TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1056719

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
COMMISSIONER CAMBRIDGE

AM2014/286

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/286)
Supported Employment Services Award 2010

Sydney

10.12 AM, THURSDAY, 29 NOVEMBER 2018

PN1

VICE PRESIDENT HATCHER: Yes, we might take the appearances again, starting in Sydney.

PN2

MR M HARDING: Your Honour, I appear from AED, representing the Commission.

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VICE PRESIDENT HATCHER: Thank you, Mr Harding. Everyone who had permission retains permission. Yes?

PN4

MS R LEIBHABER: Your Honour, Leibhaber, initial R, for the Health Services Union.

PN5

VICE PRESIDENT HATCHER: Yes?

PN6

MR S ZEVARI: Your Honour, Zevari, initial S, for National Disability Services, ABI New South Wales Business Chamber, and I'll just note that appearing with me will be Ms Langford, who is delayed owing to the weather, but she will be joining us very shortly.

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VICE PRESIDENT HATCHER: All right, thank you.

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MR C CHRISTODOULOU: Your Honour, Chris Christodoulou, appearing on behalf of Greenacres Disability Services.

PN9

VICE PRESIDENT HATCHER: Yes?

PN10

MS M WALSH: Your Honour, Walsh, initial M, Our Voice Australia.

PN11

MR P AMOS: Amos, P, Practical Workplace Relations.

PN12

VICE PRESIDENT HATCHER: Yes.

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MS C BRATLEY: Your Honour, Bratley, C, on behalf of Endeavour Foundation.

PN14

VICE PRESIDENT HATCHER: Thank you.

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MR P BARKER: Your Honour, Paul Barker, from the Australian Government Solicitor, for the Commonwealth.

PN16

VICE PRESIDENT HATCHER: Yes?

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MS J ZADEL: Your Honour, Zadel, initial J, appearing on behalf of Select Disability Services.

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VICE PRESIDENT HATCHER: Is that all the appearances in Sydney? Yes, and in Melbourne, Mr Fleming, you appear for the ACTU?

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MR FLEMING: I do, thank you, your Honour.

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VICE PRESIDENT HATCHER: All right. Nothing, I think, that Mr Fleming and Ms Zadel have to make their submissions at some stage today, is there any agreement about the order of submissions?

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MR HARDING: Your Honour, I haven't had a discussion with anyone about the order, we'd be comfortable with the order that suits the Bench.

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VICE PRESIDENT HATCHER: All right. How long do you think you'll be Mr Harding?

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MR HARDING: Perhaps half an hour to three-quarters of an hour, if I'm optimistic?

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VICE PRESIDENT HATCHER: All right. Well, Mr Fleming, we might start with you and then we'll just proceed across the Bar table.

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MR FLEMING: Thank you, your Honour, I'll be about 10 minutes, and I might remain seated, if that's all right with the Bench?

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VICE PRESIDENT HATCHER: Yes, that's convenient.

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MR FLEMING: The ACTU supports the submissions being made by my friend from AED Legal in these proceedings, and the Health Services Union and we rely, obviously, on our written submissions. I wish to just expand upon a few points.

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We agree with the Commission's provision decision that many of the tools in the award are discriminatory and problematic and that there should be one universal tool administered, at arm's length, by the Commonwealth.

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Our view, however, is that that tool could only be the modified SWS. All the other tools result in lower wages and introduce arbitrary general competencies not relevant to the job performed.

PN30

The Commission's hybrid tool, in our view, would not meet the modern award's objective and its stated objective, for a number of reasons. It would result in lower wages for people with disabilities who are already low paid, disadvantaged workers, it would result in lower wages than the modified SWS and likely lower even than the other existing tools in the award. It will result in unlawful discrimination that would offend the Disability Discrimination Act, about which my friend Mr Harding will expand. It would not be fair and relevant and it will offend long-standing work value wage determination principles. I'm going to focus on the work value principles and the issue of fairness and relevance in these oral submissions.

PN31

So turning, firstly, to work value principles, the concept of job sizing is fundamentally at odds with some of these long-standing principles. The proposed process would, in effect, of job sizing that is, in effect an operation tailor work value to an individual workers' capacity, in contravention of the principle that work value relates to the nature of the job and not to the capacity of an individual employee performing the job.

PN32

Under section 156 of the Act, in a four yearly review of modern awards, the Fair Work Commission can only vary modern award minimum wages if justified by work value reasons. Subsection (4) defines work value reasons as:

PN33

> *Reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following: the nature of the work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.*

PN34

So the test here is an objective one about the kind of work, not the skills or qualifications of the individual employee.

PN35

I forwarded to Chambers, I apologise, at short notice this morning, an extract from Mills & Sorrel, *Federal Industrial Law*, 1975, just to emphasise this is a long-standing principle of the Commission and it's predecessors. I've highlighted it, from page 100 there's a list of principles of wage fixation and I've highlighted a number of those.

PN36

H B Higgins, in *A New Province for Law and Order*, 1968, listed a number of principles. Those include, at 1 and 2, on page 100:

PN37

The secondary wage is remuneration for any exceptional gifts or qualifications necessary for the performance of the functions, e.g. skills, strength or responsibility. It preserves the old margin between the unskilled labourer and a skilled or exceptional class.

PN38

I wish to emphasise, that the intention here is to create a class of employees. Then, turning to page 102 of that extract, under the heading The Value of Work as a Basis for Wage Fixation, it says:

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It has been consistently stated that the process of wage fixation and arbitration proceedings is essentially one of placing a value on the work in question.

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And it goes on:

PN41

Since the arbitrator's concern is limited to the work falling within the scope of the classification in question and his award will apply to all persons doing such work. It will not be influenced by matters which are peculiar to particular employees.

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And it cites a number of authorities for that proposition.

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We say the Commission's proposal would effectively so fragment the bands or classes of work in the current classifications as to make the concept of a classification, related to the nature of work, rather than the capacity of the individual employee, meaningless.

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As we understand it, the classifications in a person's job would, in the Commission's proposal, be broken down into granular tasks. Then a person's wage would be set, according to the number of those tasks that the individual can perform. Such an approach, we say, would collapse the distinction between an objective test of the nature of work and a subjective test of the worker's capacity. Here work value would serve merely as a cover for individual capacity.

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Wage classification structures and awards have invariably identified a class of work and is a long-standing principle that the Commission should avoid fragmenting those classes, creating new classes unnecessarily or overly prescribing work classifications.

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Mr Harding has provided a copy of the National Wage Case decision of 1989, which also lists a number of long-accepted wage setting principles by which work value changes are to be dealt with. Those clearly show that the Commission should be slow to create new classifications and, as it says at paragraph (f), in appendix A:

PN47

The Commission should guard against contrived classifications and over classification of jobs.

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Work value is essentially about producing coherent classification structures that value the different types of work in the economy, in an equitable way, an value and classify the jobs and the work, not the people. The closer the Commission sails to classifying a worker, rather than work performed, the higher the risk it runs of not only ignoring work value principles but also of facilitating discrimination. (Indistinct) that the productivity assessment falls into the same error.

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I wish to emphasise that such an assessment involves no work value determination at all. Like piece rates, it only concerns output not the value for work performed.

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Turning now to the issue of fairness and relevance, I wish to highlight just a few ways in which the Commission's proposed tool is more detrimental to disabled workers than the modified SWS and, we say, less fair.

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Firstly, it's more unequal than the modified SWS in two ways. It's more unequal compared to other workers with disabilities performing the same work classification because it will lead to much greater pay disparity within a classification band, between workers with a disability and it's more unequal between workers with a disability and without a disability because it further supresses wages, compared to the modified SWS and creates an even higher pay disparity. The proposal obviously involves a productivity assessment but then job sizing on top of that, which results in relative wage suppression.

PN52

Further, it is the norm that non disabled workers will not perform all the tasks within a classification applying to them within an award, just a number of them. I venture to say that it would be rare that a worker perform all of those tasks in a classification at all times and yet they're all paid the full rate for that classification.

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The number of tasks a worker might perform can also vary from day to day, yet they're paid the full rate for that classification. The proposal would not have the same guarantee.

PN54

Further, the proposed tool contains arbitrary elements. The modified SWS is related to productivity so it at least reflects the value to the employer of the work. This is not the only consideration but it at least has some scientific and non arbitrary basis. Job sizing does not.

PN55

The modified SWS is, nevertheless, still fair to employees by setting wages according to productivity only and, given that the necessary supports are funded by government, it cannot be said that the modified SWS creates any unreasonable burden on the employer.

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On the other hand, the Commission's proposed tool, by allowing further discounting beyond the productivity cost to an employer, effectively subsidises employer's at the workers' expense.

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Where the Commission has options as to which tool to choose, we say it ought to choose the path of least detriment to workers with disabilities and that that option is the modified SWS.

PN58

If the Commission were to make the award classifications more prescriptive, instead of introducing a job sizing approach, we suggest this should not act as a proxy for job sizing, that is, through the creation of sub bands that allow for further discounted wages.

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May it please the Commission.

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VICE PRESIDENT HATCHER: Yes, thank you, Mr Fleming. Right, Mr Harding, if you want to go next?

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MR HARDING: Yes, your Honour. First, your Honour, before I proceed with my submissions, can I bring to the Commission's attention very sad news that Mr Paul Cain, who was an expert witness before the Commission, in these proceedings, died on 7 November, as a result of a very sudden illness. That is tragic, not only for Mr Cain and his family but also for the Disability Rights movement. He has been a mover and a shaker in that movement for many years and many people owe much to Mr Cain and we wish to mark his passing. Vale Paul Cain.

PN62

Your Honours and Commissioner, we have filed a number of written submissions, both on our own part and as part of a group of others, and we don't wish to repeat what has been said in those submissions, other than to draw attention to a couple of matters arising from them and also then to say something about some of the

proposals that you have received on the proposed wages tool, as I think that terms has been used in our submissions.

PN63

Perhaps if I start with the last, which is the supplementary submission that was filed, on 21 November. I just indicate that we have flagged the issue of whether leave is required, if it's not then I won't press it, but if leave is required I seek that leave.

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VICE PRESIDENT HATCHER: Sorry, leave for what?

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MR HARDING: To file the submission.

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VICE PRESIDENT HATCHER: Yes, we've received the submission so you can take it we'll take it into consideration.

PN67

MR HARDING: Okay. Perhaps if I refer to the joint submission or it was called the further submission, from ADE Legal Centre and various other parties, that was filed on 16 July 2018. I wish to highlight a number of matters in relation to that, there are three, really.

PN68

The first is that this Commission, in relation to this matter, the AED came along to the Commission to propose that the SWS, in its modified form, be the tool adopted in the award and we did say, based on comparison to employment of disabled people in open employment and we wish to reiterate the concern that we have that any criticism that might be made of the SWS tool, in these proceedings, should and must have regard to the utility or the use, by this Commission, of that tool in almost every other - I think every other award, including at the national minimum wage level. And that if the Commission were to make adverse findings, in relation to the SWS, in this proceedings, it should desist in doing so until there is a more broad-ranging inquiry, if that is something the Commission is minded to undertake.

PN69

In relation to schedule B of this award, the Commission has flagged reform of the classification descriptions. Your Honours and Commissioner, as was pointed out in the submissions, no party has come along to this Commission to suggest that those classification descriptions should be amended in any particular say, disposed of, or rewritten and that if that was a path the Commission thought it needed to go down, it ought to, as a matter of procedural fairness, allow parties to make submissions and call evidence, in respect of that, before that step was taken, based on concrete proposals, we say, for those classification descriptions - what they should look like. At this stage of the proceeding, we're a long way from that.

PN70

The job site element, as you will detect from the submissions that have been filed, is of great concern to the AED. The AED endorses the submission made by Mr Fleming, on behalf of the ACTU, in relation to those matters. It's not necessary for me to go much further into what has already been said by the AED on that subject, other than to point out that the effect of the job sizing proposal would be to inflict on disabled workers and the ADEs a double discount arising from their disability, based on the notion that there would be, first, a classification arising from - or subclassification embedded in the award and, second, then an output measure, both of which suppress wages from the minimum that the Commission would otherwise - that an employer would otherwise be required to observe.

PN71

I do wish to say a little more about the supplementary submission and can I ask, at the outset, whether the Commission has had an opportunity to read that submission?

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VICE PRESIDENT HATCHER: Yes.

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MR HARDING: We have also, I understand, well, I've been informed, filed or provided Chambers with a number of the cases referred to in the submission.

PN74

The purpose of this submission is to explain why there is a risk, real risk, arising from the reasoning in Nojin, why the job size element may, in fact, offend the Disability Discrimination Act, and why, in those circumstances, the Commission ought not pursue such a tool, if it is satisfied that such a risk exists. We have, as a matter of construction, sought to identify, in the Fair Work Act, provisions that support that proposition and we've drawn attention to section 161 of the Act, for that purpose.

PN75

There is an interesting tension or interaction, perhaps, between the discretion the Act confers, by section 139 and read with 153, to empower the Commission to set rates for those who have disabilities, as defined and, plainly, 153(3) appears to permit discrimination against employees with a disability, in relation to minimum rates, but only, strictly, in circumstances where the provision merely provides for minimum rates.

