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 of Association for Employees with a Disability Inc (the AED) to the submissions of the Commonwealth of Australia

A. Relevant Background

1. The Commonwealth represented by the Department of Social Services (the **Commonwealth**) filed a submission on 9 September 2022 (the **Commonwealth Submission**). The Full Bench has granted leave to any interested party to respond.

2. During the hearing, the presiding member of the Full Bench, the Vice President, stated that the Full Bench had access to the written submissions made by the Commonwealth to the Federal Court in *AED v Commonwealth* (2021) 283 FCR 561.[1] Those submissions advanced a constructional argument pertaining to section 153(1) of the *Fair Work Act* 2009 (the **FW Act**). The Court in *AED* declined to determine the correct construction.

3. The Commonwealth Submission substantially embraces the constructional arguments it pressed in *AED*. This being so, the AED has developed this response on the basis that the Full Bench will only have regard to this submission of the Commonwealth, and not the

[1] Transcript PN2019-PN2020.

one to which the Bench has said it has access. It is noted that the Bench has only granted leave to respond to the submission filed in the FWC, the Commonwealth Submission. However if the AED's presumption is incorrect, the AED wishes to be heard.

4. As will be apparent, the Commonwealth's construction of section 153(3)(b) conceives of the provision as a zone of discriminatory freedom that would grant the FWC permission to discriminate at large against employees with a disability in relation to the minimum wage terms to be included in modern awards for them. This view should be rejected. Its construction relies on a selective reading of legislative history and of the FW Act as well as an approach to statutory construction that does not accord with legal principle. Acceptance will result in disharmonious and incongruous outcomes that cannot be reconciled with the human rights of disabled workers or the protections they enjoy under Commonwealth law, including the FW Act itself. In this respect, the Commonwealth Submission does not engage with the objectives it itself has espoused to the FWC in this proceeding.[2]

5. The FWC will be mindful that the context for the Grade A and B Terms is the fixation of a minimum award base for unskilled work that would value that work below the value set for a worker who needs training to perform the basic work described in Grade 2, and lower than an award free disabled worker employed in any work subject to the second special national minimum wage.

B. The proper construction of section 153(3)(b)

B.1 Applicable principles of statutory construction

6. The Commonwealth Submission continues to embrace the principles of statutory construction posited by the AED in *AED v Commonwealth*.[3] Those principles are summarised, by reference to authority, in paragraph [13] of the AED's jurisdictional submission in chief dated 13 May 2022. However, the sparse summation of principle contained in paragraph [13] of the Commonwealth Submission makes it necessary to set those principles out in detail.

7. The "plain" meaning of section 153(3)(b) pressed by the Commonwealth should be rejected as inconsistent with the principles of statutory construction. Simply stated, deciding what section 153(3) means, and accordingly what it exempts from the

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2 See paragraph [48] herein.

3 (2020) 238 FCR 561.

prohibition in section 153(1), is neither a question of reading up or reading down section 153(3)(b), or rejecting a "narrow" view. Rather, it is a question of ascertaining the meaning of all the words used in the section by reading the text contextually and purposively.[4] The legal meaning of statutory language is what the legislature is taken to have intended by the words it has used. The context of the words used, the consequences of a literal meaning and the canons of construction will all bear upon the legal meaning and indeed may indicate a meaning that is different from the grammatical meaning of the language that has been used.[5]

8. A recent, authoritative, exposition of principle is contained in the reasons of Allsop CJ in *Construction, Forestry, Mining, Maritime and Energy Union v Australian Building and Construction Commissioner* (*the Bay Street Appeal)* (2020) 282 FCR 1, [3]-[5].

> Much has been written by the High Court on statutory construction over 35 years, in particular about the relationship between text and context, including purpose. That discussion in the authorities reflects the perennial debate focused on particular statutory provisions, as they arise from time to time for consideration, between so-called clarity of plain meaning (as if such can reliably exist without context) and the ascription of meaning to words in their context. Whilst there can, naturally, often be differences of opinion about the effect and influence of context, including purpose, in respect of any particular provision, there can be no doubt that words are not read in isolation as if they can have meaning without context.
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> Whatever may be the form of expression by individual judges or groups of judges, the task requires the search for applicable principle, not an emphasis on the literality of words of judgments as if they were the text of a statute: *Cassell & Company Ltd v Broome* [1972] AC 1027 at 1085 (Lord Reid). Sentences from High Court judgments seen to be favourable to an argument should not be strung together in a particular order to support an argument about the construction of a particular statute, almost as if to create a new, virtual, High Court judgment. The principle is clear: Meaning is to be ascribed to the text of the statute, read in its context. The context, general purpose and policy of the provision and its consistency and fairness are surer guides to meaning than the logic of the construction of the provision. The purpose and policy of the provision are to be deduced and understood from the text and structure of the Act and legitimate and relevant considerations of context, including secondary material: See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]; Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*

