use as the preferred instrument: “58 out of the top 100 most commonly used federal awards (excluding the Victorian Minimum Wage Orders) contain the SWS model clause The delay in inserting the model clause is cited as a major contributing factor encouraging the use of other mechanisms such as the continued use of the Slow Worker Permits and the move towards AWAs. Many employment services regard the SWS process of assessment and the protection it offers to employees as the preferred industrial mechanism however, without the inclusion of the model clause in the award, its use has not been feasible.” (p. 36)
4. An Award that is often designated for business services for the determination of the no-disadvantage test, the ALHMWU Supported Employment (Business Enterprises) Award 2001 (AW814307), does not contain the SWS model clause. It includes a provision that enables the union and employers to

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determine a system of wage assessment. The union and the employers have not determined such for approximately ten years, while some respondents have developed their own internal assessment. It is not possible for the Commission to determine the no-disadvantage test with an award that does not contain the SWS model clause.

5. The SWS model clause is an allowable matter under the award simplification process. Yet the Commission certified the ALHMWU Supported Employment (Business Enterprises) Award 2001 on the 13 March 2002 (PR915201), without the insertion of the SWS model clause. The workers who are subject to this award continue to receive below the safety net wage rates without any due regard to an independent fair assessment of their productive capacity. This makes a mockery of the award system and requirements of the safety net provisions.

6. Many certified agreements for business services contain a plethora of below award rates of pay arrangements for workers with disability in business services. There appears to be no consistent rule or principle guiding these decisions.

7. Agreements where the employer determines below award rates of pay contrary to the independent assessment and safeguards of the SWS.

7.1. Some certified agreements for business services contain below award wage arrangements that are determined by the employer. The employer conducts assessments of competency and/productivity to determine rates of pay below the safety net.

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7.2. *Ballarat Regional Industries Enterprise Agreement, 2001*. Melbourne, 27 September 2001 - PR909808. This agreement contains a pro-rata wage assessment, which includes an assessment of a workers competency, but also includes an assessment of effort and training and support in determining wages below the safety net. It is important to note that a business service, are provided funding for the support and training assistance of workers. To include an assessment of training and support in an assessment of wage is without basis.

7.3. MAI_WEL Ltd Enterprise Agreement 1999. Wage rates range from \$1.06 and extend to \$3.20. Wages determined by employer with their own assessment method of skills and productivity.

7.4. Wallara Industries Enterprise Agreement 2000 and Woorinyan Incorporated Enterprise Agreement 2000. Both these agreements are characterised by internal below award wage assessments performed by the employers. Rates of pay for workers range from \$0.50 per hour to \$1.60 per hour.

7.5 Yooralla Ability Press Certified Agreement 2002: AG816355 PR918700. Wage rates for workers with disability range from \$1.12 to \$4.50. The pro-rata wage assessment is complex and convoluted, conducted by the employer, and includes measurement of such non wage matters of “understanding occupational health and safety procedures, self hygiene, punctuality and working consistently” in the determination of wages.

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8. Fixed rates of pay below award rates of pay.

8.1. Some agreements simply state a fixed rate of pay below the award or safety net minimum. These rates of pay are not linked to any productivity assessment.

8.2. These appear to be based on what the employer is prepared to pay or had been paying before seeking a legal industrial agreement. There is no link to an independent and valid assessment of productive capacity in comparison with a relevant award.

8.3. Examples of such agreements include:

8.3.1. *Victorian Vocational Rehabilitation Association Enterprise Agreement 2000*, [V0544 Cas S Doc S9458] certified 23 August 2000. This agreement has two fixed below award wage pay rates, 12.97% and 19.58% of the minimum wage, neither of which relate to the productive capacity of the worker, classification of work or relationship to a relevant award.

8.3.2. *Vantage Supported Employment Agreement 2002 (currently before the Commission seeking certification)* This draft agreement simply states a fixed rate not linked to a classification or assessment of productivity: “*The current standard rate of pay is \$1.71 per hour and will be adjusted in percentage terms in accordance with movements in the minimum adult rate of pay as determined annually by the AIRC. The adjustment will occur when notified.*”

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- 8.3.3. *Disability Services Australia Business Services Division Employee Representative Agreement 2001 (PR914163)*. This is a certified workplace agreement where there is no pro-rata award wage system set out in the agreement. Workers receive below fixed below award rates of pay ranging from \$0.75 to \$3.75
9. Agreements where they do not pass the no-disadvantage test but have been deemed to pass the public interest test
- 9.1. *Endeavour Industries Limited Supported Employees Enterprise Agreement 2000 [Dec 534/00 N Print s5945]*. In this application the employer accepted that the agreement did not pass the no- disadvantage test which was agreed with by the Commission. The agreement was passed, however, on the basis of s. 170LT (3) (4), that is, the agreement was not contrary to the public interest. Wages in this agreement range from \$1.09 and extend to \$2.24.
10. The certification of business service agreements to date indicate a propensity to certify agreements at business services despite failure to meet the no-disadvantage test or provide for the SWS model clause. As a result many of the agreements provide for below award levels of pay without a valid and independent assessment of productivity, or below award wage assessments that contain elements of assessment which are discriminatory and processed that are not independent.
11. In the absence of a principle or rule about what is acceptable to meet the objects and requirements of the Act, NCID and DEAC submit that workers with disability in business services are subject to an industrial process where employers are obtaining certification of wages and conditions of employment that disadvantage and discriminate against their industrial rights.

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12. The industrial process is placing workers with disability, particularly workers with intellectual disability, in a situation where argument and instruments regarding their wages and conditions are being determined without due regard to their interests and rights. NCID and DEAC consider that this is an abuse of the industrial relations system and is promoting poor practices of agreement making.

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WORKERS WITH DISABILITY, LIVING STANDARDS AND THE NEEDS OF THE LOW PAID

1. Successive Governments have told people with disability that they have the same rights as other Australians to be included in the social and economic fabric of Australian society. In 1991, twelve years ago, the then Commonwealth Government issued a social justice statement for people with disabilities. It stated that:

1.1. *“For too long this group has suffered the indignities of poverty, segregation and unequal treatment and has been denied opportunities to participate fully in the work and life of the community.”*⁶⁴

2. Workers with disability in business services receive wages and conditions of employment below that of the safety net of fair minimum wages and conditions.

2.1. 71% receive wages less than \$60 per week; 85% receive wages less than \$80 per week; 91% receive less than \$100 per week.

2.2. The low wages do not reflect an independent or valid assessment on the impact of their disability on their productivity, if indeed there is an impact.

2.3. 58% of workers are working more than 31 hours per week; 87% of workers are working more than 16 hours per week.

⁶⁴ Commonwealth of Australia. (1991). *Social Justice for People with Disabilities*. Tabling Statement by the Minister for Health, Housing, and Community Services. AGPS.

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SUBMISSION

2.4. For 92% of workers with disability in business services, the main source of income was the Disability Support Pension.^{65 66}

2.5. Only 3% of workers with disability in business services have wages which are their main source of income.⁶⁷

3. Such conditions of employment are well below any community definition or notion of the “low paid”. Such a situation could be construed as a ‘work for the pension” scheme or even a form of exploitation or impoverishment.
4. As part of the Welfare Reform Strategy the Commonwealth commissioned a report on possible approaches to welfare reform. The report⁶⁸ noted its concern for people reliant on income support for the majority of their income:
“Over the past thirty years there has been a steady upward trend in the population receiving income support and other publicly provided assistance. Of special concern is the proportion of the population that depends on income support for the majority of their income.