PN76

161 of the Act, and it's accepted, of course, that 161 provides for an application of a particular kind by the Disability Discrimination, or the Human Rights and Equal Opportunity Commission, rather, but 161 of the Fair Work Act says, in quite clear terms:

PN77

> *If such an application is made and the Commission forms the opinion there is unlawful discrimination, putting aside the exception, with respect to compliance with the award, then it must remove the tool.*

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Or "must remove the provision", rather.

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We say that section 161 stands as an absolute no go area, in respect of what might be considered unlawful discrimination, properly analysed, under the DDA, so that even if a provision could constitute discrimination against an employee, within the frame of section 153, section 161 says, "But not discrimination that's unlawful", pursuant to the DDA.

PN80

It's interesting, in that respect, there's a decision which has not been included in the materials that we've provided, but if I could just draw your attention to it, it's a decision of Tracey J, in *SDA v National Retail Association & Anor* which is reported at 205 SER 227.

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VICE PRESIDENT HATCHER: Sorry, could you just repeat that?

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MR HARDING: It is 204 SER 227.

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VICE PRESIDENT HATCHER: Thank you.

PN84

MR HARDING: His Honour analyses the concept of discrimination against. We've also drawn attention to a case that has dealt with that phrase, in an adverse action context, but his Honour here directly considers discrimination against - pursuant to section 153, and at 52 of his Honour's judgement his Honour says:

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> *The Act does not define the word "discriminate" or the words "discriminate against". The ordinary, natural meaning of the word "discriminate" connotes the making of distinctions.*

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And he refers to a number of authorities.

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> *In the context of section 153(1), this involves the making of distinctions between employees, whose employment is regulated by the award.*

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So therefore we an see what "discrimination against" means is that we are creating a distinction. Of course the authority that was referred to in earlier submissions requires there to be some adversity attached to that, that adversity is apparent from the fact that we're talking about inferior minimum wages.

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His Honour goes on to say, though, from paragraph 54 to 56 that on his reading of the Act the provision did not include indirect discrimination, as that term is understood in the antidiscrimination statutes, including the DDA.

PN90

I won't - - -

PN91

VICE PRESIDENT HATCHER: Mr Harding, if an award sets a minimum wage, of whatever nature, that's a requirement that a person not be paid below that minimum wage. It's not a requirement, is it, that that person be paid that minimum wage, it is - - -

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MR HARDING: No.

PN93

VICE PRESIDENT HATCHER: 161(3) talks about the award requiring somebody to do something, do we require anybody to do anything when we set, in whatever fashion, a minimum wage?

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MR HARDING: Yes, you do.

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VICE PRESIDENT HATCHER: How's that?

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MR HARDING: Because the obligation is to observe that provision, which would require the payment of that rate, or something better than that rate. Obviously if you're paid better than that rate you satisfy the obligation. If you're paid less than that rate, then you're failing to abide by it. In this situation the provision would say employers must apply or must assess rates of pay by reference to this tool, on these criteria. That's the procedure that the award would mandate, in order to determine a rate to be paid.

PN97

Now, that was an argument that was debated in Nojin, does this require an employee to do anything? Below Grey J said, "No." But Buchanan and Flick JJ said, "Yes, it does require, because it's a condition." Conditions, the circumstances in which a rate of pay is determined, as a result of a procedure that's mandated by the award. In those circumstances, both Buchanan and Flick JJ found there to be a requirement or condition imposed by the employers.

PN98

I've drawn your attention to those parts of their Honours judgment which deal with that and Flick J specifically uses the word "conditions". Now, he did so, without necessarily analysing the detail - let me put it this way, your Honour, the particular methodology that BSWAT utilised. What he was concerned with is to say, "Because BSWAT, as a tool, conditions wage alterations, there was a requirement or condition." The requirement or condition that had originally been

pleaded in Nojin, on the basis that if an employee wanted to obtain higher wages, they had to satisfy the BSWAT requirements. That was a requirement of condition that was found to be within the frame of the first element of indirect discrimination, under DDA and, likewise, here.

PN99

If a disabled worker wants to obtain a higher rate of pay they're going to have to demonstrate greater work capacity. They may not be able to because of their disability. The disability directly impacts on their ability to obtain a rate of pay that's higher, because that rate is linked to their capacity.

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VICE PRESIDENT HATCHER: So how is the SWS different?

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MR HARDING: The SWS is different because it concerns itself with output. What the employer is able to demonstrate, in terms of the production of work, whereas the job sizing element is linked directly to capacity.

PN102

But there's another reason why the SWS is capable of being defended. I anticipated you might ask me this question, your Honour, and the job sizing element knot. It pertains to the third element, reasonableness, and the simple point, in relation to that, is the SWS, a factor that both Buchanan and Katzmann JJ singled out, was that the position for employees, in open employment, was covered by the SWS.

PN103

In other words, every other kind of disabled employee in Australia whose productive output is affected, they are entitled to have their wages assessed by reference to the SWS. That was a powerful reasonableness point that went in favour - that goes in favour of the SWS, as opposed to the job sizing element, bearing in mind that the addition of the job sizing element, when combined with the output measure that is in the Commission's April statement, results in a lower rate of pay. It's a double impact. The SWS would produce a single impact.

PN104

As Mr Fleming has said, based on what her Honour Katzmann J mentioned in her judgment, if there is a need to distinguish between competency, on the one hand, and output on the other, you should take the path that produces the least discriminatory impact, the least harm to the position of disabled employees.

PN105

So viewing this matter, within the frame of indirect discrimination, changes the way in which you analyse the issue.

PN106

We've drawn attention, also, to the notion that the DDA has now adopted a measure that states, as a positive discrimination measure, an employer is obliged to make reasonable adjustments. The only thing that gets that, the only aspect of the person that engages that obligation is the fact that they are disabled.

PN107

We've given you the decision of her Honour Mortimer J, who analysed, extensively, the concept of reasonable adjustments, in its course and origin and its strictness. Her Honour made clear that, actually, the term "reasonable" when you analyse the definition of "reasonable adjustment" in the DDA, doesn't require or doesn't require the court, or the employer, to assess anything. If an adjustment is made to adapt the work to the person's disability, that is a reasonable adjustment, for the purposes of the DDA.

PN108

Now, there was extensive evidence, and your Honours and Commissioner made findings about the extent of adjustments that are made in ADEs, they are made, as they are made in open employment, but they're also made in ADEs.

PN109

Now, the DDA comes along and says, "You're not only obliged to make those adjustments, you must make them." It also doesn't permit an employer to extract a penalty for having made them, unless the employer can demonstrate an unjustifiable hardship.

PN110

Now, no employer has come along here and said they can't do this, they do it all the time. That is a part of the case that they make, we make adjustments for the nature of the employment we have. Now, in that situation it goes to reasonableness if, as a result of doing what the DDA says, they would be entitled to discount wages, by reason of giving what the DDA says any employee with a disability should have, is entitled to.

PN111

So the Commission's looked at the job sizing element, by reference to a value lens. It needs to, in my submission, adjust that lens to accommodate what the DDA confers on disabled people and on disabled people alone. That frame of reference needs to modify how one analyses value. Put it this say, if the Commission was of the mind that because of a disability a worker can only perform one task of a notional single job and the employer retains that employee in employment and accepts that work, that is a reasonable adjustment that the employer has made for that worker. In which case, looking at it through the value lens, is to ignore, in my submission, the impact of the substantive equality that the DDA aspires to. It's not the same treatment, that was the position in Purvis, the DDA was amended to overcome Purvis and introduced, expressly, the concept.

PN112

There is another factor that goes to reasonableness, and that is the, and I've referred to this in submissions earlier, bear with me for a moment if you would? I'm not sure I tendered this, and I'm happy to do so, but I did refer to it in final submission, which is the report of the committee, on the rights of persons with disabilities. That report was made on 21 October 2013 and the committee's observations are entitled Concluding Observations on the Initial Report of Australia, adopted by the committee at it's tenth session, on 2-13 September 2013.

PN113

This is the body, the guardian of the international convention on the rights of disabled persons. At paragraph 49, under the right to work provisions, in article 27 of the convention, says that:

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The committee is concerned that employees with disabilities in Australian disability enterprises are still being paid wages based on the BSWAT.

PN115

Their recommendation to Australia is to:

PN116

Immediately discontinue the use of the BSWAT and (b) ensure that the supported wage system is modified to secure correct assessment of the wages of persons in supported employment.

PN117

Now, it has been modified, that was by consent, between the employers and those representing employees. Clearly the international committee viewed the supported wages system in the way that it did.

PN118

Now, I accept the Commission has taken a view about the SWS in it's assessment of value.

PN119

VICE PRESIDENT HATCHER: We've taken a provisional view.

PN120

MR HARDING: You've taken a provisional view, yes, thank you, your Honour. That provisional view needs to be adjusted, in my submission, by reference to the considerations that I've referred to.

PN121

Unless you've got some questions about those submissions, your Honours and Commissioner, I'll just proceed to make a few observations about the proposals that have been put, starting with the recent amended - supplementary submission of ABI, which was filed last night.

PN122

The device that I've referred to, in terms of the linkage between impairment and job size, is made manifest in the submission, the supplementary submission, at step 1:

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Employees are assigned a particular job, based on their abilities and operational requirements.

PN124

Actually, there's the two things. Actually it's what the employer needs and what the employee can do. But, clearly, implicit in this is an acceptance that the person's abilities, if they're retained in employment, and give effect to the

employer's job requirements, will be a foundation for how one progresses rates, based on step 1.

PN125

Step 2 seeks, I think, to address an issue that was specifically referred to by Buchanan J in Nojin, namely, whether the need for, or the criticism of BSWAT in that it didn't look at actual work but some theoretical or hypothetical role that might be performed by an employee - that might never been performed by an employee.

PN126

Notably, the ABI proposal links what the employee might be doing with what is required or authorised by the ADE. So the employer's haven't given away any contractual right to direct, they still want that right. So how are we going to, in a substantive and definitive way, fix a job size, if the employer still wishes to be able to direct work? It becomes unstable.

PN127

The Commission has never made an award that fails to recognise that an employer can direct and then leave it to the employer to do so, as long as they are paying a rate of remuneration, based on the work that fits within the classification, for work that they have required, but they leave it up to the employer to determine what they need. As I understand the proposal, that would continue.

PN128

VICE PRESIDENT HATCHER: Just to be fair, what - - -

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MR HARDING: This is step 3.7, second sentence.

PN130

What matters is what the employee actually does, as part of the job, provided, of course, this is activity requested or authorised by the ADE.

PN131

COMMISSIONER CAMBRIDGE: Isn't that saying, though, if there was a change to what you're actually doing you'd have to start again and do a reassessment?

PN132

MR HARDING: I'm not sure that it is saying that. That might be - - -

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COMMISSIONER CAMBRIDGE: That's how I interpreted it.

PN134

MR HARDING: Okay. I didn't interpret it like that. I'm not sure how one - the employer's haven't really advanced a very clear idea about how this assessment would occur, in my submission. It seems to be that there would be an assessment by them, that would align with a particular classification. But the timing of that assessment, how that's done, in what circumstances? Do they do it based on the

work that's been done at a point in time, or do they monitor the work and make an assessment and change the rate, is not, in my submission, clear, on the proposals that have been put. I'm not sure how the assessment is to be done, on these proposals.

PN135

But what does seem to be clear is that they want to do it. They don't want the Commonwealth to do, or at least they don't want to propose that, they want to do it.

PN136

VICE PRESIDENT HATCHER: Mr Harding, currently, where you have an ADE that's using the SWS and you wish to employ somebody, what's the practical means by which you get the assessment done? Is it done on request?

PN137

MR HARDING: Yes, I believe it is done on request.

PN138

VICE PRESIDENT HATCHER: What's the capacity of the Commonwealth to respond to requests? Let's say we adopted your application and have everyone on the SWS, just for the sake of argument, what would be, perhaps you can't answer this, but what would be the capacity of the Commonwealth to simply deal with requests for inspections? Perhaps the Commonwealth can take that on notice.

PN139

MR HARDING: Yes, that might be a question for them, your Honour. But there is - as I understand it, the handbook provides for a period when the assessment would be done, but it's a matter for them, I think.

PN140

VICE PRESIDENT HATCHER: Yes.

PN141

MR HARDING: I also observe that we still have somewhat opaque descriptions of what it is an employee might be doing. So, for instance, in 3.8, going back to our examples of what ABI says, the employees in question might be performing somewhat more complex tasks, whatever that means, exercised as discretion. Again, a large amount of subjective assessment built into these words, bearing in mind that their proposal is that they do the assessment, that is the employers.

PN142

It's interesting to note that, in my submission anyway, when you have regard to the submissions by the other employer and parties, that really only ABI has sought to grapple with the principles, rather, the provisional views that have emerged out of the April statement.