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4 See *Construction, Forestry, Mining, Maritime and Energy Union v Australian Building and Construction Commissioner (the Bay Street Appeal)* (2020) 282 FCR 1, [2] (Allsop CJ). 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. Further, section 15AA(1) of the *Acts Interpretation Act* 1901 expresses a purposive preference in interpretating Commonwealth statutes.

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

> [1985] HCA 48; (1985) 157 CLR 309 at 315 which drew upon Viscount Simonds in *Attorney-General (UK) v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 (cited in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1 at [57] and in the other authoritative decisions of the High Court referred to in *Federal Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79; (2016) 247 FCR 40 at [5]); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39]; *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [22]-[23]; and *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14].There can be no doubt that the search for principle in the High Court reveals a settled approach of some clarity: R v A2 [2019] HCA 35; (2019) 93 ALJR1106; 373 ALR 214 at [31]-[37]. The notion that context and legitimate secondary material such as a second reading speech or an Explanatory Memorandum cannot be looked at until some ambiguity is drawn out of the text itself cannot withstand the weight and clarity of High Court authority since 1985: see *Jayasinghe* 247 FCR 40 at [3]-[12]; and *CPB Contractors Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70at [8], [50]-[60].

9. Allsop CJ went on to discern the "practical content" to statutory words of "generality and abstraction" (those contained in section 347 of the FW Act) by reference to the subject matter and object of those provisions. He cautioned against a narrow approach to construing objects, at [13]. His Honour thus posed the question for the appeal as the intended subject or scope of the "request" by or the "requirement" of the industrial association (at [27]) and resolved it by eschewing a literal view of the words contained in the provision and construing them contextually (at [29]-[37]).[6] Flick J also approached statutory construction contextually and concluded that it was the context of the provision under consideration that dictated a "more confined and natural meaning," at [64]-[65]. White J divided from the rest of the Court in his application of principle but, for the most part, did not differ on the principles themselves.[7] Following High Court authority, his Honour stated that context is to be considered at the first stage of the task, not after some ambiguity or uncertainty has been identified. Context sheds light on text, at [118]. The available sources of context are diverse. Drawing upon authority, White J said at [119]:

> The context of a statutory provision includes a diverse range of matters including the surrounding provisions, the statute as a whole, the existing state of the law, the purpose of the provision, matters of legislative history, and extrinsic material including, when applicable, the reports of law reform bodies:

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6 See also Flick J, [63]-[64].

7 His view of when extrinsic materials can be examined (at [120] is at odds with Allsop CJ at [5] and less explicitly Flick CJ at [68]. International instruments constitute extrinsic material to which regard can be under section 15AB(1) of the *Acts Interpretation Act* 1901: *Ryan v Commissioner for Police* [2022] FCAFC 36 (the Court), [115].

> *CIC Insurance at 408; Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39].

10. As the above extract demonstrates, White J drew upon the principles enunciated in *CIC Insurance Ltd v Bankstown Football Club* (1995) 187 CLR 384 at 408.[8] Those principles were described in that case as "well settled." The Court had no difficulty accepting that general words could be constrained by considerations of context. This case is cited by the majority in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (footnote 18) in support of the proposition that context should be regarded in its widest sense.

11. Further, the High Court said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at [69]-[70], that:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court to "determine which is the leading provision and which the subordinate provision, and which must give way to the other." Only by determining the hierarchy of the provisions will it be possible in many cases to give best gives effect to the purpose and language while maintaining the unity of the statutory scheme.

12. The construction of section 153(3)(b) posited by the AED gives effect to these principles. The general words used in the section are construed in line with their subject matter (including the defined content). That subject matter has two main legal features:

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[8] List of Authorities, item 19, page 740.

(a) It pertains to award content in the form of "terms" that "merely", "provide for" two matters:

(i) wages terms that constitute "minimum wages," which has, as the AED has explained, a settled industrial meaning; and

(ii) wages terms of this kind for a defined class of employee with a disability of a kind and to a degree defined by law.