What is unique about workers with disability in business services is that they do have a job, but in receipt of wages and conditions of employment that has little, if any, impact on reliance on the pension income.

5. The most frequent wage range for workers in business services is between \$41 and \$60 per week. The current rate of pension for a single person over 21 years of age is \$429.40 per fortnight. A pensioner has to earn more than

⁶⁵ Current Rate of Disability Support Pension for Single person over 21 years of age is \$429.40 (Exhibit 47)

⁶⁶ Commonwealth of Australia. (2003). *Commonwealth Disability Census 2001* Commonwealth Department of Family and Community Services. p. 70 (Exhibit 48)

⁶⁷ Commonwealth of Australia. (2003). *Commonwealth Disability Census 2001* Commonwealth Department of Family and Community Services. p. 71 (Exhibit 48)

⁶⁸ *Participation Support for a More Equitable Society*. Final Report of the Reference Group on Welfare Reform. July 2000. (Exhibit 49)

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\$116 per fortnight to effect a reduction in the full pension rate. For the majority of workers in business services they do not earn enough to effect any reduction, or any significant reduction, on the full pension rate.

6. The Welfare Reform report noted the impact of “*entrenched economic and social disadvantage*”. Such an impact was said to result in negative consequences for individuals, families, and the community, including reduction of current and lifetime incomes, reduction in self esteem leading to disengagement from employment, family, and the community, physical and psychological health and reduced life opportunities.
7. There is also a body of research, which acknowledges the additional costs of living due to the effects of disability. In a study commissioned by the Commonwealth undertaken by PriceWaterhouseCoopers Actuarial and Superannuation Services (June, 1999) it was conclude that; “*the proportion of respondents with any non-discretionary costs (excluding extra costs) is 91%*”. The mean additional per fortnight costs of disability of people with intellectual disability ranged from \$17.10 for low severity of disability to \$25.25 for high severity of disability.
8. The research on the costs of disability indicates that there is an additional cost of living due to disability which varies according to nuances of disability type and degree of disability. This evidence emphasizes the added poverty to what is already an impoverished set of economic indicators for workers with disability in business services.
9. Given that workers with disability have endured such poor wage and employment conditions for many years, some for a number of decades, the long term impact on their living standards, and ability to accumulate wealth is oppressive.

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10. The converse of this 'gloomy' picture is that many workers with disability, with similar levels of disability and productivity, employed outside the business service industry are earning significantly more wages per week.

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APPENDIX 1

PROPOSED AMENDMENT TO THE SUPPORTED WAGE CLAUSE

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WORKERS ELIGIBLE FOR A SUPPORTED WAGE

- (a) This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award. In the context of this clause, the following definitions will apply:
- (i) "Supported Wage System" means the Commonwealth Government System to promote employment for people who cannot work at full award wages because of a disability, as documented in "[Supported Wage System: Guidelines and Assessment Process]"
 - (ii) "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.
 - (iii) "Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.
 - (iv) "Assessment instrument" means the 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.

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Eligibility criteria

- (b) Employees covered by this clause will be those 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 under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.

(The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this agreement/award relating to the rehabilitation of employees who are injured in the course of their current employment).

This clause shall apply to Employers covered by this clause will be those whose, programme, undertaking service or the like, or part thereof, receives funding under s.10, s.12A or s13 of the Disability Services Act 1986, or, if a part, that part.

Supported wage rates

- (c) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this award/agreement for the class of work which the person is performing according the following schedule:

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Assessed capacity % of prescribed award rate

10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$65 per week).

Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

Assessment of capacity

- (d) For the purpose of establishing the percentage of the award rate to be paid to an employee under this award/agreement, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:
- (i) the employer and a union party to the award/agreement, in consultation with the employee or, if desired by any of these;

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- (ii) the employer and an accredited Assessor from a panel agreed by the parties to the award and the employee.

Lodgment of assessment instrument

- (e) (i) All assessment instruments under the conditions of this clause, including the appropriate percentage of the wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.
- (ii) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the award/agreement, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

Review of assessment

- (f) 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.

Other terms and conditions of employment

- (g) Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment

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as all other workers covered by this award/agreement paid on a pro rata basis.

Workplace adjustment

- (h) An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

Trial period

- (i) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.
- (ii) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
- (iii) The minimum amount payable to the employee during the trial period shall be no less than \$65 per week.
- (iii) The amount payable to the employee during the trial period shall be \$45 per week or such greater amount as is agreed from time to time between the parties (taking into account the Department of

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Social Security income test free area for earnings) and inserted into this Award.

- (iv) Work trials should include induction or training as appropriate to the job being trialed.

- v) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under sub clause (c) hereof.

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Appendix 2

Proposed Amendment to the Statutory Declaration

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That the commission amend its rules to provide that the statutory declarations lodged by the parties to Certified Agreements

The amendments to be in the form outlined below

To illustrate we have outlined amendments to the Statutory Declaration made in respect of an application under Division 2 of Part 6B

1. Add to 5.4 the question “Does the employer receive funding under s.10, s.12A or s13 of the Disability Services Act 1986 to support employees covered by the proposed agreement in their employment?”(see s170LT (7)

If yes; “Has the productive capacity of the employees subject to the agreement been assessed by an accredited assessor utilising an approved assessment instrument?”

2. If yes; “Have the assessment instruments including the appropriate percentage of the Award wage to be paid to the employee been lodged with the Registrar?”

TAB 1

MAREE JOAN IRELAND

Disability Worker / Solicitor

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Maree Joan Ireland of Action for Community Living, Advocacy House, 179 High Street, Northcote in the State of Victoria make the following witness statement:

1. I am a Solicitor and I was admitted to the Supreme Court of Victoria in April 2002 after I completed my Law/Arts Degree at the University of Melbourne in 1994. I now work for Action for Community Living as their Systemic Advocate and, more recently, as their Legal Counsel.
2. However, I have not had the normal path to becoming a Lawyer and that is why I am writing this statement. In fact, for thirteen years, from 1973 to 1986, I “worked” in various Spastic Society sheltered workshops mainly doing basic packaging/assembling work and some typing and computer work. Therefore I have first hand knowledge of life in such workshops and why change is so desperately needed in the areas of wages and conditions in sheltered workshops
3. Before I go on, I would like to say that when my time to leave school arrived, I had no idea what I wanted to do. There had been no encouragement from my teachers to think about it. I now believe that there had been an underlying assumption that my future lay in a sheltered workshop with the Disability Support Pension and a so-called supplementary wage as my

income for my life. There was no discussion about being able to support one's self, nor the development of one's abilities or skills to be able to earn a decent wage and not be dependent on welfare. This is why it is now important that this Commission looks at this whole issue of wages and conditions for workers with disabilities within sheltered workshops. Workers want to be paid real meaningful wages for their daily efforts and not be at the mercy of workshop management and the welfare system for their future income.

