Fair Work Act 2009
s 156 – 4 yearly review of modern awards

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010 - AM2014/286

Submission on jurisdiction of the Association for Employees with a Disability Inc (the AED)

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Relevant Background

1. On 3 December 2019, the Full Bench published (2019) 293 IR 1 (the **December Decision**). Another decision was published on 30 March 2020 in [2020] FWCFB 1704 (the **March Decision**). Both decisions foreshadowed a trial of a wage determination methodology that was described in the December Decision as the "preferred approach." The trial results were published in November 2021. In a statement published on 31 January 2022 ([2022] FWCFB 6), the Full Bench stated that the trial report was provided to the Fair Work Commission (the **FWC**) on 25 January 2022. The Bench identified a number of potential issues that would likely be of significance, without limiting them,

and indicated that they intended to take the final step in process envisaged in the December Decision and make a "final determination as to the new wages structure to be placed in the *Supported Employment Services Award* 2010 (the **Award**)]" after affording an opportunity for further evidence and submissions.[1]

2. Pursuant to the Full Bench's directions, the AED filed a position paper on 16 March 2022 that foreshadowed arguments that the "preferred approach," the subject of the trial, would include terms in the Award that would exceed the statutory variation authority[2] conferred by the former section 156(2)(b)(i) of the *Fair Work Act* 2009 (the **FW Act**).

3. The "preferred approach" has a number of aspects. Those the subject of objection are the proposed variations designated in the annexure to the December Decision and the March Decision as clause B.1.1; clause B.2; and clause B.3. Additionally, the proposed inclusion in clause 14.1 of the words "nature of the position in which the employee is employed" and the classifications in clause 14.2 labelled Grade A and B.[3] Collectively, these proposals are referred to hereafter as **the Grade A and B terms**.

4. The AED relies on the statement of Kairstein Wilson dated 13 May 2022 (the **Wilson Statement**). Insofar as the Wilson Statement identifies evidence and arguments raised by the AED prior to 30 March 2020 that have not, so far, been dealt with by the Full Bench, those matters are dealt with further in paragraphs [58] to [60] below.

The Fair Work Commission's authority

5. The former section156(2)(a) of the FW Act required periodic review of all modern awards. The review of an award enlivened a discretion on the part of the FWC to make a determination that, relevantly, varied the reviewed award to give effect to the outcomes of the review: section 156(2)(b). However, the discretion is not at large. It is subject to, and limited by, other provisions of the FW Act. A term must be permitted or required content (see section 136(1)) and alter the award only to the extent necessary to achieve the modern awards objective and, if applicable, the minimum wages objective.[4] The FWC was only permitted to vary modern award minimum wages if satisfied that doing so is justified for work value reasons.[5]

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1 Statement, [8]-[9].

2 Using that term in the manner described in *Hossain v Minister for Immigration* (2018) 264 CLR 123, [23] (Kiefel CJ, Gageler and Keane JJ).

3 As refined in the Full Bench decision of 30 March 2020 [2020] FWCFB 1704.

4 Section 138 of the FW Act.

5 Section 156(3). Those reasons were exhaustively defined by section 156(4).

6. Of particular significance is section 136(2)(a) of the FW Act, which prohibits a term that contravenes subdivision D of Division 3 of Part 2-3. A contravening term is of no effect to that extent.[6] The prohibition is imperative. To include a contravening term constitutes a material breach of an express condition of the valid exercise of a decision-making power[7] and would cause the FWC to mistake its authority.[8] It follows that a purported exercise of the variation power in breach of section 136(2)(a) is invalid. Variation would be futile in any event due to section 137.

7. Subdivision D includes section 153(1). It too is imperative, and provides:

> *Discriminatory terms must not be included.*
>
> (1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

8. The text of section 153(1) is plain and broad: terms that "discriminate against" employees "because of, or for reasons including," disability must not be included. The phrase "discriminate against" in section 153(1) connotes adverse differential treatment[9] "because of or for reasons that include" mental or physical disability. The Grade A and B terms would maintain the status of employees with disability as the lowest paid of any employee covered by a modern award because of, or for reasons including, disability (noting that qualification under section 94(1) of the *Social Security Act 1991* (the **SS Act**) requires the presence of physical and/or mental disability). The wage would be lower than for an award free employee with a disability covered by the Second Special National Minimum Wage Order because of, or for reasons including, disability.

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6 Section 137 of the FW Act.

7 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32 [23] (Gageler and Keane JJ).

8 To 'misunderstand the nature of [its] jurisdiction … or 'misconceive its duty' or '[fail] to apply itself to the question which [section 153 of the Act] prescribes: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208–209 [31] (Gleeson CJ, Gaudron and Hayne JJ); see also *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* (2018) 268 FCR 128 at 144–145 [70]–[71] (Allsop CJ, Griffiths and O'Callaghan JJ), *Mwango v Fair Work Commission* [2019] FCA 1274 at [45(3)] (Thawley J).

9 *Shop, Distributive and Allied Employees Association v National Retail Association* (2012) 205 FCR 227 at [53] (Tracey J). See also *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* (2012) 203 FCR 345 at [25]-[27] (Buchanan J); [69] (Flick J, who cited *SDA* at [61]); [111] (Katzmann J); *Director, Fair Work Building Industry Inspectorate v ADCO Constructions Pty Ltd (no 2)* [2016] FCA 1463 at [100]-[104] (Collier J); and *Director, Fair Work Building Industry Inspectorate v ADCO Constructions Pty Ltd* [2016] FCA 602 at [13] (Logan J).

Section 153(3)(b)

9. In paragraph [377] of the December Decision the Full Bench explained that:

> "We are also satisfied that the variations would not involve any contravention of s.153(1), having regard to s.153(3)(b)."

10. This is the only statement in the December Decision (or other decision in these proceedings) that addresses the interaction between sections 153(1) and 153(3)(b). It may be inferred that the Full Bench was of the view that the Grade A and B terms enlivened section 153(3)(b). This invites consideration of the proper construction of this provision in light of the broad prohibition in section 153(1) and other relevant provisions of the FW Act.

11. Section 153(3)(b) provides that:

> (3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:
>
> (b) all employees with a disability, or a class of employees with a disability.

12. Mere disability does not engage the defined phrase; the employee must have a form of impairment recognised by section 94(1) or section 95(1) of the SS Act to a prescribed degree such that, as will be shown, the employee's productive work capacity is adversely affected.

Applicable Principles

13. Statutory construction requires consideration of the ordinary and grammatical meaning of the words that are used while at the same time taking into account context and purpose. The meaning to be given to statutory words is their contextual meaning.[10] Remedial or beneficial provisions of a statute are to be given a generous, fair, liberal and large interpretation. Exceptions do not require such an interpretation and

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[10] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ), *Talacko v Bennett* (2017) 260 CLR 124 at 145 [65], (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ), 149 [82] (Nettle J), 148 [78] (Gageler J), *R v A2* (2019) 93 ALJR 1106 at 1117–1118 [32]–[37] (Kiefel CJ and Keane J), 1131 [124] (Bell and Gageler JJ), 1138–1139 [163]–[164] (Edelman J). See also Fair *Work Ombudsman v Spotless Services Australia Ltd* [2019] FCA 9 at [9]-[20] (Colvin J), most of which were cited with approval in *Berkeley Challenge Pty Ltd v United Voice* [2020] FCAFC at [153] (Collier and Rangiah JJ).

should be read narrowly.[11] Moreover, so far as possible, statutes are to be construed consistently with Australia's international legal obligations.

14. Section 153(1) is beneficial and protective. In clear and unambiguous terms, the section bans award content that "discriminate against" those with a stated attribute because of or for reasons that include those attributes. The ban applies irrespective of the employer or the nature of the employment. It applies regardless of any consideration that might otherwise justify inclusion.[12]

15. Section 153(3)(b) renders the general ban inoperative to the extent of its terms. The section does not, however, authorise the FWC to devise a minimum wages structure for those employees outside the parameters established by the FW Act. No special treatment or exemption is given by the FW Act for employers who also happen to be ADEs. Nor does the section create a zone of decisional freedom that renders it unnecessary to give constructional weight to the protection section 153(1) otherwise confers on all disabled employees.

<u>Relevant aspects of general findings</u>

16. There are several aspects of the general findings referred to in paragraphs [245]-[253] of the December Decision that bear on construction.

17. *First*, the implicit finding[13] that ADE employment caters for "more severely disabled persons" has, respectfully, no statutory or evidentiary footing. Neither the SS Act or the FW Act distinguish between categories of impairment in this way. DSP qualification is engaged if a person has an impairment of a prescribed nature and degree. The FWC has no role in this assessment. Moreover, save for capacity based wages of the kind referred to in section 47 of the *Disability Discrimination Act* 1992 (the **DD Act**), section 45(2) of the DD Act expressly excludes wage discrimination conceived of as a special benefit for disabled persons. This conception was implicitly rejected by the Productivity Commission in the review of the DD Act that resulted in the inclusion in that Act of section 45(2).[14]

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[11] By parity of reasoning see *Rose v Department of Social Security* (1990) 21 FCR 241 243-244 (Lockhart, Gummow and Einfeld JJ); *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 293 [19]-[20] (Kirby J, agreeing in the result).

[12] Of course, regardless of the interaction between sections 153(1) and section 153(3)(b), a term must still be permitted or required and still be capable of inclusion to the extent stated in section 138.

[13] December Decision, [246].

[14] *Review of the Disability Discrimination Act* 1992, Productivity Commission, 2004. A contention that ADEs constituted a special measure was recorded by the Productivity Commission and implicitly rejected by their recommendation, 352-354.

18. *Second*, the jurisdictional context is minimum wages. Minimum wages is an employee benefit.[15] The mode of operation of ADEs or the manner in which they may arrange work the subject of award regulation is, respectfully, the incorrect frame of reference.

19. The position of ADEs as employers has no statutory significance for the exercise of the FWC's minimum wage authority. In any event, the perceived risk to continued ADE employment from the SWS is negated by evidence exposed in the trial report (but not disclosed to the Full Bench by any of the ADE employers, their organisations or the Commonwealth) that five of the ADEs in the sample group utilise the SWS to determine wages.[16]

20. *Third,* it is not the function of the FWC to act upon a desire to protect ADE employment in fixing minimum wages for work (the Full Bench said it was a "factor foremost" in their consideration[17]). Nor is the reason why employers employ labour or how they deploy it to meet their needs relevant to setting the minimum cost of that labour. Job customisation for the same cohort of employees occurs in non-ADE employment.[18] The *National Disability Insurance Scheme Act* 2013 (the **NDIS Act**) enables an individual disabled participant to align their goals and aspirations with the necessary and reasonable supports considered appropriate to support them. The alignment is achieved by a "highly individualised" assessment.[19] A goal or aspiration of employment or of continued employment can be supported through the NDIS regardless of the identity of the employer.[20] This tells against the FWC intervening in favour of ADEs by conferring on them a labour cost *advantage* relative to other employers of employees with a disability.

21. *Fourth*, the fact that DSP qualification results in a person falling within the defined phrase "employee with a disability," as the subject matter of section 153(3)(b), has itself no significance for wage setting. The DSP is a welfare measure that addresses the work inability of an employee with a disability. It has nothing to do with remuneration for the work the employee *can* do. It is entirely residual. This explains the presence of the SWS

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[15] Minima are intended to intervene in the market and lift the floor of such wages: *Re Annual Wage Review 2017-18* (2018) 279 IR 215, [478].

[16] See table A.3 on page 138 of the Fair Work Commission New Wage Assessment Structure Evaluation. This group was the third highest in the sample. The report also records on page 72 that a small number of ADEs had reported that the SWS subsidy paid by the Department of Social Services had helped their organisation remain viable in the past.

[17] December Decision, [246].

[18] Wilson Statement, [29]-[30].

[19] Sections 31, 33(1)(a), and 34(1) of the NDIS Act. More so than other legislative schemes, the NDIS Act confers a benefit that is highly individualised: *National Disability Insurance Agency v WRMT* (2020) 276 FCR 415, [152] (the Court).

[20] There is no statutory reason why an individual person cannot select ADE employment or continued ADE employment as a goal and aspiration for NDIS purposes.

as a criterion for qualification and the definition of "work" in section 94(5) as part of the "continuing inability to work" criterion. They enable the remunerative work *capacity* of a person to be ascertained. The DSP itself is an irrelevant consideration.[21] It is not a work value reason.

"Employee with a disability"

22. The phrase is a term of art. It is defined in s 12 of the FW Act.

> **employee with a disability** means a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the *Social Security Act 1991* (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act.[22]

23. To qualify (and accordingly meet the threshold stipulated by section 12 and section 153(3)(b) of the FW Act), the Secretary must be satisfied of each element of section 94(1) of the SS Act (but for FW Act purposes with the omission of section 94(1)(e)):

> A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
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> (b) the person's impairment is of 20 points or more under the Impairment Tables; and
>
> (c) one of the following applies:
>
> (i) the person has a continuing inability to work;
>
> (ii) the Secretary is satisfied that the person is participating in the program administered by the Commonwealth known as the supported wage system; and
>
> (d) the person has turned 16; and
>
> (da) in a case where the following apply:
>
> (i) the person is under 35 years of age or is a reviewed 2008-2011 DSP starter;
>
> (ii) the Secretary is satisfied that the person is able to do work that is for at least 8 hours per week on wages at or above the relevant minimum wage and that exists in Australia, even if not within the person's locally accessible labour market;
>
> (iii) if the person has one or more dependent children—the youngest dependent child is 6 years of age or over;

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21 It is noted that the Full Bench have expressed a different view: December Decision, [253].

22 These submissions focus on section 94(1) of the SS Act. Section 95(1) applies to people who are legally blind. There is evidence to suggest that this is engaged by the Grade A and B terms.

the person meets any participation requirements that apply to the person under section 94A; and

......

(ea) one of the following applies:

(i) the person is an Australian resident;

(ia) the person is absent from Australia and the Secretary has made a determination in relation to the person under subsection 1218AAA(1);

(ii) the person is absent from Australia and all the circumstances described in paragraphs 1218AA(1)(a), (b), (c), (d) and (e) exist in relation to the person.

24. Of significance is criterion (c). This requires that either of the things it mentions apply to the person. The first is a "continuing inability to work." The second is SWS participation. The concept of a "continuing inability to work" is contained in section 94(2):

(2) A person has a ***continuing inability to work*** because of an impairment if the Secretary is satisfied that:

(aa) in a case where the person's impairment is not a severe impairment within the meaning of subsection (3B) or the person is a reviewed 2008-2011 DSP starter who has had an opportunity to participate in a program of support - the person has actively participated in a program of support within the meaning of subsection (3C), and the program of support was wholly or partly funded by the Commonwealth; and

(a) in all cases - the impairment is of itself sufficient to prevent the person from doing any work independently of a program of support within the next 2 years; and

(b) in all cases - either:

(i) the impairment is of itself sufficient to prevent the person from undertaking a training activity during the next 2 years; or

(ii) if the impairment does not prevent the person from undertaking a training activity—such activity is unlikely (because of the impairment) to enable the person to do any work independently

25. In section 94(5) a "program of support" and "work" are defined as:

program of support means a program that:

(a) is designed to assist persons to prepare for, find or maintain work; and

(b) either:

(i) is funded (wholly or partly) by the Commonwealth; or

(ii) is of a type that the Secretary considers is similar to a program that is designed to assist persons to prepare for, find or maintain work and that is funded (wholly or partly) by the Commonwealth.

work means work:

(a) that is for at least 15 hours per week on wages that are at or above the relevant minimum wage; and

(b) that exists in Australia, even if not within the person's locally accessible labour market.

26. Section 94(2)(aa) requires that the person be "actively participating in a program of support." This in turn requires the individual person to satisfy the requirements of a legislative instrument made by the Minister (section 94(3C)). That instrument is the *Social Security (Active Participation for Disability Support Pension) Determination* 2014. The Determination identifies criteria for active participation in section 7(1). One of these criteria, section 7(1)(b), calls up additional criteria, all of which must be "satisfied in relation to the person and the program of support." The last is section 7(5):[23]

> (5) This subsection is satisfied in relation to a person and a program of support if:
>
> (a) at the end of the relevant period[24], the person is participating in the program of support; and
>
> (b) the person is prevented, solely because of his or her impairment, from improving his or her capacity to prepare for, find or maintain work through continued participation in the program (emphasis added).

27. As can be seen, the whole application of the defined phrase "employee with a disability" hinges on an individual's participation in the SWS or the existence of a continuing inability to work, as defined. The latter criterion in particular is highly individualised. A period of assessment is required to determine whether the person is *prevented* from working independently of an ADE due to the effect of their impairment on their *capacity.* Here, work means at least 15 hours a week on wages that are at or above the relevant minimum wage.

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[23] An ADE is included in the list of providers designated as a "program of support:" section 5.

[24] "Relevant period" is defined as 36 months after a person claims the pension: s 5(1). A person satisfies this requirement if they have participated for at least 18 months during those 36 months: section 8(2).

28. Eligibility for the SWS is expressed differently:

> Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension (emphasis added).

29. Unlike the continuing inability to work criterion, it is sufficient that the employee be unable to perform the range of duties contemplated by a class of work covered by an award (as distinct from being prevented from performing work independently of, relevantly, the ADE by the impairment itself). Both section 94(1)(c) criteria however focus on what the worker can deliver by way of work as the work indicia of the effects of disability.

30. The "gateway requirements" in clause B.1.1 would alter this state of affairs by subjecting access to the minimum wage to a hypothetical assessment of the work contribution the employer considers the employee can make given the "circumstances" of that person's disability.[25] The requirements however are likely to have distorting effects for DSP eligibility.

31. An employee employed in a position that is tailored and adjusted for the circumstances of their disability is a person, it follows, who *is able to* perform the range of duties to the competence level required within the class of work which the employer is engaged under the award. Eligibility for the SWS is of course predicated on *an inability* to do those duties. Likewise, such a person is unlikely to satisfy section 94(2)(a) of the SS Act. That element is an aspect of the "continuing inability to work" criterion. As has been mentioned, it focuses on whether the person's impairment by itself prevents work independently of a program of support. However, "work" is defined by section 94(5) of the SS Act as work "for at least 15 hours per week on wages that are at or above the relevant minimum wage." The outcome of the evaluation contemplated by clause B.1.1 is work *at* the relevant minimum wage for Grades A and B. It is difficult to see how the prevention threshold for the continuing inability to work criterion could be met.

"Merely"

32. The word "merely" in section 153(3) is a word of limitation. This is apparent from the text and context of the section. The text is obvious. By itself, "merely" is a word of strict

[25] The FWC has no visibility of this assessment or the comparative work value of the resultant work. This aspect of the "preferred approach" was not assessed by the trial evaluation.

limitation. Context explains the nature of the limitation as confined to the provision an award makes for minimum wages in respect of the work output that an individual employee with a disability has the capacity to deliver. This is apparent in several ways.

33. *First*, section 153(3)(b) ambulates section 94(1) by enabling a wage standard to be developed which intersects with the work criterion for DSP qualification.

34. Section 94(1) takes award regulated work as it finds it. Implicitly, it picks up where work leaves off by presuming the existence of an award based wage standard that has valued work. A harmonious construction of the qualification provisions of the SS Act and section 153(3)(b) is one that construes section 153(3)(b) beneficially; as a provision that permits adjustment to the award wage standard to enable the impaired person's productive work capacity to be ascertained and remunerated, according to that capacity, for work that has been valued on the same basis as other employees (i.e. without regard to impairment, which is not a work value reason prescribed by section 156(4)). The residual incapacity is addressed by the welfare benefit.

35. *Second*, section 150 of the FW Act prohibits the inclusion in an award of an "objectionable term." Such a term is one that permits, has the effect of permitting, or purports to permit a contravention of Part 3-1 of the FW Act.[26] "Permits" means "authorise," in the sense of "give permission to or opportunity for."[27]

36. Proposed clause 14.2 would authorise a minimum rate of pay for Grade A and B[28] that is lower than other employees of an ADE employer by reason of the circumstances of their disability, or for a reason that includes that reason. This is one form of adverse action.[29] The proposed clause would allow the opportunity for abstract assessment of a disability and its perceived effects (not necessarily based on actual work performance over a period of time) to intrude into how work is classified. The FWC cannot exclude the possibility that this intrusion will authorise the infliction of injury in employment[30] because of disability. This too is adverse action.[31]

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[26] FW Act, section 12 (definition of "objectionable term").

[27] See *Re Application by Metropolitan Fire and Emergency Services Board* (2019) 284 IR 239 at [254], [264] (Gostecnik DP) citing *Australian Industry Group v Fair Work Australia* (2015) 205 FCR 339. On this issue, the Full Court in *AIG* cited the reasons of a Full Bench at [18] and agreed with them at [66].

[28] Presently, those rates are 34% and 69%, respectively, of the rate that currently applies to the lowest classification in the Award, Grade 1 (which is a training grade).

[29] Section 342(1)(d) of the FW Act. It is the current position: December Decision, [342].

[30] *Lamont v University of Queensland* (No 2) [2020] FCA 720 at [66]-[67] (Rangiah J); *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155 and 164 (Ellicott J).

[31] Section 342(1)(b) of the FW Act

37. An employer who takes adverse action because of disability contravenes section 351(1) of the FW Act, unless doing so is not unlawful under anti-discrimination law, relevantly the DD Act.[32] Section 47(1)(c) and (d) of the DD Act saves anything done by an employer in "direct compliance with" (*inter alia*) an award (s 47(1)(c) and (d)) from a finding of unlawful discrimination, but only to the extent that the award makes specific provision for payment of salary or wages, including minimum wages, to people who would be eligible for a DSP, where the salary or wages are determined by reference to the capacity of the person.

38. It would not be a harmonious construction of sections 150 and 153(3)(b) of the FW Act to read the latter as permitting the inclusion of an "objectionable" term on the subject of minimum wages as if it were a broad based exemption for disability based discrimination. Such a construction would enable the FWC to include forms of wage adversity in an award that go further than the carefully calibrated adversities excused by section 47(1)(c) and (d) of the DD Act on the same subject.[33]

39. *Third,* section 161 of the FW Act imposes on the FWC a duty to review an award referred by the Australian Human Rights Commission under section 46PW of the *Australian Human Rights Commission Act 1986* (Cth). If, upon review, the FWC is satisfied that a proposed award term requires a person to do anything unlawful (but for the fact that the act would be done in direct compliance with the award), the award must be varied.[34] The President of the Australian Human Rights Commission must refer the award to the FWC if he or she receives a complaint.[35] The legislature is unlikely to have intended that section 153(3)(b) would sanction discriminatory minimum wage terms liable to be removed under s 163(3) of the FW Act.

40. *Fourth*, as has already been mentioned, the prohibition on discrimination in section 153(1), read with section 153(3)(b), is beneficial. So are the minimum wages terms of an award. This, together with the text and context of ss 153(1) and (3), supports

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32 FW Act, section 351(1), (2)(a), (3)(ab)).

33 As has been mentioned, the Grade A and B terms cannot be viewed as a special, beneficial, measure. This is foreclosed by section 45(2)(b) of the DD Act and implemented the Productivity Commission's recommendation that the exemption given by the DD Act by section 47 for "capacity based wages" not be overridden by viewing discriminatory wages as a "special measure: *Review of the Disability Discrimination Act* 1992, Productivity Commission, 2004, 352-354. That the Commission's recommendation was the source of the inclusion of section 45(2) in the DD Act is apparent from the Explanatory Memorandum to the *Disability Discrimination and Other Legislation Amendment Act* 2008, [99]-[101].

34 Section 161 has been the subject of scant consideration. In *Black Coal Mining Industry Award 2010* [2015] FWCFB 2192; 249 IR 26, the Full Bench referred to having received a referral under s 46PW of the *Australian Human Rights Commission Act*, but the impugned term was straightforwardly discriminatory within the meaning of s 153(1) of the FW Act.

35 AHRC Act, section 46PW(1), (3), (7)–(8).

a construction of section 153(3)(b) that authorises the inclusion in an award of minimum wage terms that permit differential minimum wage treatment in respect of employees with a disability only insofar as this is necessary to take account of the effects of disability on a person's capacity. "Capacity" here denotes "productive capacity."[36] This is how "merely" is to be understood.

Consequences of the AED's construction

41. The AED's construction of "merely" aligns section 153(3)(b) with the DD Act, the SS Act[37] and with *Noijn v the Commonwealth* (2012) 208 FCR 1. In *Noijn*, Buchanan J said at [148] that pay should be fixed at a rate that was reasonable "having regard to the output of the disabled worker compared with the output of the non-disabled worker."[38] The AED's construction produces no disconformity with the FWC's other wage instruments. Rather, it aligns with those instruments. Further, the AED's construction:

    (a) It avoids the possibility that personal characteristics and assumptions about disability and its effects will intrude into the classification of work.[39]

    (b) Gives effect to the methodology utilised by the FWC to design the National Minimum Wage Order. Productive capacity is the basis for the distinction made by the FWC between the first and the second special form of order.[40] The second Order contemplates lower actual pay than would otherwise apply for the performance of work. However, the work itself retains the same value.

    (c) Gives effect to the human rights embodied in the *Convention on the Rights of Persons with Disabilities*, which confers rights to equal remuneration for equal work and to just and favourable conditions of work,[41] and ILO's *Vocational Rehabilitation and Employment Convention* 1983, which requires measures that enable employment opportunities that conform with salary standards applicable to workers generally.[42] These rights establish comparative standards that support raising terms and conditions for employees with a disability.

    (d) Does not alter the work value of the work the worker has been engaged to perform.

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36 As distinct from say "competency". For this concept in an award setting see *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414 at 428 [55]–[56] (Bromberg J)".

37 See section 47(c)(iv) of the DD Act.

38 See also *Noijn*, [12].

39 This is something that the Full Bench have themselves identified as undesirable: December Decision, [366].

40 Wilson Statement, [9]-[10].

41 Wilson Statement, [26].

42 Wilson Statement, [28].

Indeed, it keeps work and worker separate, ensuring that the work is not devalued by association with disability.

(e) Would enable the FWC to establish a safety net of fair minimum wages that meets the objective stated in section 284(1)(e) of the FW Act and that achieves the modern award objective of fairness, relevance in a manner that addresses the matters expressly referred to in section 134(1)(a), (c), (d) (e) and (g) as well as the general objects of the FW Act stated in section 3(b) and (e).

42. The other two forms of exemption granted by section 153(3)(a) and (c) do not assist to construe the reach of section 153(3)(b). The subject matter of each is entirely different.

43. It follows from the foregoing that section 153(3)(b) is not engaged by the Grade A and B terms. Those terms would not "merely" make provision for the authorised subject matter.

The consequences of including the Grade and B terms in the Award

<u>Minimum wage has a settled meaning</u>

44. Inclusion of the Grade A and B terms would result in legally sanctioned double discrimination against ADE employees with a disability for the same disability.[43]

45. Proposed clause 14.2 and the gateway requirements of proposed clause B.1.1 would first require the employer to classify an employee by matching a position to its assessment of the "circumstances of the employee's disability." This is wholly evaluative of the worker, as distinct from the work of that worker.

46. The criterion "circumstances of the disability" is broader than "capacity" and, for the purposes of assessment, may or may not require actual work performance and is divorced from the value the employer obtains from its labour need. The frame of reference is work only employees with a disability would perform as the basis for fixing an upper limit on the amount of minimum wage the individual worker could earn from the employment, regardless of their productive output. It risks the intrusion of subjective views of what a person <u>*can't do*</u>. A focus on output emphasises observable performance of what the employee <u>*can do*</u>.

47. The "preferred approach" would then, through proposed clause 14.4, make another wage

[43] Of course, if the FWC does not stipulate the SWS there is a risk that the worker would not qualify under section 94(1) and hence not be an "employee with a disability."

assessment method available that does test the employee's productive output but does so in the very work that proposed B.1.1 assumes has been adjusted. It may be thought this would be unnecessary if, having tailored duties for an individual person, that person remains employed, but that is not the operating assumption of the "preferred approach."

48. Even if the "preferred approach" is viewed as providing for two methods of assessing capacity, and accordingly viewed as capable of being lawfully included in the Award,[44] the effect is to do so for the same disability by methodologies that produce differing wage outcomes for the same work. Such a disparity strays beyond mere differential minimum wage treatment[45] and is unlikely to be necessary to meet the minimum awards objective.

49. No other employee covered by the Award would be subject to two evaluative methods applicable to wage determination. Those classified in Grades 1 to 6 of the Award would have the benefit of the alignments with the Manufacturing Award recognised by the Full Bench.[46] The Bench proposes further alignments with the *Food, Beverage and Tobacco Manufacturing Award*, the *Gardening and Landscaping Services Award*, and the *Textile, Clothing, Footwear and Associated Industries Award*.[47] These alignments correspond with the statutory concept of minimum rates, which is based on uniformity and consistency of employee treatment within and between awards.[48] The FW Act was legislated against this background,[49] and the legislature is to be taken to have intended the continuation of that approach.[50] The Grade A and B classifications would be anomalous. The minimum wage base would be ascertained solely by reference to work done by those with disability employed by an ADE.

50. The Grade A and B terms would, if included, destroy consistency across awards, in creating a uniquely disadvantageous classification for employees of a particular kind (*i.e.*, with a disability) employed by a particular form of enterprise (*i.e.*, ADEs). This does not constitute the setting of a "minimum wage," within the settled industrial

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[44] And even then a proposed terms must still meet the safety net standards the FW Act: section 134(1) (the modern awards objective); section 138 (achievement of the modern awards objective) and section 284(1) (the minimum wages objective). The term must also satisfy the necessary threshold.

[45] See *Noijn v the Commonwealth* (2012) 208 FCR 1, [266] (Katzmann J).

[46] December Decision, [13].

[47] Wilson Statement, [19].