PN143

The Endeavour Foundation wants to set arbitrary - an arbitrary number of tasks of 20, where's 20 come from? It wants to allocate a 5 per cent allocation per task. So if a person performs one of those tasks that's 5 per cent of the value of then - in

formulating the rate of pay. Where's the 5 per cent come from? Why should it be 5 per cent? Why shouldn't it be another number?

PN144

The Greenacres and Endeavour Foundation want to set up some uber job statement, sitting somewhere in the award. Who does that? How prescriptive is it? Does it describe every single task that an employee with a disability will perform in every single ADE? How is it to be done?

PN145

The complexity starts to become mind numbing and they've offered no solution to it. In fact, the Endeavour Foundation wants to use part of its own existing tool, the one that this Commission has said it's not minded to include in the award as part of the assessment.

PN146

ABI, to its credit, has not done that, but the main employer, well, one of the key employer's in this industry, which is Endeavour Foundation, does. Again, it wishes to undertake the assessment. It simply hasn't grappled with, in my submission, the key provisional findings of this Commission, in relation to the problems with the existing award and how it might be formulated or re-formulated.

PN147

I might add that Greenacres has conceded, in its submission, the difficulty that would be inherent in framing a set of job statements and it is unable to offer a solution. I'm saying that because that job statement that they have in mind, which would be difficult to formulate, is the comparator, the notional fully competent employee, performing a task that, on the evidence, no fully competent employee actually performs in ADEs. So how is this comparator going to work, in a way that would enable a job size to be actually undertaken in a fair way that's objective?

PN148

There is a potential arising from these very complex arrangements that have been proposed by the various employees, for great disputation around how the system is applied, what constitutes a task, how that's to be compared with a comparator, who the comparator is and other matters of like nature, when getting into, as Mr Fleming put it, the granular detail of work performed by a single individual. This in a context where most of the workers who work in ADEs, on the evidence, have in intellectual disabilities, in which case that is a material factors in the Commission's assessment about whether the dispute resolution procedures that the Commission would normally proscribe, to deal with disagreements like this, could actually have real utility. There is, therefore, a risk that unfair assessments will remain in operation and left to lie, because there's no practical means of challenging them.

PN149

We draw attention to these matters in order to illustrate what we see as potential difficulties with the proposal. We've advanced reasons why we say the modified SWS should be adopted. I accept that the provisional concerns the Commission

has adopted but, in my submission, those provisional concerns really, on the quality of the evidence before you in this proceeding, should be approached with extreme caution.

PN150

Unless there are any questions, they're the submissions in chief for AED.

PN151

VICE PRESIDENT HATCHER: Thank you. Ms Leibhaber?

PN152

MS LEIBHABER: Your Honours, the agency supports the submissions of AED Legal and ACTU and we also rely on our previous submission in this matter. I am just going to make a few short comments today.

PN153

The decision of the Full Bench, of 16 April, in this matter, found that the tools proscribed in clause 14 of the award do not meet the modern award objective, for three reasons. That is, they produce different wage outcomes for persons performing equivalent tasks, they permit employers to establish their own classification structure and pay rates, rather than those derived from the award, and they may contravene the Disability Discrimination Act, such as was found in Nojin, in relation to BSWAT.

PN154

We say that these criticisms also apply to the wage tools proposed in the provisional view of the Full Bench and the proposals provided by the ADE employer parties and ABI in this matter.

PN155

We fail to see how the proposals in front of us ensure that employees performing equivalent work for different employers will receive the same wage outcome. The examples proposed by the NDIS, ABI and Endeavour, and other parties, appear to provide for a highly subjective job sizing and wage assessment, which will necessarily lead to different wage outcomes for equivalent work from job to job and employer to employer.

PN156

The Full Bench's April statement emphasised that the new wage assessment mechanism should be objective, amongst other things, and we fail to see how the proposals meet this criterion and objectivity.

PN157

The job sizing proposal leads to a situation where, because each job is sized, based on the position description and job design created by the employer, there just seems to be too much free rein for employers, under the proposed tool, to design a job around what they are prepared to pay, rather than the needs of the supported employee or the actual value of the work they do.

PN158

As AED Legal has submitted, in some detail, we agree that the proposed wage tool is discriminatory and we support their submissions. We also add that this is relevant to the modern awards objective, in part, because section 134G is concerned with ensuring a stable and sustainable modern award system. If a discriminatory wage assessment mechanism is inserted into this award, which may be subject to challenge under the Disability Discrimination Act, as BSWAT was, then the award can't be said to ensure a stable and sustainable modern award system.

PN159

We say sustainability, in the context of a modern award objective, does not refer to the viability of an individual business enterprise, as some parties, such as the Endeavour Foundation, have argued in their submissions, we say it's concerned with ensuring the stability and durability of the modern award system.

PN160

We therefore do not support the proposed wage tool or proposals advanced by ADE parties and ABI in this matter. We maintain our view that the modified supported wage system is the most appropriate and is the best option in meeting the Full Bench's criteria or fairness, equality, objectivity, independence, sustainability and non discrimination, as was emphasised in the April statement.

PN161

Unless you have any questions, your Honours, that's all the comments I was going to make.

PN162

VICE PRESIDENT HATCHER: And HSU has declined to advance any alternative proposal which might address the concerns advanced in our April statement?

PN163

MS LEIBHABER: We think if - we don't have any proposals, no, but I will say that there is nothing to prevent further work on the modified supported wage system, we would prefer looking at something like that, rather than introducing a new tool and assessment mechanism.

PN164

VICE PRESIDENT HATCHER: Well, this was the opportunity to address the concerns in the April statement expressed provisionally, but you haven't advanced any proposal to further modify the SWS to meet those concerns?

PN165

MS LEIBHABER: In our view, the modified supported wage system meets the requirements, so we see it as the best option. We see it as far preferable than the options proposed by other parties, and we don't see - while we did turn our mind to the job sizing proposal, but we couldn't see a way in which that could be implemented which meets all the objectives in the April statement. We couldn't see a way in which that could be implemented while maintaining objectivity and maintaining non discrimination amongst those other objectives, so for those

reasons we were unable to provide any alternative. We still think the modified supported wage system is the best option.

PN166

VICE PRESIDENT HATCHER: Thank you.

PN167

DEPUTY PRESIDENT BOOTH: Might I ask you, Ms Leibhaber, you said that you saw no reason why there couldn't be further discussions to further modify the modified supported wage system, but previously you said you wouldn't take part in any further conciliation, does that qualify that view about further conciliation?

PN168

MS LEIBHABER: We would take part in further conciliation, but I think we had reservations about - this process has already been ongoing for a long time and we weren't sure about the value of further conciliations where there seems to be strong disagreement between the parties. But I don't think we ruled out taking part in conciliation but we would be willing to take part in further conciliations but we would want timelines and limitations placed on those.

PN169

DEPUTY PRESIDENT BOOTH: Thank you.

PN170

VICE PRESIDENT HATCHER: Mr Zevari?

PN171

MR ZEVARI: Thank you, your Honour. Your Honours and Commissioner, I'll start with a reference to a comment that was in the joint statement filed by ADE Legal, on 16 July 2018, I believe that, in terms of the opening comments I'll make, and in light of the last exchange we had. An interesting proposal and comment that was made in those joint submissions, and I'll just read from it now:

PN172

The subject matter of the preliminary conclusions of fact, contained in 15(1) and (3) of the statement -

PN173

and that being a reference to the Full Bench's April statement:

PN174

has been the subject of evidence and submissions, which we will not repeat.

PN175

Then it goes on:

PN176

To cavil with those findings -

PN177

This, of course, being prior to the ultimate invitation from the Commission to make comments on the merits of the provisional views that were expressed, we

would say that of course the evidentiary case, having been closed, in relation to this matter, it's of course, helpful, in terms of today, and the submissions that have been filed, and the oral submissions that will come forward, to have some discussion about those things, but that all needs to be against the backdrop of a consideration that we've had eight days of hearing, we've had a very extensive, as Ms Leibhaber has said, long period of conciliation leading up to modifications to the SWS, and there's a concession, consistent with what's already been said, that there's been ongoing disagreement about any further amendments. It's taken a very long time to get to this point, so I would just caution against any - us falling into any trap, and we certainly won't be, of a three-card trick of trying to relitigate the evidence that the Full Bench has already seen, the observations that it's made, in relation to the viewings.

PN178

Of course there's room for some legal submission around what might flow from those things, but if what's been proposed, in relation to ADE Legal and the HSU and the various supporters on their side of the Bar table, this cannot be an appeal by stealth. That's simply not the nature of what it is and I'll make no further comment beyond referring to that and saying that the probative evidence that's before the Full Bench has, very properly, led to the conclusions, we say, that were provisionally expressed in April and, in our respectful submission, those matters have been ventilated and should be confirmed.

PN179

That said, I will touch on, briefly, some of the commentary this morning and also arising from the opposing submissions.

PN180

In terms of jurisdiction, under the Act, to set wages for employees with a disability, there can be no debate that the Commission has jurisdiction, in relation to those matters. Section 284(3) confirms as much, in relation to the minimum wages objective. Section 139(1) unambiguously confirms it and, in that case, directs us to the notion of skills-based classification and career structures.

PN181

It's also uncontroversial that the Act allows for lower wages for employees with a disability. Mr Harding's talked, at length, this morning, about how he views a potential out, in relation to the SWS, arising from discrimination law or on the basis of reasonableness, amongst other things. But the inescapable conclusion is, nobody in these proceedings is proposing any outcome that does anything else than result in lower wages for employees with a disability. The question is why and the question is does that properly reflect work value, as is a requirement for the Commission to consider, in relation to determining the content of the classification structure. Those matters have been extensively addressed in our previous submissions and we rely on those matters.

PN182

There's a reference also, in recently filed submissions to competency again, as though it's some form of dirty word. I would note that the award, as it is now, including the SWS section of the award at D.3.1, uses the expression of competency. We shouldn't hide from competency, it's a valid consideration, not

only in supported employment but in every sector. But as I'll go into, in relation to our proposal, and a key issue arising from the April statement that we've sought to take into consideration is, competency against what? Are we assessing the person or the job, in terms of work value and job sizing?

PN183

Now, I understand more clearly, following hearing Mr Harding's oral submissions this morning. I must admit, when I read the written submissions and the reference to the exemption in the Disability Discrimination Act, and there was a reference to setting aside the exemption, I initially read that to see, well, we can't just set it aside, it's put there for a reason, I understand the foundation for that submission better, as I say, this morning. But I would echo - I don't agree with those submissions, nonetheless, and I would echo your Honour's comments, in relation to querying whether or not, in fact, the award forces anybody to do anything. It provides for a floor, not a ceiling. There is nothing precluding any employer from paying above award rates, and I would cavil with the notion that the relevant exemption, under the DDA, doesn't apply, and we've already gone into the provisions of the Fair Work Act that allow it.

PN184

I'll now turn to a consideration of work value. I wanted to comment on a matter raised by Mr Fleming. He commented this morning that the SWS doesn't reflect work value, only piece work. Commissioner, you may recall a comment you made about Taylorism, during the course of the hearing, that is precisely the issue, we say. It's interesting that the ACTU would be submitting anything that would sound like paying people, on the basis of piece work. I understand that the SWS is more sophisticated than that, but, in essence, that's what it is. It's a stopwatch with some considerations of quality. That's not satisfactory for the purposes of wage setting, under the award, because it doesn't accurately reflect work value.

PN185

We are being portrayed, in this matter, as the industrial heretic, as though we're proposing to do something that is uncalled for or inappropriate. It's simply not the case. the approach we're proposing to take is entirely consistent and the approach that was provisionally noted by the Full Bench, in April of this year, focuses on work value and the ability to take the particular circumstances of supported employment into consideration.

PN186

This is not an industrially radical proposal, it's not an exotic proposal at all, that an employee with a disability ought to be treated as any other employee, in this sense, "What I'm paid is not about me as an individual, but what I do and how I do it, the value of that work", and our proposal sees to address those things.

PN187

The evidence and the Full Bench's observations, during the viewings that took place in February of this year, and the comments that were included in the April statement, confirmed the very unique nature of the supported employment services sector and the need to facilitate the employment of employees with a disability, through a desegregation of jobs.

PN188

I'll refer your Honours and Commission to paragraphs 172 to 184 of the transcript of the hearing on 5 February 2018, during which Mr Ward goes through some of these submissions about the specific nature of the supported employment sector, in more detail. But that's clear, it was clear on the evidence, it's clear, in relation to the provisional views that the Commission expressed in the April statement.

PN189

Now, I won't go into depth, in relation to our proposal at this point, I'll come back to that, but what we've sought to reflect, in relation to our proposal, is taking into consideration key stepping points, in relation to the valuation of activity, under our proposed classification structure concept, and I'll talk through some of those factors and how they help establish those stepping value moments.

PN190

I want to turn, also, to commentary from both the ACTU and ADE Legal, and it was reflected in some of the written submissions about this concept of a double discount. This is not a double discount we're talking about, any more so than under the award, as it is now, an employee could be classified at grade 2, as opposed to grade 3, that's a discount reflecting what they do. We're simply proposing that within those grades there is more refinement and consideration of the work value associated to particular parts of a broader job.