4. I would now like to discuss some of my experiences within the sheltered workshops. As I have said, there had been no discussion about my abilities and what I wanted to do with my life.
5. Northern districts spastic Centre. This is where I would be going to work and earn an "income." Of course this was what one did when one left school. So early February 1972 I set off to work. I think I had had an introductory day before the day I started so in a way I knew what to expect. My first impression of the workshop was rows of long tables with people in wheelchairs and chairs doing lots of packaging and assembly work. I then remember a sense of relief when I saw a few people I had known at school. Looking back, maybe that was my first mistake. Knowing I had friends there kind of made it all right. Not that I knew anything better to leave for.
6. My first task as a "worker" was packing small nuts and bolts into plastic bags. A few weeks later, I progressed to stripping Kodak film, I had to strip exposed film from the paper backing and put each into its own barrel which was on either side of my chair Other sorts of work were very similar to this. It wasn't until years later that I realised how this type of work was not suited to my fine motor skills.

7. Most people remember their first pay cheque with a sense of achievement and pride at the amount of the money they had earned. From vague memory I think my first fortnight's paycheque was about \$1.50 – not something to sing about!
8. During my first year there the O.T. helped me to start one subject for my HSC, which was ENGLISH. So I was allowed to study for two hours in the morning, which gave some relief from the boredom.
9. There is a strange ethos about a workshop and staff there. It is like they have to constantly remind you that you are there because of your disability and you should accept it. If you can't, then you need psychological assistance to learn to cope with the boredom of the work you were given to do. This was what I was told by a workshop manager when I told him that I was bored and depressed with what I was doing.
10. I had several friends there with whom I shared conversations while working. But even then, I would be checked by the supervisor for not working hard enough because I had to use my hands to talk. It is sad looking back because at the time I thought my life, even though somewhere in side me something didn't feel right, was how it should be and was normal even though I felt like I was sometimes on a treadmill.
11. It was always like I was in a constant state of contradiction with myself. Being in a workshop never gave me a good work ethic and never developed my sense of self-worth as a worker. From the moment I arrived at my "place of work" it was like being on a treadmill. I was taken into "the worker's lunch room" for a cuppa and to order lunch. Then you would go to your worktable until lunchtime. Then I'd have lunch for 30 minutes. Then return to my worktable until afternoon tea then I'd leave work about 3.30 and go home on the bus that had brought me to work.

12. I think the saddest part of it all is places like these do not develop people's own sense of worth, integrity, creativity, lateral thinking or problem solving. All these attributes are squashed in a person to make them see that what they are in "is quite normal"
13. I can't express the feeling of change I feel in myself between then and now. I feel I am talking about another person rather than myself. I have much more confidence in what I think I can do.
14. The experience of being at University and studying for a Law/Arts Degree and having the Disability Supports that I needed, that is, note-takers; library assistance and cafe assistance all under my control, gave me a sense of my own self worth and potential.
15. It was not only the fact that I was studying law, but I began to develop a sense of my own worth and ability, which the workshop management had stripped away from me.
16. In my current position, it is both exhilarating and sometimes depressing. It is exhilarating in that I am fighting for social change for people with disabilities, and am being paid a decent wage to do so. One aspect of my position has been the involvement within a coalition of advocacy organisations called CAFEE, Campaign for Fairer and Equal Employment. Our aim is to improve the working conditions of workers within sheltered workshops either through closure, which at this time doesn't seem a viable option, or fighting for equal and fairer conditions. This involves meetings with various organizations including the Australian Council of Trade Unions ("ACTU"). In 2002 we held a combined conference to raise awareness of these issues. Other CAFEE members have been working around the issues of preventing unfair EBA's getting certified.

17. It is also depressing in that we are all still fighting for this in such an adhoc manner because there are varied issues and the legal system has not been able to solve them as yet.
18. Personally, I have concluded that, "this type of employment" should, at the least, no longer exist. If this cannot be achieved, then the Commission should be investigating and establishing proper and respectful wages and conditions for these workers just like all workers. Workers with disabilities do not want "special awards" established with: "special conditions" that can be misconstrued by management in that "these workers are special so they need special awards and rates".
19. Workers with disabilities should no longer be expected to accept second-class pay rates and conditions for the sake of retaining such work places. Governments, public and private enterprises should be looking at employment opportunities where workers with disabilities are treated with equality, respect and rewarded properly for their efforts and no longer disadvantaged because of their disabilities. Legal precedents are needed to establish equal wages and conditions for workers with disabilities. Where people with disabilities are not "able to work for a fair day's pay" then research is needed to establish alternative but meaningful activities for these people. Again the above should be rejected as an argument to retain poor wages and conditions within these places.

I hope the Commission will investigate this matter.

Dated this 18th day of February 2003

MAREE JOAN IRELAND

TAB 2

PETER FRANZ PAVLIK

Disability Worker

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Peter Franz Pavlik of 7 Crockford Street, Benalla in the State of Victoria make the following witness statement:

1. I am a qualified electrician by trade. My back injured over a number of years and I was unable to work as before, since that time I have not been able to work in my profession. I have been on the Disability Support Pension since that accident.
2. After consultation with Centrelink, I decided that I need to earn some extra money. I was referred to Merriwa Industries Pty Ltd, Business Service and commenced employment there in January, 2000.
3. My duties consisted of process worker and setting up machines.
4. In October 2000, I was involved in a workplace accident where I lost part of my forefinger. I did not return to work at Merriwa until March 2001. I returned to the same section in June/July and then moved to Process and Packaging section where I had to work putting labels on cans.
5. Up until the time of my accident I had been happy at Merriwa. When I started work again everything was alright for a couple of months. After that

my working arrangements were continually changed around. I sought a leave of absence without pay so that I could recover and be productive when I returned to work. The Business Service would not give me a leave of absence and I decided in the end to quit so that I could at least get better.

6. Whilst I was working at Merriwa, I received \$2.50 per hour. I was working alongside other employees who were receiving full award wages yet we were doing the same job. I did not have an assessment done relating to my productivity and I believe that the work I did was in the quality and quantity of those I worked alongside.
7. Merriwa is situated in Wangaratta. As I live in Benalla I traveled 50km trip each way. After my accident my hours of work were 7.30am–11.30am each day I was employed. I received \$10 for these hours. I paid \$2 towards petrol for the morning trip and \$2.40 for the lunch time train back to home. I ended up with \$20 a week extra when I was working, as I paid half of what I earned in traveling expenses.
8. When I originally commenced at Merriwas the original rehabilitation agreement promised a pay rise after the three (3) month probation period. This never eventuated and when questioned the management said that I could not be given the pay rise because I had been assigned to new work. This was at the instigation of management. I was told I had to prove myself at the new work area. The movements required in the new work forced me to use my injured elbow to the detriment of my health and I was forced to resign.