[48] (2013) 235 IR 332 at 352–353 [76]–[79]; (2018) 279 IR 215. See also *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [2020] FWCFB 6301 at [28]; *Re Annual Wage Review 2019–20* [2020] 297 IR 1 at (128); *Re Annual Wage Review 2015-16* (2016) 258 IR 201 at [138].

[49] *Re Annual Wage Review 2012-13* (2013) 235 IR 332 at 352–353 [76]; see also *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [2020] FWCFB 6301 at [28].

[50] See in particular, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347 [81] (McHugh J), see also 323–325 [7]–[8] (Gleeson CJ), 370–371 [161] (Gummow, Hayne and Heydon JJ), 398 [251] (Callinan J).

meaning of that phrase. The effect is to deny the Grade A and B terms the status of minimum wages for the purposes of s 153(3)(b).

51. The Full Bench is aware that the "preferred approach" would result in rates of pay below the National Minimum Wage.[51] However, the true effect of the "preferred approach" would be to establish a wage on a basis that is less beneficial than even the Second Special National Minimum Wage. Worse, since the Second Special National Minimum Wage is set for any employee with a disability performing any work of any kind in employment, ADE employees would be worse off compared with employees whose work the FWC has not valued or classified. This exposes the discrimination the "preferred approach" contemplates as based partly on disability and partly on an entirely irrelevant consideration - employer identity. It also exposes adversity. Disability discrimination however requires specific justification[52] with a view to avoiding the adversity and injustice so offensive to human dignity that it entails.[53]

52. On these grounds alone, inclusion of the Grade A and B terms would not engage section 153(3)(b). However, even if the "preferred approach" does set a "minimum wage," the Grade A and B terms would still do not engage section 153(3)(b).

Work value reasons

53. In the December Decision, the Full Bench stated that this review was not an occasion for an across the board wage increase.[54] This view however sits uneasily with the Bench's finding that current standards fixed by clause 14.4 of the Award fall below the safety net standards of the FW Act.[55] Respectfully, a fair and relevant safety net is not one that preserves employee's existing, below safety net, wages position (which the Bench identified as "about $7.00 per hour").[56] This position is, as the Full Bench has found, produces the lowest paid persons within the entire modern award system.[57] Yet, having regard to Grade A, this is what the Full Bench has proposed.

54. The rates of pay proposed for Grades A and B (which, if included, would lower the minimum wage currently prescribed by clause 14.2 of the Award) do not, at least expressly, invoke the work value reasons referred to in section 156(4). The Full Bench

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[52] *Noijn* at [138] (Buchanan J) (and at [139]); at [268] (Katzmann J). See also *Souliotopoulos v LaTrobe University Liberal Club* (2002) 120 FCR 584 at [33], [40]-[50] (Merkel J).

[53] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 379 (Brennan J).

[54] December Decision, [367].

[55] December Decision, [342].

[56] December Decision, [253].

[57] December Decision, [342].

appears to have had in mind some adjustment to traditional work value considerations where jobs are tailored or adjusted.[58] There could be no possibility of adjustment from those stipulated by the statute.

55. A factor foremost in the Full Bench's consideration was the effect of wages on the viability of ADE's and ADE employment . Similarly, and to the same end, the Full Bench had regard to the nature of commercial opportunities pursued by ADEs, and to whether ADEs were for-profit or not-for-profit enterprises.[59] The Full Bench also proposes an association between personal capability and work of a particular kind. Additionally, one effect of proposed clause B.1.1 would be to introduce considerations of personal capacities and characteristics into an evaluative alignment exercise that for other workers is irrelevant.[60] Respectfully, none of these are reasons relevant to the satisfaction referred to in section 156(3); namely the pay rate and one of the specified reasons.[61]

All or a class of employee with a disability

56. Finally, if the Grade A and B terms do set a "minimum wage," section 156(3)(b) is only available if the wage applies to all or a class of employees with a disability. Plainly, the Grade A and B terms would not establish a minimum wage for all employees with a disability, or even all employees with a disability who are covered by the subject award. Only those employees with a disability in "tailored or adjusted" positions and who perform "a simple task or tasks" involving a number of "sequential actions" under "direct supervision and constant monitoring" are affected.

57. Nor would the Grade A and B terms establish a minimum wage for a class of employee with a disability. The word "class" as it appears in section 153(3)(b) is not at large. The limb denotes a class of a defined group. This demonstrates that differentiation must occur in a manner that engages the defined phrase. Doing so is consistent with a view of the exemption as one that is focused on those who fall within the qualifying criteria contained in sections 94(1) and 95(1) of the SS Act. Having regard to those provisions, the basis for identifying sub-groups (classes) is readily apparent. For examples, a qualifying impairment for the purposes of section 94(1) of the SS Act is someone with a psychiatric disability, intellectual disability or physical disability. Someone who is legally blind has a qualifying impairment that engages section 95(1) of the SS Act. Neither section makes the kind of work a person is employed to do or their employer a qualifying element of

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58 December Decision, [366].

59 December Decision, [248].

60 Something the Full Bench has said should not be done: December Decision, [366].

61 *Re 4 yearly review of modern awards* [2018] FWCFB 7621, 284 IR 121 at [165].

their membership of the broader category described by the umbrella term "employees with a disability." The "preferred approach" does not differentiate in any way that is relevant to the criterion that engages the definitional phrase.

Remaining Matters

58. The argument referred to in paragraph 3 of the AED's position paper foreshadows a natural justice argument that could only arise if the FWC were to make a final determination without dealing with the evidence and arguments raised by the AED prior to the Bench's 30 March 2020 decision. The AED does not assume this will be case, as Ms Wilson acknowledges in paragraph 5 of the Wilson Statement.

59. In any event, these submissions address all but the "Tailoring of Work Submission" referred to by Ms Wilson in paragraphs [29]-[30] of the Wilson Statement. That submission is directly relevant to the perceived exceptionality of ADE employment referred to by the Full Bench.[62] That perceived exceptionality is a central justification, as the AED understands it, for the Grade A and B terms.

60. The Tailoring of Work Submission would in any event be a relevant consideration about a matter the FWC is bound to consider, namely whether the Grade A and B terms would ensure a fair and relevant minimum safety net of conditions for the purposes of section 134(1) and contribute to a fair range minimum wages for the purposes of section 284(1)(e) of the FW Act, assuming it was within power to include them.

Conclusion

61. The Award cannot lawfully be varied to include the Grade A and B terms. The terms would offend against the prohibition in section 153(1) of the FW Act and are not necessary terms that ensure a fair and relevant safety net for employees with a disability covered by the Award.

13 May 2022

M. Harding

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[62] December Decision, [246]-[247], [348], [350].

Fair Work Act 2009
s 156 – 4 yearly review of modern awards

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD

AM2014/286

STATEMENT OF KAIRSTEIN WILSON

I, Kairstien Wilson, lawyer**,** say:

1. I am employed by the Association for Employees with a Disability Inc (**AED**) and hold the position of Supervising Legal Practitioner. I have responsibility for the management of AED.

2. I am authorised by AED to make this statement on its behalf.

3. I make this statement from my own knowledge unless I state otherwise. Where I rely on information provided to me, I believe that information to be true.

4. AED filed a position paper on 16 March 2022 identifying, in summary form, a number of jurisdictional objections to the “preferred approach” articulated by the Full Bench in their decision published on 3 December 2019 in (2019) 293 IR 1.

5. Paragraph 3 of the position paper refers to arguments raised before the Full Bench prior to their further decision published on 30 March 2020 in [2020] FWCFB 1704. Those arguments were substantially contained in a submission filed by AED on 17 December 2019. AED’s concern was that the Full Bench had not, so far, responded to a number of identified arguments. I note however that in their statement [2022] FWBFB 6, the Full Bench indicated in paragraph [8] that:

> We now intend to undertake the final step in the process envisaged in the decision of 3 December 2019, namely to receive further evidence and submissions from the parties in light of the trial outcomes recorded in the Report and to make a final determination as to the new wages structure to be placed in the SES Award

The Supported Wages System

6. By determination made on 8 November 2017, the Full Bench included modifications to the Supported Wages System included in schedule D of the *Supported Employment Services Award* (the **Award**). Paragraph D.1 of schedule D:

> Defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award.

7. Paragraph D.2 defines the phrase "supported wage system" (the **SWS**) as:

> "**supported wage system** means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System handbook. The handbook is available from the following website: www.jobaccess.gov.au.

8. Paragraph D.3.1 describes eligibility for the SWS as follows:

> Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension.

Special Minimum Wage Orders

9. Section 294(1)(b)(ii) of the *Fair Work Act* 2009 (the **FW Act**) requires that the national minimum wage order set special national minimum wages for all award and agreement free employees, including employees with a disability. Paragraph 3.1 of the current national minimum wage order states that the phrase "employee with a disability" is, unless a contrary intention appears, defined in the same terms as section 12 of the FW Act. No contrary intention appears in the Order. Two special minimum wages orders have been made for employees with a disability.

10. The first special national minimum wage order applies to employees whose disability does not affect their productivity. The second special national minimum wage order applies to employees with a disability who are unable to perform the range of duties to the competence level required of the employee within the class of work which the employee is engaged because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of the disability support pension. The application criteria of the second form of special national minimum wage is materially the same as the SWS eligibility criteria.

11. Section 294(4)(c) states that a special national minimum wage applies to the employees to whom it is expressed in the order to apply and that, relevantly, these employees must be "*all employees with a disability who are award/agreement free employees, or a specified class of those employees*."

AED's Minimum Wages Submission

12. In their decision of 3 December 2019, the Full Bench:

    (a) Recognised an alignment between grades 1-6 of the Award and Levels C14, C13, C12, C11, C10 and C7 of the *Manufacturing and Associated Industries and Occupations Award*: paragraph [13].

    (b) Stated that, with rare exceptions, disabled employees covered by the Award are paid a reduced minimum wage as a result of an assessment carried out with the use of a wage assessment tool approved under clause 14.4: paragraph [16].

    (c) Explained the modifications they had made to the SWS in schedule D: paragraph [25] to [27].

13. No interested party had sought an alteration to the existing rates of pay or the insertion of any new or amended classifications in schedule B.

14. In, the Full Bench invited further submissions. On 17 December 2019, AED filed a submission (**AED's Further Submission**) in response to the invitation referred to in paragraph [378] of the Full Bench's 3 December 2019 decision. Annexed to this statement and marked **KW-1** is a true copy of that submission.

15. In paragraph 14 of AED's Further Submission, AED submitted that the Full Bench should not proceed with grades A and grade B, and elaborated further on this proposition in paragraphs [15] to [42] in addressing the topics the Full Bench had invited submissions upon. In paragraphs [23] to [27] and paragraphs [38] to [42], AED submitted that the rates of pay proposed for grades A and B would not establish minimum wages having regard to the historical approach adopted for fixing safety net minimum wages in minimum rates instruments like modern awards (the **Minimum Wages Submission**).

16. The alignments between Levels C14, C13, C12, C11, C10 and C7 of the *Manufacturing and Associated Industries and Occupations Award* and Grades 1 to 6 of the Award are shown in the table of rates below:

Manufacturing Award Classification level	Aligned Award grade	Minimum weekly wage	Minimum hourly wage
C14	**1**	**772.60**	**20.33**
C13	**2**	**794.80**	**20.92**
C12	**3**	**825.20**	**21.72**
C11	**4**	**853.60**	**22.46**
C10	**5**	**899.50**	**23.67**
C9		927.70	24.41
C8		955.90	25.16
C7	**6**	**981.50**	**25.83** (the aligned classifications are in bold type)

17. The Fair Work Commission's valuation (expressed as a weekly and an hourly sum of money) of work in grades 1 to 6 of the Award is identical to its valuation of work in levels C14, C13, C12, C11, C10 and C7 of the *Manufacturing and Associated Industries and Occupations Award*.

18. The valuation for Grade 1 is identical to the first special national minimum wage for employees with a disability and serves as the basis for any productivity adjustment in respect of the second special national minimum wage.

19. In attachment A of their decision of 3 December 2019, the Full Bench proposes to align Grade 2 of the Award with classifications in four other modern awards. The same approach is taken with respect to Grades 3 to 7 of the Award. The alignments would be as follows:

- *Food, Beverage and Tobacco Manufacturing Award: Level 2*
- *Gardening and Landscaping Services Award: Level 1*
- *Manufacturing and Associated Industries and Occupations Award: Level C13*

- *Textile, Clothing, Footwear and Associated Industries Award: Skill Level 1*

20. The valuation (expressed as a weekly and an hourly sum of money) for the performance of work in Grade 2 of the Award is the same as the same amounts prescribed for work within level 2 of the *Food, Beverage and Tobacco Manufacturing Award;* within Level 1 of the *Gardening and Landscaping Services Award;* within Level C13 of the *Manufacturing and Associated Industries and Occupations Award;* and within Level 1 of *the Textile, Clothing, Footwear and Associated Industries Award.*

21. Apart from the *Gardening and Landscaping Services Award,* each of the aforementioned awards contains a clause under the heading “supported wages system” that refers to the relevant SWS schedule of that award. Exceptionally, clause 15.7 of the *Gardening and Landscaping Services Award* states*:*

> For employees who because of the effects of a disability are eligible for a supported wage, see Schedule [relevant schedule reference] —Supported Wage System.

22. The lowest classification prescribed by the aforementioned awards is a training or induction classification, similar to Grade 1 of the Award.

23. Section 3(a) of the FW Act states that an object of the Act is to provide:

> ….workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations.

24. The Full Bench was referred to the *Convention on the Rights of Persons with Disabilities,* to the International Labour Organisation’s *Vocational Rehabilitation and Employment Convention* 1983 (No 159) and to the associated recommendation of the International Labour Organisation Convention, the *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation* 1983 (No 168). These treaties were provided to the Full Bench on 6 February 2018.

25. The Australian Treaty Series citation for the *Convention on the Rights of Persons with Disabilities* is [2008] ATS 12. The Convention came into force in Australia on 16 August 2008. The Australian Treaty Series citation for the *Vocational Rehabilitation and Employment Convention* is [1991] ATS 18. It came into force for Australia on 7 August 1991.

26. Relevantly, Article 27 of the *Convention on the Rights of Persons with Disabilities* states:

> 1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
>
> ……………
>
> *(b)* Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
>
> ……………..
>
> (*i*) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

27. Article 9 of Part II of the *Vocational, Rehabilitation and Employment Recommendation* states:

> Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers should not be regarded as discriminating against other workers.

28. Article 10 of Part II of the Recommendation states:

> Measures should be taken to promote employment opportunities for disabled persons which conform to the employment and salary standards applicable to workers generally.

<u>AED's tailoring of work submission</u>

29. In paragraphs [30] to [32] of AED's Further Submission, AED addressed a conclusion expressed in paragraph [248], [350], [371] and [377] of the Full Bench's decision of 3 December 2019 that ADE employers tailored or customised the work they required of their employees with a disability to meet their capacities. AED submitted that the evidence did not establish that tailoring or customisation of work was confined to ADE employment but also occurred in open employment for employees with a disability who

are eligible for the SWS (the **Tailoring of Work Submission**). The Full Bench's attention was drawn to:

(a) AED's oral closing submissions on 15 February 2018 (see PN4981-PN4984; PN5031-PN5046; PN5068-PN5073; PN5116-PN5117 of the transcript) and on 16 February 2018 (see PN534-PN554 of the transcript). For ease of reference, annexed to this statement and marked **KW-2** is a true copy of the relevant parts of the transcript for those days.

(b) Paragraphs [10(a)] and paragraphs [12] to [14] of the joint written submission dated 16 July 2018. For ease of reference, annexed to this statement and marked **KW-3** is a true copy of that submission.

(c) Paragraphs [19] to [24] of AED's written submissions dated 19 October 2018. For ease of reference, annexed to this statement and marked **KW-4** is a true copy of that submission.

(d) Evidence given by Paul Cain. For ease of reference, annexed to this statement and marked:

  (i) **KW-5** is a true copy of the first page and paragraphs [36] to [41] of the first statement of Paul Cain (the statement was marked as Exhibit 15 in the proceeding);

  (ii) **KW-6** is a true copy of the first page and paragraphs [17] to [19], [28] to [31], [92] to [95], [103], [122] to [130], [210] to [211], [227] to [228] and [238] to [242] of the further statement of Paul Cain dated 21 November 2017 (the statement was marked as Exhibit 16 in the proceeding) as well as the first page and relevant pages of annexures D and I (including their indexes and executive summaries) to the statement;

  (iii) **KW-7** is a true copy of the first page and paragraphs [48] to [56] of a further statement of Paul Cain dated 14 December 2017 **(**the statement was marked as Exhibit 17 in the proceeding); and

  (iv) **KW-8** is a true copy of the first page and the pages of the transcript for 9 February 2018 containing Mr Cain's viva voce evidence at PN 2206-PN2224; PN 2298-PN 2302; PN 2439-PN 2453; and PN 2507-2519.

(e) Evidence given by Robert McFarlane. For ease of reference, annexed to this statement and marked **KW-9** is a true copy of the first page and paragraphs [16] to [18], [27] to [41] of the statement of Robert McFarlane dated 21 November 2017 (the statement was marked as Exhibit 9 in the proceeding).

30. Further relevant evidence is:

(a) Viva voce evidence given by Sally Powell on 9 February 2018. Annexed to this statement and marked **KW-10** is a true copy of the first page and the pages of the transcript for that day containing Ms Powell's evidence at PN 2644-2648.

(b) Viva voce evidence given by Michael Smith on 13 February 2018. Annexed to this statement and marked **KW-11** is a true copy of the first page and the pages of the transcript for that day containing Mr Smith's evidence at PN3963 – PN3977.

The 22 April 2022 submission filed by the Commonwealth

31. The Commonwealth, represented by the Department of Social Services, filed a submission on 22 April 2022.

32. In paragraph 17 of that submission, the Commonwealth submits that the weight to be given to the trial report, titled "New Wage Assessment Structure, Trial Evaluation Report", is a matter for the Fair Work Commission. In subparagraph (c), the Commonwealth states that the trial design for the evaluation was produced in consultation with a steering committee that included AED.

33. I represented AED on the steering committee. The Commonwealth correctly states that AED suspended its membership of the steering committee due to proceedings that it commenced in the Federal Court of Australia. That suspension occurred between 12 October 2020 and 25 March 2021. I was not involved in any discussions or steering committee meetings during the suspension period.

34. Members of the steering committee were asked to sign a non-disclosure agreement called a "Declaration of Confidentiality" in relation to the trial.

35. On 9 October 2020, an email was sent to members of the Steering Committee which stated:

> "Please note Steering Committee members who have not signed the Declaration of Confidentiality will be asked to step out of the teleconference for **Agenda item 3- Trial Design** and will not be provided the meeting papers for this item. This decision has been based on advice from ARTD and been agreed by Deputy President Booth. Deputy President Booth will talk further to this at **item 1** of the agenda."

Annexed to this statement and marked **KW-12** is a true copy of this email.

36. I was permitted to resume my involvement on the Steering Committee in March 2021. I was informed of this by email dated 25 March 2021. In that email I was asked to sign the Declaration and informed that if I choose not to I would be unable:

> "attend certain agenda items or view documentation from the period my membership was suspended".

Annexed to this statement and marked **KW-13** is a true copy of this email

37. I am not aware of what the "certain" agenda items I would be precluded from attending would be or were. I was not prepared to, and did not, sign the Declaration. As such I only received the information about the evaluation selected by the Commonwealth. I was not involved in discussions concerning the design of the evaluation.

13 May 2022

Kairstien Wilson

ANNEXURE KW-1

FAIR WORK COMMISSION

AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

SUBMISSION FROM AED LEGAL CENTRE REGARDING THE MATTERS RAISED BY THE FULL BENCH IN PARAGRAPH 378 OF ITS DECISION IN [2019] FWCFB 8179

1. On 3 December 2019, the Full Bench published reasons (the **Reasons**) for its decision to introduce two new minimum wage classifications into the *Supported Employment Services Award* 2010 (the **Award**) and to alter the text of the classification descriptors for Grades 1 to 7 in Schedule B.

2. The Reasons deal for the most part with the draft determinations proposed by the AED Legal Centre (referred to in the Reasons and in these submissions as **AEDLC**) and Australian Business Lawyers and the NSW Chamber (referred to in the Reasons and in these submissions as **ABI**).

3. The AEDLC proposal is set out in [29] of the Reasons and the Full Bench's response to it is in [315] of the Reasons. The Full Bench accepts the need for one, award based, method for determining the amount of the Award minimum wage to be paid by Australian Business Enterprise (**ADE**) employers to their employees with disability whose productivity is affected by their disabilities, but does not accept that that method should only be the Supported Wages System (the **SWS**). Nonetheless, the Bench does not reject the SWS entirely. To the contrary, notwithstanding their criticism of it, the Full Bench expressly intends to apply the SWS as a part of the wage determination method the Bench prefers, subject to some additional modifications.

4. In [315]of the Reasons the Full Bench understood that a critical aspect of the AEDLC proposal was that the SWS would work on and with the existing classification structure of the Award,[1] on the footing that these classifications, in their current form, expressed the valuation of work performed.

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[1] Reasons, at [315].

5. The ABI also contended for a proposal that left Schedule B undisturbed and accepted that grade 2 of Schedule B covered the affected workforce. In its submissions dated 21 November 2017, ABI stated that:

   (a) "Currently upon appointment, an employee covered by the Award is "graded" into one of the grades set out in Schedule B (Classifications), with reference to their skills, experience and qualifications. The grades range from grade 1 (being the lowest training grade) to grade 7 (highest). The vast majority of supported employees fall into grade 2 of the Award."[2]

   (b) Its proposal was "intended to "bake-in" a competence/skills-based approach for wage determination of the Award, by providing a default classification structure, operating alongside the existing classification structure in Schedule B (classifications), in the event that a disability enterprise elected not to use one of the currently approved tools".[3]

6. No other interested party contended or sought through evidence to prove any inadequacy with Schedule B. No party to sought to run a work value case in relation to Schedule B. The Full Bench has nevertheless concluded that the Schedule is defective, describing the "assumption that the job being performed by the disabled person is one to which the relevant award classification was intended to apply and set minimum remuneration for"[4] as flawed on the basis that an "essential feature" of ADE employment is that "ADEs create and tailor jobs specifically for the purpose of providing work to disabled persons which they are capable of doing". For the reasons discussed below, AEDLC cavils with the uniqueness of this feature, and its significance for the determination of the minimum wage safety net.

7. The Full Bench has opted for an approach of its own design that involves the creation of two new classifications that substantially lower rate of pay than is prescribed for the existing entry grade, Grade 1. The SWS is to be retained as an additional measure for these grades and for work performed by employees with disability at grades 1 to 7 of the Award.

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2 Paragraph 4.1(a) of the submission.
3 Paragraph 4.2(a) of the submission.
4 Reasons, at [348].

8. The Full Bench has invited further submissions on a number of matters, as follows:

   (a) a further opportunity to make submissions about the determination which the Bench presently considers it should make;

   (b) the identification of classification descriptors for Grades 1-7 of the Award;

   (c) comment on the proposed rates of pay for Grades A and B;

   (d) matters interested parties consider relevant.[5]

9. What follows specifically addresses each of the aforementioned matters.

Further submissions

10. The AEDLC has proceeded on the basis that the Reasons express the Full Bench's review of the Award, and that what remains to be done is to make a determination, as contemplated by section 156(2)(i) (as that provision stood at the time this review commenced[6]).

11. The observations of the Full Bench in [252] of the Reasons should also take account of evidence that ADEs are expected to operate commercially. Their purpose may aptly be described as a dual purpose, which includes operating as a commercial business. In assessing the history of the SWS it is important to recognise that recognition of their commercial character is consistent with the recognition of ADEs as employers with employees, and subject to industrial regulation accordingly. The history of award regulation reflects that evolution. Further, attention is drawn to the evidence in [42]-[50] of Mr Cain's first statement about the use and availability of the SWS in ADEs and their predecessors.[7] The Commonwealth informed the Commission that it was committed to ensuring the viability of ADEs.

12. In [2018] FWCFB 2196 at [15(5)], the Full Bench expressed a provisional view that the classification descriptors of the Award were inadequate, including on the basis that they did not, the Bench stated, identify the work tasks and skills required of a fully

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5 Reasons, at [377].
6 Reasons, at [2].
7 Exhibit 15.

competent employee at each grade. This provisional view has been confirmed in the Reasons but with some additional conclusions. These are that:

(a) industry award classifications like those in the Award are established by the Commission on the basis that an employee whose work is classified at a certain grade must be capable, with training, of performing any duties the employer may require within the scope of that grade.[8]

(b) Grade 2 of Schedule B to the Award was never intended to set remuneration for a job consisting of the one basic and repetitive task described in [352] of the Reasons.

(c) it is relevant, in determining minimum wages for ADE employees, that they are in receipt of the Disability Support Pension.[9]

13. Leaving aside the Bench's views concerning the efficacy of the SWS, as the AEDLC understands the Reasons, the Bench has concluded that Grades A and B are justified because:

(a) ADE employment is unique, in that these employers tailors jobs to meet the work capacity restrictions caused by disability;

(b) the tailoring can result in the employee performing a work task or group of tasks that has less work value than is assumed for classifications like those currently in Schedule B of the Award on the footing that these classifications are devised on an implicit assumption that an employee is, with training, capable of performing "any duties within a classification level", if directed to do so; and

(c) the classifications will recognise the lower work value of employees who perform tailored jobs, and this is explicitly recognised in the proposed paragraph B.1 of a revised Schedule B as well as in the lower hourly rate proposed in clause 14.2 (the Grade A rate is 34% of the rate prescribed for Grade 2 and Grade B is 67% of that rate).

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8 Reasons, at [350]
9 Reasons, at [371]

14. Respectfully, AEDLC submits that the Bench should not proceed with the two classifications. They do not, and cannot, it is submitted satisfy the fairness, equity and non-discriminatory standard that the Bench has identified in [367] of the Reasons as the basis for assessing the wage outcomes of this Award. This is so, the AEDLC submits:

(a) because the proposal views work value through a disability lens rather than through the skills/competence lens applicable to other skills based classifications contained in modern awards;

(b) because the proposal would fix safety net of minimum wages under this award on a different, and less beneficial, basis than is the case for other Australian workers; and

(c) discriminates (in the sense of differentiating adversely between) ADE employees with disability and other disabled employees entitled to the benefit of minimum wages established under other awards or the special national minimum wage.

15. Whilst the Full Bench has elected not to proceed with the job sizing proposal advanced in [2018] FWCFB 2196, the concerns the AEDLC has identified with respect to that proposal substantially apply to the classification approach identified in the Reasons.

<u>Work value</u>

16. Paragraph [350] of the Reasons addresses a submission advanced by the AEDLC arising from the text of the Award, in its current form. The AEDLC has in oral and written submissions identified a number of other modern awards that are similarly expressed. In addressing the AEDLC submission the Full Bench concluded that award classifications are established on the basis of an assumption that a given award grade carries with it an expectation that the employee is capable of performing at a certain level of skill and responsibility and, if required after appropriate training, can perform any duties at that classification level. The AEDLC agrees with the first part of this sentence, but cavils with the second aspect of it.

17. The capability of performing at a certain level of skill and responsibility as required is reflected in the current text of Schedule B. Having regard to [350] of the Reasons, the AEDLC takes the Full Bench to accept that, in terms, the Award currently confers an

entitlement on ADE employees to a rate of pay (subject to the tools contained in clause 14.4) that expresses the same value, in work and money terms, for the performance of one or more tasks within the scope of a Schedule B grade, and that, consistent with other modern awards, the indicative tasks listed therein do just that; they indicate the performance of work within the scope of a classification. It is relevant to note at this point that with the exception of the training grade, the skill and responsibility expectation of grade 2 is of the most basic kind.

18. The second, range of duties aspect, of the conclusion referred to in paragraph 16 above respectfully overlooks the connection between skill and competence in skills based classifications. They are two sides of the same coin, and serve to limit the range of duties that can be required to those tasks for which the employee is skilled and competent at a given grade and accordingly can apply. For example, the definition of "within the scope of this level" in paragraph B.3.1 of the *Manufacturing and Associated and Occupations Award* 2010 states:

> "for an employee who does not hold a qualification listed as a minimum training requirement, that the employee can apply skills within the enterprise selected in accordance with the National Metal and Engineering Competency Standards Implementation Guide, provided that the competencies selected are competency standards recognised as relevant and appropriate by Manufacturing Skills Australia and endorsed by the National Skills Standards Council".

19. In *Noijn* v *the Commonwealth* (2012) 208 FCR 1 Buchanan J at [42] distinguished between competencies of the kind used in the BSWAT and competency in a given task. His Honour expressly found that the latter idea related to skills and their application. This conclusion reflected its context, namely that the required skills were for work fixed against an award classification that covered basic and routine tasks. At [136] his Honour would only assume that the two employees the subject of the proceeding were suited for the work in the ADE environment for which they were employed. This suitability demonstrated competence at the requisite level because it sustained their employment.

20. Explicit in the assumption recorded at [350] of the Reasons is that a worker may require further training, presumably beyond the training at grade 1 level, to increase their capabilities to the point he or she can perform any duty within a classification as

required. However, this usually sounds in a higher classification. In *Qube Pty Ltd v McMaster* (2016) 248 FCR 414 Bromberg J, after referring to Commission authorities concerning the award restructuring exercise required by the structural efficacy principle that introduced these classifications, stated:

> "Skill recognition is an essential element of a competency-based classification structure in which employees progress from one grade to the next following acquisition and recognition of new skills and competencies".[10]

21. Apart from the training grade, grade 2 of Schedule B, in its current form, requires only a basic level of competence to perform basic work at a level sufficient to sustain employment after a period of training. There is no necessary correspondence between a particular number of tasks or actions performed by a worker and the value of their work within the scope of a single classification. Care should be exercised in inferring too much from limited observations of how some work is performed about the competencies required by Australian ADE employers. Respectfully, there is incongruity in recognising, as the Bench does at [350], that an ADE worker is paid the same rate of pay for work consisting of one or more assigned duties, yet attributing lower work value to the worker who can only do one to three by reason of their disability. Another way to view these tasks is that they are indicative of work within a designated value range. That is how the concept is expressed in paragraph B.4.1 and B.4.2-B.4.5 of the *Manufacturing and Associated Industries and Occupations Award 2010*.[11]

22. The effect of the assumption referred to in [350] of the Reasons is to inflate the work value of Grade 2 from its current position by means of comparison with a worker who can perform a hypothetical, notional, job consisting of multiple tasks. So much is evident in [348] of the Reasons. However, this assumes that greater work value can be discerned from the way an employer might wish to package tasks into a hypothetical job or position, attributing greater value to a particular kind of worker: a person with

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[10] at [56]. The other members of the Court did not deal with this issue. On the construction of the contentious clause, Bromberg J differed from Jessup J but not in the result. Allsop CJ at [6] agreed with Jessup J.