PN191

So it's not a double discount, in any sense of the word, it's a recognition that employees with a disability, working in supported employment, are working in multiple - one example that your Honours and Commissioner observed was at Endeavour Foundation seven or eight employees, on a production line, putting green tea in bags, one weighing, one sealing, one measuring et cetera. And I'll turn again, later to why that kind of arrangement is critical, in relation to supported employment and desegregation and simply does not and would not exist in open employment.

PN192

The last comment, in relation to replies so far to submissions that have been made, is this reference to reasonable adjustment. What doesn't appear to have been considered is the operation of the exemption in section 21A of the Disability Discrimination Act, this notion of reasonable adjustment. Again, an entirely uncontroversial proposition to say that the idea of reasonable adjustments is only to allow someone to perform the inherent requirements of a job. The Act, as it's expressed, says that the exemption is:

PN193

> *This division does not render it unlawful for a person, the discriminator, to discriminate against another person, the aggrieved person, on the ground of a disability of the aggrieved person, if (a) the discrimination relates to particular work, including promotion or transfer to particular work and (b) because of the disability the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer or principal or partnership made reasonable adjustments for the aggrieved person.*

PN194

There's no suggestion in there, nor in case law dealing with it, that employers have a legal mandate, a legal requirement, to change the inherent requirements of a role, provided they accurately reflect the inherent requirements. We deal with these issues all the time, people saying, "Well, is this an inherent requirement or is this some sort of ancillary requirement?" It's about a means to an end. If the suggestion is being made that employers around Australia can be taken to court in relation to not reengineering the actual core requirements of a role, we would be up to our necks in disability discrimination claims. There's a reason why the supported employment sector exists and there's a reason why more than 20,000 workers are in the sector, because they would not get jobs in open employment, bar some examples that were discussed during the hearing, of what I would call a cap in hand model to employment of, "Let's go to Bunnings and ask them nicely if they'll make a role available for a particular person?" That's not social justice and that's not reflective of the inherent nature of self interest that governs a capitalist economy.

PN195

Simply not a sustainable proposition and the notion that - first of all, it's not consistent with the Act itself, there's a ready exemption available if someone can actually make out that they're inherent requirements. Reasonable adjustments purely provide that means to an end.

PN196

So there's a very clear reason why we have supported employment and my friend's proposal, in relation to having the modified SWS be the only mechanism available, simply would not allow a sustainable sector to continue to exist. The Full Bench heard extensive evidence about that during the hearing.

PN197

Mr Harding also talked about the least discriminatory impact, the least harm. I would ask the Full Bench this, what could be more harmful to a person than the loss of a job because of a wage flaw that does not reflect the value of their work, effectively disentitling somebody to a job or substantially lessening the chance that they'll have a job and the dignity that work provides? That's really the core of why we're here, your Honours and Commissioner.

PN198

I'll now turn to the proposal itself, and I understand that your Honours and Commissioner have reviewed that document and I don't propose, at this juncture, to take you through it in detail, but I'll say this at the outset. I will make a frank concession that the supported employment industry, and I've been involved in this matter for coming up to three years, has worked for so long under wage assessment tools, and that regime, that they're working hard, feverishly, to recast their mind to this classification structure approach, but they still tend to view things through the lens of wage assessment tools and I think they could be forgiven that.

PN199

In relation to the various proposals that have been advanced, yes, our proposal is intended to closely reflect, because we agree with the provisional views that were

expressed, in relation to work value and job sizing. There are an array of different proposals before the Full Bench in relation to that but, in broad terms, the ADE sector supports the April statement and the conclusions that were raised in there. In summary, we've tried to be as helpful as we can, perhaps not as much as we desire, but we acknowledge that it's an iterative process and our proposal seeks to reflect that, in relation to further submissions being advanced about occupation types. There may be capacity, for example, my understanding, microfilm, for example, is not something that tends to be a relevant consideration anymore, we've received that arts and retail might be some appropriate inclusions. But, ultimately, that will be an iterative process.

PN200

I'll just, finally, sum up, in relation to comments and on some of the issues that Mr Harding raised, with respect to our proposal. Firstly, step 1 of our proposal:

PN201

> *Employees are assigned a particular job, based on their abilities and operational requirements. This job might involve one or more indicative tasks in each occupational category within the classification structure. For example, an employee might be engaged to do work in an ADE's team work division.*

PN202

There's absolutely - again, an entirely uncontroversial proposition, that happens in every single job. The difference is, when somebody goes to a supported employment service, the question that they ask is not, "Well, we need to do X, you can't do it, go away." The evidence that the Full Bench saw was they will work to create jobs, provided that, of course, it reflects what they broadly do, if they've got contracts in that area. We take no backward step, in relation to that being the first and obvious step in relation to that.

PN203

As to step 2, Commissioner, your reading of the proposal is the correct one. I'm struggling to understand the difficulty with employers having authority to direct their employees to do certain things. Of course, all of this would be within the normal ambit of contracts, the consideration of what people might be assigned to do. You might be working in a café, you might - that's owned by a particular ADE, you might be normally - there's a consideration of what you actually do in that role and the comment about authority is also intended to capture, "Well, if I turn up to work and I start doing things beyond my purview, with out authorisation and then demand to be paid for them", then that doesn't fall within normal award practice, in any award.

PN204

VICE PRESIDENT HATCHER: Just to be clear, it's accepted, is it, that if a job is sized to do some particular proportion of the award classification duties, the employer's authority to direct contacts to that proportion of duties and loses any authority to direct the employer to do the other parts of the duties, which don't form part of the job?

PN205

MR ZEVARI: Yes, that's correct. As to who does that proposal, well, again, as in every other award, what we want is an award classification structure that reflects, subject to the requirements of the Fair Work Act, the specific nature of supported employment. But, at the same time, like any other circumstance, your Honours and Commissioner would deal with cases, hundreds of cases dealing with disputes about what classification someone's considered to be put into.

PN206

Now, we're open to the idea of some form of review, but what we're staring with is the award. We're not starting with job statements or anything like that, we say, "Well, you come in", and, yes, of course there will be some discrepancy between specific job descriptions, such as they exist, contracts, et cetera, but that's not dissimilar to any other sector.

PN207

We can't have an award, and I agree with Mr Harding on this, that tries to capture every single task that people perform, it's simply not feasible, it's not practicable and, in our submission, there shouldn't be reference to any external document, we want a classification structure that is comprehensive enough to capture various tasks and we've, in our proposal, included a table which is derived largely from the existing award, but subject to the input process that we recommend, and seeks to then use a job sizing range. So if, for example, the award reflected that a particular job was 5 or 10 per cent, and that was all the employee was required to do, as part of their job, and reflected that, it would be rounded up to a 20. So you've got 20, 40, 60, 80, 100, and that's, again, consistent with the April statement.

PN208

On - - -

PN209

VICE PRESIDENT HATCHER: Just to be clear, your model involves the employer determining the job sizing step and then, if there's some dispute about that, there'd be access to the dispute resolution procedures?

PN210

MR ZEVARI: Yes, your Honour. Again, if there's some form of independent review of, be it spot checks or otherwise, of, "What have you classified that as? What are they actually doing in their role? Which of these do they fall into?" we're open to that being considered.

PN211

So, for example, we've used the example of someone, if you go through the work example in our submission, we've said, "Well, let's start off with someone who's engaged?" They say, "I've got some work -" and then, again, this is derived from indicative tasks in the award, as it is now, "I can work in your timber work division." That's step 1. The person says, "Well, we've got some duties available, we've got some contracts in that." Step 2, we look at what you're actually doing, in relation to that, in relation to grading.

PN212

Now, Mr Harding commented on his being perplexed by the language, "somewhat more complex", it's actually derived from paragraph 15(8) of the April statement, in relation to that language used, of "somewhat more complex." "Exercises discretion, et cetera." So they're placed at a grade 3.

PN213

Then the next step is, "What do they actually do, in relation to that?" Not what can they do, what are they theoretically capable of doing. Again, if I go into the café downstairs and say, "Well, I've got legal qualifications, I'd like to review your contracts", and they say, "No, no, we just need someone to pull coffees, thanks very much", it doesn't entitle me to payment at whatever award might cover me, if the legal sector at my level did have an award that covered it.

PN214

So it's what are they actually doing? The example we said was, "Well, in this job you're engaging in nail gun work, which is at 25, manual sewing, manual cutting." Adding those three things up, 55 per cent rounds up to 60 per cent band and then we have output assessment following that. So that's how the proposal's recommended structure is, but we, again, acknowledge that it's an iterative process and it will require further input for appropriateness of tasks.

PN215

We've also set out, in the proposal, at 3.17, some factors that we say should be considered, starting from lowest work value to highest work value, and your Honours and Commissioner will see we start with very simple, single manual task activities, and then working up - these are broad guidelines that might help assist the parties, in relation to a conference process to help ascertain what percentage values might apply to particular indicative tasks.

PN216

3.18 includes a more sophisticated example than what's in the award now and is, indeed, in the table in our annexure of what, for example, the specialist packing occupational category might look like.

PN217

VICE PRESIDENT HATCHER: One possibility is that that SWS style, and assuming there's willingness and resources to do this, that the job sizing task would be undertaken by somebody independent and external, what would you say to that proposition?

PN218

MR ZEVARI: Well, your Honour, as I said earlier, the - I think we're open to the notion of independent review, perhaps, or assessment of where someone - what jobs sizing levels they're at. So someone in that example might come in and say, "Well, I've observed them and they're actually doing more than just those three things that we said, within the indicative task list, so that needs to be added", or perhaps the other way around, "They do that so occasionally that it doesn't actually form part of their usual duties, therefore it needs to be taken off." But we acknowledge that the particular nature of the sector may call for some independent verification review, et cetera. But we're in the Commission's hands in that relation. And, of course, the Commonwealth, in terms of funding.

PN219

COMMISSIONER CAMBRIDGE: Whether it's independent or it's the employer, surely there might be - using your examples here, considerable prospect for the hundred per cent to be achieved, in the sizing process, so then you just go back to the SWS process.

PN220

MR ZEVARI: Correct. Of course, provided someone actually does that, as part of their actual job, as opposed to hypothetically can do it.

PN221

COMMISSIONER CAMBRIDGE: So we're really only looking at, if you like, instead of this sort of double dipping, we're only looking at a mechanism in certain circumstances where, in other circumstances, there's no double dipping, it's the application of the SWS?

PN222

MR ZEVARI: That's correct, Commissioner, yes. This does contemplate that a person with a disability can be fully competent in a range of indicative tasks.

PN223

COMMISSIONER CAMBRIDGE: If the work there doesn't effectively comprehends what a non disabled person is doing, it's only a matter of output?

PN224

MR ZEVARI: That's right, and so it should be, in our submission. Unless there are any questions?

PN225

VICE PRESIDENT HATCHER: Thank you. Mr Christodoulou? Sorry, Mr Christodoulou, we might take a short morning tea adjournment and resume in about 10 minutes.

SHORT ADJOURNMENT **[11.34 AM]**

RESUMED **[11.56 AM]**

PN226

VICE PRESIDENT HATCHER: Mr Christodoulou.

PN227

MR CHRISTODOULOU: Thank you, your Honour. Firstly, Greenacres would also like to just place on the record our sadness to hear of the passing of Mr Paul Cain. Whilst we've had many differences in this Commission in this matter with Mr Cain's approach to wage determination, I can say having known Mr Cain, he has been a great advocate for people with disabilities across a whole range of issues in the disability sector and I think it's true to say his presence in the sector will be sadly missed.

PN228

Your Honour, in terms of my submissions, can I say we've attempted in our submissions to deal with the four dot points that are contained within the April

statement, subparagraph 15.10 in terms of all those issues. Suffice to say that in relation to further modifications of the SWS or the modified SWS, we did in evidence in exhibit 5, attachment 4 which I'll simply refer to you. I don't think you need to find it, but we did have a discussion paper that we put during conciliation about further modifications to the SWS that might make it more palatable to ADE's but that paper didn't get anywhere, but I would refer the Commission to that if it is of any relevance at all because time has now passed.

PN229

In terms of the submissions made by ABL, Greenacres certainly supports those submissions and indeed, we support the approach that ABL has taken with respect to putting the job sharing part, the job sizing part of any ways determination in the award. However, in order to provide the Commission with other alternatives to consider, Greenacres had been doing some work on this and hence we put forward another option, again, only by way of consideration that the Commission might consider and may want to take parts out of when finally making a determination on this matter.

PN230

In terms of implementation issues, can I say from our position, we think it's very important that the Full Bench actually make a decision in relation to the matters before that. When I sway a decision, a full decision. That's not to say that it will have determined incompleteness a wage determination mechanism, but we think it's important that it sets down clearly what the parameters would be and then if necessary, should consider facilitating a set of conferences between the parties. Not to revisit that decision, but simply to see the best forward to implement that decision or to fine tune it with respect to that.

PN231

In terms of testing the proposal, we think that once that proposal has been finally determined, the Commonwealth has a role to play, I think, in providing resources to the parties and indeed, this Commission, to test whatever the mechanism that will go forward. Then we think there would be a period of report-back where there could be some costings as against whatever the Commission determines.