Dated this 18th day of February 2003

PETER FRANZ PAVLIK

ROBERT RAYMOND DICK

Advocate

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Robert Raymond Dick OF 31 Princess Street, Warrnambool in the State of Victoria make the following witness statement:

1. I have worked in the social and community service sector for 15 years. I have worked in disability advocacy for 5.5 years. I have a Bachelor of Arts (Hons) and a Diploma of Community Services.
2. Currently I am employed by Southwest Advocacy Association Inc. We have two advocates as well as one support staff. Southwest Advocacy services the South West region covering Warrnambool, Portland, Hamilton and Camperdown.
3. There are two organizations that run business services in the South West region of Victoria. There are a group of business services run by Vantage Inc. and another group run by Kyeema Centre Inc. Both organizations mainly employ people with intellectual disabilities. The level of intellectual disability amongst employees varies from mild to moderate.
4. In my experience people with intellectual disabilities want to be compliant and to please. They are more likely to give answers that they think people in authority want from them. When asked to make a decision or given a choice

they are more likely to give an answer that will stand them in good stead with the person, particularly if the person is in authority.

5. People with intellectual disabilities need things to be explained in relatively simple language. Sufficient time needs to be taken to ensure that they understand what is being explained to them. Information needs to be repeated and reinforced to help them understand.

6. I do not believe that some of the complex concepts involved in workplaces and in workplace agreements are adequately explained to people with disabilities, or in a way that enables them to make informed choices or decisions.

I also believe strategies need to be developed to safeguard the rights of those people who will not be able to make a genuine vote despite the best efforts of employers.

7. Many people with disabilities have often lived lives where they have lacked power and control and as a result they are easily intimidated. People with intellectual disabilities who work in business services are commonly afraid to speak out on issues for fear of being branded as troublemakers and losing their employment.

8. I will provide a specific example. In a particular workplace a vote was to be taken on a EBA. One of the employees consulted me in my role as an advocate. The client told me that most people at the worksite did not understand the agreement and the majority intended to go along with what Management said when it came to a vote. Southwest Advocacy was asked to assist the client in regards to sorting their Agreement out. Many of the aspects of Agreement were contrary to conditions and wages that should have been acceptable. A flat rate of \$171 was to be paid to each employee with no assessment procedure included. One of the first clauses stated that

the relationship was between provider and consumer which overrides the relationship of employer/employee.

South West Advocacy instructed DEAC to intervene in the Hearing after the client had informed us a vote by the employees had accepted the Agreement. Leave was granted to DEAC to intervene and a hearing is set down for 12 March 2003.

9. It is common in business services for employee representative committees to be established to negotiate agreements on behalf of all employees. Clients suggest that many employees in business services do not know who the representatives are and that there is inadequate consultation between representatives and employees.
10. At one particular Business Service, the employees are commonly told that if they were paid more they would lose the disability support pension. There doesn't seem to be any link between rates of pay and awards. There appear to be inconsistencies between rates that people with disabilities are paid. One person gets \$1.50 per hour while another with similar work is paid a slightly different rate of pay. It should also be noted that business services pay supervisory staff wages in line with community standards.
11. I believe that it is necessary for the Commission to hand down some principles that are followed in the format of Business Service's Agreements. This group of employees are so vulnerable however, they are entitled to be recognized for the work they do within their workplaces. For too long their needs have been ignored. With the Disability Standards due to take effect in January 2004, the time to do something is now.

Dated this 18th day of February 2003

ROBERT RAYMOND DICK

TAB 4

ROBERT GRAHAM MACFARLANE

Disability Consultant

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Robert Graham MacFarlane make the following witness statement:

1. I spent ten years working in a disability employment agency. I worked predominately in marketing and job development. I am a member of the Australian Services Union disability working party, ACTU workers with disability group and Coalition Action for Employment Equity (CAFEE). I have a Bachelor of Arts and Graduate Diploma in Human Resources and Industrial Relations Management. I am now self employed as a consultant in disability awareness, training, industrial relations and human resources and I am a workplace assessor in the supported wage system and have been since 1995.
2. I believe that there is a real need for wage fixing principles to be set by the AIRC for Business Services.
3. Over the past two years there have been a series of appalling agreements go through the commission that maintained very low wages, and either have no wage assessment processes or unsatisfactory ones:-
 - a. Disability Services Australia
 - b. Yooralla
 - c. Ballarat Regional Industries

4. I have recently assisted a business service develop an enterprise bargaining agreement. In the application for Certification the Business Service has applied to use a generic cleaning industry award and added the supported wages system clause.

The Business Service involved were concerned that the employees were able to contribute to the process. They arranged for a Union to come out to talk to the employees and were given a choice of who they wanted to act for them. The employees asked that DEAC represent them and a number of consultative and negotiating meetings were held with DEAC and the employees.

5. Given the generally poor Enterprise Bargaining Agreements allowed through the commission for Business Services there needs to be greater education of Commissioners. Some principles need to be set for the Commissioners to refer to when making decisions relating to the Business Services.
6. It is my belief that the AIRC needs to look at the wage assessment tool used. The supported wages system should be the system used across the board. One of the big problems under the disability employment standards is that there is a huge loophole for business services when choosing their wage assessment tool. The criteria and tools set down by the DSA does not provide any certainty or consistency and leaves the assessment of validity to auditors who have no industrial relations authority or competence.
7. One business service in South Australia that is quality accredited will not make available to the public its wage assessment tool. There is a need for greater public accountability from business services in regard to wage assessment methods.

Dated this 18th day of February 2003

ROBERT GRAHAM MACFARLANE

TAB 5

GENNARO DINUCCIO

Manager Workforce

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Gennaro Dinuccio of Rear 9 Langwells Parade, Northcote in the State of Victoria make the following witness statement:

1. I have worked at Workforce since September 2001. Prior to that I was the manager of a commercial cleaning business. I have worked in the cleaning industry for approximately 18 years.
2. Approximately twelve to eighteen months ago Workforce established the Business Service called Cleanforce. Cleanforce is a business that does contract cleaning. Groups of employees attend worksites to do their cleaning. Cleanforce is run as a viable business and to compete in the open market must offer competitive rates.
3. We commenced the bargaining process about 12 months ago. The managers of Cleanforce explained to the employees that an Enterprise Bargaining Agreement would provide benefits for both management and workers. Copies of the draft agreement were made available and discussions held over time with the employees. There are probably four or five variations compared with the award. Management invited the miscellaneous workers' union and DEAC to offer assistance to the workers in support of the development of the Enterprise Bargaining Agreement.

4. A number of meetings were held with information being provided to the employees about wage line, EBAs and contracts. When individual workers asked about the information, management staff took time to explain matters and direct workers to other sources of help.
5. Management involved the legal advocate from DEAC, Kairsty Wilson, in all meetings. Kairsty could fully explain all the items in the Agreement to the workers. I like to believe that the workers employed at Cleanforce do understand the agreement. There were lots of things that the workers were happy with such as sick leave, annual leave etc. The workers raised many issues but were most concerned with wages, supported wage system assessments, entitlements, hours, penalties, forms of leave and uniforms.
6. I believe all the workers have a really good understanding. Management invited support workers/advocates to the meetings to support workers who required such assistance. These advocates were given copies of the EBA and each clause was explained to the employees by their advocate. Many of the employees had items they wanted to be included such as boots. Although, we were unable to consider them at this time it was agreed that where they are necessary they would be provided..
7. Cleanforce as a new business needs to use an assessment tool. The supported wage system is necessary in order to be successful. I need this tool to employ people who's productivity is below standard, however the majority of our employees are paid at full award rates.
8. This use of the supported wage system is discussed openly with workers when they first start with the company. There are good conditions for all of the employees.