[11] See also clause 24.3(c) of the Award which states that: "Where an employee's level is not determined by the Metal and Engineering competency standards, the classification level is to be determined by the classification structure and definitions at Schedule B.1 to B.3 and by reference to the indicative tasks in Schedule B.4".

less disability who is able to be deployed more flexibly by the employer.[12] These may be legitimate metrics of value to the employer, but this is not the test for assessing work value in the sense relevant here (see in an analogous context *Equal Remuneration Decision* (2015) 256 IR 362 at [62(5)(c), and also at [71] which refers to comparable worth). That kind of value is usually to be reflected in arrangements above the safety net and is of no analytical significance for safety net purposes. There is also the problem of subjectivity referred to in [370(b)] of the Reasons.

Approach to safety net

23. The Commission is of course here devising a safety net of minimum wages. Work must be given to that idea. ADE employees are entitled to the same minimum wage consideration as other employees. That must start from the proposition that minimum wages is a relational concept based on uniformity and consistency of treatment across industries. That this is so was clearly articulated in the Annual Wage Review of 2012-2013: [2013] FWCFB 4000. There, the Commission (which included the President) stated from [76]:

> "At the outset it is important to appreciate that the Act was legislated against the background of a long-standing approach to minimum wage fixation. Parliament may be presumed to have known of the historical approach taken to such claims. The concepts of uniformity and consistency of treatment have underpinned the fixation of minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* and implemented in the *National Wage Case August 1988* decision. The principle of consistent minimum rates across awards was maintained through the award simplification process; the *Paid Rates Review*; and award modernisation.
>
> As to the current legislative framework, the minimum wages objective requires us to establish and maintain "a safety net of fair minimum wages" and the modern awards objective requires us to ensure that modern awards (together with the National Employment Standards) provide a fair and relevant minimum safety net of terms and conditions. The modern awards objective also speaks of the need to ensure a "stable and sustainable modern award system". In our view, considerations of fairness and stability tell against an award-by-award approach to minimum wage fixation. If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with

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12 B.3, Reasons at p. 144.

similar or comparable levels of skill. In this regard, we note that in its submission, Australian Business Industrial (ABI) "fully accepts that there is a presumption of uniformity in the Fair Work Act and compelling reasons for the system of modern awards for awards to be treated equally in Division 3 Part 2-6 reviews". Similarly, in its oral submission during the 22 May 2013 consultations, the Australian Industry Group (Ai Group) referred to the need for consistent relativities within and between modern awards. It is also relevant that in establishing and maintaining the minimum wages safety net, the Panel must take into account the principle of equal remuneration for work of equal or comparable value. Such a principle supports the determination of consistent minimum rates for work of equal or comparable value. The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.

At a broader, conceptual, level it is important to appreciate that the framework for workplace relations established by the Act is predicated on a guaranteed safety net which underpins enterprise level collective bargaining. The safety net of fair, relevant and enforceable minimum wages and conditions is provided through modern awards, national minimum wage orders and the National Employment Standards. Collective bargaining at the enterprise level is underpinned by that safety net. This is evident from the fact that enterprise agreements must pass the "better off overall test" in s.193 of the Act and the terms of an enterprise agreement may supplement, but cannot exclude, any provision of the National Employment Standards (ss. 55 and 186(2)(c)).

The award-by-award approach to minimum wage fixation, based on sectoral considerations, advocated by some parties in these proceedings *is inimical to the safety net nature of modern award minimum wages. Enterprise level collective bargaining is the primary means by which the statutory framework envisages differential treatment based on the circumstances in particular enterprises, which would be influenced by relevant sectoral considerations.* That the system functions in this way is evidenced by the sectoral variation in actual wage outcomes." (emphasis added).

24. These views echoed the position adopted in the previous Annual Wage Review: [2012] FWCFB 5000. Those views included this observation at [258]:

> "The notion of a fair safety net of minimum wages embodies the concepts of uniformity and consistency of treatment. These concepts underpin the fixation of minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* and implemented in the *August 1988 National Wage Case decision*."

25. The approach of the Full Bench in the Reasons involves a departure for ADE employees to these principles of minimum wage fixation by a specific award based method for fixing minimum rates for ADE employees. The circumstances of ADE employment and its future appeared to have played a significant part in why the Bench has taken this path.[13] However, a critical feature of section 134(1) of the *Fair Work Act* (**FW Act**) having regard to the approach extracted above is the Commission's antipathy to minimum wage fixation based on sectoral considerations. There is no obvious work value relationship between the rates proposed for Grades A and B and other minimum rates contained in this Award or other modern awards.

26. For other minimum wage employees, including disabled employees whose productivity is affected by their disability and for that reason are entitled to the special national minimum wage, this Commission made clear in the 2018 Annual Wage Review: [2018] FWCFB 3500 the matters referred to in paragraphs [19]-[23] of the AEDLC's submission dated 19 October 2019. The AEDLC reiterates these considerations, especially the principle recorded at [478] which states that the purpose of the relevant statutory provisions is "to benefit national system employees by creating regulatory instruments that intervene in the market setting minimum wages to lift the floor of such wages". This principle refers to the minimum wage objective. The link between minimum wage setting under modern awards and the national minimum wage is expressly recognised in the 2018 Annual Wage Review, and it is in this context the minimum wage concept articulated by the FW Act is to be understood.

27. Respectfully, the identity of the employer has not been treated as a matter of great significance in the determination of safety net wages for other Australian workers, including other workers whose productivity is affected by disability.

<u>The Disability Support Pension</u>

28. The Full Bench states in [371] of the Reasons that they have proceeded on the basis that the affected employees are in receipt of the Disability Support Pension (the **DSP**), and this will operate in conjunction with the prescribed rate of pay to ensure that the employee receives a total income that is socially acceptable. The Reasons contain an analysis of the interaction between the DSP and wages rates at [253]. The Bench's

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[13] See for instance Reasons, at [358].

conclusion of an overall, if diminished benefit, from an increase in the rate of pay is not inconsistent with the evidence of Mr Cain, albeit as Mr Cain pointed out in his evidence the size of the benefit will be influenced by the amount of the wage and the number of hours worked by the employee.[14]

29. The above notwithstanding, receipt of the DSP is not particular to ADE employees. By reason of the definition of "employee with disability" in section 12 of the FW Act any employee with disability subject to the SWS under another modern award or entitled to the special national minimum wage must be in receipt of the DSP. If it were otherwise the definition is not engaged. The DPS does not seem to have been a factor that has influenced minimum wage setting for non-ADE disabled employees.

<u>Tailoring of work is not unique to ADE employment</u>

30. Respectfully, there is evidence before the Commission that the tailoring of work to meet the competencies of the disabled person is not unique to ADE employment. AEDLC draws the Bench's attention to:

    (a) the AEDLC's oral submissions as follows:

        (i) 16 February 2018, PN4982

        (ii) 16 February 2018, PN5035;

        (iii) 16 February 2018, PN5044-PN5046;

        (iv) 16 February 2018, PN5116-PN5118;

        (v) 17 February 2018, PN535-PN554.

    (b) the written submissions of the AEDLC, as follows:

        (i) Further Submission dated 16 July 2018 at [10(a)] and [14]

        (ii) Submission dated 19 October 2019 at [22(b) and (c)] and footnote 19;

    (c) the evidence of Paul Cain:

14 Further statement of Paul Cain Exhibit 16 at [86], as well as [88]-[89].

(i) First statement of Paul Cain at [36]-[39];[15]

(ii) Further statement of Paul Cain dated 21 November 2017 at [90]-[104] (see in particular [92]); [111]-[112], [224]-[228], [235]-[242] (especially [239]; Evaluation of Disability Employment Services, annexure I at pp. 122-123.[16]

(iii) viva voce at PN2200, PN2209, PN2507-PN2509;

(d) the evidence of Robert McFarlane dated 21 November 2017 at [27]-[41] and [56]-[62][17]

31. Notwithstanding the observation stated in [352] of the Reasons about the open labour market, the submissions and evidence referred to above pertain to that market but are not dealt with by the Bench in the Reasons.

32. Further, AEDLC draws the Bench's attention to the observations of Buchanan J in *Noijn* at [145].

Discrimination

33. On 21 November 2018, the AEDLC provided the Commission with submissions that addressed discrimination. The AEDLC reiterates these submissions.

34. Whilst the submissions directly concerned the job sizing model, which is no longer being advanced, the AEDLC contends that, as currently proposed, Grades A and B are vulnerable to challenge as authorising indirect discrimination against ADE employees who are paid according to these classifications.[18] Properly construed, section 161 of the FW Act manifests an intention that a modern award not include terms that oblige an employer to unlawfully discriminate.

35. In this respect, it is noteworthy that Grade A and B employees will have their minimum wages determined on a different, and less advantageous, basis than:

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15 Exhibit 15.
16 Exhibit 16.
17 Exhibit 9.
18 see from [10] of the submissions.

(a) other Australian employees - whose safety net wages are rates fixed by reference to other minimum rates for work of equal or comparable value, rather than the circumstances of particular enterprises;

(b) other disabled employees – whose safety net wages are determined as stated above and by means of the SWS, whether under an Award or the Special National Minimum Wage.

36. By contrast, Grade A and B ADE employees will have their minimum wages fixed in an award specific way by reference to:

(a) classifications that first fix a wage rate that is lower than the national minimum wage based on the competencies they have due to their disability; then

(b) makes that wage subject to further reduction through the application of the SWS.

37. This may only be done if the person meets the impairment criteria for receipt of a DSP: clause B.1.1(a),[19] and only if the position is tailored or customised "for the circumstances of the person's disability". On this subject, it is noteworthy that this proposal will result in the work of disabled employees under this Award being valued less favourably than would employees with disability who have restricted work capacity under other modern awards and the special national minimum wage instrument. For the purposes of exposing disadvantage it has been accepted that the circumstances of the disabled person the subject of treatment may be a person with a different disability.[20]

38. The AEDLC is also concerned that the Grades A and B, in their present form, do not constitute "minimum wages" for the purposes of the FW Act and in particular section 153(3).

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19 Reasons, at p. 143.

20 *Watts v Australia Post* (2014) 222 FCR 221 at [250] (Mortimer J).

39. As has been mentioned, minimum wages has a well understood meaning under the FW Act. This Commission concluded in the Annual Wage Review [2013] FWCFB 4000 at [76]-[77] that:

> "the Act was legislated against the background of a long-standing approach to minimum wage fixation. Parliament may be presumed to have known of the historical approach taken to such claims."

40. Whilst the Full Bench does not accept that Grade A and B work is of equal and comparable value to that of the other grades in the Award, to constitute "minimum rates" within the historical conception of that term a proper work value relationship must exist between the rates there prescribed and other minimum rates.[21] As the AEDLC has already observed, it is not obvious that such a relationship exists or if so the basis for it. In these circumstances, the rates may be perceived as arbitrary.

41. The above is also significant because in [374] of the Reasons the Full Bench contemplates that the SWS will operate for any grade as a percentage of the specified rate based on the productivity of a relevantly non-disabled person. There are two consequences of this:

    (a) In the case of grade A and B, the comparison will be between a relevantly non-disabled person entitled to the full award rate of pay (because that person will not be an employee with a disability, as defined) and a disabled employee entitled to a rate fixed on an entirely different basis.

    (b) Grade A and B will prescribe rates determined on a basis that is divorced from, and less beneficial than, the way wages are determined for other Australian workers.

42. If the Grade A and B rates do not constitute properly fixed minimum rates of pay, in that the sense that they have been arrived at by an assessment of their relationship to other minimum rates, it is contended that section 153(1) of the FW Act is engaged. This will preclude their inclusion in the Award for want of jurisdiction.

The text of grades A and B

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21 c/f *The Paid Rates Review* (1998) 123 IR 240 at p, 253 and p. 255-256.

43. Under Annexure A of the Reasons, Grades 1 and 2 are to retain the full minimum award rate for the performance of a "basic task or tasks". However, an additional element is prescribed for Grade A and B. To engage the classifications the employer must create a "position" that it considers is tailored or adjusted to the circumstances of the person's disability. This gives wide latitude to the employer to construct a job of its choosing by reference to its view of a person's capabilities due to disability before training is provided, as contemplated by Grade 1. This is of significance. The Dunoon Report observed at p. 22:

> "Many people with severe disabilities do in fact earn full wages in open employment. Often people with physical and sensory disabilities very successfully performed job for full award wages where they make use of their abilities - in particular, intellectual abilities - with necessary adjustments being made in the work environment to minimise any difficulties arising. Similarly, significant numbers of people with intellectual disabilities achieve and maintain full award wage employment with the assistance of supportive employment agencies. In the consultant's view it is vital that the assessment system in no way creates barriers that might inhibit individuals from achieving their employment potential.
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> ....
>
> Moreover, and as also recognised by the Wages Sub-Committee's principles, *people with disabilities commonly improve their ability to perform a job over time. In part, these improvements will come about as individuals develop their skills and competencies, either as a result of on-the-job experience or specific training.* Improved performance may also reflect the introduction of modifications (often quite small ones) to the job and the work setting. The assessment this system needs to be sufficiently dynamic to take account of these changes affecting performance"[22] (emphasis added).

44. Further, in a skills based classification system it is not obvious why the additional element specified in clause 14.1 "the nature of the position in which the employee is employed" is relevant or how it will operate. The AEDLC contends clause 14.1 should focus on what is necessary for the employee to apply skills appropriate to work within a job classification. The existing formulation of skills, experience and responsibility is sufficient for this purpose. The additional element has the potential to prevent reclassification on the footing that the employee has been employed to a particular

22 Exhibit 16, Annexure F.

position. In this regard attention is drawn to the extract from the Dunoon report referred to in the preceding paragraph. It is observed that this element would apply to all grades, albeit it replicates aspects of the additional element prescribed for grades A and B specifically.

45. Next, if a worker performs a simple task consisting of up to three sequential actions under supervision and monitoring Grade A applies, but if there are 3 sequential actions supervision and regular monitoring Grade 3 applies. Respectfully, the distinction between and the meaning of "simple" and "basic tasks" is illusive. There is a considerable risk that both will be viewed through the prism of disability and its effects, compounding the disadvantage to the disabled ADE employee arising from subjective judgments about their capacity made by their employer. Further, it is not apparent what "sequential actions" consists of and how it is to be distinguished from "tasks".

Other relevant matters

46. In their report dated 15 October 2019, the Committee on the Rights of Persons with Disabilities, which supervises the Convention on the Rights of Persons with Disabilities, expressed concern about:

> "The ongoing segregation of persons with disabilities employed through Australian Disability Enterprises and the fact that such persons receive a sub-minimum wage".[23]

47. This concern was expressed in connection with Australia's obligations under the work and employment article of the Convention, Article 27. The Committee further recommended that Australia:

> "Undertake a comprehensive review of Australian Disability Enterprises to ensure that they adhere to article 27 of the Convention and provide services to enable persons with disabilities to transition from sheltered employment into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value".[24]

23 CRPD/C/AUS/CO/2-3 at [49(b)].

24 Ibid at [50].

48. The AEDLC submits that, having regard to the views expressed by the Committee, the proposal for inclusion of Grades A and B in the Award will be inconsistent with Australia's obligations under Article 27 of the Convention.

The timetable

49. The Commission envisages a trial of 3 months for the modifications that it proposes to make to the Award for ADE employees with disability once it has determined the final wages structure for the trial. The Bench states at [379] of the Reasons that the results should be made public and a further opportunity should be given to make further submissions. This is appropriate. The AEDLC has assumed that the Full Bench does not intend to limit what it takes into account in the final determination to the overall labour costs referred to in [379] of the Reasons.

50. The AEDLC contends that the Bench should invite submissions about the work that will be the subject of the trial. These examples should, to the extent possible, typify the services performed by ADEs in the sector. Further, the AEDLC considers that the impact on employee wages of those selected for the trial should be published as well as the nature of the work, how it is arranged by the employer and the nature of the employee's disability.

Conclusion

51. The AEDLC contends that as currently described in the Reasons the Bench's proposal for a new Grade A and B in Schedule B and the consequential adjustments to Grades 1 to 7 do not *ensure* a fair and relevant safety net minimum rate as required by section 134(1) of the FW Act. However, consistent with the evolution of award regulation of this form of employment the AEDLC welcomes the development of a single, award based, wage determination method prescribed by the Award. The AED intends to participate in the process the Commission has established pursuant to the timetable referred to above.

17 December 2019

M. Harding

ANNEXURE KW-2

VICE PRESIDENT HATCHER: I understand that submission as a matter of construction of the existing award but it may point to underlying problems with the way these classifications are defined. I mean, if you look at grade 2, beyond the fact that it says it's more than grade 1, it's difficult to actually find a description that actually encaptures who is meant to be covered by grate 2.

PN4980

MR HARDING: Yes, well I read that as being the default classification, your Honour, which is that anyone who is not classified by the other levels falls into grade 2 if they're performing work within 30.2.2.

PN4981

COMMISSIONER CAMBRIDGE: But if we use that description to have had a broader application in, say, some outside industry context, and we've seen clear evidence where you can't translate that into what has effectively been a deconstructed series of tasks which have no relevance to what would be in an outside industry context. It is an invalid comparison, isn't it? So the benchmark is wrong.

PN4982

MR HARDING: No, I don't accept that, Commissioner. I think the evidence shows that in relation to the comparison there is a direct comparison to be made between those with intellectual disabilities who work in open employment and who perform basic tasks in open employment in circumstances in which the job is made up for them and customised to deal with their particular limitations arising from their disabilities. Certainly the submission of the ADE's is that the ADE world is so different from the rest of the world that it should be treated as an exception. But in my submission that's not what the evidence shows at all. When you examine the evidence what it tells us is that there are, true, a deconstruction to the extent that employees might be expected to only perform one task, or they might be expected or required to perform more than one task. But the tasks are all described in the same terms or similar terms to those described in the award. And there are illustrations in the evidence I can take you to, to make that point good.

PN4983

One example that springs to mind is that - you might have heard my cross-examination of Ms Fitze yesterday in which I asked her to - questions about the types of tasks that employees in her organisation would perform. And when I did, I read from the list of tasks under the heading, "Specialist packing", one by one, and she agreed with all of them. They were tasks that she could expect should we require an employee to perform them. That employee might perform one, or that employee might perform more than one. I also asked her some questions about the tasks that appear under the "Gardening" subheading. Basic labouring was a function that she identified as a task that she identified as a task that would be performed by an employee.

PN4984

Now in those circumstances I don't accept that there is that much of a distinction. True it is the work is basic. But grade 2 is basic. True it is that sometimes on the evidence an employee might only perform one task. But there are examples of that occurring outside ADE's. But in terms of open employment or - you know, one can spring - if you go an airport and there's a man who holds a sign saying, "stop", in relation to traffic as it comes up the road, that's one single function, one task that that employee is required to perform. It doesn't matter whether it's performed in an ADE environment or a non ADE environment in order to attract the labelled work, and then to attract the operation of schedule B.

PN4985

COMMISSIONER CAMBRIDGE: If you use that analysis though.

PN4986

MR HARDING: Yes.

PN4987

COMMISSIONER CAMBRIDGE: You might see a subdivision again of the functions of the stop/slow technician. That is, that in a deconstructed arrangement a particular individual would be given a task of just holding the stop sign and not making a decision as to when it should be turned to be "slow."

wants them to perform. And when we're looking at it in terms of a productivity assessment, the productivity assessment then would only assess the sweeping. And if the supervisor came in and lent a hand, that deducts from the productivity output. That's the way the evidence goes. And in those situations there is a proper measure of the productivity because we we're only focussing on the output of the input, namely the labour that the worker injects into the production process.

PN5030

VICE PRESIDENT HATCHER: Right.

PN5031

MR HARDING: I've sort of skipped ahead of what I was intending to say on that subject but in my submission there is a direct comparison to be made between the position of workers in open employment who have an intellectual disability, and those in ADE employment. I accept there is a difference in scale in the sense that we've got in ADE employment, a larger part of the workforce comprising people with disabilities, as opposed to, say, in non ADE employment. But the evidence of Mr McFarlane, the evidence of Mr Cain, which you ought to accept, and in fact the evidence of Mr Smith was that in open employment jobs are customised in order to meet the particular requirements of the individual.

PN5032

The additional documents that I handed up today illustrate that very well and I encourage the Full Bench to read those articles. I accept that they're in the American context but at the end of the day we're talking about how we deal with work and the evidence of Mr McFarlane was particularly instructive on this question. His evidence was that often these jobs don't exist and there has to be someone who goes out to persuade the employer that there is work that the employee can do, and the work is then identified. Often that work is work that is being performed by other employees who could be doing other things. And specific tasks are carved out of a job role that might be performed by other employees. And those tasks are then performed by the intellectually disabled worker.

PN5033

It is in this Commission the SWS has been accepted in all modern awards as the standard by which to determine pro rata wages for that cohort of disabled worker. There has been considerable effort that has gone into modifying the SWS to deal with the particular circumstances of ADE's. If you have a worker in open employment who's performing a sweeping task, who's performing the task of emptying the bins, who's performing the task of cleaning and tidying, in a work value sense there is no difference between that and a person who's performing similar tasks in an ADE setting, no difference whatsoever in a work value sense. In which case, if that proposition is accepted by the Full Bench there is no justification for the Full Bench to accept a different standard for the performance of the same work value in ADE settings.

PN5034

VICE PRESIDENT HATCHER: The problem with that is that we're not reviewing the operation of the SWS in other awards.

PN5035

MR HARDING: No, in which case the Full Bench has to accept that the standard that applies in modern awards is what the Commission has prescribed, and that's the SWS. We can't look behind that fact. So if you're pursuing a relativities arrangement, if we're trying to work out the relative work value as between awards, then the starting point has to be that the relative work value for open employment is established by the SWS. That's the benchmark. And if that's the case then there can't be the application of a different standard for ADE's, at least in relation to work value, unless there are specific circumstances that throw up different work value considerations for that cohort of workers. And in my submission there isn't. My friends will probably say there are several, one of which the fact that ADE's operate differently from commercial enterprises. Perhaps they might also say that there's the addition of support available in ADE's that may not be to the same extent as in open employment. Well, I drew attention to the fact that in open employment, I think it was Annexure (i) of Mr Cain's second statement, in fact there is support provided to intellectually disabled workers and other disabled workers in open employment.

PN5036

DEPUTY PRESIDENT BOOTH: Yes - - -

PN5037

MR HARDING: You have a question, your Honour - - -

PN5038

DEPUTY PRESIDENT BOOTH: Well, it's an observation and these things are obviously random in some senses and trying out ideas on you, if you'll permit that sort of exchange. But it seems like there's a continuum and I struggle to see how the classification descriptor in a single classification in a modern award, say the Clerical Award, for example, and I don't have it in front of me but let's take a theoretical, hypothetical, level 2 in a clerical modern - in the (indistinct) award, and then level 2 in the SESA - - -

PN5039

MR HARDING: Yes.

PN5040

DEPUTY PRESIDENT BOOTH: And underneath the clerical modern award there might be a person working in an office environment in level 2, doing the full range of tasks which might be typical of an administrative assistant, that might involve some very basic tasks, as well as some slightly more complex tasks. So the person might be operating at reception, answering the telephone and directing calls, they might be then also going to the post office to collect the mail and going back to the office and scanning the mail, they might be cleaning the boardrooms and doing some filing.

PN5041

And then into that workplace comes a person with a disability underneath the supported wage system and they have their job customised, and out of that overall office assistant job we take out the job of reception and answering the phone and we perhaps take out the job of filing because both of those jobs require some judgement or some numerical skills, in the case of filing or recognising in alphabetical order, or in terms of answering the phone, making a judgement about the nature of the call and where to direct it. And we leave the tasks of going to the post office and scanning the mail and cleaning the boardroom. So we still have that person in level 2 but we apply the supported wage system to the level of performance that is considered to be a hundred per cent of performance of those tasks and conclude a percentage of the wage. And then moving towards down and continuing to more elementary or more deconstructed roles in an ADE, a person might only be scanning, just scanning.

PN5042

MR HARDING: Yes.

PN5043

DEPUTY PRESIDENT BOOTH: And they might be scanning work that's given to them to scan, so they're not making a judgement about who to scan it to or which document to pick up now, that there might be a system by which there's no choice to be made. And that would also, under the SESA Award, sit in level 2, and yet there's a vast difference between the customised job in open employment and the scanning job in the ADE, and it just seems to me that somewhere along the way we've tried to adapt an award system that was designed for people who were able to work, earn the full award wage, for those who couldn't, and we've done a reasonably good job at doing that in open employment but in an ADE setting we've tried to sort of fit the ADE into that framework and it's, to pick up a point of someone who said this yesterday, fitting a square peg into a round hole.

PN5044

MR HARDING: Your Honour, I can only go on what the evidence tells us about the extent of the customisation and in open employment and I would caution against assumptions being made about the extent of the customisation. In other words, one shouldn't assume the customisation stops in open employment at a particular point. Using your example of the scanner it might be the case in an open employment setting that there is some judgment utilised by the employee with the disability in relation to how to use the scanner. But there's no evidence before the Commission that says that necessarily has to be so, or always is so. It's equally possible that a person is directed to perform a particular task

in open employment. What we know is that the level of customisation on the evidence of Mr McFarlane and Mr Cain can be considerable.

PN5045

The Commission can only, in my submission – or that I should also say the Commission has inspected ADE's but hasn't inspected any open employment. So you've had the benefit of seeing ADE employment in action but you haven't had the benefit of seeing open employment in action. So I urge caution in terms of making assumptions that necessarily open employment ought to be assumed to be of a higher standard of work or require more of the worker necessarily than might be open in ADE employment. What we are left with at the end of the day is an award system that says, if you're doing work in open employment, leaving aside the SESA for a moment, and you're a person with a disability then the SWS can be applied to assess the output that you perform in the work the employer gives you, corresponding with the grade. That's as far as it goes. And I'll readily accept there could be a range of outcomes depending on what that work is, and I think there was some evidence and Mr Cain that – particularly, Mr McFarlane, there's a negotiation that does occur between the assessor and the employer about identifying the duties that are being assessed.

PN5046

In the end the award system does not reach down so far to actually precisely identify the particular tasks that might be performed in every employment situation and then say, that's the benchmark, compare it on that basis and then fix a rate under the SWS. It leaves that ultimately to the employer and to the assessor on the basis of what's actually done. So all the Commission can do in my submission on the evidence is to accept that as a proposition there is customisation that goes on in open employment where tasks are carved out and those tasks could be equivalent to, and it's my submission are in many cases equivalent to, the tasks that an ADE might require of an employee. If that standard is good for open employment there's just simply no justification for the standard to be different in relation to ADE's, because then you're effecting – (a), the relativity is not the same, and (b), you run the risk of imposing an inferior wage on ADE employees than would be acceptable in open employment without a proper evidentiary basis to do so.

PN5047

VICE PRESIDENT HATCHER: So just, I just want to test some basic work value propositions. I mean, if you had a production process which was, from go to whoa, done by seven people performing a discrete basic task - - -

PN5048

MR HARDING: Yes.

PN5049

VICE PRESIDENT HATCHER: And the employer says, well, I'm not satisfied with this, I'm going to get rid of all of them except one. I'm going to get the one person to work flexibly and do all the basic tasks themselves, and they implement that and they succeed, any union representing that person would say there's been a massive increase in work value, wouldn't they?

PN5050

MR HARDING: On the basis that the quantity of the work has increased?

PN5051

VICE PRESIDENT HATCHER: Well, you've gone person who because of their multitasking and the fact that they're performing a wider range of tasks, is now doing the work that was previously done by seven people.

PN5052

MR HARDING: I suppose that's a change in the circumstance. But the nature of the work might not be different.

PN5053

VICE PRESIDENT HATCHER: That's the point. It's not the fact that a particular task had become more complex, it's the fact that one person can do all of them by working flexibly, perhaps with the

Of course, that concept has been rejected by this Commission since 1969 in the equal pay case, and was rejected recently in the equal remuneration case. It's seductive, and it's seductive because it does invite the Commission to speculate about what represents a real job and what doesn't represent a real job. It invites comparisons from other experiences that are not represented in the evidence, based on experiences that individuals might have had themselves and then looking at how it is that it works in another enterprise where they haven't had experience. And it also invites invalid comparisons between different enterprises because the value to one employer might be substantially different to the value to a different employer.

PN5063

So in the production example I gave about filling, there might be a perfectly valid reason why an employer in open employment decides it wants one worker to fill and another worker to pack, and that's the way it wishes its production process to be organised. The Commission doesn't second guess that and doesn't say, well, you know, it should be done differently, or it doesn't say, that's not a real job. It is a real job. They have contracted with that employee to perform that work and the work has been performed. The output, the fact of performance in purely contractual terms, the fact of performance invokes the obligation to pay. Under this award the fact of performance at the level the employer chooses to have that work performed invokes the obligation to pay under the award.

PN5064

VICE PRESIDENT HATCHER: Well, if you have a non-disabled employee the award doesn't contemplate any account being taken of their productivity output, does it? That is, you have a series of award prescribed rates for a series of tasks, as I say, and in a given enterprise for a non-disabled person if they can't meet reasonable expectations they face dismissal. They don't have access to a lower rate of pay.