(b) If (a) is true, and such a term or terms is or are included, an employer of a covered employee is commanded by section 44 of the FW Act to comply with it or them.

13. A further, and important, legal feature of the defined class of employee that section 153(3)(b) addresses is that those persons are bearers of specific rights and protections at international law and under Commonwealth law that pertains to the very attribute that supplies the justification for the section 153(3)(b) exception – their disability. The FWC has the benefit of a detailed explanation of this from Professor McCallum,[9] whose evidence and expertise went unchallenged. Those specific rights and protections are recognised by the FW Act itself through section 351. Additionally, the review function the FWC is performing in these proceedings is subject to an obligation to take account of the need to help prevent and eliminate discrimination referred to in section 578(c).

B.2 Text of section 153(3)

14. In terms, section 153(3)(b) constitutes an exception. It is not an independent, freestanding, source of inclusion power (this is dealt with by other provisions of the FW Act). It is not accordingly a "carveout." It operates to deem award terms of the requisite legal character as terms that do not "discriminate against" employees because of, or for reasons including, their physical or mental disability. This much is clear from the provision's text. It contemplates directly a disability based distinction that would engage the ordinary meaning of "discrimination against" in section 153(1), the meaning and effect of which the AED has addressed in its previous written and oral submissions. Because section 153(3)(b) is an exception, the canons of construction as well as the text of the provision confine and limit the discrimination it excuses.

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[9] Witness statement of Professor Ron McCallum AO (Exhibit F), Annexure RM-2 (**McCallum Report**), see in particular pp 10-12.

15. The AED has drawn attention to the word "merely" in the provision. The Commonwealth Submission underplays the importance of that word.[10] It is however necessary to focus on the statutory language; section 153(3)(b) is not engaged and by reason thereof section 153(1) is not disabled unless, properly characterised, the postulated term *only* provides for "minimum wages" and does so *only* for "employees with a disability," as defined. This reflects the ordinary meaning of the word, only part of which the Commonwealth embraces:

> "*adverb* only as specified, and nothing more; simply: *merely as a matter of form.*"[11]

16. But "merely" also draws explicit attention to the subject matter of section 153(3)(b). That subject matter is expressed in general, abstract, language. This makes it necessary to construe it contextually,[12] as the AED has done,[13] by construing all the words and phrases of the section. This is necessary for a proper understanding of what the section means and allows.[14] The AED has done this in a way that harmonises the FWC's jurisdiction with the rights, protections and authorities contained in the FW Act and other sources of law that address discrimination against disabled persons, including wages discrimination. Additionally, the AED traces the legislative history below. The Commonwealth has not engaged in this analytical exercise. It has not shown why its generous view of "merely" is to be preferred.

17. There is no need in this part of its submission for the AED to address paragraphs [17], [19] and [20] of the Commonwealth Submission independently of what it says below about the subject matter of those paragraphs. It will be apparent that the AED rejects the Commonwealth's contention that it has asked the FWC to somehow "read down" section 153(3)(b) or "read in additional words." Neither is true. The submission is baseless.

B.4 Context and Purpose

18. It is convenient to start this part by responding to the contention in paragraph [29] of the Commonwealth Submission that a "plain reading of s 153(3) best promotes the objects

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10 Commonwealth Submission, [18].

11 Macquarie Dictionary, online edition.

12 Where important human rights are concerned, protective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation: *IW v City of Perth* (1997) 191 CLR 1 at 58 (Kirby J). For the general principle see *Rose v Department of Social Security* (1990) 21 FCR 241, 243-244 (item 20 of the List of Authorities).

13 AED jurisdictional submission in chief, paragraphs [32]-[40].

14 *Construction, Forestry, Mining, Maritime and Energy Union v Australian Building and Construction Commissioner* (*the Bay Street Appeal*) (2020) 282 FCR 1, [13] (Allsop CJ), [62] (Flick J). *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71].

of the FW Act." This is said to follow from the recognition "that in respect of the categories of employees identified at (a) to (c) [of that subsection] special minimum wage (sic) may be required in order to achieve the objects of the FW Act. Those objects include, as part of the modern awards objective, promoting social inclusion through increased workforce participation."[15] As will be apparent, this views social inclusion in an unnecessarily narrow way.