Dated this 18th day of February 2003

GENNARO DINUCCIO

BRAMANI FLICK

Community Legal Educator

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Bramani Flick of Ross House, Flinders Lane, Melbourne in the State of Victoria make the following witness statement:

1. I am employed as the community legal educator/community development worker at Villamanta. I have worked at Villamanta for three years. I continue to meet with, and provide education to, employees in business services. Primarily I run the community legal information service. I provide information around general rights. I use a community development work approach. I use a method of inquiry to investigate issues relevant to, and of importance to, the group.
2. Many, many participants raise the issue of poor wages and conditions in many business services I have visited. There are also concerns about poor environmental conditions and poor occupational health and safety. There is also an issue around poor support in the workplace and workplace bullying. There is very little choice about the work that can be done. The work is mostly repetitive.
3. I am concerned that the process of certified workplace agreements in business services is totally inappropriate. This is my view because there is lack of real advocacy and support. There is, historically, a high level of

disempowerment of workers in business services. There is a lack of access to qualified industrial advocacy and a lack of trade union involvement.

4. A major issue is that many business services have a public face of being representative, however in reality workers are constantly stifled. Some business services are better at providing opportunities for employees to have a say, however the majority of people I meet are fearful and unwilling to speak out because of fear of retribution.
5. Quite often informed consent is assumed when people actually do not fully understand the issues at hand. Parents are referred to inappropriately to give consent when it is not appropriate to contact them. Quite often the employees have a limited ability to understand information. Also people have an inability to balance risk and alternatives. Employees do not have the ability to consent in an informed manner.
6. People are not given full access to information. Employees in business services do not engage in real bargaining. It is ludicrous to assume that there is a real bargaining period. Quite often guardians are not consulted. It is ironic that often a person's ability to make decisions is taken away and the appropriate guardian is not consulted about the CWA. Business services do have the responsibility to ensure that people have information so that they can provide informed consent.
7. Often employees in business services are subject to threats. Common threats are that if your pay goes up you will lose your pension or the workshop will close. Threats are consistently used without the provision of adequate and proper information about wages, pensions etc.
8. In conclusion, I consider it vitally important for the AIRC to give due consideration to an industrial framework that provides workers with disability in business services. To ensure that they receive their wages and

employment conditions that are fair and through a process that protects the worker from fear of intimidation and coercion.

Dated this 18th day of February 2003

BRAMANI FLICK

TAB 7

PHIL TUCKERMAN

Manager Job Support

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Phil Tuckerman of 1-5 Commercial Road, Kingsgrove in the State of New South Wales make the following witness statement:

1. Prior to the introduction of the Disability Services Act in 1986 people with a moderate intellectual disability did not achieve open employment. I established Jobsupport in 1986 as a Commonwealth Government funded demonstration project to investigate whether people with a moderate intellectual disability could achieve open employment.
2. Today Jobsupport supports approximately 400 people with a moderate intellectual disability in jobs throughout Sydney. Approximately one third are paid sub-award wages under the Supported Wage system. Many people with a moderate intellectual disability can only access employment at sub-award wage levels. I was a member of the Ronald's Report committee that recognized the need for a fair sub-award wage system.
3. Jobsupport spent several years trialing alternate approaches to calculating sub-award wages before settling on the weighted productivity approach used by the United States Department of Labor as the best available option in 1991. This weighted productivity approach now forms the basis of the current Supported Wage system. Most recently I was the ACE National

Network (ANN) representative on the committee that oversaw a review of the Supported Wage system. The review found that the Supported Wage system was well accepted by employers, people with disabilities and service providers. No system is perfect and incapable of improvement however the current Supported Wage system provides a useful standard against which future alternate approaches can be assessed.

4. Jobsupport's experience is that the Supported Wage clause is often overlooked. It can take two months to arrange an Australian Workplace Agreement (AWA) when the clause is not inserted and it is unclear whether AWAs would be retained under a future labor government. In some cases even an AWA is not possible.
5. Jobsupport had to write to a large government employer recently indicating that we would have to withdraw from the placement and advise the client to resign unless an appropriate legal basis for paying the client a sub-award wage was put in place. We had been unable to secure award wage employment, the inclusion of the Supported Wage clause in the enterprise agreement or an AWA despite several years of requests.
6. I hope that the Full Bench will consider the following two initiatives. Both initiatives have the full support of the ANN Executive:-
 1. Adopt the current Supported Wage system as the standard against which any future sub-award wage approaches are assessed on a 'no disadvantage test' basis.
 2. Make inclusion of the Supported Wage clause mandatory in every industrial agreement.

Dated this 18th day of February 2003

PHIL TUCKERMAN

KAYE FARISH

Nurse, Author and Mother (of Kate Farish - disability worker)

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Kaye Farish of Old Melbourne Road, Dunnstown in the State of Victoria make the following witness statement:

1. I hold the following qualifications:
 - i. Registered nurse (Division 1)
 - ii. Registered midwife
 - iii. Maternal & Child Health nurse
 - iv. Post Graduate Diploma in Childhood Development
 - v. Bachelor of Science – Nursing
 - vi. Lactation Consultant
 - vii. Continence Nurse advisor
 - viii. Certificate IV, Workplace Assessment and Training

2. 1967 to present – I have been employed in the public sector in many positions relating to my nursing qualifications. During this time I have worked as a general nurse, in intensive care units, in special nurseries, practiced as a midwife, as a maternal and child health nurse, as a specialist nurse in treating elderly incontinence.

3. Additionally I own and manage a private consultancy treating children and young adults for nocturnal (night time) and diurnal (day time) enuresis (bed

wetting) and encopresis (soiling). I have written many articles on the subject including several assessment and management manuals that are sold throughout Australia and New Zealand and the United Kingdom. I am the author of a number of books on the subject and lecture extensively throughout Australia and the United Kingdom.

4. I have also assisted my husband with the running of a company manufacturing and selling high quality enuresis alarms and associated products. I have also been involved with the compilation of the documents, including manuals, and assisted with the certification of this company to ISO 9002 and subsequently ISO 9001:2000 for Quality Assurance. In the course of assisting in the running of this company I have been involved in the setting up and maintenance of the company records; assisted in research and development projects and marketing finished products.
5. I am the mother of two children. My son has an honours degree as a Mechanical Engineer. My daughter is intellectually disabled. I have taught her developmental skills and ensured that she is as prepared as can reasonably be expected to be a worthwhile member of the community. These tasks range from teaching her to read through to sex education. We have been involved, hands on, in an ongoing basis to enable her to reach her present level. Kate lives independently. She is capable of looking after her personal hygiene, house work, shopping, budgeting and managing her own finances including paying bills. She does however need supervision. Kate is in receipt of a disability pension. She has also been placed in the 'Futures for Young Adults' program.

Kate's Employment

6. Over the years Kate has been employed in a number of jobs. Prior to her current position she was employed as a kitchen hand at a pub called 'Irish Murphy's' in Ballarat. During this time she was subjected to bullying by the

chef and when she complained to management the matter was inappropriately handled. Instead of the bully being tackled about her behaviour Kate was dismissed from her position.