PN5065

MR HARDING: No, that's right. That is the - - -

PN5066

VICE PRESIDENT HATCHER: The system is structured to treat disabled differently from non-disabled people.

PN5067

MR HARDING: Yes.

PN5068

VICE PRESIDENT HATCHER: That's just a given in this system we've got here.

PN5069

MR HARDING: Yes, it is. And that's accepted. Clearly the fact of disability implies that there is a difference that the Act which says legitimately can be dealt with by an inferior rate of pay. I accept that. The real measure in my submission is this. Accepting the fact that the Act accepts that the discrimination can occur in terms of rates of pay, the question really then becomes how best to apply the award in the least discriminatory fashion. There is a statement by Katzmann J in the Nojin case that in my view encapsulates that and it is at 268 of her Honour's judgment at her Honour's reasons. She says:

PN5070

The BSWAT may be fair in its application to some disabled employees. Powerful evidence was given in these cases however it was unfairly skewed against the intellectually disabled. If competencies must be measured independently of productivity consistently with the objects of the Act that should be done in a way as to eliminate as far as possible its inequitable aspects.

PN5071

So the search here is for the least discriminatory method, the least discriminatory method of applying rates of pay to a disabled workforce where the effect of their disability is that their productivity is affected adversely. That shouldn't be left in the hands of the employer as clause 14.4 currently does. That clause essentially says, you, the employer, or I'll back a step - 14.4 purports to say, here's a

discriminatory regime for providing for rates of pay for disabled workers, but we'll allow you as an employer to choose from any one of these different ways to pay rates of pay on a discriminatory basis, all of which produce different wage outcomes as your Honour observed, quite significant differences. We have got multiple minimum rates based on different standards of application. Now where's the standard in that? How can the Commission ensure, and I use that word specifically because that word appears in section 134(1) in relation to the minimum wage objective.

PN5072

This Commission must ensure there is a fair and reasonable standard, a fair and reasonable safety net. How can the Commission ensure there is a fair and reasonable safety net if there are so many different ways of assessing discriminatory wages for disabled workers? There must be a principle that underlies the imposition of discriminatory wages on disabled workers. In my submission that principle is embodied in what Katzmann J said which is, we've got to find a way of producing the least inequity in delivering the benefit that the modern award confers on workers. And in relation to wages in my submission it's plain the safety net is intended to benefit workers. That's its real object. It's not saying to employers, look, you know, go willy-nilly out there and fix rates of pay as you see fit. The Act says the Commission can set a standard in relation to minimum rates that represents a fair and reasonable standard which all employers have to pay regardless of whether or not it's viable for them to do so. There are considerations relevant to 134 which I'll get to, but at a basic proposition that's what section 134 says.

PN5073

So if we are looking at a beneficial standard, intended to benefit workers it necessarily follows in my submission that the Commission must apply one that has the least discriminatory impact. That's the first proposition. The second proposition that follows from that is where there is in the award system already, a discriminatory standard applicable to disabled workers in a different context (indistinct), open employment. It should not choose an inferior standard to that unless there are specific reasons that justify it consistent with the principle that I have articulated. And in my submission the evidence simply does not allow those distinctions to be made in respect of open employment versus - - -

PN5074

VICE PRESIDENT HATCHER: In that case why do we have the supported employment award, at all? I mean, the fact is an award was created presumably to be tailored for the needs of a specific sector but on your approach we could just abolish it and people can just apply the ordinary industry award and ISWS, and that would be the end of it.

PN5075

MR HARDING: Well, the supported employment award applies to non-disabled workers, too. It applies to workers in supported employment whether they're disabled or non-disabled - - -

PN5076

VICE PRESIDENT HATCHER: Yes.

PN5077

MR HARDING: 14.4 as a carve-out for disabled workers. That's all it does. So presumably the Commission thought that it was sensible to have an award that covered supported employment. In my submission the mere fact that there is one doesn't necessarily support the proposition that supported employment is different enough to justify it but in any event if those differences existed they're only different at the disabled worker level, yet the award covers non-disabled workers. Whilst my instructor is trying to find the decision that I want to refer to – I'm just going to hand up a document – in relation to the appropriateness of the SWS, it's not just our view. It's surprising that the DSS hasn't brought this to the full Bench's attention. But nonetheless it hasn't, so we will. The committee on the rights of persons with disabilities, considering Australia's situation as a signatory to the treaty on the convention has dealt with a range of issues it's asking Australia to consider. And at paragraph 50, and I might add this opinion was issued in 2013 – at paragraph 50 the committee recommends that the state party do the three things that are set out in (a), (b) and (c), and I draw attention to (b).

PN5078

PN5114

MR HARDING: Yes.

SHORT ADJOURNMENT **[11.35 PM]**

RESUMED **[11.58 AM]**

PN5115

VICE PRESIDENT HATCHER: Mr Harding?

PN5116

MR HARDING: Thank you, your Honour. I want to say four more things. I realise I've consumed a fair bit of the morning already. In relation to the point about the comparability between open employment and ADE employment I do wish to draw attention to Annexure A of the second statement of Mr Cain, which is exhibit 16, which is a piece of research done by Evolution Research, some time ago I accept. But there's no evidence that undermines the veracity of that now, and I rely on page 3 of that document which first talks about the observations between the difference between what might be required as in terms of a job description and what was actually performed both in open employment and business services.

PN5117

And the observation from the research is that in open employment the average number of competencies performed was 2.8, and that's on page 4, and in business services the average competencies performed were 2.38, which is on page 6, and the point there is that when we're talking about the kind of tasks that might be performed in open employment and ADE employment this research suggests there isn't that much difference between those two scenarios. Without wishing to go to the particular evidence I just draw attention to a number of things arising from the comparison I have made between the evidence about what tasks are performed and how they then line up with grade 2.

PN5118

Can I draw attention to paragraph 15 of Mr Burgess' statement, exhibit 22, and also paragraph 20 of his statement and also paragraph 34. There is a list of tasks that he says are performed in his ADE and I invite the Commission to compare those with grade 2. And likewise the statement of Mr Burgess from Centacare at paragraph 6 and the evidence of Mr Dickens, exhibit 31, where he gives evidence about the function of inserting pepper and salt into packets that are then used for the airline industry. Again I invite the Commission to compare that with the list of packing duties set out in the award.

PN5119

I do wish to turn to the issue of viability and then what I propose to do is to talk briefly about some of the other tools for which there has been some evidence collected and where cross-examination occurred, and to conclude on that basis. There is an assertion in the evidence from ADE employers that the adoption of the SWS will lead to terrible consequences resulting in the closure of ADEs holus bolus. There is, in my submission, no concrete evidence that the Commission can rely on that would support that proposition, and the Commission has the benefit of at least a statement from the secretary of the DSS speaking for the Commonwealth, which is exhibit 8, that states that:

PN5120

The Commonwealth

PN5121

That is the government:

PN5122

will ensure future policy settings allow for the ongoing viability of ADEs.

PN5123

Now I think the Commission can take that at face value.

PN5124

PN527

The reliance on Nojin from the point of view of the AED, my client, is the approach that the court took to analysing the issues that arose in respect of BSWAT, and those are apparent in many places in Buchanan J's reasons but I draw particular attention to paragraph 146 of his Honour's reasons. There are other examples but this one illustrates the point, where his Honour says:

PN528

There is no doubt that BSWAT has support at many levels. In my view, that is not sufficient

PN529

VICE PRESIDENT HATCHER: What paragraph?

PN530

MR HARDING: 146, your Honour. I will skip through it. His Honour is talking there about training and so forth, and also the direct examination of actual work. And in relation to work value he is comparing that to open employment where he says:

PN531

Such workers are not themselves assessed that way. That is because it would be irrelevant to their real work value to do so. It was equally irrelevant to the real work value of Mr Nojin and Mr Prior. They were subjected to a process which produced an assessment score that did not fairly relate to what they actually did. It provided a comparison with a theoretical idea, which had been adjusted so as to be not too easily attained, rather than a straightforward comparison with the efforts and output of someone working at the Grade 1 level - i.e. a comparison which related to what the Grade 1 rate of pay was fixed for. Such a comparison occurs for disabled people in open employment.

PN532

VICE PRESIDENT HATCHER: That is - competencies were not relevant to the actual award criteria for grade 1 rate of pay.

PN533

MR HARDING: Yes, but your Honour, he is focusing on the output at the end of the day of the worker based on what they actually did, and that's the point we're seeking to emphasise. The work that they actually did, his Honour is saying, was at the grade 1 rate, and for that they were discounted by reference to irrelevant competencies. Putting it in a Greenacres circumstance, if I can use that example, again returning to the forklift driver, the actual work that was done by the forklift driver is driving the forklift, yet there was a discount applied by reference to underpinning work skills.

PN534

VICE PRESIDENT HATCHER: Going back to your Nursery Award example, grade 1B, it would not be irrelevant to take into account to perform that range of duties if required to do so. The reason why a disabled employee may be doing only one task all the time is because they're incapable of doing any of the others and that's why they're not assigned that work. Whereas if you had an employee with a lesser degree of disability or a non-disabled employee, they could be - and it may not happen all the time, it may be five or ten (indistinct) time - be required to do any of these other things.

PN535

MR HARDING: That's true, your Honour. That is true and perhaps I haven't made myself clear because the premise of the AED case is really a comparison between open employment for a person with an intellectual disability and ADE employment. In an open employment setting, as I think I've just mentioned, if a person with intellectual disability employed under the Nursery Award could only do one of these tasks, they would get the rate of pay prescribed by this award subject to a productivity assessment.

PN536

It's not right - and I suppose this comes back to the proposition we advanced right at the outset which is that there is a direct comparison between open employment on the one hand and ADE employment on another in relation to work. We accept there are some differences. The most significant of those is scale. But in terms of the work we don't accept that there's a difference, and in fact in transcript on

Friday of last week your Honour asked Mr Cain a question about open employment. It starts at PN2507 and concludes at PN2509, where your Honour the presiding member said:

PN537

One example I gave: SWS will just take the discreet task the disabled person was doing, measure it against some sort of benchmark and then assign a percentage regardless of the fact that the job has been carved out for the specific purpose of having that person being able to do it?

PN538

Mr Cain's answer was yes. That's how the SWS works.

PN539

The reports that Mr Cain had put into evidence, exhibit 179(sic), my learned friend Mr Ward said this is all about the negotiating model. I'm not sure what he refers to. The article from Mr Luking(?), albeit an American article, deals precisely with a situation in which the job didn't exist and had to be made for the person with the intellectual disability, and the example that is given in that article, I draw your attention to that at page 268 and 269. I don't intend to go through it unless you want me to but there's the example.

PN540

Mr MacFarlane's evidence was - and there is some criticism being made of him for this, but his evidence is, we had to go out and find the work, and then when we've gone out and found it we've explained to employers how this person could perform the tasks that they want them to perform, and then the job is carved out is a matter that conforms to the abilities of the individual worker. That's the evidence of what occurs in ADE employment. We carve out a job, we make it suitable for the abilities of the individual worker. I think Mr MacFarlane said the jobs aren't advertised, we have to go and get them, and when we've gone and got them we make them work for the individual. In that situation you're dealing with a direct comparability between open employment for an intellectually disabled person and ADE employment for an intellectually disabled person. It's an apples and apples comparison.

PN541

Scale we accept might be an issue but that refers to the operational circumstances of ADEs, not the work. There was some question about what proportion of the persons who are assessed for SWSs had intellectual disabilities, and there have been various figures bounded around, 4 per cent, 11 per cent. Mr Cain's evidence is it's 68 per cent. It's 68 per cent of those who are using SWS assessments are those with intellectual disabilities, and the evidence of that is on paragraph 130 of his witness statement, the second witness statement which is exhibit 16, and annexure A of that statement on page 27, and then he references an annexure K which is a PowerPoint presentation given by the DSS.

PN542

That proposition is put to him in evidence and he confirms that position at PN2447. It's actually put to him:

PN543

But does it not follow from that that the majority of SWS assessments are in relation to non-intellectually disabled people?

PN544

No, he says it's the opposite.

PN545

Mr Ward said the SWS works really well for people with physical disabilities. I don't know how he knows that but leaving that aside, the evidence actually is that SWS assessments occur mostly for people with intellectual disabilities, not physical disabilities.

PN546

Attention has been drawn to annexure A.

PN547

VICE PRESIDENT HATCHER: Before you go on, obviously some of those - 16 per cent will be ADEs and I guess the larger bulk on it will be in open employment, is that right?

PN548

MR HARDING: Yes.

PN549

VICE PRESIDENT HATCHER: So do we have a figure of the proportion of those in open employment who did not have an intellectual disability but would be assessed under SWS?

PN550

DEPUTY PRESIDENT BOOTH: It would have to be the balance of (indistinct).

PN551

VICE PRESIDENT HATCHER: But some of those are ADE people.

PN552

MR HARDING: I don't - I can't tell you. He goes on in - maybe this is it - PN2547 and gives a figure of 7.4 per cent of the population - no, he's referring there to those in open employment with an intellectual disability, not those who use the SWS. So I can't tell you, your Honour. That's a matter of great significance, in my submission, because it's another comparability point as between ADE employment and open employment.

PN553

Attention was drawn to annexure A, to exhibit 33, which is the discussion paper "Ensuring a strong future for supported employment" and the figure of 4 per cent having an intellectual disability. That of course is a figure pertaining to DES participants, and Mr Cain was cross-examined by Mr Christodoulou about this report and he points out there are two subprograms which are referred to on page 9 of that report.

PN554

The first subprogram has people, employment support services for job seekers with permanent disability and an assessed need for regular ongoing support in the workplace in open employment, and the second category is those who don't need that, and his evidence in cross-examination is that it's the first category where you'll find the 68 per cent of those who are having SWS assessments. The four per cent is a combination of the two subprograms. So it's misleading to say that only four per cent of people with intellectual disabilities are using the SWS on the evidence.

PN555

There's been some criticism of Mr Cain and Mr MacFarlane. All I can say in relation to Mr Cain is that despite the criticisms that have been made against him he is clearly someone who knows his stuff. He gave very forthright answers to complex questions. The information he gave was given in a way that was forthright and studied and persuasive. Insofar as there's some suggestion that he has an axe to grind the Commission should ignore. He's entitled to a viewpoint. That viewpoint should not be conflated with the accuracy of the evidence that he gave. He was accepted as an expert in Nojin and relied on by the Full Court.

PN556

Mr MacFarlane is the only person who's given evidence in this Commission with the level of experience that he has as an SWS assessor. He expressed a philosophical view when cross-examined about the position that he put to the Human Rights Commission. Who cares what his philosophical view is. What he did in his evidence was to give persuasive descriptions using actual examples of how open employment worked, how it is jobs were carved out, how it was that they were obtained, and how it is then the SWS assessments were undertaken.

PN557

There has been a bit of debate about exactly what goes on in this negotiation process and I think what's occurred is there's been a slippage following the evidence that he gave about the extent of those

ANNEXURE KW-3

FAIR WORK COMMISSION
AT MELBOURNE

AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

FURTHER SUBMISSION FROM AED LEGAL CENTRE, THE HEALTH SERVICES UNION, UNITED VOICE, INCLUSION AUSTRALIA, PEOPLE WITH DISABILITY AUSTRALIA, DISABILITY ADVOCACY NETWORK

1. On 29 May 2018, the Full Bench listed its review of the *Supported Employment Services Award* 2010 (the **SESA**) for mention following publication of a statement dated 16 April 2018 [2018] FWCFB 2196 (the **Statement**).

2. VP Hatcher identified the purpose of the mention as:

> "All right, the purpose of today's short hearing is to hear the response of interested parties to the provisional views expressed by us in our statement issued on 16 April 2018. It appears to us that in the light of that statement, there are two ways forward."

3. The ways forward were identified as the scheduling of conferences before DP Booth or the scheduling of further hearings for evidence and submissions. Having canvassed the views of those appearing, the Full Bench indicated that they would consider their position. At the time of writing, that position has not been disclosed by the Commission.

4. AED Legal Centre (AED), the Health Services Union (HSU), United Voice (UV), Inclusion Australia (IA), People with Disability Australia (PWD) and the Disability Advocacy Network (DANA) wish to make a further submission about the Statement (the **Further Submission Parties**).

5. The Further Submission Parties note that on 9 July 2018 Mr Zevari of Australian Business Lawyers wrote to the Commission and informed it that various organisations had conducted a number of meetings and had formed a working group in order to assist in the development of a new wage assessment mechanism. Mr Zevari concluded by

stating that his clients preference is for further conciliation conferences. The Further Submission Parties learned of the working group through Mr Zevari's email.

6. The position of the Further Submission Parties at the time of the mention was, and still is, that further conciliation at this time would be inappropriate. This is so for two reasons:

   (a) We have concerns about aspects of the preliminary conclusions expressed in [15] of the Statement and wish to be heard further on these matters.

   (b) The Bench's preliminary conclusions in favour of a revised classification structure for Schedule B of the SESA, especially for Grade 2 and 3, and for a proposed hybrid model of wage assessment are expressed at a very high level. Undoubtedly, however, they foreshadow a very substantial, and potentially controversial, overhaul of wage setting arrangements for those covered by the SESA. Yet the parameters of this overhaul remain unclear,[1] at least to the Further Submission Parties.

7. We say more about these matters below. However, before doing so, we note that Paul McBride, Group Manager, Disability, Employment and Carers of the Department of Social Security wrote to chambers on 4 July 2018. He states in that letter that the Minister for Social Services, Dan Tehan, has announced that the Australian Government will provide up to $0.95 million to support any agreed trial and analysis activities in the Commission to inform a new wage assessment approach under the SESA. We note that the funds committed by the Commonwealth are for "agreed" trial and analysis activities in relation to a "new wage assessment approach" that is, as we have said, unclear. We identify some further concerns with the approach below.

Preliminary conclusions of fact

8. We observe at the outset that the Full Bench has expressed the matters referred to in [15] of the Statement as "preliminary conclusions". A purpose of this submission is to give the Full Bench an insight into our view of these preliminary conclusions to assist

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1 We note the principles stated in [15(7)] of the Statement, namely that the new wage assessment mechanism should meet the objectives of fairness, equality, objectivity, independence, sustainability and be non-discriminatory. These objectives have the potential, we observe, to cut in more than one way in the formulation of a wage determination system for ADE employees.

the Bench in its consideration of the next steps referred to by VP Hatcher during the mention. Subject to what the Bench decides, some or all of the Further Submission Parties may wish to elaborate further on the matters contained herein.

9. The subject matter of the preliminary conclusions of fact contained in [15(1), (3)] of the Statement has been the subject of evidence and submissions, which we will not repeat. We do apprehend however that these preliminary findings have significance to the direction foreshadowed by the Statement. Accordingly, the Further Submission Parties submit that the Commission should proceed to make final findings that confirm or otherwise the aforementioned preliminary factual conclusions based on its assessment of all the evidence and the Bench's consideration of the submissions.

10. With this in mind, there are two preliminary factual conclusions referred to in the Statement that we consider to be of particular significance and about which we wish to advance the following two submissions:

    (a) Insofar as the last sentence of [15(1)] of the Statement may be read as suggesting that ADE's are the only organisations that are capable of or do make the adjustments for employees with a disability (as defined by the SESA), we contend otherwise. The evidence supports findings that open employment employers do so too for employees with the same or similar disabilities and that a majority of those who use open employment have significant intellectual disabilities and, like ADE employees, are supported in their employment by the NDIS and by other Commonwealth funding.

    (b) Respectfully, the preliminary conclusions set out in the dot points in [15(3)] of the Statement do not, we submit, reflect the evidence available to the Commission about the operation of the SWS. On this basis, we would urge the Commission to give careful consideration to whether these conclusions ought to be confirmed. We make the same submission with respect to the Bench's preliminary conclusion that the SWS does not take into account the proper range of work value considerations used to assess award wages. This, with respect, reflects a misapprehension of the purpose and operation of the SWS.

        The SWS is a system of individual employee assessment that compares the output (in terms of rate and quality) of an employee performing required work

with the output of an employee on the full award wage of average performance doing similar work. The means used to ascertain the performance benchmark was the subject of evidence and submissions.[2] The SWS however takes the Award's valuation of required work as it finds it. That valuation, expressed as a sum of money, is the full minimum rate of pay fixed for the particular kinds of work graded and described in Schedule B of the SESA. This is the source of the work value, not the SWS. It is not part of the function of an SWS assessment to make work value determinations.

11. We next turn to some other matters arising from the preliminary conclusions referred to in [15] of the Statement.

The intersection between the SWS in ADEs and in open employment

12. The Full Bench states expressly that its preliminary conclusions concerning the SWS are not intended to affect the operation of the SWS in open employment. With respect, there is a considerable risk that they do.

13. In the dot points contained in [15(3)] of the Statement, the Bench makes certain, general, criticisms of the SWS that are not obviously capable of being quarantined to ADE employment. These criticisms have the potential to undermine the SWS as *the* modern award system for determining the proportion of the award rate to be paid by an employer to its employees with a disability for work covered by an award. In these circumstances and in the absence of further evidence that addresses the matters to which the Bench has referred in [15(3)] of the Statement, including in an open employment setting, the Commission should, we submit, exercise caution in confirming these criticisms. This is a matter of considerable significance given the extensive use made of the SWS in awards made by the Commission.

14. Another reason for exercising caution is the potential for the Commission to introduce a discriminatory system of wage setting into the award safety net that disadvantages ADE employees compared with similar employees employed in open employment. The

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2 The Bench expresses, we apprehend, a concern about the determination of that benchmark in the last dot point of [15(3)] of the Statement.

Commission has evidence before it that describes the characteristics of users of open employment and establishes the similarity between them and ADE employees.

The Schedule B classification proposal

15. The Full Bench has singled out as inadequate the Schedule B classifications on the basis stated in [15(5)] of the Statement. We contend that the Commission ought to be cautious in adopting this preliminary conclusion. No party advanced a case before the Commission that Grades 1-3 of Schedule B were "inadequate and unlikely to meet the modern award objective". No evidence was called that addressed this issue.

16. The Commission had before it two proposals. The AED proposed the deletion of all the wage tools in cl. 14.4 of the SESA, save for the SWS. Its proposal succeeded in part. The second proposal from ABI/NSWBC was rejected in its entirety. Common to both proposals was their reliance on the existing grades, rates and classification descriptions contained in Schedule B of the SESA.

17. As a matter of procedural fairness, the Further Submission Parties contend that it is necessary for the parties to be placed in a position where they can make submissions and, if need be, call evidence about a "redesigned classification structure for Grades 1-3" based on a concrete proposal for that design. We submit that it is not otherwise open for the Commission to conclude that Grades 1-3 of Schedule B are "inadequate and unlikely to meet the modern award objective". The Commission should accordingly not reach any final conclusions at this time to that effect which changes the valuation expressed in the existing Schedule B classifications in a manner that is adverse to employees, or which has that effect.

The proposed new model of wage assessment

18. Finally, we draw attention to three matters arising from the Commission's proposed hybrid model of wage assessment.

19. The hybrid model would embrace a valuation range at certain percentage points of the full SESA rate fixed for a particular kind of work based on the 'size' of an award covered job that an employer wishes to be performed. At the high level the model is described in the Statement, we have the following three concerns.

20. On its face, "job size" is a dynamic concept; the configuration of a "job" is in the hands of the employer, not the Commission. We understand the Commission's intention is to devise criteria for the sizing of jobs. These criteria, depending of course on what they are, may constrain an employer's discretion but would not, we apprehend, immunise against variations in job size whether by a single employer from time to time, between ADE employers, or indeed from one employee to another. Unfairness may result from variations to the size of a job through the addition or subtraction of tasks between assessments or due to differing assessments conducted at different times between different employers with different work needs. Further, since it appears that "job size" must be assessed, it is not apparent to us why this system is any more objective than an SWS assessment. Both systems would, it appears, require assessment of the tasks an employer requires at the point in time the assessment is undertaken. However, the result for the employee of a job sizing assessment is, as we apprehend it, that he or she will be allocated to a proportion of the full modern award rate, for award covered work, within a fixed range.

21. Second, the job sizing assessment is to have a "particular focus on the range of tasks required to be performed" as the foundation for the work value assessment the hybrid model contemplates. However, the form of work value assessment contemplated by s. 156(4) of the *Fair Work Act* 2009 is one that justifies the amount to be paid for employees doing a particular kind of work, rather than the elemental tasks that might make up a "job". Further, we anticipate difficulty in designating required work as merely a task that forms part of a job (which diminishes the value of the work) as opposed to a job in itself. What constitutes a full job may be difficult to discern and may mean different things to different employers. Tying value, and hence remuneration, to the size of a job also has the potential to be subject to manipulation, and will create a difference that has not existed before between open employment employees, including those performing customised work, and ADE employees.

22. The usual focus of work value assessment is on characterising and categorising the work that will be covered by an award and then assessing the value of each category of that work. The job sizing model appears to anticipate something more particular than that, with the result that the actual minimum rate payable to ADE employees will likely be determined on a different, and less beneficial, basis to non-ADE employees.

23. Third, the hybrid model contemplates an SWS like assessment as the means of governing movement within a value range (for example 20%-40%). This assessment is "to take into account any non-productive periods on the part of the supported employee and provide for an objective and consistent method of bench-marking". This preliminary conclusion appears to accept that this "SWS like" assessment is able to do something that the Bench perceives the SWS as being unable to do adequately. The same is true with respect to the apparent acceptance in [15(9)(b)] of the Statement that the "SWS like" assessment can "provide for an objective and consistent method of benchmark setting". The SWS is criticised for an inability to do just that. It is not apparent to the Further Submission Parties how these features of the SWS like assessment to be used in the hybrid model can be reconciled with a rejection of the SWS.

24. We do not suggest that the three matters we have identified constitute an exhaustive list of the concerns that we may have about the new wage assessment proposal, once there is a concrete proposal released by the Commission. They are however significant concerns that, we consider, have the potential to undermine the achievement of the objectives the Bench has set as the benchmark for its satisfaction that the SESA could meet the modern award objective.

Conclusions

25. If the Bench's preliminary conclusion in favour of adoption of its hybrid model becomes their concluded view, the development, and testing, of this model will, we expect, take time to properly develop. What is contemplated is a significant reform. To devise such a model that meets the objectives stated in [15(7)] of the Statement is, we apprehend, a matter of some complexity. The Further Submission Parties intend to participate in the Commission's processes within the resources each of us has to do so. Nonetheless, the likely time we expect these processes to take is a matter of considerable concern. ADE employees are currently subject to quite inadequate wage setting processes that do not conform to the modern award objective. The necessary conclusion is that they are currently disadvantaged compared with other employees who are entitled to the benefit of a safety net that does conform to the objective.

26. We accept that the Commission intends to phase out cl. 14.4 of the SESA. On the reasoning of the Full Bench this results in ADE employees continuing to be subject to an award that does not conform to the modern award objective until the transitional period ends. For that reason, we would urge the Commission to specify a short transitional period rather than a longer one, and urge against the phase out period being fixed by reference to the embryonic nature of the hybrid model.

16 July 2018

ANNEXURE KW-4

FAIR WORK COMMISSION
AT MELBOURNE

AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

SUBMISSION FROM AED LEGAL CENTRE REGARDING THE PROVISIONAL CONCLUSIONS OF THE FULL BENCH

1. The Full Bench released a statement on 11 September 2018 (the **September Statement**) that addressed the position that interested parties adopted in response to the provisional views expressed in an earlier statement dated 16 April 2018 (the **April Statement**). These views were conveyed during a report back hearing on 29 May 2018.

2. In the September Statement, the Full Bench concluded at [5] that by reason of the position adopted by the interested parties to the review seeking to represent the interests of supported employees, it was necessary for the Full Bench to proceed to determine to finality the matters before them. One of those parties is AED Legal Centre (**AED**). The Full Bench went on to say:

   > "That will require us to receive any submissions which interested parties wish to make in response to the provisional conclusions expressed in the Statement before issuing a final decision."

3. The Full Bench then directed that submissions be filed in the Commission on or before 19 October 2018. The Bench indicated that those submissions could include submissions as to the merit of the provisional views expressed in the April Statement and any proposal that any party wished to advance concerning the design and implementation of the new wage assessment mechanism outlined in that document, should the Full Bench ultimately adopt the provisional views it expressed in the April Statement.

4. On 16 June 2018, AED, in combination with a number of other interested parties (including the union parties – the HSU and United Voice), filed a submission (the **Joint**

Submission) that addressed the provisional views expressed in the April Statement.[1] AED re-affirms the Joint Submission.

5. AED:

   (a) Supports the provisional conclusion in [15(1)] of the April Statement that supported employment, covered by the *Supported Employment Services Award* 2010 (the **Award**), has a valuable and socially significant role in providing employment to disabled employees. However, as made clear in the Joint Submission, AED does not accept that the evidence before the Commission supports a conclusion that ADE employers are the only employers of disabled workers who adjust daily job tasks to suit the abilities of these workers or are the only employers who do so for those employees with intellectual disabilities.[2]

   (b) Supports the provisional conclusion in [15(2)] of the April Statement that the determination of wages by the multiplicity of wage assessment tools currently prescribed in clause 14.4 of the Award fails to meet the modern awards objective.

   (c) Supports the provisional conclusion in [15(7)] of the April Statement favouring a single prescribed method for the determination of a pro rata wage for supported employees.

6. The September Statement invites submissions concerning the design and implementation of the wage assessment approach posited in the April Statement (the **Proposed Wages Tool**). AED submits that the Proposed Wages Tool should not be adopted. AED relies on the matters referred to in [18]-[23] of the Joint Submission, and the additional matters referred to below.

The Proposed Wages Tool

7. The Proposed Wages Tool would, if adopted, perpetuate the markedly different set of minimum wage arrangements which uniquely apply to ADE employees. The case for

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1 The parties are identified in the document as the Further Submission Parties.