B.4.1 Special wages and legal policy

19. The Commonwealth phrase "special minimum wages" has no basis in section 153(3)(b) itself. This absence contrasts with section 294(1)(b) of the FW Act, which, in reference to the statutory concept of a "national minimum wage," requires a special national minimum wage to be set for all award free employees with a disability that is the same for all employees in this category. A further level of exceptionality is prescribed if the FWC is satisfied that exceptional circumstances justify a different wage for a sub-class. Even then, section 287(2) limits this difference to derogations "just to the extent necessary because of a particular situation to which the exceptional circumstances relate." As is apparent, in relation to an analogous form of employee benefit, the FW Act strictly limits what amounts to "special." The Commonwealth's conception of "special" in a modern award is different and does not align with the national minimum wage. Unfortunately, the metes and bounds of its conception are left undeveloped.

20. It is readily apparent however that the Commonwealth's "special" minimum wage term is a synonym for discrimination that conceives of different wages (another euphemism for discrimination) as a special measure to secure the maintenance of employment through low wages. This is said to effectuate the objective of social inclusion, which the Commonwealth assimilates with the use of pay rates for the singular purpose it describes in paragraph [22]: "different rates of pay can be used to create and protect employment opportunities for certain categories of employees." In support thereof, the Commonwealth points to certain provisions of former iterations of federal industrial law.[16] The paucity of the Commonwealth's analysis is unhelpful. Nevertheless, the AED makes five submissions.

21. *First*, the asserted statutory basis is not the singular basis for junior rates of pay or those subject to training arrangements. In its 1998 *Junior Rates Inquiry*, the Australian Industrial Relations Commission found that junior rates had historically been set having

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15 Commonwealth Submission, paragraph [27].

16 Commonwealth Submission, footnote 10.

regard to a range of factors in which the "allocative principle" (that is, the promotion of workforce participation) was only one factor amongst a range that included work value and the income needs of workers.[17] More recently, the FWC has treated work value for junior employees as a more sound basis to proceed, taking into account "the concepts of uniformity and consistency [which] underpin the fixation of minimum wages in modern awards".[18] Moreover, the FWC has also declined to set discriminatory rates for junior employees in circumstances where a non-discriminatory rate was available.[19] Similarly, while training wages are discounted for age related factors, the main basis of the (20%) reduction applied to trainees is to account for the time spent in training.[20]

22. *Second*, the Commonwealth's own submission in paragraph [50] undercuts its argument. The annual wage reviews it cites[21] give equal weight to both employment *and* pay and conditions in their consideration of social inclusion. Indeed, on this topic the Bench in *Re Annual Wage Review 2016-2017* (2018) 267 IR 241 said at [472]:

> We make one final point. A number of parties emphasise the benefits of being employed. These benefits extend beyond just the income earned, to include greater dignity and self-respect and capacity for social inclusion. It is consistent with this view to believe that dignity and self-respect, and sense of fairness, is enhanced when individuals and families are paid a fair wage and are able to rely more on what they earn and less on social welfare benefits to sustain themselves. A dollar received as a wage carries a different meaning from a dollar received as a welfare transfer.

23. Disabled ADE employees are the lowest paid in the modern award system, lower even than those covered by the second special national minimum wage. Those employees would retain this status under the Full Bench's "preferred approach" and the recent wage proposal of the ABL represented employers. Both wage proposals would adjust the ***level*** of modern award minimum wages (**the minimum award base**) downward from its current position and by doing so would reduce the wages benefit the Award would confer for those classified as Grade A and B, having regard to the position under other modern awards and the second special national minimum wage.

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17 *Junior Rates Inquiry* [1998] AIRC 1781 (24 December 1998) at [2.2.6]

18 *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [2020] FWCFB 6301 at [84]

19 *4 yearly review of modern awards—Construction awards* [2018] FWCFB 6019 at [286].

20 See *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re Apprentices training* [2006] AIRC 106 at [44]. Notably, section 298(1)(e) of the WorkChoices iteration of the *Workplace Relations Act* 1996 required consideration of whether hours attending "off the job training" should count as hours for which the basic periodic rate of pay was payable

21 Commonwealth Submission, [50], footnotes 23 and 24.

24. The disadvantaged wages position of these employees is manifest from the Commonwealth's own evidence showing disparity in earnings even after the DSP is taken into account.[22] This disparity impairs social inclusion by impairing dignity in the way described in the extract joined to paragraph 22 herein. The disparity reinforces a social status which is incompatible with the human rights of the employees concerned. Disabled persons are properly viewed as the holders of rights and protections, rather than merely objects of social protection.[23] The disadvantage this exposes is not addressed in the substantive way the Convention requires or that the DD Act now contemplates.[24] As Professor McCallum states:

> To put this framework in simpler terms, substantive equality needs to redress disadvantage; to combat prejudice, stereotyping and violence; to enhance social inclusion and participation; and to respect and accommodate differences.[25]

25. The outcome is an inferior form of workforce participation.

26. *Third,* the Commonwealth's "plain" meaning does not explain how it could sustain, on social inclusion (or any other) grounds, two safety net minimum wage standards for the same class of employee that produce wildly different wages outcomes: a wages standard for "employees with a disability" employed by an ADE and another wages standard for an "employee with a disability" employed under another modern award or the second special national minimum wage. There is an irreconcilable inconsistency at the heart of the Commonwealth argument.

27. *Fourth*, the SWS is owned by the Commonwealth. It, together with the "continuing inability to work" (**CITW**) criteria, constitute the work criteria for DSP qualification under section 94(1) of the SS Act. The Commonwealth does not contend that adopting the SWS as the only proportional methodology sanctioned by the Award would fail to engage section 153(3)(b) (or satisfy the policy it has asserted). Nor does it suggest that use of this methodology to yield a rate of pay derived from properly fixed minima is

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22 Witness statement of Sunil Kempi (exhibit G): [10] and SK-1. In particular, compare scenario 1 and scenario 7. The difference between them is the rate of pay. Scenario 1 employees are $221.83 per week worse off. These scenarios were prepared by Debbie Mitchell who is the Deputy Secretary of the Department of Social Services and provided to the Disability Royal Commission, see [8]-[9] of Kempi statement.

23 *Nicholson v Kaggs* [2009] VSC 64 [13] (Vickery J), List of Authorities, p. 846.

24 Productivity Commission report, List of Authorities, pp 1200, 1210. A key way in which substantive equality is effectuated is through reasonable adjustment. That statutory concept was explained by Mortimer J in *Australia Post v Watts* (2014) 222 FCR 220, [18], [24].

25 McCallum Report, p. 11.

unfair, does not reflect payment for the value of work performed or prejudices enforcement of the derived rate (whether by itself or in combination with the obligation that facilitates proof prescribed by clause D.6.1 of schedule D to the Award). As will be apparent, the legislative history shows that the SWS is the only proportional methodology that has been specifically recognised by federal industrial law.

28. *Five,* the Commonwealth's brief sketch of the statutory predecessors to the FW Act is incomplete and selective. The Commonwealth has focused very narrowly on certain provisions in isolation from their statutory context. A more fulsome analysis of the legislative history demonstrates that:

(a) Since the *Industrial Relations Act* 1988, the FWC's predecessor was required to take into account the principles embodied in the *Disability Discrimination Act* in performing its award making functions.[26] Section 47(1)(c) and (d) of the DD Act have always formed part of that Act. A primary object of federal industrial law since the *Industrial Relations Reform Act* 1993 has been the prevention and elimination of discrimination, including in respect of disabled employees.[27]

(b) In its submission, the Commonwealth draws attention to section 123 of the *Industrial Relations Act* 1988. However, the text and structure of that section does not resemble section 153(3)(b). Rather, its terms are closer to the eligibility rule of the SWS contained in clause D.3.1 of Schedule D to the Award.

(c) The pre-WorkChoices *Workplace Relations Act* 1996 included section 88B(3)(c). This required the FWC's predecessor to, in performing its award making functions, have regard to the "need to provide for a supported wage for people with disabilities." Further, a decision or determination by the former Australian Industrial Relations Commission under section 143(1C)(e) that in its view amounted to an award had to ensure that, where appropriate, it provided for "support to training arrangements through appropriate training

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26 Section 93 of the *Industrial Relations Act* 1988 and the pre-WorkChoices *Workplace Relations Act* 1996; section 104 and 105 of the WorkChoices iteration of that Act. Section 578(c) of the FW Act is similar to section 104 of the WorkChoices iteration of the *Workplace Relations Act* 1996. Additionally, on the subject of capacity based wages the obligation contained in section 104 was treated by the Productivity Commission as significant in its 2004 Review of the *Disability Discrimination Act*: List of Authorities, page 1595.