7. Prior to the dismissal Kate had her hours cut back from 30 per week to 5. These were not consecutive hours but split up over the week. At this time she was living at home and traveling 10km to work and 10km home. Some of the time my husband and I were able to take her and collect her however there were other times, each week, that she had to take a taxi. When the wages were reduced, due to the hours worked being cut back, she had insufficient salary to cover the cost of the taxis and my husband and I subsidised them.
8. Most of the staff she worked with were accepting of her disabilities and found her to be friendly and co-operative and voiced their concern when Kate was dismissed and an additional chef appointed.
9. Kate remained unemployed from then for a period of 18 months. During this time she was searching for employment and attended a number of training courses. Her self esteem suffered badly and she became quite depressed.
10. In May 20001 Kate commenced employment at Ballarat Regional Industries (BRI) as a packer and kitchen hand. When Kate was interviewed (by Paul McGee, Human Resources Manager) for her position my husband and I were also present. We were told that Kate would initially start on \$2.50 per hour and this was at the lower end of the scale and Kate's hourly rate would increase in line with her productivity. We were not given any documentation nor were we told when any assessment would take place to reassess her productivity. To our knowledge she has never been assessed.

11. Early in 2002 we had a further meeting with BRI (Mr McGee) about Kate's progress and increase in her hourly rate. Mr McGee stated that Kate wasn't as fast in some areas as he felt she may have been capable of. This related specifically to tying ropes on laundry bags. Although Kate was shown a number of times how to do it she didn't pick up the technique and expressed her frustration. She continued to have problems with this task until they were no longer required to perform it. Mr McGee asked Kate if she had anything to say about work and she told him of the problems some of the supervisors had understanding people with disabilities. (The supervisors employed by BRI do not have any experience in working with people with a disability and do not have the relevant Certificate in Workplace Assessment and Training). Mr McGee's reply was to tell Kate to mind her own business and it was up to BRI to decide who they would employ as team leaders.

12. Several months after this meeting. I rang Mr McGee and asked him for a fan for the kitchen. I also asked him when Kate's wages would increase. His reply was that they were reviewing it and this review would take about a month. After the month had expired I again contacted him and again asked for the fan and about the wages. Once again I was told the matter was still being reviewed. During this waiting period I spoke to Kate and explained to her that she would have to speak to her employer representative about asking for the fan at the workers meetings held each month. This she did, on at least two occasions, in the presence of Mr McGee, but still no fan was forthcoming.

13. On 6th May 2002 we had a meeting with the Department of Human Services where we expressed our displeasure at the situation. Kate has not learnt new skills at work and that nothing had happened about her pay review. On 20th May 2002 we had another meeting with the DHS about these matters and lack of action by BRI and on 31st May 2002 we had another meeting

with the Department of Human Services about the lack of action by BRI over her pay review. On 22nd July 2002 we had a further meeting with the DHS and once again expressed concerns about the lack of action at BRI. The level of Kate's funding to BRI was investigated by DHS which revealed that BRI was claiming for full time employment for Kate under the Futures for Young Adults funding when, in fact, Kate was working about half time. The Department also informed us that there was no mechanism to enable them to recoup the excess funding paid to BRI.

14. On 2nd December 2002 we with three other parents whose children (co-workers of Kate's) had a meeting with Paul Cain and Kevin Stone. Paul is an Advocate from NCID and Kevin is the President of NCID and the CEO of Valid. A further meeting took place in late December with Paul and Kevin (no other parents or children present). We were told that they had had a meeting with BRI and had discussed the breaches of the workplace agreement, including the failure to re-assess Kate for her productivity pay increase. They asked us if we would attend a meeting with the CEO (Rex Carland) of BRI on 14th January 2003. This we agreed to do.
15. Apart from the problems of a failure to re-assess Kate (and the others) for pay increases, issues were raised about the inadequacy of the team leaders in recognising and dealing with persons with disabilities. We also raised our concern about the lack of communication of how the grievance procedures worked within BRI.
16. During the whole of this time we were unable to get a face to face meeting with Mr McGee or anyone higher up the hierarchy of BRI. Every time we requested a meeting, we were side tracked to the production manager Paul Ross. Everything was handled on the phone – usually unsatisfactorily.

17. In May 2002 Kate was ordered to perform cleaning duties and her allocation included the male and female toilets, disabled toilets, sick bay, foyer, warehouse and bins. Kate was shown once how to do these duties and was given written instructions also. Kate had difficulty in following the instructions. The cleaning of the toilets included the bowls and urinals (on the instruction sheet given to Kate is written the word 'revenge' after the instructions on cleaning the urinals). As a result of Kate being put on this type of cleaning duty we took her out of BRI on the date she was rostered to do it and put her into a computer course instead. We did not believe that she was employed to do these duties and had not received adequate training.
18. At no time have we been given a copy of any of Kate's file. We have asked, both verbally and in writing, for a copy but have, to date, not received anything. This includes a copy of any assessment of her. At no time has she been informed that an assessment is to be conducted on her.
19. I am wanting Kate to participate in the workforce and earn a decent wage. Her correct wages and conditions of employment do not reflect her true worth and productive capacity. I hope the Commission will seek to address this enquiry and unacceptable situation.

Dated this 18th day of February 2003

KAYE FARISH

PAUL CAIN

**SENIOR POLICY OFFICER
NATIONAL COUNCIL INTELLECTUAL DISABILITY**

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Paul Leonard Cain of 17 Partridge Crescent, Frankston in the State of Victoria
make the following witness statement:

1. Current Employment: Senior Policy Officer, National Council on Intellectual
Disability

**Qualifications: *Bachelor of Social Science (Human
Services)***

2. ***I have worked at Disability services for 15 years.
From 1994 I have undertaken senior national policy
positions at Disabled Peoples' International
(Australia), National Ethnic Disability Alliance,
Australian Psychiatric Disability Coalition, and the
National Council on Intellectual Disability.***

3. I have represented the National Caucus of Disability Consumer Organisations (which is a network of national organisations representing people with disability) and the National Council on Intellectual Disability, on many employment reform working groups attempting to address change in disability employment services funded by the Commonwealth since 1994.
4. These Commonwealth working groups including: The Quality Assurance and Standards Working Party, The Case Based Funding Trial Working Group; The Business Services Reform Implementation Group; The Business Services Wage Assessment Tool Reference Group; and The Assessment and Contestability Trial Reference Group (Welfare Reform).
5. ***It is the goal of the National Council on Intellectual Disability to ensure the maximum participation of people with intellectual disability in Australian society. The Council attempts to represent the interests of people with intellectual disability and their family members to Governments.***
6. The subject of the rights of people with intellectual disability in employment has been a targeted area of the Council's work for many years. As an employee of the Council, I have been engaged in argument and action to ensure that employees with disability receive wages and conditions of employment that reflect their fundamental right to the same terms and conditions of employment enjoyed and expected by other workers as per the Law.
7. NCID has received complaints from workers with intellectual disability and their family members who work in the business services industry (formerly

know as sheltered workshops). Workers and their families complain about the appalling wages and conditions, poor training and support, and the lack of choice they have to gain meaningful employment. This complaint is reflected in consultation and research reports of workers with intellectual disability.⁶⁹