PN232

That's important, because at the end of the day, there's no doubt in my mind whether it is the proposition put forward in a preliminary sense by this Commission, or if there's any other proposition, there undoubtedly will be wage increases associated with any decision. Because I presume that what we're not going to want to do is reduce the wages of any existing supported employee with any new system that we introduce. So therefore, wages can only go up for those where there will be improvements, but wages cannot go down for those that exist in the system.

PN233

VICE PRESIDENT HATCHER: There might need to be an employer who volunteers to be the subject of a trial of any new system.

PN234

MR CHRISTODOULOU: Sorry, your Honour?

PN235

VICE PRESIDENT HATCHER: There might need to be an employer who volunteers to be the subject of a trial of any new system.

PN236

MR CHRISTODOULOU: Well, we've always been prepared to put our hand up to be a trial in any system your Honour, because we do want to find a solution to this very vexed problem. We would then say in terms of implementation that of course, once there is some determination of these factors, there needs to be a phasing-in period, there'd need to be some discussion with the Commonwealth about supplementary funding and the like.

PN237

On the question of revised classification structures, notwithstanding the proposal we're putting forward, can I say I think it's not right to say that - sorry, it is correct by Mr Harding to say that nobody put in an application to change classification structures, but I recall in a discussion with your Honour, or it may well have been with her Honour about classifications in the award.

PN238

I said that we had not looked at the classification structures that were extremely old in the award, simply because everybody was focussed on wage assessments. Therefore, no other aspect of this award has really been looked at in any great detail because we were all focussed around trying to get an outcome out of wage assessment. But I do think the classification structure, whether it's to change because of wage assessment or otherwise does need to be looked at.

PN239

In terms of our proposal, it is found in appendix A of our submission and it is a somewhat different proposal to the one that's been put forward by ABL. It does rely upon the creation of what we call job statements. We took this view that if we had to size a job as against another person without a disability who we at Greenacres might otherwise employ at level 2, we would need to look at the duty statement of the person at level 2 who doesn't have a disability and need to size the job as against that duty statement.

PN240

So, in attachment 1 of appendix A at page 16, there is an actual job statement and it actually goes through and it deals with breaking up a job into tasks. I agree with Mr Harding, we've picked five per cent, simply because this is about sizing a job, it's not at this stage about the complexity of each of those tasks, but can a person do the task that we're asking them to do? We've got three columns there; high support. If someone requires high support, we won't be directing them to do that task because it means they wouldn't be able to do it safely and they wouldn't be able to do it without one on one direct intervention and we're not funded to be able to do that.

PN241

We do have employees of course - it is our role in Australian Disability Enterprises to train employees to actually improve their skills. So there's lots of times where we ask people to carry on tasks, not necessarily because they can do

the task properly or productively, but because we're trying to train them to get to the point where they can do it properly and productively to a quality outcome.

PN242

So we've got a third thing, that there's someone is in training and the third column that we have in that job statement is general, and that's where the task that they've been directed to carry out and that they can carry out.

PN243

We believe the process would be this, that yes it would be the employer that would be doing the assessment and the direction of the tasks that the employee can carry out, as against the job statement, to job size the job. But it would be the role of the independent assessor when they come to visit the employer to assess the SWS, is to audit the job sizing aspect of the job. In other words, we would say well here are the tasks that the person is carrying out, of those tasks this is what they spend most of their time on and we're setting our proposal that we should pick three of the tasks that they're capable of doing or be directed to do and to have those assessed in terms of productive output.

PN244

But we do support the SWS assessor just making sure that where we've said someone can't do a job or they're not doing a job, that in fact that is correct. Now how that actually works in practice, there's obviously work to be done around that, but we have no difficulty with having a system in place that would safeguard the employer simply narrowing the job sizing when it's pretty clear the supported employee would be capable of doing tasks if the employer directed them to do so. There is a bit of a difference between our approach and possibly the pro job of ABL.

PN245

We've come up with a proposal, a formula as to how you round up to make sure the supported employee is not disadvantaged in any way whatsoever in terms of a calculating formula. So in actual fact, attachment 1 in Appendix A starts to build an assessment tool or determination method, save and except - and Mr Harding is right, what we don't have are the job statements. Now I don't think it would be difficult actually, to create what I think would probably be about a hundred job statements through a working party and we've put this in our submissions, the Commonwealth could facilitate a working party where these job statements could be put together for the purposes of job sizing.

PN246

Because if we don't do that, or don't have something similar to that process, we do run the risk of employers making their own determinations about job sizing, save and except I must say, that if they're clear in the ABL structure as to the job sizing percentages and there's still lots of work to be done if you're to go down that path with the ABL structure.

PN247

VICE PRESIDENT HATCHER: Do ADE's typically, in your experience, prepare position descriptions or job descriptions for disabled employees?

PN248

MR CHRISTODOULOU: No, we don't. We've relied upon the tool in this sense, that in terms of the Greenacres tool, as you know, we have skill levels and we have trainers that will assess people as to their skills from simply tasks and to our most complex tasks at our ADE. So it really is a matter of how people up-skill over time as to how they move through that skill structure. So we don't have job descriptors for our supported employees. But I think in this particular case, this is why I'm thinking this would be a way of being able to determine that.

PN249

The other thing I would say about the sizing and I would make this one concession to AED Legal and that is - and I raised this point before in the submissions that our higher school people under the Greenacres tool do more complex tasks, sewing is a good example of that. Under the SWS in all our work that we've done, they would have been disadvantaged because they could not sew as fast as a person with a disability in the case of the supported employees that we have sewing at Greenacres. Conceivably, they would have got paid less than a person packing things in boxes at Greenacres. That's was one of the anomalies with the SWS.

PN250

In terms of this approach, in terms of job sizing, and then attaching SWS to it, that anomaly could still occur because you still have a productivity element to the assessment. So we have actually put some safeguards in there for person that are working at a level 3. So we are saying that in terms of the overall wage assessment of a person continuously working at level 3, notwithstanding the formula we've put in, they shouldn't get paid less than 40 per cent of the award wage.

PN251

We've done that only because we can see that in the case of Greenacres, that people that are doing more complex work because of a productivity aspect of this approach, could be disadvantaged, so we have done that. Now I must say - - -

PN252

VICE PRESIDENT HATCHER: Just for the sewing, so from the inspections as I recall it, we had disabled people sewing alongside non-disabled persons.

PN253

MR CHRISTODOULOU: Yes.

PN254

VICE PRESIDENT HATCHER: Which would suggest that if you adopted the job sizing approach, they're doing a job of a hundred per cent and then there's a productivity assessment done of that.

PN255

MR CHRISTODOULOU: Yes, well, you are right in this sense that if you just look at that one job of sewing, you would be correct in saying that. That would probably make - yes, that wouldn't change my problem about productive output in those employees. But when we look at say body bag manufacture, it also is

sealing, cutting and doing some of the other work, ancillary to the actual sewing as well. Because some of the employees can do these other tasks, so we were thinking well that might be a job statement in that one area of work, where they're able to do those other tasks as well.

PN256

VICE PRESIDENT HATCHER: I mean, it does raise a difficulty because I thought that position was that Greenacres had engaged non-disabled casual employees just to do sewing.

PN257

MR CHRISTODOULOU: We do.

PN258

VICE PRESIDENT HATCHER: In which case that is by itself a hundred per cent of a job because Greenacres didn't require them to do anything else.

PN259

MR CHRISTODOULOU: Yes, you are correct about that, but those same people that do sewing, you can also get them to do cutting and sealing as well, alongside people with disabilities.

PN260

VICE PRESIDENT HATCHER: Right.

PN261

MR CHRISTODOULOU: So, I'm being transparent about just how this operates in the complexity of this. Having said that, I don't think there's anything in the proposal either that we've put forward or ABL has put forward, that can't be overcome through a job sizing exercise, but it does get down to determining what the job is that we're job sizing against.

PN262

That's why I'm suggesting the possibility of a working party or possibly through conferences of this Commission that we can actually determine these things, because they'll need to be determined as part of the classification structure in any event.

PN263

COMMISSIONER CAMBRIDGE: But if the process is one where that's reviewed by the SWS assessor, wouldn't that sort of act as a sort of safety net for that?

PN264

MR CHRISTODOULOU: Yes, it could do, that may well be a way of doing it, but I think the SWS assessor would need a benchmark to review against. So if it's going into Greenacres and let's look at this more complex issue of sewing, it would need to make sure that if it's going into - not that Flagstaff do sewing, but if they were doing sewing as well, they were looking as far as possible, like with like to ensure that the benchmarking is correct.

PN265

COMMISSIONER CAMBRIDGE: All right.

PN266

MR CHRISTODOULOU: Your Honour, I didn't want to say anything more about our proposals. I think Mr Zevari has covered off his response to AED Legal, save and except to say this, that in Mr Harding's submission of 21 November, he does refer to the Commission's April statement with respect to non-discrimination. I think he refers to that in terms of the statement her Honour put out on 15 October.

PN267

But conveniently I think, forgets and has forgotten about all the other objectives that were in her Honour Booth DP's statement, a lot to do with sustainability of jobs, security of employment and the like. Whilst it is true, if you remove the question of legality and the construct of various Acts, the reality is that if a person with a disability is not getting paid a full award wage, then they're being discriminated against.

PN268

But the reality is also this, the reason why we have exemptions for these things and the reason why the Commission has certain powers to deal with these matters, is because everyone in this room I think accepts that if you were to pay a person that's currently on a supported wage, whether they be at Greenacres or in open employment a full award wage, they probably wouldn't have a job.

PN269

The other issue that I did want to mention about Mr Harding's statement, he does say and he does refer to paragraph in the Nojin decision. This is at paragraph 14 of Mr Harding's submission, he says:

PN270

> *In Nojin the court held that applicants suffered less favourable treatment from the imposition of the BSWAT tool because they had intellectual disabilities which limited their capacity to work.*

PN271

Now, I must say the SWS has never been before the Federal Court. But if you're a person with a physical disability and I was to get you to do packing work and by virtue of your physical disability you worked slower than a person with an intellectual disability who didn't have a physical disability, you could be treated just as unfavourably by the SWS because of the mechanism of testing you on speed, because your physical disability wouldn't allow you to work as fast, possibly as a person with an intellectual disability who can work faster.

PN272

So, it does not really matter. At the end of the day, whatever tool, whatever mechanism this Commission comes up with, there are going to be winners and there are going to be losers by virtue of the person's disability and I think that is a matter of fact. So it is a complex issue and for us, it is about ensuring that we

come up with something that's fair and equitable but also being able to make sure that we keep people in employment.

PN273

So, they're my submissions, your Honour.

PN274

VICE PRESIDENT HATCHER: Thank you. Right Ms Zadel, are you next? Sorry, Ms Langford, yes.

PN275

MS LANGFORD: Ms Langford. My apologies for my delayed arrival this morning, your Honour. Mr Zevari has actually stated very much the NDS position around wage determination. What I'd like to add at this point of time, is I'd like to reiterate what Mr Christodoulou said around really I suppose, a considered implementation of whatever the new mechanism is, so that the sector has time to move so that we know that we've got it right, that we're not coming back in a few years' time and revisiting this. I think that our appetite to have this resolved is quite large at this point in time.

PN276

I'd also like to respond to your question around the use of job descriptions in supported employment. In Greenacres, that may not be the norm, but I am aware of a large number of other disability enterprises that actually do use job descriptions, so it's not a one size fits all. I think we need to consider that as well at this point.

PN277

I actually have nothing further to add at this point and if anything comes up during reply, I may speak again. Thank you, your Honour.

PN278

VICE PRESIDENT HATCHER: Thank you. Ms Zadel.

PN279

MS ZADEL: Thank you Vice President, Deputy President, Commissioner. We refer to the provisional views set out in the April 2018 statement of the Commission. Civic filed written submissions in response to the Commission's provisional views on 29 October 2018. These submissions supplement those written submissions, which have already been filed.

PN280

In these supplementary submissions, Civic seeks to further comment on the tools proposed by various parties in response to the provisional views. In these proceedings at the outset, it was Civic's submission in accordance with its 21 November 2018 written submissions that the SWS and the modified SWS did not represent an appropriate method of determining the wage rates for supported employees in Civic's ADE.

PN281

It was also Civic's submission that the Civic wage assessment tool is a valuable, reliable, fair and equitable tool for the assessment of support that supported employees engaged in Civic's ADE. Civic has considered the provisional views of the Commission and whilst those views are in some regards different to Civic's original position in this matter, Civic accepts and supports the provisional views of the Commission.

PN282

In accordance with all of Civic's submissions to date, Civic's major concern with the SWS tool and the modified SWS, has been that those do not adequately measure non-productive time of the work on the part of supported employees. In this regard, Civic strongly supports paragraph 3 of the provisional views of the Commission with regard to the Commission's provision on the SWS and the modified SWS.