2 The evidence is that 68% of disabled employees being assessed under the SWS in open employment have intellectual disabilities: see transcript PN549-PN554.

doing so appears to hinge on the provisional acceptance by the Full Bench of certain conclusions that AED respectfully contends should not be given the weight apparently attributed to them in the April Statement.

8. The April Statement suggests that the Full Bench has accepted the existence of a simple/complex dichotomy with respect to the range of work performed by ADE employees, albeit that the work, uncontroversially, falls within the basic Award grade – Grade 2. The Full Bench also criticises the existing classification structure in Schedule B of the Award in [15(5)] of the April Statement, stating:

> "[I]t has not been structured with the specific circumstances of supported employment in mind, and has not been drafted in a way that clearly identifies the work tasks and skills required of a fully competent employee at each grade, and may on one view be read as entitling supported employees in ADEs who perform only disaggregated parts of a single job to the full classification rate".

9. These provisional conclusions, expose, with respect, certain assumptions for which there is no apparent basis.

10. There is no textual support in the *Fair Work Act* 2009 (the **FW Act**) for the notion that minimum rates of pay are or should necessarily be fixed with a notional fully competent employee in mind who performs a notional single job composed of unspecified tasks. It is not apparent how or on what basis such an employee is to be discerned, in the abstract, or why it should be necessary to do so, let alone what constitutes a single job within a classification. In this context, a simple/complex dichotomy is not a useful analytical tool.

11. Schedule B grades work. All work within a grade is valued at a single rate. Grade 2 is engaged after an employee undertakes certain training "so as to *enable* them to perform work within *the scope* of this level" (emphasis added).[3] The grade covers a very broad spectrum of work. An employee is entitled to the Grade 2 rate of pay if he or she performs work within the scope of the level. There is no stipulation of how much work is to be performed what number of tasks must be performed or what must be

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[3] This language is similar to the language used in the definition of "work within the scope of this level" in cl. B.3.1(b)(ii) of the *Manufacturing and Associated Industries Award* 2010.

demonstrated by the employee to justify payment of the full minimum wage.[4] An employee is competent if he or she has been enabled to perform work within the scope of the level and is performing it.[5] The Award is not unique in these respects.

12. The base level of the *Fast Food Industry Award* 2010 applies if an employee is "engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres".[6] However, the duties performed in relation to these kinds of work is determined by the employer (employees perform duties as directed) and must be "within the limits of their competence, skills and training".[7] An employer who directs the performance of a preparation duty, which might be due to the competence level of the employee, is obliged to pay the rate of pay fixed for this level. The same is true of the employer who directs a more competent employee to perform multiple tasks or duties associated with more than one kind of work; for example, preparation, the receipt of orders and sale.

13. Level 1 of the *Gardening and Landscaping Services Award* 2010 describes an employee who performs *simple or routine tasks* essentially of a manually nature to the limit of their training.[8] (Emphasis added). The aggregation or disaggregation of simple or routine tasks does not alter the rate of pay. Under the *Nursery Award* 2010, an employee is graded at the base level if "the principal functions of their employment, as determined by the employer, require the exercise of any *one or more* of the skill levels set out below" (emphasis added).

14. The language used in the aforementioned awards may be contrasted with the classification descriptors in the *Dry Cleaning and Laundry Award* 2010 which classify

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4 See by way of comparison the classifications in the *Stevedoring Industry Award* 2010 considered in *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414, per Bromberg J at [56]. That Award specifically defined work within a grade by reference to an employee's "*demonstrated competence* in clerical and/or operational skills at this grade" and an employee's performance of "functions *as required by the employer* from time to time in relation to" particular, named, functions; see at [13] (emphasis added).

5 The Full Bench appears to envisage that this assumption be fleshed out in the classification descriptors of the Award itself: See [15(8)] of the April Statement.

6 B.1.1 of Schedule B to this Award.

7 Ibid, at cl. B.1.2.

8 Cl. B.2 – Level 1 of Schedule B to this Award.

employees into a particular grade if they are employed by an employer in particular, named and described, job.[9]

15. Nor does the traditional conception of work value assume the existence of any particular kind of employee performing a notional single job. The concept was relevantly articulated in the *National Wage Case August 1989* (1989) 30 IR 81 at p. 102 in these terms:

> "(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required all the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.
>
> ....
>
> (b) Whether new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole" (emphasis added).

16. Provided that the work performed by an individual is work within a category of work of a particular nature (with a described level of skill and responsibility), no change to the valuation of that work is implied from differences in the way in which work of that kind is performed from one employee to another or as between employers. A change in work performed was not by itself sufficient to alter rates of pay. What was required was a change of sufficient significance to justify a new classification. Change at the level of an individual employee was not enough. Principle (b) recognised that there could be new or changed work arrangements applicable to particular employees, but held that if this were so it would only justify a special allowance, not a re-framing of the classification. No part of the work value concept called for an assessment of the job size of an individual employee's assigned work (from time to time) within a single classification. Nor was a simple/complex dichotomy observed for work within the same classification. Rather, this was of relevance in considering whether a new classification

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[9] See also footnote 4 above.

was justified. It is also of relevance to the progress of a worker from one classification to another.[10]

17. The allowance referred to in principle (b) may be seen as recognising that new or additional work performed by some employees within a classification delivered greater value to the employer over and above the general value of their work. Thus, the allowance was only payable when the changed work was performed and thereby absorbed by the employer. There is analogy here with the SWS. It allows the employer to recognise the disabling effects of a disability on a worker's productive output and pay only for the output of the productive work it absorbs. It is beside the point that output may correspond with that worker's capability, provided that the worker has capability to perform work covered by the Award and is retained in employment to do so.

18. The principal element of the Proposed Wages Tool is job size, which serves here as a proxy for competency. This is a unique way of viewing competency in the award system,[11] which usually conceives of it in terms of skills. In this context it adds a further detrimental effect to the discrimination s. 139(a) and s. 153(3) of the FW Act authorises. So much is apparent from the example offered of the Proposed Wages Tool at the foot of [15(9)] of the April Statement.

19. The principal purpose of section 134(1) of the FW Act is that the Commission ensure that modern awards prescribe a fair and relevant minimum safety net. The safety net extends to minimum wages. Section 135(2) requires that the Commission, in exercising its powers under the Part to set, vary or revoke modern award minimum wages, take into account the rate of the national minimum wage as currently set in a National minimum wage order. In this way, the FW Act confirms the relevance of national minimum wage instruments to modern award minimum wages.

20. The current National minimum wage order, which was promulgated after the April Statement on 1 June 2018, relevantly, prescribes a special national minimum wage for award free employees with a disability. There are two. The criterion used to distinguish

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10 *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414, per Bromberg J at [56].

11 The conception of competency as it emerged from the *National Wage Case August 1989* was concerned with skill recognition as "an essential element of a competency-based classification structure in which employees progress from one grade to the next following the acquisition and recognition of new skills or competencies" at [55].

between these two forms of special national minimum wage is productivity.[12] Those disabled employees whose productivity is not affected by their disability are entitled to the same national minimum wage as anybody else. Those whose disability does affect their productivity are entitled to a special minimum wage calculated in accordance with the SWS.[13]

21. Whilst the Annual Wage Review held that fixation of a national minimum wage was to not to be viewed exclusively from the perspective of employees, it was accepted that the:

> "statutory provisions relating to the Review and to NMW orders as remedial, or beneficial, provisions. They are intended to benefit national system employees by creating regulatory instruments which intervene in the market, setting minimum wages to lift the floor of such wages".[14]

22. This sentiment applies with equal force to the determination of minimum wages for employees with a disability, including those whose wages are governed by the Award. With these considerations in mind, three observations can be made relevant to the exercise of the Commission's review of the Award, having regard to the provisional views contained in the April Statement:

    (a) The Review panel accepted the link between modern award wages and the National minimum wage.[15] The submission of the Ai Group that the review decision should flow on to modern award rates of pay was cited to that end.[16] The Review also cited evidence from the Victorian Government that "submitted that the median incomes of persons with a disability were less than half of those without a disability and that more than half lived in households in the lowest two quintiles of equalised gross household incomes".[17] It persuasively tells in favour of a minimum wages setting that lifts the floor of such wages for all disabled employees.

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12 Annual Wage Review 2017-2018 (2018] FWCFB 3500, at [478].
13 Ibid, at [489(b)].
14 Ibid, at [16].
15 Ibid, at [490] and [496].
16 Ibid, at [462].
17 Ibid, at [463]. It was not suggested that this submission was not accepted.

(b) Competency does not feature at all as a criterion for the second special national minimum wage.[18] The second special national minimum wage is concerned only with output. There is no specific evidence of any material distinction between the disabilities of ADE employees and those entitled to the benefit of the second special National minimum wage order.[19] In these circumstances, use of competency, by means of the job size criterion, for ADE employees as a limiting factor in the amount of remuneration an employee performing Award covered work can earn, as a minimum, requires specific justification.[20]

(c) For special national minimum wage purposes, the output of disabled employees whose productivity is affected continues, as in past years, to be determined by application of the SWS. This appears inconsistent with the provisional conclusion of the Full Bench that the SWS is an inappropriate method of determining wage rates for supported employees for the reasons stated in [15(3)] of the April Statement; each of these reasons could apply equally to an award free productivity affected employee with a disability. Notably, the SWS is the only method utilised by this form of special national minimum wage to authorise a lower rate than is prescribed by the national minimum wage.

23. The Proposed Wages Tool does not promote the lifting of the minimum wages floor for ADE employees, it diminishes it. Whilst the SWS also discounts the full award wage, the Proposed Wages Tool would entitle ADE employers to a further discount by reference to competency and output criteria. The disadvantage is compounded by the provisional acceptance of job size increments of the kind referred to in [15(9)(a)] of the April Statement. These increments appear entirely arbitrary.

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18 The Panel concludes at [487]: "For award/agreement free employees with disability whose productivity is not affected, the wage will be set at the rate of the NMW. For award/agreement free employees with disability whose productivity is affected, the wage will be paid in accordance with an assessment under the SWSS". See also [489].

19 The April Statement provisionally finds that ADE employment provides employment principally to those with intellectual disabilities. The evidence is that 68% of disabled employees being assessed by the SWS in open employment have intellectual disabilities: see transcript PN549-PN554.

20 *Nojin* per Buchanan J at [138].

24. A non-ADE employer of disabled workers would not have the aforementioned right.[21] It is incongruous that an ADE employer should have it.[22] In these circumstances, the Proposed Wages Tool, AED submits, will fail to meet the fairness and equality benchmarks the Commission has set, as well be discriminatory. A non-discriminatory object is one that minimises the deleterious effects of discrimination and seeks if possible to eliminate them.[23]

The SWS in open employment

25. The Full Bench has emphasised in [15(3)] of the April Statement that they express no conclusion about the operation of the SWS in the context of open employment. The Joint Submission expressed concern about the possibility that the Commission's finding in this review may undermine the SWS more broadly. That concern appears to be borne out. The Annual Wage Review made clear at [486] that "although the consideration of the SWS in the review of the SES award is conducted in the specific context of its use in ADE's, the modification or replacement of the SWS in that award has potential implications for the use of SWS in other awards."

26. No party called upon the Commission to review the SWS. The predicate of AED's variation application was the Commission's acceptance in other awards it has made (other than in the Award) of this tool as the method for determining a pro rata wage for employees with a disability. The Commission has again applied it, as late as 1 June 2018, to the determination of the second special National minimum wage. The Commission should exercise caution in these circumstances. It should consider refraining from making further adverse findings about the SWS, at this time, and instead consider whether a broader inquiry into the role of the SWS in the award system is justified. should the Full Bench confirm their concerns about the SWS in these proceedings. In the absence of such an inquiry, a finding that the SWS does not take proper account of the work value considerations used to assess award wage rates cannot

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21 Nor would an ADE employer in respect of a non-disabled employee covered by the Award.

22 Attention is drawn to Article 27(1)(b) of the *Convention on the Rights of Persons with Disabilities* to which Australia is a signatory, which requires State parties to: "Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value".

23 So much is apparent from the observation of Katzmann J in *Nojin* at [268] that: "If competencies must be measured independently of productivity, consistently with the objects of the Act that should be done in such a way as to eliminate as far as possible its inequitable aspects."

safely be made in light of the wide-spread use made by the Commission of the SWS to do just that.

Further matters

27. Since the April Statement there have been several developments that, AED submits, also stand against adoption of the Proposed Wages Tool.

28. First, as is apparent from the September Statement, there is not a consensus in favour of the Proposed Wages Tool. Those who the Full Bench recognises seek to represent the interests of supported employees have expressed their strong concerns in the Joint Submission. The Annual Wage Review observed at [483] that:

> "The Full Bench proposed that interested parties and the Commonwealth participate in a conferral process to develop a new classification structure and wage assessment mechanism in line with a number of identified principles. The process envisaged would necessarily involve the modification or replacement of the SWS in the SES".

29. The conferral process has not occurred.

30. Second, there is no indication from the Commonwealth that it has shifted its support from the SWS to the Proposed Wages Tool. As mentioned in [7] of the Joint Statement, the relevant Commonwealth Minister informed the Vice President on 4 July 2018 that some funding was available for *agreed* trial and analysis activities. No further commitment has been made by the Commonwealth, including a commitment to support and fund both elements of the Proposed Wages Tool.

31. On 10 October 2018, Our Voice filed a submission in response to the September Statement. It expressed general support for the provisional views of the Full Bench, but pointed to the lack of commitment thus far from the Commonwealth. AED shares this concern but sees it as a factor that counts against adoption of the Proposed Wages Tool.

32. The Proposed Wages Tool threatens minimum wage uncertainty for supported employees for an extended period. The Full Bench has no way of knowing how major elements of the approach (those that require assessment of a job and an individual) will be delivered, by whom, how they will be paid for, or how long it will take to determine whether they can work appropriately and fairly in the multiplicity of work environments of the employers covered by the Award. This may result in a longer

phase out period than might otherwise be the case, permitting ADE employers to continue to use the tools currently prescribed by cl. 14.4 of the Award. This is undesirable.

Conclusion

33. As observed in the Joint Submission, the high level nature of the Proposed Wages Tool, as it emerges from the April Statement, necessarily results in high level submissions about its appropriateness and practicality. AED understands that the Commission would welcome submissions from interested parties that might advance the design of the Tool, if it is minded to adopt it. The Proposed Wages Tool is, at this time, purely conceptional. The Commission does not have sufficient information to enable it to decide if such a Tool can be applied uniformly, or to identify the effects on employees were it to do so.[24] In these circumstances, if the Full Bench decides that it will pursue development of the Tool, it should only consider doing so in light of a concrete proposals or proposals supported by evidence and submissions that persuades the Commission of its merit as an award instrument. This will require further programming by the Commission of steps necessary to facilitate the Commission's further consideration.

19 October 2018

M. Harding

[24] For example there may be employees who are worse off under the Proposed Wages Tool than they are under the tool from the current list in cl. 14.4. that their employer has elected to use.

ANNEXURE KW-5

Fair Work Commission

4 yearly review of Modern Awards

Supported Employment Services Award

Matter No: AM2014/286

STATEMENT OF PAUL CAIN

I, Paul Cain, [redacted] say as follows:

Professional Background

1. I am employed by Inclusion Australia (formerly known as the National Council on Intellectual Disability) as the Director of Research and Policy. I have been employed by Inclusion Australia in various roles since 1995. My work for Inclusion Australia entails the development of policy, support and actions towards the goal of greater employment participation of people with intellectual disability. I received a Bachelor of Social Science in Human Services and People with Disabilities from the Edith Cowan University, Western Australia in 1995.

2. I have worked in the disability sector for almost 30 years, having worked in the areas of early intervention, inclusive education, individual advocacy, and the national representation of people with intellectual disability on education and employment.

3. I was employed as the Senior Policy Officer for Disabled Peoples' International Australia (DPIA) in 1994. During 1995 I represented DPIA on Commonwealth Department of Human Services and Health working groups to address wage and integration recommendations of the Report of the Strategic Review of the Commonwealth Disability Services Program (1995).

4. In 1996 the National Caucus of Disability Consumer Organisations (Caucus) was formed to represent a collective view of all national peak associations for Australians with disability. From approximately 1996 to 2003 I represented the Caucus on disability employment service reform working groups initiated by the Commonwealth Government in the areas of quality assurance, service funding,

The SWS recognises that jobs for people with significant disability are frequently customised or created to match the needs of a business with the strengths of an employee.

36. Customised Employment is;

. . a flexible process designed to personalize the employment relationship between a job candidate and an employer in a way that meets the needs of both. It is based on an individualized match between the strengths, conditions, and interests of a job candidate and the identified business needs of an employer.[8]

37. Customised employment is an important strategy to include some jobseekers whose disability means that they are unlikely to meet the requirements of advertised job vacancies. Instead, employer engagement is about understanding how the strengths of an individual with significant disability can be best utilised to meet the needs of an employer.

38. A job with a narrow range of job tasks, relative to a job with a broad range of job tasks on the same award level, is not grounds for devaluing the right of an employee with disability to the relevant Award rate of pay for the job tasks they are performing

39. Many people with intellectual disability who currently earn award or pro-rata award rates of pay in open employment, or at ADEs, are performing job tasks that have been customised to meet the needs of the employee and the employer.

40. The SWS will assess the productivity of the actual job tasks that are performed by the employee. There is no fixed number or minimum number of required job tasks assessed, as the SWS is concerned with an assessment of the job tasks that are actually performed by employees, whether tasks are undertaken in open employment or in ADEs. The SESA classifications do not predetermine or set a fixed number of job tasks. Consistently, the SWS values the job according to how the employee's job tasks are classified under the SESA classifications.

[8] United Stated Department of Labour. What Is Customized Employment? https://www.dol.gov/odep/categories/workforce/CustomizedEmployment/what/

41. The SWS is the only wage assessment currently listed under section 14.4 of the SESA where the value of the job is based only on the value attributed to it by the award according to its award classification.

The SWS has been available to ADEs since the decision by the Australian Industrial Relations Commission to approve the SWS model clause in 1994.

42. The SWS, from the original decision by the Australian Industrial Relations Decision in 1994, has been available for ADE employers, (previously sheltered workshops, and business services), to determine productivity based wages for employees.[9]

43. At the time of the AIRC decision in 1994, sheltered employers (i.e., ADEs) were required to transition from section 13 to section 12a and then to section 10 of the Disability Services Act 1986 (the DSA). Sheltered employers were required to make this transition to meet the principles and objectives of the DSA. The SWS model clause deemed employees working for sheltered employees (i.e. ADEs) funded under section 12a or section 10 as eligible for a wage assessment conducted by the SWS.

44. The DSA transition required funded organisations to meet disability service standards including a standard on employment which stated that;

    Each person with a disability enjoys comparable working conditions to those expected and enjoyed by the general workforce.[10]

45. Some sheltered employers took the opportunity to use the SWS to determine the wages of their employees from the mid 1990s, and still do today.

46. The DSA was amended in 2002 which ended DSA transition arrangements. From 2002, disability employment providers, including ADEs, could only receive Commonwealth funding if they met the principles and objectives of the DSA. In essence, all employees working for ADEs have been covered by the SWS model clause since 2002.

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[9] Australian Industrial Relations Commission. Dec 1831/94, S Print L5723, 10 October 1994

[10] The Disability Service Standards. Handbook for services funded under the Commonwealth Disability Services Act (1986). Commonwealth Department of Human Services and Health. December 1993.

ANNEXURE KW-6

Fair Work Commission

4 Yearly Review of Modern Awards

Supported Employment Services Award 2010

Matter No: AM2014/286

FURTHER STATEMENT OF PAUL CAIN

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

1. I am asked for my opinion in regard to the proposed draft determination, submissions, and associated witness statements provided by Australian Business Industrial and the NSW Business Chamber to the Fair Work Commission; and the supporting submissions of Greenacres Disability Services. In relation to these materials, I am asked several questions. These were;

   1.1. Is the system of work classification for Award covered work proposed by the draft determination necessary for wage setting purposes in ADE employment to take account of the effects of disability on work performed by ADE employees?

   1.2. Is the inclusion of competency criteria into wage assessment an element that is necessary in ADE employment compared with open employment to take account of the effects of disability on work performed by ADE employees?

   1.3. Do I have any comment about the content of the classifications proposed and the work skills definitions proposed in Annexure A and Annexure B?

   1.4. What are the benefits or disadvantages for wage assessment if the proposed tool were to be adopted?

   1.5. Whether and how the Supported Wage System addresses any defects that I may identify.

   1.6. Do I agree with the observations made by statements in support of the Draft Determination?

   1 7. Do I have any comment about the comparability of ADE employment and open employment that affects the appropriateness of the SWS as a wage assessment tool in ADE employment?

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

17 Comparative research[1] conducted by the Commonwealth and presented in *Nojin v Commonwealth* showed that people without disability, doing similar jobs in open employment as people with disability in ADEs, were earning in excess of the award rate of pay ***(Attachment A)***

18 This comparative research highlighted that workers without disability, performing similar jobs in open employment as workers with disability in ADEs, had a similar average number of tasks per job (2.8) as workers with disability (2 4).

19 The research also found that workers without disability in open employment performing comparable jobs with only one job task were getting paid at least the relevant award rate of pay.

20. The WVCT proposes, however, to apply a different classification system of wage rates for workers with disability doing comparable tasks, and comparable number of tasks, as workers without disability in open employment. By doing this, the WVCT limits the capacity of many workers with disability to earn a higher wage via a comparative productivity assessment (i e , the SWS) based on an agreed performance standard to achieve the full rate of pay of Grade 2 of the Award.

21 The WVCT also proposes a set number of job tasks in Annexure D when an employee with disability may perform more or less tasks in their job role. This treats employees with disability differently to employees without disability who are not subject to such a fixed number of job tasks to access the relevant award rate of pay.

22 The SWS provides an assessment of the performance of a worker with disability against an agreed performance standard for each job duty to earn the relevant Award rate of pay

[1] Department of Family and Community Services/CRS & Evolution Research Business Services Wage Assessment Modelling and Competency Matching

23 For example, a worker with disability performing a specialised packaging job duty under Grade 2 of the Award is entitled to a percentage of the current hourly award rate of pay of $18 81

24 Following a SWS assessment of a specialist packaging duty, such a worker may be deemed to have achieved a 70% performance rate against an agreed performance standard to earn the full award rate of pay for the same duty. The employee would be entitled to an hourly rate of $13 167, which is 70% of the Grade 2 Award hourly rate of pay

25 Under the proposed WVCT, if such an employee is classified in either Level A, B or C, their wage will be discounted by a further 45%, 30% or 15% (or discounted by $8 46, $5.64, or $2.82). Only when such a worker is classified in Level D would they get more than a productivity-based wage assessment

26. The WVCT would provide employers with a wage tool with the authority to decrease wage costs below what many workers with disability would be able to achieve via a comparative performance of their productivity against an agreed performance standard for the award rate of pay

27. The WVCT inappropriately includes ongoing work support, personal support, and supervision as part of its system of classification and pay rates.

Support and Supervision

28 Ongoing work support, personal care, supervision, work based personal assistance, training, counselling, and other supports are funded by the Commonwealth government to ADEs to deliver this support to employees with disability in ADEs

29. According to the published ADE contract example[4] ***(Attachment B)***;

"Employment Assistance should meet the support needs of people with disability in a supported employment service by providing practical supports in a suitable work environment including, but not limited to:

(a) assessments;

(b) preparation of Employment Assistance Plans.

[4] Disability Employment Assistance Grant Agreement Schedule – Comprehensive Grant Agreement https://www.dss.gov.au/sites/default/files/documents/10_2016/schedule_disability_employment_assistance_example.pdf

(c) training (social skills training, work readiness training, work preparation training, on-the-job training and other training);

(d) supervision and other one-on-one support

(e) interpreter assistance for interviews and/or work orientation;

(f) counselling;

(g) case management,

(h) physical assistance and personal care; and

(i) administrative duties such as documenting and managing client files"

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

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

Case Based Funding Core Fees

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

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

Case Based Funding Additional Fees

Additional Fee 2017-2018	Amount (GST exclusive)		
Work Based Personal Assistance (2015-2018)	Either • $31 82 per hour where the work based personal assistance is provided by an Approved Support Worker from within the Outlet or • $40 91 per hour where the work based personal assistance is purchased from a second agency, is provided up to a maximum of 10 hours per week		
	ARIA Classification	Amount Per Month	Amount Per Annum
	• Highly Accessible	Nil	Nil
	• Accessible	$1,509	$18,108
	• Moderately Accessible	$3,017	$36,204
	• Remote	$4,526	$54,312
	• Very Remote	$6,029	$72,348
Existing High Cost Worker's Payment	An amount in excess of CBF Employment Maintenance Fee Level 4 in accordance with Supplementary Condition 1 22 to 1 29		

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

Wage assessment conducted by the employer

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

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

34 The SWS Evaluation report noted that;

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

90 In paragraph 6 of Mr. Burgess statement, it is stated that *Flagstaff employs Supported Employees who have significant barriers to securing employment in the open employment market.*

91 There are indeed people with disability who have significant barriers to getting a job in the open labour market, however, this does not mean that this group *can't* get a job in the open labour market

92 It is important the Fair Work Commission (FWC) is not inadvertently misled by statements about the capacity of people with significant disability to work in the open labour market — as if this group is limited to ***only*** work in ADEs

93 The international and Australian research and demonstration is clear that people with significant intellectual disability have the capacity to work in the open labour market when they get the *right level and type of support.*

94 This was reported by the Evaluation of Disability Employment Services (DES) 2010-2013 when considering the outcome results of participants with moderate levels of intellectual disability (i.e. IQ ≤60, a group with significant intellectual disability) which stated that,

> "Research and practice in the field has shown that with the right level and type of support, people with significant intellectual disability can achieve more substantial employment."
>
> and,
>
> "There is no doubt that this is a group of job seekers with exceptionally high needs, who face considerable odds in the open labour market. What appears to set them apart is the body of evidence of their potential to succeed given the right type of service" ***(Attachment I).***

95 Whereas 'intellectual disability' is a significant barrier to getting and sustaining a job in the open labour market, there is a support technology that exists and demonstrates high rates of job placement and retention

96 The statement by Mr Burgess at paragraph 87 infers that there is a proposal before the Fair Work Commission for the payment of "close to, or actual, minimum wages" for employees with disabilities in ADEs

97 My understanding is that there is no such proposal being put to the Commission

98. The statement at paragraph 87 suggests that the jobs of employees with disability are not part of a "complete job" This is not so

99 The Award classification does not demand employers and employees to agree on a specific number of job duties or tasks within an award classification to be paid the award rate of pay

100. It has been a frequent consideration put by some in wage assessment design that there should be a minimum number of tasks or competencies that an employee with disability should be assessed upon The argument being that a person without disability is (supposedly) required to demonstrate performance across a minimum number of job tasks and competencies to be paid the award classification

101 This wage assessment design, however, was shown in the Federal Court's examination of the Business Services Wage Assessment Tool (BSWAT) in *Nojin v Commonwealth* to be incorrect and disadvantages employees with and without disability

102. For example, the BSWAT required an employee to be assessed on a minimum of four industry competencies, whether or not an employee with disability's job actually related to at least four industry competencies If an employee had less that the minimum four industry competencies an employee's wage would be discounted by 6 25% for each missing competency. Such a requirement was shown to disadvantage both employees with and without disability.

103 Comparative research of matching jobs in open employment and ADEs found that workers in 'open employment' had a similar average number of job tasks to workers in ADEs (i e., 2.8 vs 2.4). This research showed that workers with and without disability would have had their wages unreasonably discounted under a wage assessment tool that set a standard of four industry competencies

104 The research also found that four of the work roles reviewed in open employment for people without disability were covered by a single job task, but still attracted at the least the award minimum rate of pay If BSWAT were to be applied to workers without disability in open employment, the Federal Court concluded that workers without disability would have received less than the award rate of pay This showed the award comparator used by BSWAT to be unfair to all workers

122. A critical part of the development of the SWS was the experience and involvement of *Jobsupport* as one of the employment providers used to pilot test the SWS. Jobsupport is a specialist (supported) open employment provider for people with significant intellectual disability (IQ ≤60) and was a demonstration provider for the Disability Services Act in 1986.

123. Jobsupport currently supports over 700 individuals with significant intellectual disability in jobs in the open labour market. All jobs were created or customised jobs (i.e., not advertised vacancies). Fifty-nine percent of these individuals earn full award rates of pay, and Forty-one percent of these individuals earn an award rate of pay determined by the SWS ***(Attachment J)***.[8]

124. The key point that the Commission should note is that the SWS was developed and trialed with people with severe disability including people with significant intellectual disability in customised job positions.

125. The development of the SWS was not developed for people with mild disability as asserted by Mr. Christodoulou.

126. At paragraph 26, Mr. Christodoulou states that the SWS is inappropriate to assess the wages of people with disabilities particularly those with intellectual disabilities. This statement is without any reasonable basis.

127. The SWS was designed for people with severe disability, including people with intellectual disability.

128. The key finding of the SWS evaluation was,

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

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

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

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

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

129 The SWS has been successfully used to determine the pro-rata award wages of people with severe disability, including people with intellectual disability, since 1994 in open employment and in ADEs.

130 The SWS evaluation reported that the majority (68%) of SWS employees had intellectual and learning disability as at June 2000 (5.2.4 Primary disability, SWS Review, KPMG) ***(Attachment D).*** The Department of Social Services reported in 2013-14 that most SWS assessments (68%) continue to be for people with intellectual disability "***(Attachment K)***[10]

131. Mr Christodoulou states at paragraph 26 that the SWS is inappropriate to assess the wages of people with disabilities because it is a system based on productive output (that is, time piece work) that does not distinguish between the complexities of the task/s. This statement is incorrect.