8. In recent years, workers and family members have alerted the Council to the negotiation of workplace agreements in business services. Family members, in particular, have been outraged by employers negotiating and

⁶⁹ Commonwealth of Australia. Report of the Handicapped Programs Review. *New Directions*. (1985) Australian Government Publishing Service: Canberra. (Exhibit 28)

The Parliament of the Commonwealth of Australia. (1992). *Employment of People with Disabilities: Report of the Senate Standing Committee on Community Affairs* (Exhibit 31)

Commonwealth of Australia (1992). *Consultancy on the Development of a National Assessment Framework for a Supportive Wages System*. Report to the Wages Subcommittee of the Disability Task Force. Don Dunoon, Department of Industrial Relations. AGPS. (Exhibit 32)

Commonwealth of Australia. (1995). Baume, K., & Kay, K. *Working Solution*. Report of the Strategic Review of the Commonwealth Disability Services Program. AGPS (Exhibit 33)

National Caucus of Disability Consumer Organisations. (Dec, 1995). “*All I want is a job ..*” Report on consultations regarding the Disability Services Quality Council Strategic Plan. (Exhibit 34)

National Council on Intellectual Disability June 1995. *Consultations with consumers on aspects of the discussion papers relating to integration and wages in employment services*. Not published. (Exhibit 35)

Commonwealth of Australia. (1996). *Making Rights Count. Services for people with a disability*. Review of legislation administered by the Department of Health and Family Services. Australian Law Reform Commission. Report No 79 p. 233. (Exhibit 36)

Service Quality Australia. February 1997. Evaluation Of The Barriers To The Implementation Of The Disability Service Standards. A Report To The Disability Service Standards Review And Quality Assurance Working Party (Exhibit 14 & 38)

Report of consultations held with people with disability regarding the recommendations of the Business Services Review: [A viable future - strategic imperatives for Business Services](#). National Caucus of Disability Consumer Organisations. June 2000. Funded by the Commonwealth Department of Family and Community Services (Exhibit 40)

ACTU Workers with a Disability Conference. Outcomes and statement arising from the Workers with a disability conference held on July 11 - 12 2002. (Exhibit 1)

Commonwealth of Australia. (2002). *Evaluation of the Case Based Funding Trial*. Australian Healthcare Associates. Department of Family and Community Services. (Exhibit 43)

bargaining with their sons and daughters about their terms and conditions of employment. This outrage is due to the fact that their sons and daughter have intellectual impairment and are highly vulnerable to abuse and exploitation.

9. The issues of fair wages and employment for people with intellectual disability continue to be a “running sore”. Workers employed by business services receive wages and conditions of employment that the ordinary person would find to be exploitative and abusive.
10. It is a situation that the Commonwealth has been aware of through consultation, research and audit for at least two decades⁷⁰. Workers with intellectual disability, however, continue to be supported in businesses where they do not receive fair wages and conditions of employment.
11. Much of my work, on behalf of people with disabilities, has concentrated on assisting the Commonwealth refine the system by which employment assistance funding is granted to employment service organisations.
12. This work has always been distracted by the non-compliance of the Business Service (also known as sheltered workshop) industry. This model of employment was deemed by the Disability Services Act 1986 as not meeting basic standards of integration or employment conditions (and many still do not meet basic service standards). Many strategies have been provided to assist such organisations change over a period of 16 years – i.e. resources, transition assistance, reviews, research, pathways, self assessment tools, time, etc. I am in the process of contributing to the preparation of advice to the Minister to determine further measures of support for Business Services.

⁷⁰ See footnote No. 1

13. Despite a concerted effort by the Commonwealth and the sector, little change has occurred. Due to recent changes to the Disability Services Act, the expectation is that “time is up” for Business Services to meet basic employment rights of workers with disability.
14. Very few Business Services have paid award rates or maintained award conditions however, under the Workplace Relations Act s.123 to pay below minimum rates an employer must have permission of the Commission. The reason why the AIRC is confronted with a growing number of agreements from business services is that AIRC certification is now required to be eligible for Commonwealth service provider contracts under the DSA 1986.
15. The consequences of this is that, workers with disability in Business Services who had been receiving illegal wages and conditions of employment are now subject to industrial bargaining processes in which they do not have any independent support, advocacy or safeguards to protect their employment rights.
16. As a result the Commission has been presented with many agreements which seek to argue the legitimisation of wages and conditions of employment which are essentially appalling and discriminatory in substance. Employers have, however, been able to present arguments to convince the Commission that there is no disadvantage or discrimination, or even if there is, it is in the public interest to do so. Without any opposing view from employees, who in large part are unaware and rendered powerless, the Commission has inadvertently certified wages and conditions of employment which should never have been allowed.
17. The frustration of NCID has been that the law provides many safeguards, i.e. the supportive wage system, the need to take into account the needs of particular groups of people, the no-disadvantage test and the need to take

into account the Disability Discrimination Act. Yet employers, who are desperate to achieve certification in order to remain eligible for Commonwealth employment assistance funding, have sought to subvert these safeguards.

18. The frustration of NCID is further exacerbated by the nature of the system of industrial relations, particularly the ability for employers and employees to bargain a workplace agreement. This provision places a major disadvantage on workers with disability in business services. This means that an industrial process can be initiated, pursued and completed without the knowledge of any other party. The result is an agreement that is placed before the Commission without any safeguards, no independent advocacy or information provided to the workers, and the propensity of only one view, that of the employer, being presented to the Commission. This has led to decisions based on information that was never tested, and information that was skewed to suit the purposes and interests of the employer.
19. I believe that the Commission urgently needs to determine some critical issues to safeguard the rights of workers with disability. This includes rulings on what pro-rata award wage system is going to be acceptable for passing the no disadvantage test, or at the very least, what principles pro-rata award assessments and systems require to be deemed valid. Currently the SWS, according to the Act, passes the no disadvantage test, yet the Commission has passed many others that do not provide any safeguards against exploitation, have no independence in assessment, and lack valid comparison to relevant awards and job classifications.
20. There is also an urgent need to consider rulings on the process of enterprise bargaining in the business service sector including issues of genuine consent, voting, provision of information, independent support for information and bargaining, and preventing and eliminating discrimination.

These issues need urgent development so as to guide the Commission in meeting its obligations when determining certification of awards and agreements.

21. If these tasks are not addressed, workers with disability in the business service sector are at risk of a further two decades of wages and conditions of employment which are exploitative.