PN283

As well, Civic strongly supports paragraph 9 of the Commission's provisional views, wherein the Commission proposes a hybrid tool in part, taking into account non-productive time on the part of supported employees.

PN284

Civic has now had the opportunity to further consider the tools proposed in response to the provisional views expressed by the Commission. In particular, we refer to the tool proposed and set out in the 19 October 2018 submissions of ABI and the NSW Business Chamber. We further refer to the tool as set out in the 28 November 2018 submissions of ABI and the NSW Business Chamber. In light of the provisional views, Civic generally supports the tools advanced in those submissions.

PN285

Following the review of that tool and other tools proposed by the parties, Civic would support a process whereby parties are directed or provided with the opportunity to engage in further conferencing on this matter with regard to the finalisation of a new wage assessment tool. This would allow the parties to further refine any proposed tool in accordance with the Commission's decision on this matter. It would also allow the parties to discuss any ambiguities or uncertainties in any proposed tools.

PN286

Like other employer parties in these proceedings, Civic is a not for profit enterprise subject changes in government funding. Any change to the wage assessment tools in the award could affect Civic's ability to meet funding requirements. It is for this reason Civic has submitted it would be appropriate in the circumstances for any new wage assessment tool to be introduced with notice or following trial and/or following a phasing-in period. This will assist and other ADEs to properly forecast budgets and avoid, so far as is reasonable, the impacts of sudden cost changes on business viability.

PN287

Civic would like to thank the Commission for the opportunity to comment on its provisional views. Civic submits that the Commission should now confirm those

provisional views so that the matter can be listed for further conferencing on the new wage assessment tools and the parties can consult on proposed tools in light of the confirmed views of the Commission. Thank you.

PN288

VICE PRESIDENT HATCHER: Mr Barker.

PN289

MR BARKER: Thank you, your Honour. The Commonwealth is present here today to make itself available to provide any factual or clarifying information that may be of assistance to the parties and the Commission. We do seek to reserve an opportunity to make any closing submissions in the course of submissions over the two days, if any issues arise that we feel it's appropriate to comment on.

PN290

Your Honour, in submissions by AED Legal, we understand your Honour had a question about the capacity of the Commonwealth to provide SWS assessments for all supported employees. Should the Commission make a decision to retain only the modified SWS in the award, the Commonwealth would need to consider what steps it would take to enable access to SWS assessments to the 20,000 odd supported employees. It's not clear to the Commonwealth that this option of having only the modified SWS in play, is currently being considered.

PN291

VICE PRESIDENT HATCHER: Well, I asked that question because not so much in relation to the modified SWS, but the provisional views contained in the April statement and I'm looking at obviously paragraph 9 and particularly paragraph 9(b) envisage some sort of across the board process of independent assessments. That's why the question I obviously raise it is, in the event that we decided to give effect to that provisional views, would the Commonwealth be in a position to provide the resources to allow that to happen? And obviously if the answer is no, well, then it may mean that the provisional view is not practicable.

PN292

MR BARKER: Yes. Well, your Honour, whether the Commonwealth or the government will support any new wage assessment mechanism and provide funding to the implementation of assessments under any new mechanism is a decision for the government to make - I don't mean government, I mean cabinet. The government can't make a decision on this matter until the features of any new wage assessment mechanism are known and the government has had an opportunity to consider them.

PN293

As part of the process of consideration, while the government has an idea of the cost of performing say an SWS type assessment, the cost of any job sizing assessment is unknown at the moment because the features of that assessment are unknown. In any decision made by government other factors will be considered such as - well, will likely be considered, such as compliance with the Disability Discrimination Act, compliance with international obligations and any other implications that might arise with the Commonwealth, including any exposure to the Commonwealth of legal or legislative challenges to the tool and so on.

PN294

So unfortunately, we're not in the position to make a decision on funding or support for the tool.

PN295

VICE PRESIDENT HATCHER: On one level that's understandable, but it does create for us a circularity, that is we don't know whether to give fresh to the provisional view in the absence of the necessary government support to make it happen. That is, on one view it might turn out to be a futile quest if at the end of the day the Federal Government doesn't like what we do and isn't prepared to support it.

PN296

MR BARKER: Yes, I appreciate the difficulty, your Honour.

PN297

VICE PRESIDENT HATCHER: No answer. Anything else Mr Barker?

PN298

MR BARKER: Not unless - - -

PN299

VICE PRESIDENT HATCHER: I take it that at this stage, having seen the provisional view back in April, the Commonwealth has no submission to make about any possible difficulty vis-a-vis the Disability Discrimination Act or Australia's international obligations? You're not here to put up a red flag, as it were?

PN300

MR BARKER: Yes.

PN301

VICE PRESIDENT HATCHER: Because if you are, we need to know about it.

PN302

MR BARKER: Yes, so the Commonwealth doesn't have a position as yet on that.

PN303

VICE PRESIDENT HATCHER: When you say as yet, what do you mean by that? Because this statement has been out there for six months.

PN304

MR BARKER: Yes, but the features of the tool are not known. Perhaps we can base some issues for the consideration of the Commission at this point in time.

PN305

VICE PRESIDENT HATCHER: Points such as?

PN306

MR BARKER: These issues arise under the international law, in the international law context. The first is the Commonwealth understands that the Commission intends - with the job sizing aspect of the new mechanism to take account of the

degree of support necessary to allow the employee to perform their tasks. This is a provisional conclusion, paragraph 15(ix)(a). The Commonwealth notes that the cost of employment support in the workplace is covered by the Department through a case based funding and that will transition - or responsibility for funding will transition to the NDIA.

PN307

Funding for employment support in the workplace will for the majority of existing supported employees, be provided through individualised employment support funding in the NDIS participant packages. When considering the detail of the job sizing assessment, the Commonwealth respectfully suggests that the Commission has regard to Australia's international obligations, particularly under article 27(1)(a) and (b) are the convention on the rights of persons with disabilities, namely to take appropriate steps to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, and to protect the rights of persons with disabilities including providing equal opportunities and equal remuneration for work of equal value.

PN308

Given the proposed mechanism like all wage assessment tools, will calculate wages for disabled persons in a way different than wages would be provided to persons without disabilities, is the potential for article 27(1) to the infringed. However, if the proposed wage assessment mechanism treated persons with disabilities different to persons without disabilities, it may still be compliant with Australia's obligations under the convention, if it constituted legitimate differential treatment.

PN309

Assuming that the principle of legitimate differential treatment applies to this convention in broad terms, this would require consideration of whether the proposed mechanism is aimed at achieving a legitimate purpose, is based on objective and reasonable criteria and is proportionate the aim to be achieved. With respect, the proposed mechanism appears aimed at achieving a legitimate purpose, namely the encouragement of employment of persons with disabilities by accurately assessing their remuneration in a manner that is consistent with their capacity to work.

PN310

However, the Commonwealth, respectfully suggests that the Commission considers where the proposed mechanism would be proportionate to this aim or another legitimate aim, if employees received a reduction in their wages for the employment support they require when the cost of that support is already funded through the Department or the NDIS.

PN311

Further, if the proposed mechanism is deemed proportionate in this regard, the Commonwealth respectfully suggests that the Commission considers whether there is a potentially disproportionate impact of the mechanism on employees with disabilities who have generally high support needs, noting that 75 per cent of employees in ADE's have an intellectual disability.

PN312

The second point we wish to raise is we observed that the implementation of the Commission's proposed mechanism may exacerbate existing wage and equities for people with disability. One person with disability employed under the SES Award could be remunerated significantly differently from another person with disability doing the same or a very similar job, but employed under a different modern award and assessed using the SWS.

PN313

Having regard to the potential for such significant wage disparities, the Commonwealth respectfully suggests that the Commission has regard to whether its proposed approach is based on reasonable criteria and therefore whether it constitutes legitimate differential treatment for supported employees.

PN314

Now of course, much will depend upon the precise design of any new wage mechanism, but we do note that with the transition to the NDIS, we are entering a new frontier and it may be the case that new organisations come into the market and provide employment support for persons covered by the NDIS and they may not be traditional ADE's, and may not fall outside the coverage of the award. So we may have a situation where we have a greater number of what are not supported employees working in a different environment, and potentially covered by different modern awards.

PN315

We also ask that the Commission consider the potentially compounding effect that this might have on intellectually disabled employees who have higher support needs as well. We note that as I've noted, compliance with international law obligations is a matter that will be considered by government or likely to be considered by government when deciding whether to support the implementation of assessments.

PN316

If your Honour pleases.

PN317

VICE PRESIDENT HATCHER: Ms Bratty, I think you're next.

PN318

MS BRATTEY: Thank you, your Honour. Your Honour Endeavour supports the preliminary views of the Full Bench and that should be that the Supported Employment Services Award should provide for one approved wage assessment tool and that this model takes into account the size of the job, the complexity of the task, the support provided to the employee to enable them to complete the task, and the productivity of the employee.

PN319

It is Endeavour's position that the provisional statement provided by the Full Bench would adhere to the modern awards objectives to ensure that together with the National Employment Standards. That it provides a fair and relevant minimum safety net with terms and conditions which take into account, amongst

other things, the likely impact of any exercise of modern award powers on business including on productivity and employment cost and the regulatory burden to ensure a simply and easy to understand stable and sustainable modern award system. In doing so, it's also necessary to give cognisance to the financial implications for the industry in that realm as well.

PN320

Our submissions filed on 19 October outlined ideas and concepts as to what the new tool should look like. As we say, they're just ideas and concepts. We haven't had the opportunity to try any of these concepts out, however further to your Honour's indication earlier, Endeavour would welcome the opportunity to try out any new proposed tool once the Full Bench has reached its consideration.

PN321

In our submission today, we would like to address the criticisms from the AED. We would also like to supplement our submissions filed on 19 October and we'd also like to reply to the AED Legal submissions filed on 21 November 2018 and more broadly the submission that was also filed on 19 October.

PN322

If I may first address the area of criticisms that were raised regarding the outline of our submissions. Again, I have to impress that these were merely concepts and ideas. We don't propose to have all the answers. We merely want to give ideas and concepts for the Bench to consider any new tool that may come out of these hearings which will inevitably need to be tried and tested for a variety of different reasons.

PN323

However, one of the criticisms that was made of our submissions was it was arbitrary in terms of setting the number of tasks and the job sizing. How did we arrive at five per cent for example? The example that we've given in our submission should clearly highlight why the five per cent was arrived at, and that was simply because on the basis of the job statement as an example that we have given, lists 20 tasks. Therefore, each task is correlated at five per cent. Should a job statement come up with 10 tasks, each task would be correlated at 10 per cent and that would have the effect on the job sizing.

PN324

It was also suggested that we had given no indication as to who comes up with the job statement. Who does this? How prescriptive is it? How is it to be done? Was there questions that were floated and submissions by AED Legal? Again, those are matters that are addressed in our submissions. We propose working parties get together to design the job statements. We agree with Greenacres' submission on that point that we don't think it's too hard.

PN325

These are jobs that have been done in industry for a long time. The best people to sit down and design these job statements are those that work with it on a day to day basis. They're the ones that have the industry knowledge; they know what their employees are capable of doing and what they can't do. It's a matter of record I believe that that's what's been happening in industry for a long time. In

Endeavour's submissions to the Bench earlier on in this matter in the hearing, was we gave an example of how we used the Greenacres tool to set up the job descriptions.

PN326

We already job size to some effect. We gave the example of how we assess an employee on packing bird seeds. One of the jobs that we have an Endeavour down at the Wacol plant is that we pack bird seed for Mars. Now that production line is broken down into 20 tasks. This was in Andrew Donne's statement that is before the Full Bench. How they do that is broken down into 20 tasks. Each task is then assessed a level of complexity. It's something that's already taking place under the Greenacres tool.

PN327

Therefore, it's not new to the industry as to how they actually job size and how they assess for complexity. Therefore, being able to come up with the job statements should be a relatively quick process. However, perhaps many people thought that about the conciliation process. It's already taken place in relation to this matter and therefore if that's not possible to achieve consensus in that space, then Endeavour's position on that would that it would be a matter for the Commonwealth, or indeed the Fair Work Commission to step in and decide that for the industry.

PN328

However, the preference would be for the industry to actually sort that out amongst themselves. They are after all, the ones that deal with this on a day to day basis. They are the ones that are going to have to carry out the assessment, albeit what we are suggesting in our statement is that that assessment is then independently audited by the Commonwealth and that will address the Commission's concerns about the process being open to abuse.

PN329

It is correct by Mr Harding that we do propose within our submission that elements of the Greenacres tool can be used. But what we are not suggesting is that we continue with the Greenacres tool. We fully support the Bench's decision that one tool should operate across the industry. However, I don't think that that precludes us from saying parts of the tools could be accepted in any new proposed model.

PN330

Indeed, if I understand Mr Harding's submission, what he's suggesting is that the modified SWS tool continues, which has also been criticised by the Bench in its provisional statement. So, we're neither further forward, but we believe that there are certain elements within the Greenacres tool that would assist to help devise a new proposed tool and that's in relation to the complexity element and the support element.