132 First, the SWS is not based on timed piece work.

133 A piece rate is where an employee gets paid by the piece of work produced instead of the hourly award rate of pay. For example, a worker may get paid $5 for each box of apples packed. The worker may pack 30 boxes on Monday and get paid $150, but pack 25 boxes on Tuesday and get paid $125.

134 In contrast, the SWS is based on a percentage of the Award hourly rate of pay for the relevant classification of work. For example, an Award may fix an hourly rate of pay of

[9] SWS Evaluation, 2001 Executive Summary 1.1 Key Findings

[10] Trish James, Director Disability Employment Services Participants Section, Department of Social Services, 2 December 2014

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

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

This is not a complete or accurate description of the SWS

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

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

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

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

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

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

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

This is statement is incorrect

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

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

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

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

"None of the employers interviewed had sought out the SWS. Most were approached for employment on the basis that they were able to create a position that could be tailored to the needs of the person with disability seeking employment. It was only through the creation of such a position, and as a result of the needs of the individual, that employers became aware of the SWS[44] (6 2 1 1 Employers' awareness and knowledge of SWS) ***(Attachment D)***

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

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

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

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

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

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

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

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

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

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

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

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

> None of the employers interviewed had sought out the SWS Most were approached for employment on the basis that they were able to create a position that could be tailored to the needs of the person with disability seeking employment It was only through the creation of such a position and as a result of the needs of the individual. that employers became aware of the SWS [44] (6 2 1 1 Employers' awareness and knowledge of SWS) ***(Attachment D)***

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

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

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

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

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

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

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

240. At paragraph 56 of Mr Dickens' statement it is stated that,

Evaluation of Disability Employment Services 2010-2013 Final Report, p. 122

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

241 Many workers with disability in open employment who have jobs that have been modified, and have had their wage determined by the SWS, frequently qualify for the highest levels of ongoing support funding

242 Ongoing support, in open employment or ADEs, is funded by the Commonwealth The determination of a pro-rata award wage however is concerned with the performance of the employee while receiving *the same level of support and supervision that would be reasonably available to other people who do not have a disability*[13] This ensures a fair assessment of productivity against an agreed performance standard to achieve an award rate of pay

243 At paragraph 57 of Mr Dickens' statement it is stated that.

"I understand the modifications to the SWS to date were aimed at trying to capture or measure the differences between open employment and supported employment."

This statement is not accurate.

244 The agreed SWS modifications addressed common concerns by all parties, including concerns that the independent SWS assessment may not pick up variances of productivity over time The agreed modification to the SWS permits valid employer collected productivity data to be included in the SWS assessment

245 Agreed modifications also addressed concerns that the previous SWS minimum weekly wage was a barrier for the employment of some employees and unfair to employers to pay a wage greater than the assessed rate of pay The agreed modifications also addressed concerns about rounding to the ten percentile so that the exact assessed percentage rounded to a whole percentage would determine the pro-rata award rate of pay

246 The modifications were not made to address differences in employment setting but to seek an agreed single national pro-rata award wage system to address the disadvantage and discrimination highlighted by United Voice and the Health Services Union following the findings in *Nojin v Commonwealth*. The unions identified that many

Supported Wage System Handbook

ATTACHMENT

'D'

Department of Family and Community Services

Supported Wage System Evaluation

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1 Executive summary

This report presents the findings of an evaluation of the Supported Wage System (SWS) conducted by KPMG Consulting on behalf of the Commonwealth Department of Family and Community Services (FaCS).

The report examines the effectiveness of the SWS in assisting people with disabilities gain and maintain employment, the efficiency of the SWS from an operational and administrative perspective, the appropriateness of the SWS within the workplace relations environment and the ability of the SWS in meeting current and future demand for services.

1.1 Key findings

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

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

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

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

1.1.1 Establishment of clear objectives, performance indicators and operational procedures

The operation of the SWS would benefit from the establishment of a clear statement of objectives and a set of performance indicators by which the success of the system could be measured. At present the SWS is best suited to individuals whose disability has a consistent impact on their productive capacity and who are in types of employment where productive capacity is easily measured. A key policy question to be resolved is whether the system should maintain this focus, or whether it should be expanded to encompass the needs of people with a disability who are unable to consistently work eight hours per week, or whose productive capacity is variable, or where the nature of employment is such that the measurement of productive capacity is far more complex and involves a broader range of skills.

The resolution of these policy questions not only will inform the future targeting of the SWS but also will address current ambiguities within the system that cloud its operation and the outcomes that are achieved.

1.1.2 Funding arrangements

The decision to remove on the job support funding (OTJS) for SWS placements from October 1999 provides the opportunity for the system to support additional demand within the current funding cap of five million dollars per year.

Some employment services have indicated that the removal of this OTJS funding for new SWS placements makes the system less attractive, some indicating they have chosen to use state based industrial mechanisms to avoid administrative costs and delays associated with the SWS.

At this stage it is not possible to assess the full impact of the removal of OTJS on placements and individuals with disabilities seeking employment. This is an area that will require ongoing monitoring.

1.1.3 Program administration

Capacity exists to improve the SWS administrative process.

The efficiency with which new SWS placements are made could be improved, particularly in circumstances where the potential employee is not receiving a Disability Support Pension, or where the relevant award does not contain the SWS model clause. Active effort to promote the adoption of the model clause to industrial parties where it is currently not part of award arrangements will assist in simplifying the administrative process and hasten the placement of SWS employees.

Ongoing review requirements can also be simplified. A more flexible approach to the annual review process where an individual has been in stable employment with consistent duties and productive capacity for a period of three years would assist in simplifying the ongoing administrative process.

1.1.3.1 The administration of the assessment function

Stakeholders identify the adequacy of the selection, training and accreditation process currently managed by FaCS as a major concern.

This concern primarily relates to variable skills and competencies of assessors, inadequate mechanisms to ensure the maintenance of assessors' skills, and specific issues related to assessors' knowledge of industrial relations requirements. Assessor accreditation against nationally established competency standards could assist to address these concerns. Furthermore, consideration could be given to market testing new arrangements for securing the necessary skills and resources that are required to undertake assessments within each jurisdiction.

1.2 Key recommendations

Recommendation 1: That FaCS develop clear and quantifiable performance indicators by which the 'success' of the SWS can be assessed. Such measures should account for:

• differing forms of employment e.g. full and part time employment, use in business services;

• differing nature of work e.g. process work, service industry work, knowledge based work;

• the level of independence expected of employees (people with disabilities) on the job;

• the nature of an individual's disability; and

• the duration of the employment.

In determining suitable performance indicators for the SWS it will be important to consider the Government's broader welfare reform agenda as well as the reform strategy currently underway within the disability employment arena.

Recommendation 2: That FaCS encourage all funded open employment services, in instances where a sub-award wage is to be provided to a person with a disability seeking open employment, to do so within the context of the SWS where conditions permit i.e., the existence of the model clause in the relevant award.

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

Recommendation 4: That FaCS, in response to the program objectives and performance indicators developed in Recommendation 1, develop/refine the guidelines for the SWS, with particular focus on:

• people with high support needs, people who are frail and people with episodic disabilities e.g. people with psychiatric disability. In particular, the main issues that need to be considered are:

- the appropriateness of SWS as a mechanism in securing and maintaining employment; and

- a method for assessing productive capacity in relation to changing needs and capacities.

• its suitability as a mechanism for securing work experience for people with disabilities;

• its applicability in employment settings other than in areas of unskilled labour. In particular, consideration needs to be given where:

- work tasks are flexible and varied; and

- where there is a heavy reliance on knowledge based work;

• with various workplace relations mechanisms e.g. Australian Workplace Agreements (AWAs), certified agreements; c minimum wage rates for full and part time work; and

• its applicability in business services.

Recommendation 5: That FaCS develop a more equitable means for determining wage rates that minimises any potential differential impact on an individual's recommended wage rate, as is currently experienced through established rounding procedures.

Recommendation 6: That FaCS critically review the SWS operational procedures to ensure that all requirements are relevant, appropriate and add 'value' to the system as a whole. Where possible procedural

requirements should be minimised unless they relate to protecting the rights of an individual, they directly assist in achieving the desired program outcomes, or they meet statutory requirements.

Recommendation 7: That FaCS update the:

• SWS policy manual;

• Assessors handbook; and

• data collection requirements;

to reflect current policies including the outcomes arising out of Recommendations 1, 4, and 6.

Recommendation 8: That FaCS ensure that:

• staff responsible for administering the SWS are made aware of, and receive training as required, in any changes in operational policies and/or procedures; and

• employment assistance agencies are informed of any changes in operational policies and/or procedures for the SWS.

Recommendation 9: That FaCS produce an on-line version of the operating manual for the SWS that can be accessible to all who use the SWS.

Recommendation 10: That FaCS establish an electronic mailing list for SWS users, to distribute policy and procedural updates as well as to provide information on the SWS that may be of interest to stakeholders.

Recommendation 11: That FaCS establish a user friendly and accessible database where accurate financial and client data can be stored and extracted. The database should be able to provide up-to-date reports on the key success measures for the SWS as well as general program administration data. It should be accessible within FaCS offices regionally and centrally. It should be able to be interrogated as required by FaCS staff involved in the administration of the SWS.

Recommendation 12: That FaCS compile regular reports on performance trends within and across states and territories for FaCS offices to assist in the ongoing management of the SWS.

Recommendation 13: That FaCS make publicly accessible for key stakeholders annual, aggregated performance reports on the SWS.

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

• the minimum entry requirements for assessors;

• the nature of training to be undertaken by assessors specifically in relation to assessment, workplace negotiation and workplace relations;

• mechanisms for ensuring the independence of assessors from employment placement;

- mechanisms for updating assessors' skills and knowledge;
- quality assurance mechanisms; and
- performance reporting arrangements.

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

Recommendation 16: That FaCS, in conjunction with the key stakeholders, actively promote the adoption of the model clause to unions and employers where it is currently not within their award arrangements.

Recommendation 17: That FaCS develop information products targeted at employment support agencies that clarify the linkages between the model clause and other industrial mechanisms such as certified agreements and AWAs.

Recommendation 18: That FaCS give consideration to the feasibility of adopting a more flexible approach to the annual review process where an individual has been in stable employment with consistent duties for a period of three years or more. In considering such options, regard will need to be given to the statutory obligations that arise from the relevant industrial mechanisms.

Recommendation 19: That where an employment support service is experiencing difficulties in meeting its performance targets due to the removal of OTJS funding , FaCS undertake a review of the service's individual circumstances, to determine any necessary adjustments that may be required to agreed performance targets and/or level of block grant funding. As part of the review, consideration should be given to the needs of individuals receiving OTJS funding who change employment.

Recommendation 20: That FaCS develop a comprehensive marketing strategy, supported by appropriately targeted information products, aimed at increasing the awareness of the SWS and the benefits it can provide for people with disabilities seeking employment. Such a strategy should, at a minimum, be targeted at:

- people with disabilities through the Centrelink networks; and
- the employment assistance agency networks including Job Network Intensive Assistance services, open employment services and business services.

1.3 Conclusion

Though there is clear capacity to improve the current arrangements and processes that support the SWS, it has overwhelming support from the majority of stakeholders and is seen as a far more effective mechanism than previous and alternative systems for establishing productivity based sub-award wage rates for people with disabilities in the labour market.

Radical reform is not required, rather a considered approach that will ensure that the SWS can remain relevant, responsive and flexible in a changing and dynamic environment.

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6 Key findings and issues[43]

6.1 Overview

There are many strengths identified with the SWS by all stakeholder groups.

The opportunities that the SWS provides, by enabling access to employment for people with disabilities through the use of productivity based wages is recognised by all stakeholder groups. All commented that it provides people with disabilities with employment opportunities that would not otherwise exist.

The SWS promotes the participation of all parties equally and has at its core, values of integrity and transparency in decision making.

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

As with any program there are always opportunities for improvement. For the SWS these primarily involve:

- access;
- employer incentives;
- assessment of productivity and review;
- workplace relations; and
- program administration.

6.2 Access

6.2.1 Access to SWS for open employment

There are four key pathways for people with disabilities to access open employment utilising the SWS. They are:

- placement through employment assistance services;
- referral from Centrelink.
- referral from CRS Australia; or
- a direct approach to the employer

The majority of people accessing the SWS do so through disability employment services. Very few employers or people with disabilities access the SWS directly.

Key issues that impact on the ability to access the SWS are:

- employers' awareness and knowledge of the SWS;
- understanding of SWS eligibility;
- nature of an individual's disability;
- nature of employment;
- availability of the model clause; and
- disability employment service ideology.

6.2.1.1 Employers' awareness and knowledge of SWS

There is capacity for employers to access SWS directly, yet very few do. The main reasons appear to be the lack of awareness and knowledge of the system as well as the process by which employment is frequently secured for people with disabilities.

None of the employers interviewed had sought out the SWS. Most were approached for employment on the basis that they were able to create a position that could be tailored to the needs of the person with disability seeking employment. It was only through the creation of such a position, and as a result of the needs of the individual, that employers became aware of the SWS.[34]

6.2.1.2 Understanding of SWS eligibility

The consultation process identified that there were potentially groups of people with disabilities not accessing the SWS but who may be eligible to seek assistance from the program. One such group were those currently accessing Job Network Intensive Assistance Services.

Though not always suitable[35] for people with disabilities seeking assistance from Job Network Intensive Assistance Services, a number of providers commented that the SWS would be applicable to their clients. This would be in circumstances where they meet the SWS eligibility criteria (i.e., eligibility for DSP based on medical condition/impairment rather than to DSP payment) and they were assessed as having lower productive capacity than that expected in an open employment environment.

It would appear that many Job Network Intensive Assistance services are unaware of the SWS and its potential benefits for the people they assist.

6.2.1.3 Nature of an individual's disability

The SWS is identified as a useful mechanism for a person with a disability where the functional impact of their disability is relatively stable.

Where this is not so, its use is seen to be somewhat limited. This is particularly the case for people with psychiatric disability, people with high support needs and/or people who are frail. The main reasons for this appear to be the episodic nature and impact of their disability as well as the nature of and pattern of employment sought.

The assessed productivity level determined during the assessment process is intended to represent an employee's average productive capacity over the course of a year. The average productive capacity of an employee with an episodic condition may not be captured accurately by the assessment process.

For some individuals their disability may make it difficult to sustain regular hours of employment. The minimum SWS wage rate may constitute a barrier for people whose disability makes it difficult to always work sufficient hours per week for employers to justify the minimum wage rate.

6.2.1.4 Nature of employment

The very nature of employment in and of itself can act as a barrier to individuals accessing the SWS. Some of the reasons for this relate to the changing nature of employment as well as the constraints imposed by the operational procedures associated with SWS. The key issues are:

(a) Definition of employment

SWMU policy specifies that the SWS is not intended for short-term or temporary jobs.[46] The current definition of employment for SWS eligibility requires an individual to be in employment for at least eight hours per week. It also presupposes that during some of that time the individual would be able to work independently.

A number of stakeholders commented that establishing such minimum hours and the need for an individual to achieve some independence on the job may act as barriers for people with high support needs and/or frailty.

There is a need to provide greater clarity and guidance about what constitutes employment specifically for people with high support needs and/or frailty. Current operational policies are seen to be ambiguous.

(b) Minimum SWS wage rate

As the definition of employment is seen to limit access to the SWS, similarly the minimum SWS rate is seen to be a potential barrier to employment for people whose productivity is assessed as lower than this rate.

Some disability employment services indicated that some employers were not prepared to pay the minimum rate, especially where there were minimal hours (i.e., eight hours) being worked and productivity was valued as lower than the minimum SWS wage rate. This was consistent with the feedback received from some employers. It is important to note however, that such feedback tended to relate to a small number of employers rather than the majority.

It was suggested that consideration should be given to the pro rata application of the minimum wage rate in such circumstances.

6.2.1.5 Availability of the model clause

When the Australian Industrial Relations Commission originally approved the insertion of a model clause covering the employment of workers with disabilities into a range of federal awards, there was a clear expectation of a quick establishment of wide award coverage. This was to be achieved by the insertion of the model clause in awards as an automatic measure in each industrial jurisdiction. Unfortunately this has not been achieved.

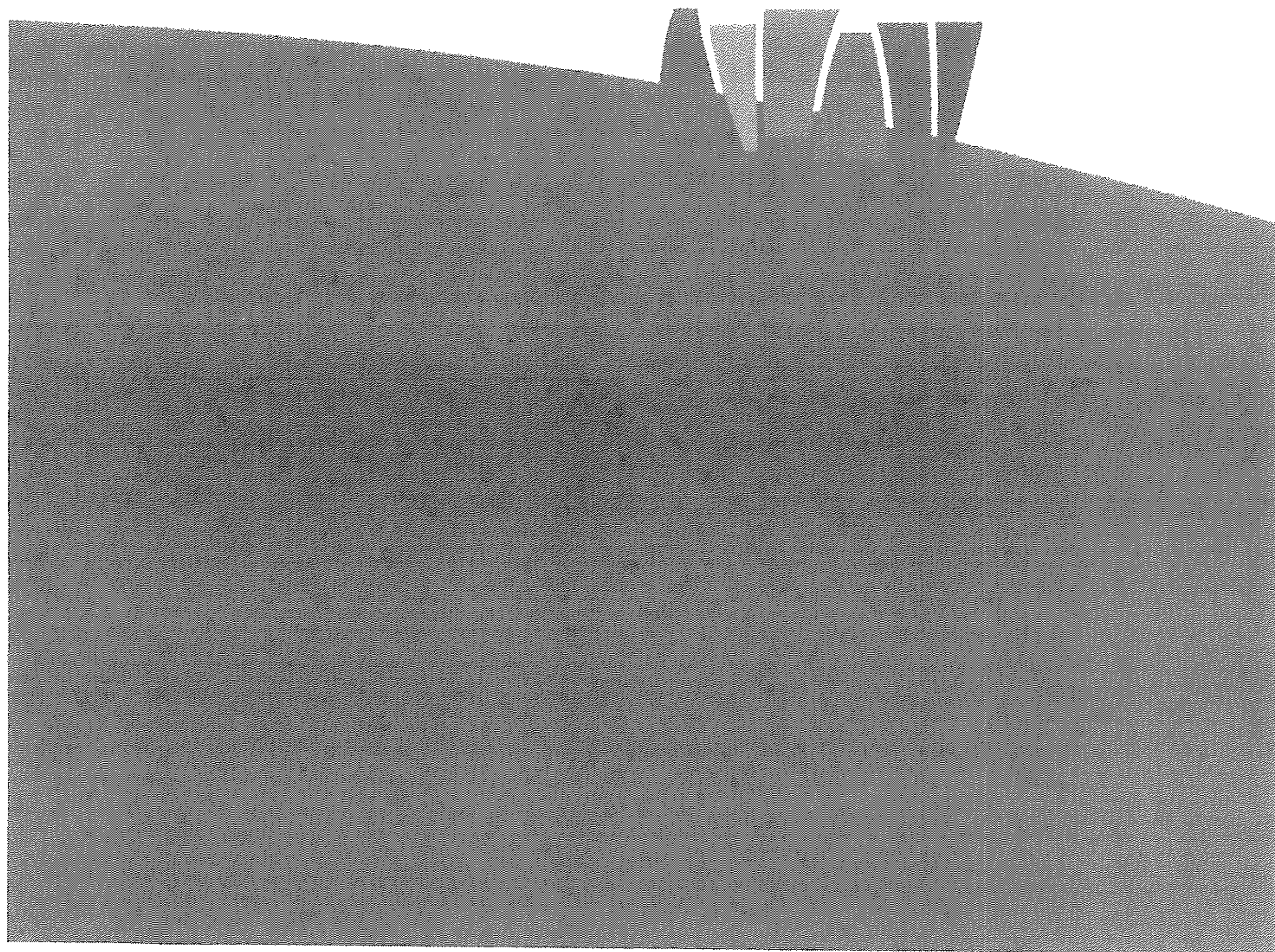
Some progress has been made in inserting the model clause into federal and state awards. At present 58 of the 100 most commonly used federal awards (excluding Victorian Minimum Wage Orders) contain the SWS model clause.

ATTACHMENT

'I'

Evaluation of Disability Employment Services 2010–2013

Final report



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Executive Summary

Disability Employment Services 2010-2013 (DES) represented an important refinement of open employment assistance for people with disability in Australia. Most significantly, the removal of service caps that existed under the previous programmes transformed disability employment assistance into a fully demand-driven programme. The fee structure was weighted more heavily towards outcome fees and tighter rules around breaks in employment were intended to encourage service providers to find more sustainable jobs for DES participants. A new model of Ongoing Support aimed to assist workers who need help to maintain employment, whether on an intermittent or regular, ongoing basis.

Two DES programmes replaced four – two capped and two uncapped – streams under the previous Disability Employment Network (DEN) and Vocational Rehabilitation Services (VRS). The DES Disability Management Service (DMS), for people with temporary or permanent disability who are not expected to require ongoing support, replaced VRS, and the DES Employment Support Service (ESS), for people with permanent disability who need ongoing support to maintain employment, replaced DEN. DMS was established through a partial open tender process that resulted in a significantly expanded and more specialized field of service providers. An Invitation to Treat process was used to contract ESS business, whereby existing DEN providers were essentially rolled over to deliver services under the new programme.

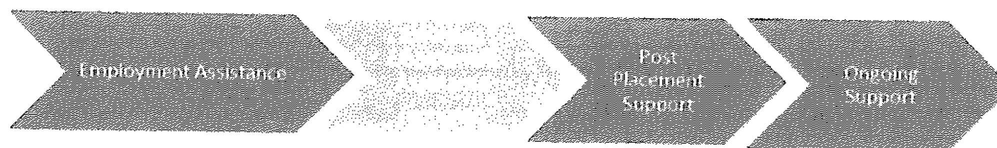
More than 290 000 people accessed DES in the period covered by this evaluation, 1 March 2010 to 30 June 2012. On 30 June 2012 the caseload numbered 148 327 participants, about equally divided between DMS and ESS.

The last comprehensive evaluation of outcomes in disability employment services examined the performance of the DEN model in 2005-06 (DEEWR 2007). Outcomes under VRS were not formally evaluated until the present report. The strategy for the DES evaluation was to compare DES participant outcomes with outcomes in DEN/VRS using a consistent and valid methodology and taking into account prevailing labour market conditions. The picture that emerges is a story of two programmes: DMS, with virtually no change to policy from VRS but a new field of service providers, and ESS, delivered by the same providers as DEN but with some important policy changes

The DES service model at a glance

DES offered eligible people up to 18 months of assistance to build work capacity until they found suitable employment with the help of a DES provider (Employment Assistance phase), followed by a period of Post Placement Support until they achieved a 26 Week Employment Outcome (six months in continuous employment). After this, support could be ongoing if required (Ongoing Support phase). The Employment Assistance phase could be extended by up to six months if there was an assessed need. Data show that participants who obtained employment tended to do so at around 160 days after commencing with a DES provider but periods in Employment Assistance varied considerably from person to person.

Figure 1: DES 2010-2013 service model



The capacity-building objective of DES Employment Assistance and the nature and duration of support following placement in employment distinguished the DES service model from mainstream employment assistance in Job Services Australia 2009-2012 (JSA). The expectation that participants receive specialist assistance from their DES provider to help reduce disability-related barriers to employment was reflected in higher funding levels in DES. For example, Service Fees payable for Stream 3 participants in JSA (people with relatively significant barriers to employment) ranged up to a maximum of $1120 over 12 months noting that, in JSA, Service Fees may be supplemented by Employment Pathway Fund credits. This compared with up to $6050 in Service Fees over 18 months for DES-DMS and up to $11 400 over 18 months for DES-ESS Funding Level 2

Another point of difference is the way that specialisation was implemented. JSA providers can be recognized as specialists for a specified target group but must also accept referrals from outside that target group. In contrast, specialist providers in DES could accept referrals only from the specialist target group, for example, a provider that specialized in intellectual disability serviced only job seekers with intellectual disability. This allowed specialist providers in DES to gear their approach to service delivery around the needs of a certain group while also attending to the particular needs of individual job seekers.

Evaluation findings

The evaluation of participant outcomes centred on a set of indicators developed in consultation with key non-government and government stakeholders. For the full evaluation strategy, see DEEWR 2010). Summarised in Table 1, these indicators were used to address four overarching questions about the programme's effectiveness in delivering employment outcomes.

Table 5.9: DES jobs with a 26 Week Outcome, percentage with hours within the participant's employment benchmark bandwidth, by programme and income support type of participant

Programme/ Employment benchmark[(a)]	Disability Support Pension[(b)]	Newstart Allowance	Non-Allowee
Disability Management Service			
8 hours	n.p.	45.8	77.2
15 hours	n.p.	72.2	56.2
30 hours	n.p.	98.4	99.4
Total (number)	**n.p.**	**8,832**	**3,952**
Employment Support Service			
8 hours	63.1	54.6	61.5
15 hours	74.1	74.1	62.7
30 hours	91.7	95.3	95.8
Total (number)	**5,598**	**3,637**	**3,115**

(a) Employment benchmark bandwidth is defined as working at or above the employment benchmark hours but below the next highest benchmark, i.e. the bandwidth for the employment benchmark of 8 is 8-14 hours, 15-29 hours for the employment benchmark of 15, and 30 or more hours for the employment benchmark of 30

(b) Insufficient data to report for DSP recipients in DMS

n.p. Not publishable due to small numbers

Source: Administrative data

Wages

A requirement of open employment programmes is that a participant placed into employment must be paid at least the minimum wage in respect of that employment, unless there is a Supported Wage System wage assessment agreement in place (four per cent of the DES ESS jobs were under a Supported Wage System agreement).[29]

Administrative data on the wages paid to employed participants is inconsistent across programmes and generally unsuitable for analysis. While wages data were recorded for DEN jobs, fewer than five per cent of VRS jobs had wages recorded. DES jobs filled from advertised vacancies have information about wages but this tends to be the advertised, not necessarily paid, wage or salary. There is no guarantee that actual remuneration matches the amount advertised on the vacancy, particularly if the hours worked differ from advertised hours or if job customisation has occurred. It is common for DES providers to negotiate with an employer to create or customise a job to suit a DES participant's skills and abilities and in this situation there is typically no wage information recorded in administrative data systems. Over 60 per cent of the DES jobs analysed here did not have wages recorded. The wages data field is free text, allowing amounts to be entered in any way: per hour, per week, per annum or simply a text description, for example, "award wage" is a typical entry. Many values do not have the measurement unit recorded and as the field is free text the data are of generally poor quality. Systems changes including data entry and validation controls would be needed to generate wages data suitable for quantitative analysis.

29 Most people with disability are able to participate in open employment at full rates of pay; however, some are unable to find or keep a job at full wage rates due to the effect of disability on their workplace productivity. The Supported Wage System enables employers to pay productivity-based wages to people whose work productivity is significantly reduced as a result of disability. A Supported Wage System Assessment takes place to determine the level of productivity-based wage.

Table 7.6: Programme expenditure per participant and per outcome, by comparison group ($)

Comparison group	Provider	Per participant	Per 26 Week Outcome
Mod. ID Loading	Jobsupport	30,111	39,620
	Other	12,359	47,534
Mod. ID Loading ESS FL1	Jobsupport	19,252	19,252
	Other	9,459	28,377
Mod. ID Loading ESS FL2	Jobsupport	30,564	40,752
	Other	13,697	61,637
DES-ID	Jobsupport	29,487	37,912
	Other	10,754	37,476
DES-ID ESS FL1	Jobsupport	19,252	19,252
	Other	7,619	24,282
DES-ID ESS FL2	Jobsupport	30,239	39,543
	Other	12,450	45,430
DEN-2008	Jobsupport	19,580	37,380
	Other	9,521	33,998
DEN-2009	Jobsupport	23,018	33,641
	Other	9,832	45,353

Note Includes Service Fees, Outcome Fees and Ongoing Support (or Maintenance) Fees that were approved in the first 15 months of service for each member of the comparison groups used for evaluation. Excludes any fees for these participants that fell outside the reference period. Fees paid for other participants on the providers' caseloads at the same time who were not selected into the comparison groups were excluded.
Source: Administrative data

7.4 Appropriateness of a fee loading for participants with moderate intellectual disability

A trial of this nature operating within a programme built on the principle of case-based funding inevitably raises the question: why moderate intellectual disability? Analogies can certainly be found in other sectors, most notably in education where an explicit link is made between the level of resourcing and severity of intellectual disability in the form of recommended minimum student-teacher ratios in school classrooms. However, to address the question in the present context we need to examine issues related specifically to employment.

The disparity in labour force outcomes between people with disability and other Australians is particularly stark for those with intellectual disability. Unemployment of around 16 per cent is double the unemployment rate of people with disability in general and only 41 per cent of people with intellectual disability in 2009 participated in the labour force (ABS 2012a). Just one in five had completed Year 12 or equivalent education. Those who do gain employment tend to have short working lives, with retirement commonly occurring by the age of 35 (Australian Institute of Health and Welfare, 2008).

Deinstitutionalisation in the late twentieth century brought hopes of participation in education and employment for people with disability hitherto excluded from community life. Access to formal

education began to open up in the 1970s with the opening of the first special class in an Australian high school in 1982. At around the same time a philosophy of presumptive employability, a strengths-based approach which presumes the person with disability is employable given the right supports, took hold. Specialist employment support models were evolving, particularly in the United States (see for example, Wehman et al. 1999). Here in Australia the *Disability Services Act 1986* laid the foundations for a specialist service system to support access to the open labour market for people along the disability spectrum.

As well as enabling legislation and policy initiatives, employment support technology has played a central role in advancement and demonstrations of open employment services for people with significant intellectual disability began to appear in the mid to late 1980s. Wehman *et al* (1999) outlined eight strategies necessary for people with significant intellectual disability to succeed in open employment:

- specialist job coach
- instructional strategies specifically designed for people with intellectual disability, for example, prompt sequences, positive reinforcement, task analysis and modification
- compensatory strategies
- natural employer workplace supports
- assistive technology
- workplace modifications
- long term support
- community supports.