Dated this 18th day of February 2003

PAUL CAIN

MICHAEL HAND

**MANAGER ADVOCAY PROGRAMME
DISABILITY EMPLOYMENT ACTION CENTRE**

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Michael Hand for DEAC, Level 8, 55 Swanston Street in the State of Victoria make the following witness statement:

1. I am the manager of the DEAC advocacy programme. I have held this position since November 2000. Prior to joining DEAC, from 1986 to 2000, I was employed in the Commonwealth Department of Family and Community Services (DFaCS) in the roles of project officer and executive officer in the disability services program (DSP). The DSP is a national program established in 1987 to implement the Disability Services Act (DSA 1986).
2. The DSA specified two new types of employment services which constitute the current disability services employment assistance program. These are competitive employment, training and placement (CETP) services to assist people with disability to obtain and retain paid employment at or above the relevant award rate. This model of service operates as a job placement service assisting people with disability to find jobs in the open labour market.
3. There are also supported employment (SE) services to provide meaningful paid employment for people who because of disability are unlikely to obtain paid employment at or above the relevant award rate and who because of

disability need substantial ongoing support to obtain and retain paid employment. The supported employment service model sees the service provider as the employer which employs people with a disability in a business. Sheltered workshops are an example of this business service model.

4. My primary role as a project officer was to work with service providers.
5. The disability services employment assistance program is a labour market program providing employment support to people with disability who require more support than mainstream labour market programs alone can provide.
6. Standard nine of the disability services standards which refers to employment conditions confirms the labour market status of the employment assistance program. Standard nine requires that workers with a disability in open or supported employment are paid wages that accord with the relevant award or industrial agreement. If a worker because of disability is unable to work at full productive capacity a pro rata wage based on the relevant award or industrial agreement is to be paid.
7. Much of my work in the disability services program concentrated on monitoring the performance of employment services against the disability services standards. Monitoring highlighted the non compliance of the majority of business services with the disability standards and in particular non compliance with standard nine.
8. What does non compliance with standard nine mean? It means that business services have for the last sixteen years continued to pay wages which do not have any identifiable relationship to relevant awards or industrial agreements. Setting of wages in business services over the last sixteen years has been arbitrary and largely determined by a business

service's capacity to pay which is contrary to the requirements of standard nine.

9. This is despite the efforts of DFACS to assist business services to change. Over the last sixteen years DFACS has provided additional funding and resources to assist business services to comply with the disability services standards and to become financially viable in order to have the capacity to pay appropriate wages.
10. Recent changes to the disability services standards require business services to meet the basic employment rights of workers with disabilities if they are to continue to receive funding from the disability services program. The changes to standard nine will require business services to pay their workers a fair day's pay for a fair day's work. Business services will no longer be able to determine wages based on capacity to pay.
11. The changes to the disability services standards are the major reason why the Australian Industrial Relations Commission (AIRC) is receiving a growing number of agreements for certification from business services. Many business services see AIRC certification as demonstrating that they meet standard nine and are eligible to continue to receive funding from DFACS. As a result the AIRC has had to deal with many agreements which seek to continue the payment of low wages and conditions of employment which employees without disability would not countenance. Unfortunately, the AIRC itself has allowed many of these agreements to be certified thus legitimising the continuation of a low wage regime.
12. DEAC has received many complaints from workers with disability who work in business services. They and their families complain about the appalling wages and conditions which they as workers have to endure. They also complain about the process of negotiation of workplace agreements that

occurs in business services. Workers with disability generally have little understanding of the industrial relations process and do not have the negotiation skills required to participate in the negotiation of a workplace agreement.

13. Many of the agreements brought to DEAC's attention have, according to the complainants, been arbitrarily presented to the workers. In this process workers have lacked opportunity to negotiate wages and conditions and have been discouraged from seeking independent support and rely on the management of the business service for explanation of the agreement and for protection of their rights as workers.
14. The quality of many of the agreements that have come before the AIRC demonstrates the inequity of this process. The issue of a fair day's pay for a fair day's work for workers in business services is an enduring and disgraceful feature of the Commonwealth employment assistance program and should not continue. Yet continue it will if the AIRC continues to certify such agreements.
15. What can the AIRC do? DEAC submits the AIRC should convene a full bench inquiry into the use of the certification process by business services to maintain a regime of low wages to the continuing disadvantage of workers with disability. The full bench should set down principles for the commissioners to refer to when making decisions relating to certification of agreements presented by business services.
16. In particular the AIRC needs to consider the wage assessment process used to determine wages. It is DEAC's view that the supported wage system (SWS) should be used to determine the wages of workers with disability in business services. The SWS, which is currently used by open

employment services, already has the imprimatur of the AIRC and has the support of the ACTU.

17. It is acknowledged by the stakeholders as the most fair, reasonable and transparent assessment method for determining productivity based wages. An evaluation of the SWS by KPMG Consulting in 2000 found the SWS assessment process to be relevant and applicable to wage determining procedures within business services.
18. Other matters the full bench might deal with include issues around genuine consent, independent support for workers with disability in the bargaining process, i.e. advocacy, and the application by the AIRC of the no disadvantage test.

Dated this 18th day of February 2003

MICHAEL HAND

TAB 11

**MARIE LORRAINE KUCHENMEISTER
MANAGER
DIAL A LUNCH**

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AT MELBOURNE

IN the matter of: C2002/2281, C2002/5548, C2002/5547, C2002/5546,
C2002/4268, C2002/5545, C2002/2282, C2002/2283, C2002/2284, C2002/5559,
C2002/5558, C2002/5569, C2002/5639, C2002/5640, C2002/5716, C2002/5674,
C2002/5694, C2002/5679, C2002/5693, C2002/5692.

WITNESS STATEMENT

I, Marie Lorraine Kuchenmeister of 6 Little Ryrie Street, Geelong in the State of Victoria make the following witness statement:

1. Corio Bay Innovators Inc., established in 1991, is a non profit supported employment service for young adults with disabilities.
2. Trading as Dial A Lunch our organization offers innovative training and employment programs through our gourmet catering service and two retail outlets in Geelong.
3. We provide real jobs with achievable outcomes and a variety of accredited courses, in partnership with the Gordon TAFE College, tailored to meet the special needs of all participants.
4. With the guidance and expertise of our committee of management and through the hard work and dedication of our management team our vision "For adults with special needs to experience meaningful employment in a commercial environment" has become a reality.

5. Our goal to pay productivity based wages to our employees was realised in 1996. All employees are assessed through the Supported Wage System and this is reviewed annually by an independent assessor nominated by the Commonwealth Department of Family and Community Services. Our move to productivity based wages was achieved with careful planning and gradual wage increases over a four year period as the business expanded and became more profitable.
6. This system was chosen by our organisation not only because the federal government expected and recommended it but because our committee of management believes it is fair and just. A productivity based wage takes into account a range of ability and within Dial A Lunch the range varies from 20% to 80%. The majority of employees are paid between 40% and 60% of the current award. This award, as set down by the Industrial Relations Commission, is the Liquor and Accommodation Industry – Restaurants – Victoria 1998 award and also covers the Supported Wage System under clause 19.
7. Providing large quantities of fabulous food while at the same time retaining the high quality of support necessary to train our employees is no mean feat. This however has been achieved and is evident in the continuing growth of our business. Participants are encouraged and expected to take ownership and to have input into the running of the business/service. Our holistic approach encompasses case management, skill development and social and community participation.
8. We are expanding our service in exciting ways and are supporting people with special needs in the achievement of their right to a place in the competitive employment market. We are proving that our business can be as efficient as any other and in so doing have promoted community awareness of the value of adults with special needs.

Dated this 18 day of February 2003

MARIE LORRAINE KUCHENMEISTER

SAFETY NET REVIEW 2003

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