27 See section 150A of the *Industrial Relations Act* 1988 (post reform Act), ss 88B and 88A of the *Workplace Relations Act* 1996 and section 576S of the pre FW Act amendments made to the *Workplace Relations Act.*

wages and a supported wage system for people with disability." The Explanatory Memorandum made clear that "a supported wage system for people with disability" was a reference to the SWS.[28]

(d) Section 180(2)(e) of the WorkChoices iteration of the *Workplace Relations Act* 1996 (as renumbered) authorised the inclusion in an Australian Pay and Conditions Standard (**APCS**) of a disability specific classification or category. In turn, section 182(2) authorised a particular rate of pay for this classification. A "special" rate was authorised by section 220(1) (originally numbered section 90ZP(1)). By that section, if a APCS was created that applied to all or a class of "employee with a disability" that determined a basic rate of pay, the standard had to contain "rate provisions" that determined "rates of pay for those employee and that so determines those rates as rates specific to employees with disabilities."

Rates struck for a disability specific classification doubtless engaged section 222(2)(b). The Commonwealth relies upon this provision, presumably because its terms most closely resemble the text and structure of section 153(3)(b).[29] However, the Commonwealth neglects to refer to the immediately preceding section. Section 222(1) (initially numbered section 90ZR(1)(b)) stated that in exercising its powers under this Division the AFPC had to have regard to the need to provide "pro rata disability pay methods for employees with disabilities." This phrase was defined by section 178 as follows:

> **Pro rata disability payment method** means a method for determining a rate of pay for employees with a disability, being a method that determines the rate by reference to the relative capacities of those employees (emphasis added).

(e) Returning to section 220(1), the Explanatory Memorandum for the WorkChoices Bill contained an illustrative example referable to this section:

> Anna has an intellectual disability and is qualified for a disability support pension as set out in section 94 or 95 of the Social Security Act 1991. King Meats operates a meat processing plant and would like to offer Anna full-time employment as a clerk, but is concerned about the employment costs associated with employing her. The APCS that would apply to Anna's employment was derived from an award that

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28 Explanatory Memorandum for the *Workplace Relations and other Legislation Amendment Act* 1996, [5.77]-[5.78].

29 Commonwealth Submission, footnote 10.

> did not include the standard supported wage system or equivalent provisions to provide for a capacity-based pay method. In the absence of such provisions, King Meats would be required to pay Anna the applicable full-time rate of pay. Anna would stand a better chance of receiving a job offer from King Meats if her basic periodic rate of pay was a pro-rata wage rate based on her assessed productive capacity.
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> Under proposed section 90ZP the AFPC has determined a special APCS that specifies that the standard supported wage system applies to the employment of employees with a disability. This special APCS would provide that Anna be paid the pro-rata wage rate based on her assessed productive capacity. This would provide Anna with a better chance of gaining full-time employment as an assistant administrative clerk at the meat processing plant (emphasis added).[30]

(f) Consistently, for employees with a disability covered by a workplace agreement, section 184(2) required that the rate of pay correspond with the rate derived under the SWS if there was not a rate "specific to employees with disabilities" contained in an APCS that covered those employees. The provision viewed an SWS derived rate of pay as substitutable for one "specific to employees with a disability."

(g) The WorkChoices iteration of the *Workplace Relations Act* 1996 was amended in 2008 to include Part 10A. This Part ushered in the concept of a modern award and provided for an award modernisation process. Section 576B of Part 10A required regard to be given to broad range of factors that included the protection of the position in the labour market of young people, employees with a disability and those with training arrangements, the needs of the low paid and the need to help "prevent and eliminate discrimination on the grounds of," relevantly, physical and mental disability (the text of this factor is nearly identical with section 578(c) of the FW Act) and relevant rates of pay in the APCS scales. Section 576J of Part 10A defined "employee with a disability" in the same terms as the FW Act, save that it included a note which expressly stated that the definition included employees under the SWS. As this section made clear, Part 10A recognised a single category of disabled employee in way that made clear that SWS employees were included in this concept.

Notably, Part 10A did not include the wage setting parameters contained in the WorkChoices iteration of the *Workplace Relations Act* 1996. One of these,

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30 Explanatory Memorandum, [469], p. 102.

section 23(d), was a parameter for the provision of minimum wages for employees with a disability, juniors and those with training arrangements that ensured "those employees were competitive in the labour market." The illustrative example of "Anna" above was perhaps intended to show how the WorkChoices version of federal industrial law expressed the method of remaining competitive. The parameters were not re-enacted by the FW Act.