Three elements are said to characterise high quality services for this group: high expectations, person-centred goals, and collaboration between service providers (Grigal *et al.*, 2011). Along with specialist practical supports there must be a strong conviction that people with significant intellectual disability can succeed in open employment.

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

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

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

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

The notion of becoming 'work ready' through a period of employment assistance does not translate as easily for this group as for other job seekers. A person with significant intellectual disability can, with considerable intervention, become ready to perform a specific set of tasks in a given workplace but their lack of adaptive behaviours means that readiness for one job does not confer readiness for similar jobs and work environments.

There is no doubt that this is a group of job seekers with exceptionally high needs, who face considerable odds in the open labour market. What appears to set them apart is the body of evidence of their potential to succeed given the *right type of service*. From the available literature it is clear that outcomes are driven by positive conviction and specialist know-how and gives a strong sense that this is very high cost servicing. Most importantly, the literature confirms that in spite of a poor overall track record of employment for people with significant intellectual disability the technology to achieve much better outcomes for this group does exist.

The guidelines in theory and practice

A cut-off score IQ 60 (range 55–65) for moderate intellectual disability was confirmed as in line with the American Psychiatric Association (2000) ranges. The Centre for Disability Studies advised that a cut-off score of IQ 60 is appropriate for targeting people with moderate or higher intellectual disability and recommended that the guidelines be refined to assist providers to correctly interpret IQ scores expressed in different formats. This can be a single score or percentile range, most commonly expressed as 5 approximation points either side of the full scale IQ score gained on the instrument used. The Centre encourages the use of adaptive behaviour or support needs assessment in conjunction with IQ, especially for situations where an IQ score may be queried. Therefore, support was given for the current guideline that allows a person to be classified by a registered psychologist using a recognised assessment tool, as an alternative to IQ ≤60.

7.5 Key findings and recommendations

The administrative data and design of the Moderate ID Loading trial did not fully support evaluation. Evaluation questions could be answered only in respect of Jobsupport because participants with moderate intellectual disability could not be identified in DEN administrative data, other than those in Jobsupport. Comparative analysis relied largely on the outcomes of Jobsupport clients and these results did not reflect the performance of the broader field of providers at the time.

Did those providers that were achieving outcomes of 15 or more hours per week in DEN for participants with moderate intellectual disability maintain or improve the level of those outcomes?

Under DES with the Moderate ID Loading, employment outcomes of 15 or more hours per week improved for people with moderate intellectual disability who were registered with Jobsupport:

- 68 per cent achieved a 26 Week Outcome for a job of 15 or more hours, compared with 52 per cent of the DEN-2008 and 47 per cent of the DEN-2009 Jobsupport comparison groups

This result should not be used to infer that outcomes for people with moderate intellectual disability improved across the board because of the specialist nature of the Jobsupport service.

ANNEXURE KW-7

Fair Work Commission
4 Yearly Review of Modern Awards
Supported Employment Services Award 2010
Matter No: AM2014/286

Further Statement of Paul Cain

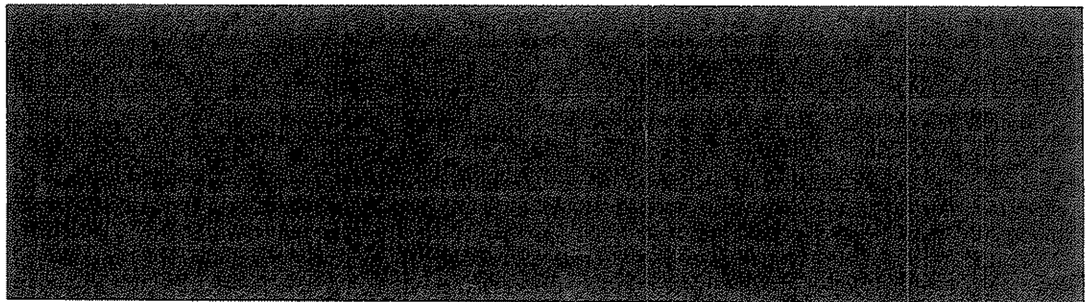
I, Paul Cain, [redacted] make this statement in reply to submissions made by other interested parties filed on or about 21 November 2017.

Employees completing tasks in a group or on a production line

1. Concerns have been raised by some submissions to this proceeding about the capacity of the Supported Wage System to provide fair and accurate wage assessments of employees completing job asks as a group, or on a production line.
2. Similar concerns were raised by the Modified Supported Wage System (MSWS) trial. The MSWS Trial report noted that;

   ". . . However, clearer direction is needed on how employees should be assessed. . . to ensure consistency and fairness for employees completing tasks in a group or on a production line."

3. In response to these concerns, the Conference AM2013/30 agreed to conduct a demonstration of the MSWS to address outstanding concerns raised by the MSWS Trail. The MSWS Demonstration Report stated that;



inequitably remunerated compared to employees working a greater range of task are not supported by the MSWS Demonstration findings.

On capacity to work in open employment

48. The submission by Mr. Michael Smith presents the view that employees with disability lack the capacity to work in open employment due to being independently assessed by the Commonwealth's job capacity assessment.

49. In my opinion, this view is misleading and requires clarification and correction.

50. First, there is no empirical evidence to support the job capacity assessment used by the Commonwealth to predict the future open employment capacity of people with intellectual disability.

51. This was confirmed by the Commonwealth's recent research report on Work Capacity Assessments where it was found that;

> *"Overall, our searches confirm the observations of Cronin et al.[4] regarding a world-wide interest in work capacity assessments and the concerns of Serra et al.[5], that is in spite of such an interest, there is a scarcity of evidence based work capacity (fitness for work) assessments validated by empirical data.*
>
> *Within the scope of our search, we did not uncover any instruments designed specifically to predict the number of hours an individual has the capacity to work, nor any evaluations of using an instrument for this specific purpose." (Dyson Consulting Group, Critical Literature Review: Instruments Assessment Work Capacity. February 2017)."*
>
> *"4..Cronin, S., J. Curran, J. Iantorno, K.S. Murphy, , L, et al., Work capacity assessment and return to work: A scoping review. Work, 2013. 44: p. 37-55. (footnote is original)*
>
> *5. Serra, C., M. Rodriguez, G. Delclos, M. Plana, et al., Criteria and methods used for the assessment of fitness for work: a systematic review. Occupational and Environmental Medicine, 2007. 64: p. 304-312. (footnote is original)"*

52. Second, research on the capacity of work in the open labour market has found that the only valid method of discovering the capacity of people with intellectual disability to work in the open workforce is to place the person in a job and provide systematic job instruction, and ongoing support

53. This is coherent with the research finding that predictive work capacity tests of youth with intellectual disability typically bear little relationship to the capacity achieved following job placement and systematic on the job training.

54. Third, people with significant disability have been regularly placed and supported in open employment since 1986.

55. The DES Evaluation stated that

> *"Research and practice in the field has shown that with the right level and type of support, people with significant intellectual disability can achieve more substantial employment."*

56. The DES evaluation 2010-13, Chapter 7 on intellectual disability found that, with the right type and level of support, people with significant intellectual disability were able to achieve employment of 15 hours of more per week in the open labour market.

57. School leavers with intellectual disability are able to move directly to the DES open employment program without having to complete a job capacity assessment. This has enabled specialist providers to avoid losing clients through the Commonwealth's job capacity assessment which may prove to be a barrier to choose future open employment opportunity.

58. It is important that a discussion about the rights of employees with disability working in ADEs to fair award wages is not inappropriately framed as being about individuals without the capacity to be included in the open workforce and entirely dependent on ADEs for employment participation. This would be misleading.

ANNEXURE KW-8

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1055625

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
COMMISSIONER CAMBRIDGE

AM2013/33 AM2014/286 AM2013/34 AM2013/37 AM2014/286

s.156 - 4 yearly review of modern awards

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

Melbourne

9.36 AM, FRIDAY, 9 FEBRUARY 2018

Continued from 8/02/2018

PN1944

VICE PRESIDENT HATCHER: Is Ms Svendsen the first witness for today?

PN1945

MR HARDING: She is, your Honour. Perhaps before I go to Ms Svendsen I ought to declare some embarrassment that I was under the impression that different witnesses were going to be called by my opponents this afternoon and I've been apprised that now Ms Powell and Mr Daley are coming. I just wanted to flag that. I don't expect that they'll be got to until after lunch and I will advise the Bench of my position after that point.

PN1946

VICE PRESIDENT HATCHER: Mr Daley didn't actually make a witness statement, it was only a submission. Why - - -

PN1947

MR HARDING: No, it's a submission but there's factual elements in the submission and that was the basis upon which we asked him to be in attendance, your Honour. But a question in my mind is

VICE PRESIDENT HATCHER: Let's raise this point, speaking for myself, the difficulty we have with that is that in the second case, the sewing job, and I for using the wrong terminology, but that a real job, in the sense that there was a non-disabled person also doing the work, which we saw, and it was work which you could actually - it's a job that actually would exist in a labour market and you could give it to a non-disabled person. In the first case it wasn't, with respect, a real job, it was something which they found for that person to do and you would never, in reality, give it to a non-disabled person. How do you take that into account, if at all?---Well, some of the evidence that was collected by the Department of Social Services, in the Nojin case, looking at this notion of would this be a job that you would have a person without disability do? All the comparative research of looking at the similar types of jobs in ADEs versus in open employment, was shown that we had the same range of competency and the same range of tasks, even if the task was simple in open employment, they were still getting at least the minimum wage.

PN2201

The question is, if the job is so constructed just to keep someone busy - it's interesting you use the word "real" then we have to question whether that's legitimate employment or whether we've actually done a very good match or a very good training. Because that was one of the things that came out of the development of the Supported Wage System, if someone is performing at such a low rate then we have to question whether we've actually put the person in a position that is real and is well matched to their strengths and able to contribute. So it does, it teases out those issues that - I think this is the notion of moving to real employment that the Disability Services Act wanted us to do. It wanted us to move away just from keeping people busy and look at commercial operations and real jobs and real wages. But we've still probably got some traditional stuff, busy work, still going on to keep people occupied.

PN2202

VICE PRESIDENT HATCHER: Thank you. Mr Ward?

PN2203

MR WARD: Thank you, your Honour. I just want to ask you some questions, if I can, about valuing work and can we just avoid having a debate with each other about how, for a minute, if we could. You'd agree with me that the focus of determining a wage should be the value of the work actually performed by the employee?---I'm sorry, could you please repeat that?

PN2204

That's all right. You'd agree with me, wouldn't you, that the focus of determining a wage should be the value of the work actually performed by the employee?---Yes.

PAUL CAIN XXN MR WARD

PN2205

Now, you use a phrase in your statement, which is "apples versus apples", I just want to put a scenario to you and just see where we disagree. Have you shopped at a Coles shop before?---Yes.

PN2206

Coles will be pleased to know that?---My family work for Coles.

PN2207

I hope there's not a conflict in the question then. Could you imagine a Coles shop, this Coles shop has Bob, the retain worker, and Bob is without a disability and performs a variety of lots of different tasks in the shop. Coles decide to engage somebody with an intellectual disability and they decide to construct a role for that person, doing no more than tidying shelves, realigning stock that the customers might have knocked?---They call it facing.

PN2208

I was informed of this yesterday, facing up, yes. We ask Bob a question and that question is, "Bob, how much of your job is facing up?" Bob says, "Well, that's just 5 per cent of my job, 95 per cent of

my job's involved in all sorts of other things." Now, you'd agree with me, wouldn't you, that right at that point, just at that point, if I'm comparing the job Bob does, the full job, with the job the person who's just facing up is doing, you'd agree with me that that is not an apples with apples comparison?---No, I wouldn't agree.

PN2209

Do you think those jobs are exactly the same?---Because you're leaving out an important element here, because even though it may be just that one particular task, they're doing that task the whole of their work time, right, whereas someone else might be doing facing up for a little bit of their work time, they might be doing some other task for their work time, and all that, so the apples with apples is task versus task, otherwise it would be completely unfair to determine that person's value, if you were comparing them against tasks they don't do.

PN2210

Just - - -?---Can I just finally say, is that this was part of the problem with the BSWAT is that we were assessing things that weren't part of people's jobs. This is the major problem that we see, otherwise you're not doing an assessment of the person's job performance, you're doing an assessment of someone else's job performance and that creates problems.

PN2211

You might remember that when I started this I said can we just put tools and things to one side for a minute, I know you're desperate to get there, I understand that?---I will try, but I need to give - - -

PAUL CAIN XXN MR WARD

PN2212

I know you're very passionate about what you believe in, I understand that. I write out a job description for Bob and it's got all of these things in it, and I wrote out a job description for the person with a disability and it's got one line in it and you're saying, as far as you see that, they're the same?---Well, they're the same, in terms of job task, right.

PN2213

You said - - -?---However it's different - - -

PN2214

VICE PRESIDENT HATCHER: Let him finish, Mr Ward.

PN2215

THE WITNESS: It's the same - I forget the names you used, but let's say, John, he's doing facing up at Coles, this happens and Coles is a big employer of people with intellectual disability in Australia and facing up is a common task. If they're doing that task, for the time that they're doing that task, that's comparable to the time that someone else is doing that task, albeit whether someone is doing additional tasks or not.

PN2216

MR WARD: I'll try one more time, I don't think you've answered the question.

PN2217

VICE PRESIDENT HATCHER: He doesn't agree with you, Mr Ward.

PN2218

MR WARD: Okay.

PN2219

VICE PRESIDENT HATCHER: Can I raise this, Mr Cain, that that's obviously the SWS methodology, but that is at odds with the way this Commission, and its predecessors, has assigned a value to work for the last 50 years. That is, we look at the nature of the work, the level of skill and

responsibility involved and the conditions under which the work is done, they're the principles in the Fair Work Act and they represent 50 years of case law. How, in that context, does the SWS match up with the way in which the Fair Work Commission actually sets rates of pay and awards, given that the SWS is meant to give you a rate of pay that relates to the rate of pay set by awards?---Well, the way the SWS works is to take that - already that classification that's worked out the skill levels and the supervision levels and quality checking levels and all that, that's already in the classifications, and that's where, if the facing up is part of that classification level, then it immediately meets those decisions that have already been made over those 50 years. Because person is working and that time that they're working, whether it be eight hours or 30 hours, for that time they're doing that task and that employer has agreed that that's valuable to their business.

*** PAUL CAIN XXN MR WARD

PN2220

So just there, if someone else is doing, say, four tasks in the hour, that's no more less entitled to or more entitled to the award classification rate of pay than someone that's doing one task. I think that's the research, again, that I've got to point to, from the Marshall Consulting the Department of Social Services funded, is that there are people without disabilities doing job tasks, under the current regime of industrial relations in Australia, who are doing as little as one tasks, or two tasks, getting paid the award rate for doing those tasks. So the question is, if we're going to differentiate for a person with disability doing one task then are we going to differentiate for those people without disabilities doing one task? That opens up a can of worms, as far as I'm concerned.

PN2221

DEPUTY PRESIDENT BOOTH: Mr Cain, the apples and the apples and the apples and the oranges are this, aren't they, that in some cases a person with a disability, in an ADE, is supervised in a manner that is never replicated in open employment, on an ongoing basis? That is to say that either an operational supervisor providing verbal prompts and role modelling periodically and routinely the task, or the kind of behavioural supervision that involves people going off task in order to be counselled and supported to exhibit the appropriate behaviours ongoingly. That's not something that happens in open employment and it's not something that the classification structures of modern awards have ever contemplated. Do you agree with that, or not?---I think generally, yes, and I think this is why the Commonwealth funds the support and supervision, in recognition of that difference. That's the notion of disability support assistance, it's the additional assistance above and beyond what would typically be expected, that's the same in the open employment assistance as well.

PN2222

So if I just give one little example, so we know that training a person with intellectual disability in open employment is considerably more intense and longer than what an employer would be normally expected to do, hence that's why the Commonwealth fund that, so that there's no burden on the employer. That way no burden on the employer and it provides the opportunity for the person with intellectual disability. I think that the same principle applies with the ADEs, that's what the funding is for, to recognise that ongoing, intensive assistance.

PN2223

VICE PRESIDENT HATCHER: That deals with issues in respect of the cost to the employer, I think the question's been raised in terms of what relevance it has to assessing the value of the work. Whether the government funds or doesn't fund the supervision may be one thing, but it's a question of whether that's a matter that you need to take into account when assigning a value to the work performed by the disabled employee for wage purposes?---Yes. The only thing I'd add is that in these lower grade levels direct supervision is part of the classification, is it not? That's the same in open employment for those levels as well. So to me it's that plus the additional funded assistance that's provided, that has to be part of the thinking and calculation here.

PN2224

Thank you.

*** PAUL CAIN XXN MR WARD

I doubt I would stop you, sir?---That performance standard uses the structure of the classification and the rates of pay. The whole structure and the interface between that assessment is dependent on that structure being there because we're asking for the employer and the assessor and the employee to come to an agreement on what's considered to be the 100 per cent rate of pay for that classification. So it's very much entwined, it's very much interrelated.

PN2293

It's a very process?---So the fact that it's not there in black and white in terms of how much is, in some ways, disingenuous to the way the system actually works because it's very much connected to the current structure that's been developed over so many years. It relies on the classification and the rates of pay that have been set already.

PN2294

I know you are an ardent advocate for SWS, you've told us you've been advocating and campaigning for that for a very long time, but wouldn't this be preferable that you go to the award, like you do for all employees without a disability, you go, "This employee's doing those things and they get that rate of pay and it's written in the award", wouldn't that be preferable?---No, because that would cause major problems in terms of the direction of including the integration of people with disabilities in the workforce because the reason why we have the Supported Wage System structure in the modern awards is to actually provide that opportunity for people who could be rejected because an employer might say, "Look, yes, you might be doing that classification work and I'm required to pay you this rate of pay, but sorry, I'm not going to accept you, I'm going to hire someone else", whereas what we've got now is the opportunity for employers and employees to actually negotiate something that's acceptable to both to recognise that lower productivity rate. So, to me, if you did it on a formal equality basis rather than a substantive equality basis, saying, "Okay, I'm doing that task and I get that rate of pay", I think we would do much damage to people particularly with intellectual disability.

PN2295

You are talking there about open employment?---No, I'm talking to both, any sort of employment.

PN2296

Do you think it better that all of this is haggled out?---I think it's better that we come to recognise that we don't need to differentiate in terms of the classifications and the rates of pay because they are already set for everyone. That's not a matter of - I don't think we set classification and rates of pay in this country just for people without disabilities. That's my understanding. So, therefore, wouldn't it be better to recognise that that's available for everyone and then have a singular system to determine the question of productivity if the employer is concerned about including that person in their enterprise?

PN2297

I think that's an interesting submission and I won't cavil with you today because we'll be here all day and never the twain shall meet. I will deal with that in our closing submissions, Mr Cain.

PN2298

VICE PRESIDENT HATCHER: Mr Cain, can I just tease that out? As you say, our modern awards set classification, and you're probably aware that a number of modern awards have junior rates of pay and they set a specified criteria, based on age, you get X per cent of the adult rate of pay. Perhaps this is a variant upon what Mr Ward is putting to you, but one possibility might be that there be some analogous construct for a disabled person, that is, you have the classification for the full rate of pay and then you set various percentage levels, say 10, 20, 30, et cetera, up to 90/100 based upon specified criteria which the employer can provide in a transparent way based upon what the award says without the need for any assessment tool? What do you think about that sort of model?---I think it's quite dangerous because you're starting from the premise of discounting on the basis of disability itself and I think that's sort of a downward slope that I think would be very frightening. I think the fact that we've got a system that recognises that your disability isn't a first point of call for something different is the

best way to go because then it requires some kind of burden of proof for an employer to determine does that disability impact on the abilities of that person to do that particular task.

PN2299

If we were to begin with something less, then I think we run into the issues of profound arguments around discrimination based on individual difference. Clearly we have accepted the individual difference of junior rates, that if you're a junior and you have a disability, you still are entitled to that junior rate, but if we were to go to disability, I think we would be arguably breaking concepts under the Disability Discrimination Act and perhaps even going against the United Nations Conventions that we've already ratified and signed up to as a nation.

PN2300

VICE PRESIDENT HATCHER: How would we be doing that?---Well, the Articles on Employment in the United Nations Convention is very clear on the basis of inclusion and equality and not making decisions based on your individual difference being disability.

*** PAUL CAIN XXN MR WARD

PN2301

If the criteria were not describing the disability but describing the work performed, does that raise the same problem?---I think it does because we'd have to ask "Is there anything particularly different in the work performed?" That's where I come back to most of the research, through particularly the Nojin case and that, is there really isn't anything substantively different in terms of the work performed. For instance, yesterday I spoke to a young woman with Downs Syndrome who is doing packing for an organisation that provides biscuits to Woolworths and I can invariably see somebody doing the same kind of task in a disability enterprise, but we can determine her wage using that classification of what that business uses and determine a productivity rate. I don't see where the tasks would be very different. They are simple and they are routine, but I don't think the tasks are necessarily different per se.

PN2302

Thank you.

PN2303

MR WARD: Can I just have a moment, your Honour?

PN2304

VICE PRESIDENT HATCHER: Yes.

PN2305

MR WARD: Mr Cain, we received some additional attachments to your statements last night. My colleague on my left is Mr Zevari. He has just got a small number of questions about those statements. He is going to ask those of you and then, your Honour, we will have finished with the witness.

CROSS-EXAMINATION BY MR ZEVARI [11.26 AM]

PN2306

MR ZEVARI: Mr Cain, just before I come to the document in Attachment K to your second statement, which is exhibit 16, I just wanted to ask you, you said earlier this morning - and please correct me if my recollection is incorrect - that government funding - it was, from memory, in response to a question from his Honour, the presiding member - that the purpose of government funding is to address support costs for ADEs associated with employees with a disability. Is that a fair summary?---That's a fair summary.

PN2307

Do you know the current rate of hourly support in open employment?---Not off the top of my head, no.

we're talking about – if we're talking back to that apples with apples and we're talking at very low grade levels in comparison where people are expected to have direct supervision. So for instance, encourages co-workers to maintain on task behaviour, so we're actually then taking people who're only responsible – are not responsible for other people's work under the classification, now we're assessing them on their ability to help others. It just seems to be – going back to the notion of doing competency for competency's sake, does that relate to the job description and job expectation of the individual? We don't know because that is never made – with any clarity for us to make a judgment on whether this is relevant, whether it relates to job performance or not. And as I tried to say, I don't know whether it came through in my statement. These are useful things for training and development. I would question whether they're useful for determining job performance and wage assessment.

PN2436

No further questions, Your Honour.

PN2437

VICE PRESIDENT HATCHER: Mr Christodoulou, do you have any questions?

PN2438

MR CHRISTODOULOU: Yes.

CROSS-EXAMINATION BY MR CHRISTODOULOU [12.36 PM]

PN2439

Mr Cain, would it be true to say that many – think you gave a figure before that – I think it was 11 per cent of people in open employment with a disability had an intellectual disability?---Correct.

PN2440

Where did you get that figure from?---That's from the Australian Institute of Health and Welfare.

PN2441

Okay. And if I could just show you – well, I'll go – before I show you a document, would it also be true to say that in terms of - - -?---Can I just complete my answer on that so you - - -

PN2442

Sorry, yes?---So it is clear where I got it from? Sorry to interrupt. So Australian Institute of Health and Welfare collect the data of labour force status of people who are receiving disability support services in Australia, and they publish a yearly report. So just to clarify exactly where it's come from.

PN2443

Yes, okay, no problem.

PN2444

VICE PRESIDENT HATCHER: Can I just follow that up? So 11 per cent of disabled people in open employment are intellectually disabled. Is that - - -?---No, no. It's 11 per cent of people with intellectual disability 15 years and over who are receiving any disability support service in Australia. So that's approximately 60 to 70,000 people. So 11 per cent of those report having work in open labour market.

*** PAUL CAIN XXN MR CHRISTODOULOU

PN2445

Do you know what the statistic is in terms of open employment between those who have intellectual and non-intellectual disabilities?---I can give you only a rough thing without having it in front of me. You would say that for the – say, the physical disability group, they've got a higher proportion in open employment and yet – and I wish I had it in front of me, but this is published information. Intellectual disability is one of the least, and together with psychiatric disability they're probably the two lowest proportions of those receiving service in open employment in Australia, yes.

PN2446

But does it follow from that that the majority of SWS assessments are in relation to non-intellectually disabled people?---No, that is the opposite.

PN2447

It is the opposite?---The majority of supported wage system assessments are people with intellectual disability. It is approximately 68 per cent. And that has been fairly constant over the period of – as I think – I forgot (indistinct) name – since 1994 when we first started doing supported wage system assessments. The majority of the participants employed in the open labour market on the SWS are people with inte4llectual disability.

PN2448

Is that because a large proportion of physically disabled people without an intellectual disability are getting the full award wage?---Correct.

PN2449

MR CHRISTODOULOU: Would you say, Mr Cain, that the Disability Employment Services, DESs, have a higher proportion of people with disabilities that they would assess under SWS?---Can you please say that again?

PN2450

So for a person with a disability going into open employment, I guess there are various ways that they can get into open employment. One of those mechanisms is that a DES can find a person with a disability a job, and in the process of finding that person with a disability a job in open employment there may be a need to assess them under the SWS?---Yes, there may be, yes.

PN2451

And would that be a reasonably high proportion?---Well, again, people with intellectual disability would dominate those number; I don't have them in front of me. So we're talking about a broad disability labour market program which DES, Disability Employment Services, about 7.4 per cent - and I only know that off-by-heart because I was talking about it yesterday – 7.4 per cent of that population of people with intellectual disability. But they will constitute the majority of people requiring a Supported Wage System, and they will be the majority of – they're also one of the – I won't say "majority" – one of the largest cohort requiring ongoing support, so I hope that makes sense.

*** PAUL CAIN XXN MR CHRISTODOULOU

PN2452

So some stats that are here indicate that in terms of DES participants that go into open employment, 44 per cent of those have a physical disability, 38 have a psychiatric disability and 4 per cent have an intellectual disability?---Sorry, where are you quoting from?

PN2453

Sorry. And I will indicate I'm quoting from the most recent discussion paper, which I'm sure you've seen, put out by the Australian Government, DSS, "Discussion paper on ensuring a strong future for supported employment" dated 7 December. I'm happy to show you?---No, that is okay. I'll just clarify my previous answer: there is two sub-programs in DES there is the – called the "Disability Management Service", there is one called the "Employment Support Service." The 7.4 per cent of people with intellectual disability I'm quoting in terms of the employment support service because there is almost no people with intellectual disability in the other program because the other program isn't an ongoing support program, it is for people that only need just short-term assistance. So the 4 per cent, I think, in that is talking about the whole thing, the two programs. I'm always focussed on the employment support service side of it because that is where people with intellectual disability typically go to to get support, yes.

PN2454

And you would agree, wouldn't you, that having that form of income then allows the person who has a disability to actually engage in other forms of community life; they can go to the pub, they can go out with their friends, they can go shopping, they can go bowling. It is disposable income that they otherwise have that they wouldn't have if they were just on the disability support pension?---Yes, absolutely.

PN2502

That is right?---Just as it does for a person with intellectual go into work and open employment.

PN2503

That is right. So you weren't - - -?---Getting paid is a good thing for – good to get money.

PN2504

That is right, and so - - -?---It pays for things.

** PAUL CAIN XXN MR CHRISTODOULOU

PN2505

And so yesterday Mr MacFarlane had sort of indicated that he thought there may be a range of people in disability enterprises that shouldn't be there really, that they probably should be in some day program. Do you agree with that?---I would in principle. I think, you know, clearly that there is – you know, and I think that goes back to, I think, that example before about the notion of the real job. I think, you know, if the purpose of the person being there is really simply for occupation for the day then the question is, you know: what is better? And I suppose that comes down to choice and preference and the like, but, you know, clearly there are cases where people are simply being kept busy during the day. So I can imagine someone making the comment that they may be better off doing something that is preferable, if that is their choice.

PN2506

Yes. And that is making a comment about someone else's life who chooses to be in an ADE earning income and using that income to do other things?---Yes. And I think this is the notion of where we're heading with current policy of NDIS in terms of choice, and, you know, clearly a lot of my work is about trying to offer the choice of moving into the open labour market trying to build that capacity to provide that option/choice, but clearly there is other things as well that is happening with the NDIS in creating options for other things that are non-employment et cetera. So I think that is the world of choice. And we were very luck, as I was reminded by international guests yesterday we're a rich country where we can offer such a broad range of choice.

PN2507

VICE PRESIDENT HATCHER: Mr Cain, with this concept of, "I started, I know about the real job and the not real job" there may be an intermediate category where, for example, you have a production line or a process where you get from A to B where you would employ for non-disabled people maybe one or two people to do it, they would do all the functions in that process, but in ADE they break it up into, for example, six or seven or eight discreet tasks. So the disabled people doing tasks which the non-disabled people will do, they've just been broken up and they only do a discreet aspect of it.

PN2508

Does SWS take any account of that? So they're still productive jobs but they're not jobs that you would get a non-disabled person to do?---Absolutely. It dominates the application of a supported wage system, and I think as – I can't remember which one of my statements where I try to point out that almost all of the Supported Wage System employees in open labour market are working in customised jobs where it has been – the job has been broken up, or it has simply been created. In fact, that is becoming more the norm than doing what they used call "job carving", take an advertised vacancy and carving it up, taking some tasks out, giving the other tasks to another and creating two different positions, so the person without a disability (indistinct) new position without those lower-order tasks

and create a new position that is all lower-order tasks, but the current trend is to actually just create a position that adds value to the business and they will be a collection of lower order tasks.

PN2509

VICE PRESIDENT HATCHER: One example I gave: SWS will just take the discreet task the disabled person was doing, measure it against some sort of benchmark and then assign a percentage regardless of the fact that the job has been carved out for the specific purpose of having that person being able to do it?---Correct, yes. That is the main process because - and it just comes down to the fact that most cases people with intellectual disability cannot perform all the tasks of what we traditionally have in job vacancies.