PN331

Perhaps now is a good opportunity to address the support element. We did file your Honour, late this morning, a further proposed schedule to deal with the support level in terms of how the Commission may consider supporting - sorry,

assessing the support level of any new proposed wage tool. That was done on reflection after having the benefit of reading Flagstaff's submissions. There are elements of the Flagstaff's submission that deal with how we assess the level of support that we think that we can adapt and modify.

PN332

You'll see there is similarities between the new proposal that we've put forward this morning and both are contained within the Flagstaff submission as to how you go about measuring the level of support within the industry we work in. Those elements that we have presented this morning, they have already been run to some extent within Endeavour's enterprises. It's part of an overall what we call a DMI assessment and that assessment takes place in relation to how employees received funding from the government.

PN333

We have slightly modified that assessment to take into account the fact that in accordance with the provision statement from the Full Bench, that the support level to be taking into account should be based on the task assessed, not the overall situation that employees find themselves in.

PN334

As we know the employees working in the supported environment receive so much support from other areas through employment coaches, through managers and supervisors, but the level of support that we're talking about that should be assessed in this case in relation to the job statement in a level of support required so that they can perform the task. Nothing more than that and that's why we have pulled together a modified version of what the DMI assessment is in that space.

PN335

Again, it's just a concept, it's an idea for the Bench's consideration, but one which aligns with the Flagstaff submission, so there already is tentative support for that as well.

PN336

The next part that we'd like to go on and address is the reply to the submissions filed by AED on 21 November and more broadly, those that were filed on 19 October. As we understand those submissions, they are critical of the provisional statement issued by the Full Bench in respect of how we have reached the job sizing in terms of classification. There's also reference to the national minimum wage and as I understand the submission, it seems to be suggested that we already have an assessment for disabled employees in the national and minimum wage and that is based on productivity alone.

PN337

Therefore, as I understand the submission, what's been put forward is that the SWS modifying tool should therefore be the preferred approach because that's what we already have within the Fair Work Act framework and the work value concept as well. I'd also like to address the submission that was filed on 21 November which in essence, declares that the proposed tool is discriminatory overall.

PN338

But first if we can perhaps move to the classifications. There seems to be concern around changing or modifying the classifications in some way to take into consideration the difficulties that intellectually challenged employees face within the sector. The submission by ADE Legal takes into account - sorry, describes them as that the classifications are based on the scope of work and the grade to that scope of work covers a very broad spectrum of work. They go on to say that there's no stipulation of how much work is to be performed or the number of tasks. I.e. that if you are being assessed in accordance with the classifications, you fit into one of those scopes under those classifications, it's not the case that you are measured on your productivity or the amount of tasks that you're actually able to perform.

PN339

That's correct. We must simply remember how the new modern award system came into being. They are based on those employees that are able to perform those tasks at the fullest level and competently. The sector in which we are operating in, generally, those employees have very little skills and in fact, they cannot perform the entire job in most cases. What they can do is perform a task that falls within the overall scope of the job. This is why Endeavour assesses the majority of its employees at grade 2.

PN340

An example of this that we keep coming back to is packaging. The job of packaging falls within the classification at grade 2. We have many jobs that fall under that area, however employees cannot complete that full range of job from one end to the other. This is why we then break it down into a variety of different tasks, because you're not comparing like for like. They can't do the full job. Therefore, we're in a situation where we have to, in effect, to some extent, design the job around the employee. That's what the AED sector is in the business of doing. They are there to try and support those employees to continue in some form of employment.

PN341

This does not mean that it's discriminatory to asses supported employees against tasks of competencies. I agree with Mr Zevari's earlier comment around we shouldn't think of competencies as a dirty work. It is not. It's something that is already inherent within the system. We shouldn't shy away from it. The Nojin decision doesn't say you cannot assess based on the level of competencies, and we'll come and address the Nojin decision in a little bit more detail.

PN342

There's also reference within the submissions about having a national minimum wage and as I understood it was said earlier that because disabled employees area already reflected in that assessment under special national minimum wage order, that therefore productivity should be the sole and only reason by which supported employees are measured.

PN343

It has to be remembered that the Supported Employees Services Award was born out of the supported wage system which was then endorsed by the Industrial

Relations Commission. At that time, that decision recorded that the supported wage system facilitates the employment of workers with a disability in open employment at a rate of pay commensurate with employees' assessed productivity capacity.

PN344

This whole system is based on open employment. The fact that we now have a Supported Employment Services Award is to help try and deal with those employees that have disabilities that cannot form part of that employment system. This is why we need to find a wage structure that suits the sector that it finds itself in. It's just not possible to compare like for like.

PN345

To make the submission that based on because productivity is already assessed in the national minimum wage order that recognises employees with a disability and therefore that should be the assessment, is fundamentally flawed.

PN346

The final part I want to respond to is in relation to the submissions filed on 21 November. The first submission I make in respect of that is that it ought to reject the submission by AED Legal which is to the effect that the proposed wage assessment tool being considered is unlawful. We say this is misconceived. Our submissions about the interplay between the Fair Work Act and the Disability Discrimination Act are set out in our earlier submissions dated 14 November 2017 and filed the same day. The relevant submissions that we would ask the Bench to reconsider are those at paragraph 37 to 77 of that outline and we repeat and we rely on them here.

PN347

Relevantly, the Fair Work Act expressly enables the Commission to make awards in terms that result in different wage outcomes for employees with a disability. That is plain from sections 153(3)(b) and sections 139(1)(a) of the Fair Work Act. Now the AED seek to rely on section 161 of the Fair Work Act, it's simply not relevant here. It is not relevant because it is not an award review referred to under section 46(p)(w) of the Australian Human Rights Commission Act 1986 and that is the prerequisite for that section 161.

PN348

In any event, section 161(3) of the Fair Work Act does not, as the AED submits, operate as an indicia of a statutory intention that tells against inclusion of a term such as being considered here. Section 161(3) when it is enlivened, does no more than broaden the Commission's powers to remove discriminatory terms that are otherwise unlawful. For example, to remove a term in an award that limits an employee's ability to access opportunities for promotion, transfer, training or other benefits because of their disability, it cannot be read so a to preclude which is expressly contemplated by sections 153(3)(b) and sections 139(1)(a) of the Fair Work Act. That's been the ability of the Commission to make an award that sets different pay rates for employees with a disability.

PN349

In addition, even if section 161 is enlivened, which we say it is not, the question of whether a particular term, in the case, the different wage outcome is also unlawful, depends on the extent to which that term is reasonable. AED's submission concedes that. They seek to canvass what is reasonable and what is not from paragraph 16 onwards of their submission.

PN350

In terms of what is reasonable, we repeat and we rely on our prior submissions. In particular, we refer to paragraph 59 of our outline of submissions dated 14 November 2017. In addition, we say the adjustment accommodations that an employer is required to make to accommodate employees with a disability are separate from the wages table under the award. Otherwise what purpose do the provisions under the Fair Work Act serve?

PN351

It is not the case that having a different wage outcome for employees with a disability means that those are somehow costed in or that the wages outcome is incongruous and that's at paragraph 21 of the AED submission. They are not. Any adjustments are entirely separate. For example, modifying a workspace or providing additional facilities to accommodate someone with a disability are quite separate from the wages table to the employee under the award. That ability I repeat and say again is there under section 153 and 139.

PN352

We've already made our submissions in respect of Nojin and I repeat again, that it is distinguishable from the facts in this case. Nojin dealt with competencies that did not relate to the job that was undertaken. The tool that we are proposing to be used relates to tasks that are undertaken by those employees. They will be assessed in the competencies that they have, but relevant to the tasks that are undertaken. This is materially different to the circumstances in Nojin.

PN353

The wage assessment tool that we've proposed and the one proposed by the Full Bench have outlined, are reasonable for the following reasons. Supported employees are assessed on the tasks that they're able to perform. The complexity of the tasks is assessed at the level of support the employee requires to perform that task and productivity is also assessed in the manner that takes into consideration the challenges faced by those with intellectual impairments. By assessing all of the above, the work value is reasonably assessed.

PN354

I don't propose to go into any more detail in the submissions that we've already filed that deal with the concepts and ideas. If the Commission has any questions in respect of our proposed concepts, we welcome the opportunity to address. Thank you.

PN355

VICE PRESIDENT HATCHER: Mr Amos and Ms Walsh, how long do you think you'll be?

PN356

MR AMOS: Probably five, 10 minutes.

PN357

VICE PRESIDENT HATCHER: Ms Walsh?

PN358

MS WALSH: Probably the same.

PN359

VICE PRESIDENT HATCHER: We need to adjourn, so we'll adjourn now and resume at 2 pm.

LUNCHEON ADJOURNMENT **[1.00 PM]**

RESUMED **[2.06 PM]**

PN360

VICE PRESIDENT HATCHER: Yes, Mr Amos?

PN361

MR AMOS: Thank you, your Honour. Your Honour, I do not intend to raise any issues regarding the submissions on either the ACTU or ADE Legal as I feel that they have been adequately challenged by other submissions during these proceedings and we support those views. We rely principally on our submissions to the Full Bench on 17 September 2017 and 17 February 2018, together with our submission in response to the Full Bench statement of 11 September 2018.

PN362

Although is our - as stated - it is our view that the Skills Masters system should be retained within the Award. In fact the Skills Masters system has been in place for over 20 years and to my knowledge we have not had one dispute raised in any of the jurisdictions regarding the use or the outcomes using that system.

PN363

It is also our view that any new wage assessment tool should adopt the same or similar principles to those that apply to the Skills Masters system and it's interesting that a number of proposals submitted during these proceedings with adopt in part or most of those principles that apply to the Skills Masters system.

PN364

In regard to the award classification structure, as submitted in our response, we support the Full Bench view that the structure needs to be addressed. It's totally inadequate to allow any organisation to assess what job, what classification or what wage level an employee should be paid at.

PN365

In regard to the users of the Skills Masters system they rely on the indicative task contained in that award together with the job descriptions of the role that is to be undertaken to create the employees' job model. The Skills Masters system I note everybody now is talking about complete jobs, whole jobs and all the tasks that are associated with that job. That's been the backbone of the Skills Masters system for over 20 years. We've always related to the back to the award which is

the legal industrial instrument covering those employees. And so any assessment of an employee with a disability is always assessed against what an able-bodied person would be required to do in the workplace.

PN366

Employing people in an ADE is no different from employing people in any other industry or any other environment for that matter so far as the employer requires a job to be done and provides a wage comparable to the job, taking into consideration the award classification structure.

PN367

Employing people with a disability when assessing a person you should be assessing that person of what they're capable of doing and how well they do it against what a full award wage person would be required to do to receive that wage.

PN368

The only difference with an ADE is that the majority of employees in an ADE have a disability, most with medium or high support needs. In fact, most ADE's are very, very labour intense. If you're employing people in an ordinary open employment environment to do some of the work that people with a disability would do you would have a machine doing it, not an employee. So they're very, very labour intense.

PN369

Basing wages on the use of competencies is not a new concept either and has been used in many Modern Awards to formulate the classification structure and wage outcomes for employees over many years. And examples of that is the Metal Industry Award which is obviously a benchmark award for all awards and another one would be the Graphic Arts Award.

PN370

As stated earlier we're relying totally on our written submissions but in conclusion we are prepared to participate in any working group to develop a new tool as was advocated by the Full Bench in its 17 November 2018 statement. At the end of the day any new tool must be a simple process - a very simple process to allow all to understand the system, including the employees with a disability, their parents, guardians and advocates. And I would ask that the Full Bench take that into consideration in any new assessment tool. Thank you.

PN371

VICE PRESIDENT HATCHER: So, Mr Amos, with the Skills Masters system are we free to plunder that for ideas or does someone own intellectual property rights?

PN372

MR AMOS: There's no intellectual property rights but I am quite prepared to give up those rights for the Commission to make this matter come to a conclusion.

PN373

VICE PRESIDENT HATCHER: Right. Thank you.

PN374

MR AMOS: The only right is the software.

PN375

VICE PRESIDENT HATCHER: Okay. Ms Walsh?

PN376

MS WALSH: On behalf of Our Voice Australia our formal submissions confirm we support the provisional views of the Fair Work Commission and the proposed classification system. Disability has many impacts, not just on employment as our 700 ADE employees and their 1100 family carer members would confirm. We have lived supported employment since we established working with our communities, with government, with the predecessor - the AIRC, with yourselves, and with our families since the '50's. We've lived the good and we've lived the bad and we look forward to increasing the greater social involvement as the NDIS rolls out.

PN377

It's disappointing however, to see by their statement dated 21 November that the applicant parties now state the proposed classification system in their view referred to as the proposed wages tool could breach the Disability Discrimination Act according to the Nojin principles.

PN378

I remember back in 2003 some of us were there before the Australian Industrial Relations Commission and we followed it through since then. We need to remember that Nojin principle referred to two individuals, not a group representation and it's actually confined legally to intellectual disability.

PN379

The proposed wage tool is in conceptual form only. It remains in conceptual form simply because the applicant parties would not agree for all parties to sit around the table under the eye of this Commission and try and work out at least some of the preliminary disagreements so that we could actually refine it and make your job as a Commission just a little bit easier.

PN380

It didn't happen that way. So now we have the legal argy bargy of ADE and others to saying that it's got to be the new modified SWS nothing else will do and they will pursue the rights issue ad infinitem as they have done for the last 15 years.

PN381

All the legal argy bargy aside my representation here today is to tell it like it is. For our family carers and for their family - disabled family ADE workers. Not just for Victoria and not just for New South Wales but there's reference to the National Wage case. The reason is this is a national issue and I visited most of the ADE's throughout Australia over the period of the last 15 years. Some more recently in South Australia. Some in Western Australia. The position on the ground is the same. They have no security. So we need this to be resolved.

PN382

None of the ADE's are the same. They are all different. They are all influenced by local and regional factors, by increased competition, overseas labour and increasing unemployment rates due to technology and innovation. And if any of you don't know someone very close to you who is a professional person in their mid-50's, late 40's who can't get a job then I'd be surprised because they're out there. They're really out there. There's plenty of them around.

PN383

The SWS whether it's the original one or the modified one imposes solvency risks. Our workers and their family carers want their jobs. They don't want to be just another statistic in the unemployment field.

PN384

Reasonableness, which has been referred to here today, in many ways, for us is to be able to go to work. For our workers it's to be able to attend a job of their choice. Their jobs count. It's their lives. We've provided evidence from at least four of our workforce workers during the hearings who had been in an open employment and it hadn't worked for them. That doesn't mean it doesn't work for everybody but many of them have had to come back. And they have to come back because they don't get the right support out there in the open workforce. That's why there's ADE's. ADE's provide choice.

PN385

How did we end up with 20,000 ADE workers? That's because of job sizing. We created the jobs by sizing the jobs. You take a job, you get a contract for it if you're lucky - locally - you break it into tasks. You size up the tasks. You allocate a ratio of the whole. Some of the jobs could be done by one - not six or seven people as we saw - or simply get rid of the people and use a machine.

PN386

So job sizing is critical for our family members. For the people we represent. For our family members, their family carers, and for the societies and communities in which they live. We need, industrially, to get it right.

PN387

In the real world reasonable adjustment or reasonable justification in wage outcome is based on skill, capacity, competency, call it what you like. It's what you can and can't do. You employ people based, actually, on what they can do. Competency and skill are critical to small business survival. I know. I work as a professional accountant.

PN388

Despite this morning's comments and the important place that has been given to ADE's as a valuable thread in our social fabric by the Commonwealth, the Commonwealth sadly is still missing in action. We just want the Commonwealth to retain neutrality. To live to the purpose of their commitment to the social thread of ADE's and to fund what the Commission and the industrial umpire decides. You've heard the evidence. You've been here. It's gone on and one and we just want the Commonwealth to play their part.

PN389

Reference has also been made to the United Nations Convention on the rights of people with a disability. Their 2017 theme - and that's not that long ago was "Leave No One Behind". Our members say the same. Don't leave us out there. Keep us involved and our jobs are important.

PN390

We need an industrial solution. The provisional decision and the concept need to be trialled, costed, rolled out and done in a timely manner that provides feedback to enable its successful implementation. For that you have to listen to the providers. It's not just based on rights. It's based on reason. It's based on reality and it's based on commercial viability and families also need to be involved.

PN391

We don't want to be back here again in five to 10 years' time. I have been before the Commission in various stages for the last 15. So we don't want a repeat of that. We've had enough of the rights, rights and rights. The sector needs stability. The Commonwealth needs to determine their role in supported employment and our workers need to know they have got their jobs.

PN392

Some of our members are here today and if they were standing here in my place and I'm representing them and they would simply say to you, "My job counts." Thank you.

PN393

VICE PRESIDENT HATCHER: All right. Do any of the parties who oppose the provision view stated in the April statement want to make any submissions in reply?

PN394

MR HARDING: I do briefly.

PN395

VICE PRESIDENT HATCHER: Right. I'll just - do you Mr Fleming?

PN396

MR FLEMING: No, your Honour. I'm content to rely on the written submissions.

PN397

VICE PRESIDENT HATCHER: Right. Mr Harding?

PN398

MR HARDING: I want to confine my reply to some of the legal contentions that were put by Mr Zevari and Ms Bradley on behalf of Endeavour. Can I start, first, with what has been said by Mr Zevari about the operation of the reasonable adjustment obligation in the DDA? And he said, as I apprehend his submission that reasonable adjustments really had only worked to do in respect of the exemption that applies in section 21A of the DDA. That provision does provide an exemption for what would otherwise be unlawful discrimination in the

circumstances provided for in subsection 1 and then there's a provision which is section 21(b) concerning unjustifiable hardship that applies in relation to inherent requirements. There's a broader unjustifiable hardship provision that's contained in section 11.

PN399

The difficulty with Mr Zevari's submission is that in relation to inherent requirements subsection 4(a) of 21A excludes that provision in relation to discrimination done under section 15(2)(b) and (c) - sorry (b) and (d) and in the submission that we filed we put the section - the whole of section 15(2) in.

PN400

VICE PRESIDENT HATCHER: Which submission was that?

PN401

MR HARDING: The 21 November. I can take you to that. The provision is in paragraph eight. Now we've relied on subsection 2(b) and (d). In our analysis of indirect discrimination and it's contravention of or potential contravention of section 15(2).

PN402

Now the critical part about the provision I have just referred to is that the whole inherent requirement provision doesn't apply to indirect discrimination that would contravene (b) or (d). That's the end of the matter in relation to that exemption but on the hypothesis that he posits he's still wrong.

PN403

We provided you with the decision of her Honour Justice Mortimer in Watts v Australian Postal Corporation and there are two aspects of her Honour's decision that I wanted to refer to. The first is the breadth of the concept of reasonable adjustments that her Honour refers to in paragraph 23 and 24 where she contrasts the language that's utilised in the Act and there her Honour speaks about how an alteration or modification is for the person which operates on the person's ability to do the work she or he is employed or appointed to do.

PN404

"The adjustment is to be enabling or facultative. There is, in my opinion, no reason in the text, context or purpose of section 5(2), read with section 4 - to construe the word 'adjustment' in a way which might arbitrarily limit the kinds of modifications or alterations required to enable a disabled worker to perform his or her work."

PN405

She says more about that in paragraph 24. And I draw your attention to the last two lines of paragraph 24. An adjustment for a person may change over time and may need to be flexible and adaptable. Much may depend on the particular disability and a particular individual. This is where reasonable adjustments fixes on the individual. And thereon, her Honour, goes on to say some more about the breadth of that phrase.

PN406

It is clear that reasonable adjustment - the provision in the Act - is a positive application. Her Honour, in paragraph 26 describes it as an "enforceable obligation" and analyses that further in paragraph 34 where she refers to the "tense" that's used in the Act. She says, "It is suggestive of an ongoing or continuing obligation imposed by the statute on the discriminator. This is consistent with the subject matter of the provision which concerns the ability of disabled people to perform work, attend educational institutions, be provided with goods and services and have access to accommodation on an ongoing basis."

PN407

And if there is the coup de grce in relation to Mr Zevari's submission is contained in paragraph 54 of her Honour's reasoning where she construes section 21A by reference to the positive obligation that's contained in the Act concerning reasonable adjustments. And she says when section 21A is read with section 5(2) the definition of reasonable adjustments it "must be construed as meaning that if the employer makes or were to make all adjustments for the person that do not cause the employer unjustifiable hardship and the disabled person cannot perform the inherent requirements of the particular work, only then does section 21A come into play."

PN408

So it's clear that all that section 21A does, even if did apply, is to say after exhausting the obligation to make a reasonable adjustment - if that is exhausted - and the worker still can't do the job then there is work to do, then that conduct is exempt.

PN409

Here, of course, we're talking about people who can do the work after reasonable adjustments are made. That's the cohort of people that we're speaking about. The group who can do the work that the employer wants them to do, after the adjustments have been made to enable them to do it. That gives effect to the DDA's positive obligation and in this circumstance is powerful in relation to how you analyse reasonableness - now in an indirect discriminatory sense.

PN410

If I can then turn to that issue in reply to what Ms Bradley said about the interaction between the discretion contained in section 139 of the Fair Work Act and 161. As I apprehend her submission it is this that we're wrong because where, in effect, the tag is wagging the dog, section 153 on her submission as I understand it confers a discretion - subsection three - to discriminate in relation to minimum wages.

PN411

That's the end of the matter. Section 161 has no further work to do. But with respect all that section - on 139 does when read with 153 - is to say the Commission has a discretion to strike a minimum wage that differentiates disabled people from other non-disabled people. That stands up against 161 which says, "Except in the case of unlawful discrimination".

PN412

Now, true it is - true it is - that 161 is engaged in circumstances where there's a referral from the Human Rights and Equal Opportunity Commission and we're not here dealing with such a referral but you can have regard to the mandatory language used in subsection (3).

PN413

Now, Ms Bradly made a submission concerning section 46PW of the Australian Human Rights Commission Act didn't quite understand what was to be made of that, other than when you have regard to that provision what it does is authorise the President of the Commission to refer a complaint made by a person that a provision of a Modern Award unlawfully discriminates to this Commission to determine it and is significant. The power of referral really comes from subsection (3) of that provision. And what it says is this - if it appears to the President that the Act is discriminatory - the President must refer.

PN414

Now, on my submission the appearance will palpable in this case because we have sought to draw attention to the reasoning of Nojin and the Full Court for which special leave was denied by the High Court. That reasoning, particularly in circumstances where you were talking about setting a differential standard for ADE employees versus disabled employees elsewhere crystallises a difficulty or a potential difficulty that might cause the President to form - to conclude there is such an appearance and refer. In those circumstances the review is engaged and if the Commission forms a view along the lines that I have suggested then they have no discretion - the Commission must remove the offending provision. It must. It's a statutory command. There's no discretion.

PN415

The Commonwealth has said a concern the Commonwealth might have when it comes to turning its mind to the question of what it might do, once there's a fully formed provision is to analyse that provision against the international instruments by reference to the legitimacy of and a proportionality of the measure. One consideration that they mention in that respect - the Commonwealth mention in that respect - is the differential standard that might be applied in ADE employment as opposed to other employment where disabled people are employed.

PN416

That is perhaps best crystallised in the annual wage review which we provide you with a copy and paragraph 489 tells us that the distinction between the two special national minimum wages - one for those whose productivity is affected - and one for those whose productivity is not affected. Both have disabilities. A person whose productivity is affected may only be performing a single task in a notional full job.

PN417

In those circumstances, if they're not a supported employee, they're entitled a national minimum wage assessed by reference to the SWS. If you were to create a different stand you'll have to have regard, in my submission, to the fact that there will be differential wage assessment mechanisms applied to people who may be performing very similar work. The only distinguishing factor being that one

group is employed by ADE's and another group is not. It will be by reference to the employer, rather than by reference to the work. I have no further submissions on this subject.

PN418

VICE PRESIDENT HATCHER: That last submission seems to be making it harder and harder for us to place - like what we do here from the wider system.

PN419

MR HARDING: Yes.

PN420

VICE PRESIDENT HATCHER: Which may have the same set of consequences.

PN421

MR HARDING: Yes, it might. But I mean clearly the position that the ADE has taken throughout is that the wider system does prescribe a particular system of wage assessment and that is of some significance to what you would do here.

PN422

VICE PRESIDENT HATCHER: And vice versa.

PN423

MR HARDING: Well, again, that it may or may not. I don't exclude the possibility it may not but I think I have mentioned at the beginning of the submissions that one should not contemplate varying the SWS for the whole of the workforce by reference only to the evidence you have received here.

PN424

VICE PRESIDENT HATCHER: Mr Zevari, what do you want to do now?

PN425

MR ZEVARI: I'll be brief, your Honours and Commissioner.

PN426

VICE PRESIDENT HATCHER: Sorry. Brief about what?

PN427

MR ZEVARI: Just to respond to the comment about the Disability and Discrimination Act if I could indulge the Full Bench.

PN428

VICE PRESIDENT HATCHER: Right.

PN429

MR ZEVARI: I understood Mr Harding's submission to be that the operation of section 21A(4)(a) was to defeat the argument that an employer can rely on inherent requirements defence. (4)(a) reads one of the exemptions is discrimination referred to in paragraph 15(2)(b) or (d) - when one goes to section 15 - 15(2) is about discrimination in employment for existing employees. What is not carved out is what's in 15(1) which is

PN430

"It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against the person on the grounds of the other person's disability. (a) in the arrangements made for the purposes 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."

PN431

Even if that wasn't an available argument which it is the carve out in section 21 also doesn't extend to the terms or conditions of employment that the employer offers the employee there are carve outs within the carve outs and they only apply to 15 which is why it says, "Promotion" and which when you go back to the wording of 21A(1)(b) talks about promotional transfer - even for an existing employee. That would just be my response to that, your Honours.

PN432

VICE PRESIDENT HATCHER: All right. We thank the parties for their submissions and we will reserve our decision. We now adjourn.

ADJOURNED INDEFINITELY [2.36 PM]