*** PAUL CAIN XXN MR CHRISTODOULOU

PN2510

Could I just qualify that a little bit because while that is true, in the Nojin case where the Marshall Consultancy reports that were put there was sort of revealing that while that is the thinking and the belief that there is a lot of job customisation going on for people without disabilities in the labour market that we are probably not acknowledging. So it is not cut and dry between people without and people with disabilities, and I think that is what was revealed in those sort of studies is that there is a lot of customisation that happens in the labour market per se, so no one is restricted to just doing this. And I think the other comment that Marshall Consultancy made was that there is a huge disparity between job descriptions and what people actually do, hence why - that is why they were sort of all talking, "We have to be careful with wage assessment based on things that are sort of there and sort of theoretical" versus what (indistinct) actually do, kind of thing, and it was always - in their view it was less than - always less than what the job description and job duties actually aspirationally wrote so - - -

PN2511

VICE PRESIDENT HATCHER: Right. You'll be a while longer, Mr Christodoulou?

PN2512

MR CHRISTODOULOU: A couple more questions, that is all, Your Honour.

PN2513

VICE PRESIDENT HATCHER: Right. Mr Harding, when we get to Ms Power, how long do you think she will take?

PN2514

MR HARDING: I would have thought more than an hour.

PN2515

VICE PRESIDENT HATCHER: So we'll be in a positon to finish by 3 o'clock.

PN2516

MR HARDING: I hope so, Your Honour.

PN2517

VICE PRESIDENT HATCHER: Right. Well, you ask your questions, Mr Christodoulou then we'll adjourn for lunch.

PN2518

MR CHRISTODOULOU: Thank you, Your Honour.

*** PAUL CAIN XXN MR CHRISTODOULOU

PN2519

(To witness) It is true to say, Mr Cain, that there is a big difference between a supported employee working under the Supported Wage as in a Coles store and the ability of, say, Coles to be able to find that person a job that might just be one task related and being able to absorb the cost if there is a cost involved in that to an ADE that employs lots of people that can only do one or two tasks?---I think the

ANNEXURE KW-9

Fair Work Commission

4 Yearly Review of Modern Awards

Supported Employment Services Award 2010

Matter No: AM2014/286

STATEMENT OF ROBERT MACFARLANE

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

1. I have been provided with the Australian Business Industrial (ABI) and NSW Business Chamber SES Award Review Draft Determination and submission along with the witness statements of nine Australian Disability Enterprise (ADE) representatives (including consumer and family/carer statements) and additional submissions from National Disability Services (NDS), Greenacres Disability Services (GDS) and Our Voice.

2. I was asked, after reading this material, to compose a report or witness statement that addresses a number of questions:

   2.1 Can the Supported Wage System (SWS) be applied, and has it been applied, as a wage assessment tool in ADE employment?

   2.2 Does the ADE work setting adversely affect the relevance and effectiveness of the SWS as a wage assessment tool as opposed to open employment environments?

   2.3 Is the proposed "tool specific system of work classification" (the WVCT) necessary for wage setting in ADE employment?

   2.4 What are the benefits or disadvantages for wage assessment if the WCVT is adopted in comparison to the SWS?

BACKGROUND

3. I set out my experience and qualifications below:

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

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

12. The above extract from the GDS Submission to the Fair Work Commission's Review of the SES Award highlights some errors in the criticisms of the Supported Wage System (SWS).

13. SWS assessments have never been just about speed or pace of work, but also the quality of work expected. SWS employees must use their skills and competencies to undertake their designated tasks safely and to the required standards, and this requirement is captured in the quality component of any SWS assessment.

14. Use of the SWS or productivity-based wage assessments for employees without disability is not appropriate or relevant, as they are entitled to the full award rate of pay for performing tasks of the relevant classification.

15. A fundamental principle of the SWS is that it is a measure of performance in actual jobs by people with disability assessed after adequate training, job design, and reasonable workplace adjustments have confirmed productivity shortfalls.

16. The majority of SWS employees since its inception through a Full Bench decision of the AIRC in 1994 have been employees with intellectual disability or cognitive impairments. The figure given in the 2001 Supported Wage System Evaluation Report (p.27) was around 75% and I doubt if this has changed much since then ***(Attachment B).***

17. Most SWS job placements have been created or redesigned positions, not advertised pre-existing "whole jobs". The same 2001 SWS Evaluation Report had this to say: *"Of the employers interviewed... by far the majority of the positions held by people with disabilities were positions that had not been advertised. The majority of employers interviewed created the job specifically for the person with a disability"* (p.34). This is still the case ***(Attachment B).***

18. Most SWS employers in the open labour market tailor jobs, usually basic, to meet the individual capabilities of their disabled employees, and consider these "low skill" jobs to be valuable in inputting to overall business operations.

19. There has always been a significant minority of ADEs that have embraced the SWS firstly as s.10 services under the Disability Services Act (DSA) 1986 and then post-2003 when the SWS was opened up to all ADEs via the

THE QUESTION OF CUSTOMISED EMPLOYMENT OR JOB CARVING

27. *"In my experience the roles that open employees undertake are often jobs that already exist and are performed by other employees who do not have a disability. Sometimes there are modifications to the job implemented to accommodate for the person's disability ... A distinct difference between open employment and supported employment is that the tasks that supported employees undertake are modified to a far greater extent in order to cater for the employee's disability Typically, a job modified in this way would not ever exist in a mainstream employment setting. It is for this reason that the modified SWS's ability to achieve a like for like comparison is unsound" (Disability Services Australia submission, Paragraphs 49-55).*

28. The majority of SWS positions in the mainstream labour force are specially created or "job carved", often after a specialist DES provider has introduced the concept and a suitable jobseeker to an employer. This, as I have previously mentioned, was my specialty in the decade when I was a DES provider employee and was responsible for setting up many SWS placements, predominantly for jobseekers with intellectual disability or cognitive impairment. My approach and rationale when negotiating with employers to redesign or create jobs tailored to individual capabilities was to point out that multi-skilling is not always cost-effective and that job carving manufactured a win/win situation, a mutual benefit arrangement: the employer gets essential basic tasks done often allowing other workers to spend more time on more complex tasks equally important to business efficacy, the employee with a disability is gainfully employed and fairly remunerated under the SWS in a job matched to his/her abilities.

29. Again the point is best illustrated with a variety of examples

30. One of the first redesigned positions I sourced was for a young man with Down Syndrome, quite significantly cognitively impaired, with limited initiative/problem-solving skills, and basic often difficult-to-understand verbal language. A local KFC franchise was convinced to create a largely back-of-house position packing/date stamping/storing potato & gravy containers, collecting cartons of drink from the cool-room to refill fridges behind the counter and emptying/relining bins. Interestingly it came to my attention not long ago that this man had recently retired after 24 years KFC service and his retirement had been acknowledged with a special in-store celebration, attended by the original franchisee, ex-managers, co-workers, ex-DES provider trainer/support workers, former SWS assessors and his parents, and involving speeches, a cake and the classic gift of a watch!

31. Another successful customised employment example was at a Spotlight store in Niddrie where I convinced the manager to create three part-time store tidying positions for job candidates who I knew wanted to work in retail but really did not have the customer service skills or intellectual capacity to undertake a full range of shop assistant tasks. These were 15 hour positions across three different store departments (Manchester, fabrics, haberdashery/craft accessories) and involved primarily the refolding and repositioning stock with occasional assistance to colleagues filling displays with new stock. This freed up more skilled shop retail staff to serve customers and undertake the more complex aspects of their roles. This then set a great precedent for approaching other Spotlight stores with this job carving idea.

32. Both major Australian retail giants, Coles and Woolworths, have engaged in job re-engineering as well with the creation of many dedicated SWS face-up positions that involve people predominantly with intellectual disabilities tidying stock on shelves throughout the supermarket. Sometimes individuals are designated a few aisles or a section of the store, or sometimes they are trained to work across the entire store. I know of one Coles store that, at the instigation of a local DES provider, created an enclave with 4-5 workers with intellectual disabilities permanently trained and supervised by a job coach recruited and paid for by the DES provider. This arrangement continues on to this date though to a lesser extent: the original DES provider was defunded, some of the employees moved on and the current Coles store manager convinced his Area Manager to redeploy a Coles employee to offer constant support to the two remaining employees from the original enclave who have now worked there for over 10 years. Some Coles and Woolworths stores who have not outsourced their trolley collecting services, have hired jobseekers with intellectual disabilities to collect trolleys and sometimes have up-skilled those capable of more to complete some basic in-store tasks (especially important for rainy days) such as collecting & restocking & even cleaning shopping baskets, restocking plastic bags at registers, stock face-up, filling drink fridges near the cash registers or helping to re-shelve "loose" or misplaced stock from around the store.

33. I recently did an SWS review assessment of a Bunnings employee in a tailored position. His primary job role was to display and move stock around in the gardening /nursery section using a palette jack under the close supervision of a co-worker with regard to the order of jobs across a part-time shift. His other main function was to work in a pair with a co-worker as a "spotter", an OH&S requirement in Bunnings stores when a forklift driver is elevating stock on palettes into upper shelves. Basically this just involved blocking off both ends of an aisle and standing guard to ensure no customers entered the aisle. The employer agreed that this spotting task should be factored into the assessment at

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

34. Officeworks is another large employer that has re-engineered retail jobs to suit individual capabilities. One store in which I conducted an SWS assessment had a young man with autism dedicated to a two-task part-time position scanning, price-checking and replacing stock tickets throughout the store. A clear regulated routine was created so that he would scan one side of an aisle at a time, then check what tickets needed re-pricing to match current store-wide prices, print off new tickets using the office computer and printer, and finally display them on the correct shelving after removing and binning the old tickets. He had also been trained to re-direct any customer enquiries to other staff as this sort of customer service interaction was not his forte.

35. Some major fast food chains, such as McDonald's, KFC or Hungry Jacks, have delved into job redesign as well, usually by creating SWS restaurant cleaner roles that could include some or all of the following duties depending on the capabilities of the individual: bin emptying/relining, table and chair clearing/cleaning, tray collection/cleaning, spot sweeping of floor debris, floor mopping, toilet checking/cleaning, glass/metal/tile surface spot-cleaning, or car park rubbish removal. Typically, these tasks have been performed by counter or back-of-house staff at times when it was not so busy taking and filling customer orders. In my experience the majority, if not all, of the job candidates filling this type of customised position have been people with intellectual disability.

36. One DES provider in Melbourne, Jobs Support, who only work with people with moderate or severe intellectual disability, have a penchant for developing interesting SWS office support positions, often in or near the CBD, that might include a range of basic tasks such as setting up and tidying meeting rooms, filling up photocopying machines, cleaning and restocking the staff kitchen/tea room, and mail distribution. I have undertaken a number of these SWS assessments in a range of office-based businesses, for example, lawyers, engineering consultants, and financial advisors. These assessments always remind me of my days as a DES operative trying to place people with intellectual disability in federal government departments under the now-defunct Commonwealth Government's Intellectual Disability Access Program (IDAP) in the early 1990s whereby it was possible to bypass the standard public service entry test and place eligible individuals into by and large re-designed clerical assistant positions. I had success with the Department of Family and Community Services (DFACS) where I placed a young Vietnamese woman with a moderate intellectual disability in a full-time job we designed around her capabilities: filing, basic data entry, photocopying, mail sorting and internal deliveries.

37 Another employer that I enjoyed working with and who were open to job carving an SWS office assistant position was the Essendon Football Club. I was approached by a local special school, one of whose ex-students was a mad Bombers fan who religiously attended all training sessions and most home games, as they in turn had been approached by the club about the possibility of creating an employment opportunity for this particular young man. An office "gopher" job was created involving a variety of basic tasks. The success of this SWS placement then opened the doors to creating an SWS kitchen-hand job for another client with an intellectual disability in the Windy Hill Social Club that primarily involved dishwashing.

38 Another local Melbourne DES provider has been successful over the years in developing a range of basic SWS job positions in the Reservoir area in a group of aged care facilities. These were mainly re-designed positions in the kitchen and catering areas. The last SWS assessment of one of these clients that I undertook involved a young woman with Down Syndrome who cleared and set up tables in a resident dining room before and after morning tea and lunch as well as helping kitchen staff serve meals and drinks to seated residents.

39 Some of these specially created positions show great creativity and ingenuity by certain DES provider staff. One SWS job that I have assessed a few times over the years involves a man with quite severe cerebral palsy (an electric wheelchair user with reduced fine motor skills and slurred speech) working for a catering company that specialised in hospital cafe contracts. He worked between two hospital sites, including the one near to the catering company's head office. His duties involved such tasks as wiping down tables after customers had left, collecting collapsed cartons from the cafes and other nearby retail outlets to deliver to the basement recycling area, and collecting/delivering mail and other paperwork from the head office across the road.

40 Some employers have gone down the job creation path on their own initiative, motivated by ideas of social responsibility, without the prodding of DES provider business development/ marketing staff. For example, for the last 19 years one printing company in a Melbourne bayside suburb that specialises in printing and collating school diaries and folders has employed a man with a significant acquired brain injury (ABI) and related physical disabilities in a redesigned position undertaking a few very basic tasks. I undertook his annual SWS review assessment recently. His main task was operating a simple press that cut ribbon used to make diary page markers. He also helped out making up despatch cartons and assembling folders.

41 Very few SWS jobs in open employment are advertised positions that workers without disability would normally perform, most have been significantly modified

ANNEXURE KW-10

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1055625

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
COMMISSIONER CAMBRIDGE

AM2013/33 AM2014/286 AM2013/34 AM2013/37 AM2014/286

s.156 - 4 yearly review of modern awards

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

Melbourne

9.36 AM, FRIDAY, 9 FEBRUARY 2018

Continued from 8/02/2018

PN1944

VICE PRESIDENT HATCHER: Is Ms Svendsen the first witness for today?

PN1945

MR HARDING: She is, your Honour. Perhaps before I go to Ms Svendsen I ought to declare some embarrassment that I was under the impression that different witnesses were going to be called by my opponents this afternoon and I've been apprised that now Ms Powell and Mr Daley are coming. I just wanted to flag that. I don't expect that they'll be got to until after lunch and I will advise the Bench of my position after that point.

PN1946

VICE PRESIDENT HATCHER: Mr Daley didn't actually make a witness statement, it was only a submission. Why - - -

PN1947

MR HARDING: No, it's a submission but there's factual elements in the submission and that was the basis upon which we asked him to be in attendance, your Honour. But a question in my mind is

profound complex disability, do you see that? And you talk about barriers they face?---Mm.

PN2644

And you say, in the second sentence, "This is largely due to the person's impaired capacity to meet productive output expectations and work effectively in traditional workplace environments". You are there not referring to open employment are you?---That statement is referring to any workplace where a traditional, what we would consider a traditional workplace environment would be. There are some supported employment facilities that operate in essentially a mainstream employment environment and there are some open employment services that do not. So it's not as clean as either yes or no, but we were looking at essentially the standard business practices that you would expect in a mainstream, if you like, or traditional workplace environment where there is a reasonable expectation on the individual that they are capable of doing the job with minimum supervision, that they can work autonomously, that they are self-directed, that they have the capacity to prioritise, that they are deemed a capable of working in a safe environment, they are able to meet productivity requirements without direction or unnecessary accommodations and that they can produce significant work to justify their salary.

*** SALLY JANE POWELL XXN MR HARDING

PN2645

That seems to be referring to a person who is not affected by disability?---Not necessarily. There are people that have physical disabilities that may be able to work completely unsupported in open employment or a mainstream traditional workplace. Equally there might be an example of someone who has a visual impairment, who is responsible - I am drawing from an example in the US - where we see that the people that do the document destruction in Washington are all blind because they are the best people to do the job and they can work completely effectively. They are the best qualified people for that job and that can't be disputed. So it's very much on the individual workplace and it's looking at what that individual can do. So it's not that clean I am afraid.

PN2646

In that situation they don't also learn the employer's secrets either?---That would be the reason they are the best person for the job. So unless that document is in braille they are absolute experts in that role.

PN2647

Experts in maintaining confidentiality?---Absolutely, kind of important.

PN2648

Indeed, particularly when you are trying to destroy the documents. But in terms of the traditional workplace environment you are referring to, you would accept wouldn't you that in open employment it is hoped that jobs can be customised in order to meeting the particular circumstances of the person with an intellectual disability who may require that?---There are varying degrees of which business, mainstream business, traditional business, particularly some of the larger employers in this country that tend to be listed and their predominant purpose is shareholder value increasing, where they are prepared to make those accommodations and provide those additional supports or to which it becomes a distraction that is unwanted.

PN2649

Thank you. No further questions.

PN2650

ANNEXURE KW-11

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1055692

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

Sydney

10.05 AM, TUESDAY, 13 FEBRUARY 2018

Continued from 12/02/2018

PN3892

VICE PRESIDENT HATCHER: Before we call the next witness, are we in a position to deal with the documents supplied by the Department, Mr Harding?

PN3893

MR HARDING: Yes, we are.

PN3894

VICE PRESIDENT HATCHER: Is there any objection to that being admitted?

PN3895

MR ZEVARI: No, your Honour.

PN3896

VICE PRESIDENT HATCHER: The documents supplied by the Department of Social Services headed Disability Maintenance Instrument Proforma will be marked exhibit 38.

EXHIBIT #38 DEPARTMENT OF SOCIAL SERVICES DOCUMENT DISABILITY

Then in the brackets it says:

PN3955

For over a decade, this independent assessment has been carried out by job capacity assessors within Centrelink who served as a primary gatekeeper in the referral of persons with disabilities to both DES providers and ADEs.

PN3956

I'm sorry, I'm not sure what the confusion is, because I think that's abundantly clear.

PN3957

VICE PRESIDENT HATCHER: The point Mr Harding was putting to you is that that doesn't happen. Is that?

PN3958

MR HARDING: Yes.

PN3959

VICE PRESIDENT HATCHER: That it's wrong.

*** MICHAEL SMITH XXN MR HARDING

PN3960

MR HARDING: Yes, that it's wrong. That what you've said there is incorrect in light of the eligibility requirements that are set out in the Commonwealth's own scheme?---I think we're comparing two different guidelines. Guidelines for an ADE and we're talking about a referral process to two different types of services.

PN3961

I'd also like to clarity what you say in paragraph 38 of your statement, please. Perhaps if I put to you a proposition and you can tell me whether I'm correct. Are you suggesting in that paragraph that the capacity of ADEs to job redesign and modify duties for its employees is inferior compared with the situation in open employment?---I'm suggesting that it's different and the degree of scope is probably less. If what your job redesigner is going to do is say we will take off more complex tasks from the worker and assign them to another worker who perhaps doesn't have a disability and can absorb them, to then create a position explicitly for a person with lower skills, when virtually the bulk of your workforce is people with lower skills to begin with.

PN3962

Some evidence given by Mr Heath Dickens, do you know him?---I do.

PN3963

His evidence was that a distinct difference between open employment and supported employment is that the task that supported employee undertake are modified to a far greater extent in order to cater for the employee's disability?---I can accept that.

PN3964

Well is he wrong or are you right?---I think we're talking different dimensions.

PN3965

Are we? It's a simple proposition?---We're talking about an unemployment situation - - -

PN3966

VICE PRESIDENT HATCHER: Just don't talk over each other. Just finish your answer Mr Smith?---I think in open employment we're talking about a situation where there's a predominantly non-disabled workforce doing a range of tasks and a DSS service comes along with a candidate who they believe can function in that environment and you can restructure a job by taking more complex tasks off a

position to make it suitable for one worker and re-assigning those more complex tasks to members of the non-disabled workforce. In an ADE, certainly the jobs are redesigned but they're redesigned in a much broader context. You're coming in with a workforce that is predominantly people with disabilities and that influences the kind of work you seek which is different from the profit minded company which may begin differently. You're looking at the hours a person can work, you're looking at the skills of your disabled people and you will, as I've said elsewhere, you will try and get work that provides opportunities for the bulk of that workforce. And yes, they will be redesigned, but it's not so much by redesigning them to take off complex tasks to give to non-disabled workers, it's trying to find the work that was in their competence.

*** MICHAEL SMITH XXN MR HARDING

PN3967

Just then talking about the open-employment example, is it your evidence that typically what occurs is that you might customise a role in open employment to reflect the person with a disability's particular requirements, is that right?---Sorry?

PN3968

Is that right?---Yes.

PN3969

Then in that way, you can allocate duties of a more complex nature to some other people who don't have disabilities, leaving the person with the disability to perform those other tasks?---That's right.

PN3970

That in the ADE situation, you're in the end limited by the fact that your major workforce is disabled people?---The bulk of the workforce is people with disabilities, for all of whom you are seeking to redesign jobs to make the opportunity available.

PN3971

Yes, but you would accept though, wouldn't you, that disability is necessarily variable?---Absolutely, all people with disabilities are individuals and there are some people who can do very close to a standard job. I don't think anywhere in my statement I've suggested otherwise.

PN3972

I'm not asking you about the rest of your statement; I'm just asking you about this part of it. In the case of a person with a disability, you might have some with greater capacity to take on more tasks and some who have lesser capacity by virtue of the disabilities that they have?---Mm-hm.

PN3973

It's right to say, isn't it, that the Commonwealth provides a scheme of funding. These are called the DMI levels. Is that right?---That's correct.

PN3974

They range from 1 to 4 and an assessment is made of the person's work support need by reference to their work requirements. Is that right?---That's correct.

PN3975

Bottom level of funding is level 1; top level of funding is level 4?---That's correct.

PN3976

The ADE has the benefit of that funding to compensate for the circumstances of a particular person with a disability?---Their support means.

PN3977

Is that correct?---That's correct.

*** MICHAEL SMITH XXN MR HARDING

PN3978

From paragraph 53 of your statement you give some evidence about the concept of what you call in 54, an earned wage and a paid wage?---Mm-hm.

PN3979

Are you there talking about that as a general economic concept?---No, well, I guess I am, but in terms of - you asked me earlier did I have research or publications that back this up. One of my great frustrations in my time in ADEs and services generally, is the absence of anyone who ever seems to have actually looked at this issue. I haven't been able to find in on internet searches or whatever. The same applies to reviews of the supported wage system, which seem to go as far as the assessment of the relative output and never look at the next step. As a result, I'm using terminology here, that I've had to come up with because of the absence of other research to draw on.

PN3980

Well, you're giving evidence as an expert. Are you saying that these concepts have an economic foundation in the literature?---I can't say that because I can't find anybody who's done it. What I am saying is, and what I've tried to do in this is because of that absence, I'm trying to outline a scenario in as simple English as I can make it, that hopefully people reading will say, whether I'm an expert or not the actual concept of that seems reasonable. You know, it's up to others to judge whether or not it is.

PN3981

You've not offering it as an expert opinion really, you're just offering it as your opinion?---I am offering it as my opinion, yes.

PN3982

If we can trip back to the previous paragraph in 53, you disagree with the concept of the SWS on the basis that you say it cannot legitimately be deemed to represent fair and productivity-based wages?---That's my view, yes.

PN3983

That's your view, I can see that that's your view; you've written it. The basis for that view is that you don't accept that SWS is a true productivity measure. Would that be fair?---That's my view.

PN3984

You distinguish between an earned wage and a paid wage in this way, and tell me if I'm wrong, obviously. An earned wage is what you might describe as a proper wage that reflects the contribution of the worker to the productive process, whereas the paid wage is what they can get by negotiation. Would that be accurate?---That's fairly accurate I would think. I think there's some filigrees to that. But in broad terms I'd say that.

PN3985

In broad terms you accept that distinction?---Yes.

*** MICHAEL SMITH XXN MR HARDING

PN3986

Is it your evidence that the earned wage is a more valid measure of wages than the paid wage?---No. I'm not making comment that one is more or less valid either side. What I'm suggesting is they may well be different and I think the issue of an earned wage brings in economic considerations and I've stated - so I'm saying that I would argue and others can judge on this, that if the production income generated by a person's production efforts is such that it doesn't cover the cost of their wages, I'm not sure how it could be defined as a productivity-based wage. If it does, it may well be. It then enters

ANNEXURE KW-12

From: SEpolicy <SEpolicy@dss.gov.au>
Sent: Friday, 9 October 2020 2:22 PM
To: undisclosed-recipients:
Cc: SEpolicy <SEpolicy@dss.gov.au>
Subject: RE: 12 October 2020 Steering Committee meetings paper [SEC=OFFICIAL]

Good afternoon all,

Apologies, I forgot to include a paper in my previous email. Please see attached.

Have a great weekend all!

Thanks,
Ashleigh

From: BLECHYNDEN, Ashleigh
Sent: Friday, 9 October 2020 10:09 AM
Cc: SEpolicy <SEpolicy@dss.gov.au>
Subject: 12 October 2020 Steering Committee meetings paper [SEC=OFFICIAL]

Dear Steering Committee members,

Please find attached papers for the 12 October 2020 Steering Committee meeting. A summary of these papers is provided below:

Paper	Description
	Agenda
A	Progress on action items
B	Summary of Trial and evaluation methodology
C	C1- Participant information sheet and consent form
	C2- Information pack for ADEs
	C3- Information about seeking informed consent
	C4- Information sheet- Union representatives
	C5- Information sheet- National Panel of Assessors
	C6- Information sheet- Non-participating ADEs
	C7- Supported employee interview guide
	C8- Survey and interview instruments

Please note Steering Committee members who have not signed the Declaration of Confidentiality will be asked to step out of the teleconference for **Agenda item 3- Trial Design** and will not be provided the meeting papers for this item. This decision has been based on advice from ARTD and been agreed by Deputy President Booth. Deputy President Booth will talk further to this at **item 1** of the agenda.

We look forward to meeting with you on Monday.

Kind regards,

Alexandra Kellar
FWC Trial Secretariat

Supported Employment Policy Section | Disability and Carer Reform Branch
Department of Social Services
P: 02 6146 0648 | E: SEpolicy@dss.gov.au

The Department of Social Services acknowledges the traditional owners of country throughout Australia, and their continuing connection to land, water and community. We pay our respects to them and their cultures, and to Elders both past and present.

ANNEXURE KW-13

Jamel Cain

From:	BLECHYNDEN, Ashleigh <Ashleigh.BLECHYNDEN@dss.gov.au>
Sent:	Thursday, 25 March 2021 11:27 AM
To:	Kairsty Wilson
Cc:	SEpolicy; Noni Lord
Subject:	Membership of Fair Work Commission Steering Committee [SEC=OFFICIAL]
Attachments:	Declaration of Confidentiality - FWC New Wage Assessment Structure Trial Steering Committee.doc

Good morning Ms Wilson,

Thank you for your letter concerning your membership on the Steering Committee for the Fair Work Commission New Wage Assessment Structure Trial.

The Trial Secretariat have consulted with Deputy President Dean, the Chair of the Committee on this matter. The Deputy President agrees it is suitable for you to resume your membership on the Committee.

Please sign and return the **attached** declaration of confidentiality by **Friday 2 April 2021**. If you choose to not sign this form, you will be unable to attend certain agenda items at each meeting, or view documentation from the period your membership was suspended.

Currently, there are no meetings scheduled for the Committee. The Secretariat will inform you when a meeting is scheduled.

Kind regards,
Ashleigh

Ashleigh Blechynden
FWC Secretariat
Department of Social Services
P: (02) 6146 0436 **E:** sepolicy@dss.gov.au

The Department of Social Services acknowledges the traditional owners of country throughout Australia, and their continuing connection to land, water and community. We pay our respects to them and their cultures, and to Elders both past and present.

From: Noni Lord <noni.lord@aed.org.au>
Sent: Thursday, February 25, 2021 2:06 PM
To: SEpolicy <SEpolicy@dss.gov.au>
Subject: FW: Steering Committee for Trial

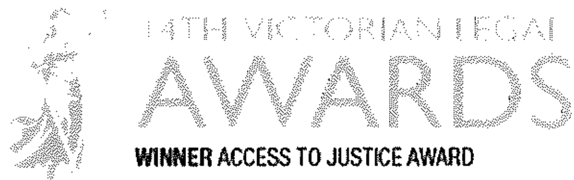
Dear Alexandra

Please find **attached** correspondence.

Kind Regards,

Alfred Oppy
Human Rights Advocate
AED LEGAL CENTRE
Suite 1 Level 9, 45 William Street, Melbourne 3000.

Tel: (03) 9639 4333 Fax: (03) 9650 2833 web:www.aed.org.au



Winner of the 2016 National Disability Excellence in Justice and Rights Protection Award
Winner of the 2014 Hesta Social Impact Award
Winner of the 2013 Tim McCoy Award
Winner of the 2011 LIV Community Lawyer of the Year Award

AED has adopted both a COVIDsafe Plan as well as a comprehensive COVID-19 policy prepared in accordance with Government and Law Institute Guidelines.

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Steering Committee for the 2020 Fair Work Commission Trial regarding the review of the *Supported Employment Services Award*

DECLARATION OF CONFIDENTIALITY

The 2020 Fair Work Commission Trial Steering Committee (the Committee) was established by the Fair Work Commission to set parameters for and oversee the 2020 trial of proposed modifications to the *Supported Employment Services Award 2010*.

Having regard to good governance and transparency of process as a Committee member:

(1) you must:

(a) use your best endeavours to preserve and maintain the confidentiality of all information to which the Member may have access by virtue of your membership of the Steering Committee. Information may include, but is not limited to, trial outcomes prior to the publication of the Trial report, information about disputes, assessment outcomes, and the identity of any organisation involved in the Trial.

(b) raise with the Committee, any conflict of interest in relation to the Trial, when/if it arises or becomes relevant to inform discussions of the Committee.

(2) the Member may communicate with such persons as are necessary to take instructions on matters raised in the Steering Committee but must as far as is practicable comply with clause 1a when doing so.

(3) the Member must notify the Department of Social Services if they have disclosed confidential information to a third party, either intentionally or unintentionally.

....	....	....
Name	Signature	Date