(h) The FW Act applies a single modern awards objective and minimum wages objective to a safety net which is inclusive of wage minima that brings employees with a disability within this statutory protection (see section 139(1)(a)). This was an act of legislative reform. At this point, it is to be observed that while section 284(3) of the FW Act contains a definition of modern award minimum wages, this definition does not define the concept itself. Rather its effect is to treat any reference in awards to rates of minimum wage (in its settled meaning) as references to an award minima, extending to the categories of employee referred to in section 153(3).[31] There is no suggestion of any repugnancy between these provisions of the FW Act and a modern award term that "provides for" minimum wages by obliging an employer to pay an "applicable percentage of the relevant minimum hourly rate of pay." [32] Indeed, as mentioned above the precursor modern award provisions of Part 10A expressly contemplated the SWS methodology would form part of the statutory concept of an "employee with a disability."

29. There is no contextual support in the legislative history for the degree of discriminatory latitude the Commonwealth asks the FWC to adopt for section 153(3). The FW Act broke with its predecessor on the subject of minimum wages. The FW Act did not embrace the WorkChoices preference for a special rate of pay struck for a disability specific classification.[33] The intention was expressly to the contrary. The Explanatory Memorandum for the amendments made to the *Workplace Relations Act* through the *Transition to Forward with Fairness Bill* 2088 spoke about their, realised, intention to repeal section 197 and section 198 of the *Workplace Relations Act*. The first of these provisions allowed for the making of a ***special*** AFPC for the same categories of employee

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31 The FW Act did not re-enact section 203(1) of the WorkChoices *Workplace Relations Act* which required that rates be expressed as a monetary rate per hour. This was subject in any event to section 208(1) which would have preserved the rate methodology in the SWS.

32 Cl. D.4.1 of Schedule D to the *Supported Employment Services Award* 2010.

33 Even so, the WorkChoices Workplace Relations Act did not conceive of a "special rate" as one divorced from full award rates.

mentioned in section 153(3). The second provision allowed for a decision to be made as to whether a *special* AFPC would operate as a minimum for some but not all AFPCs. The memorandum stated expressly that the modern award process was intended to return the subject matter of minimum wages, including for juniors, those with training arrangements and employees with a disability, to awards.[34] This act of law reform gives effect to the uniformity and consistency, *undifferentiated by sector*, intrinsic to the settled meaning of award based "minimum wages" in the FW Act and the linkage made by section 135(2) between this form of minima and the minima prescribed by a national minimum wage order.

30. The legislative history leading up to the reforms introduced by the FW Act tells against the idea of a classification based "special" minimum wage. It tells against the exclusion of employees with a disability from settled wage fixation principles or a share of the national productivity reflected in the national minimum wage (for this, see paragraph 32 below). Accordingly, it tells against the Grade A and B Terms, or the variation to these terms that have been proposed by the ABL represented employers.

31. Before leaving this section, it is necessary to say something about the effects of the Commonwealth's Submission for the obligation contained in section 135(2) of the FW Act.

32. As discussed in argument before the Full Bench, section 135(2) requires the FWC to take into account the rate of the national minimum wage as set by order.[35] It is trite that this requires more than merely noticing the rate.[36] It necessarily extends to the basis for the rate or rates contained in a current order. In oral submissions, the AED drew attention to the national productivity basis for a generalised wages floor referred to in *Re 4 Yearly Review of Modern Awards – Pharmacy Industry Award* 2010 (2018) 284 IR 121, [136].[37] The Commonwealth offers no basis for construing section 153(3)(b) as if it excluded employees with a disability (or juniors and those under training arrangements)[38] from this or any other general wage setting principle at the point the FWC takes account of a rate.

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34 Explanatory Memorandum (Transition to Forward with Fairness) Bill, [65]-[66], p. 88.

35 Section 135(2) of the FW Act.

36 To take a matter into account means to evaluate it and to give it due weight, having regard to other relevant factors: *Nestle v Commissioner of Taxation* (1987) 16 FCR 167, 184 (Wilcox J). Cited with approval by Hely J in *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499, [62] and by Katzmann J in *CFMEU v Deputy President Hamberger* (2011) 195 FCR 74, [103].

37 List of Authorities, page 307.

38 Indeed, juniors and those under training arrangements have not been excluded.

Yet this is the effect of its construction and the apparent effect of the Grade A and B Terms.

33. Additionally, the account the FW Act obliges the FWC to take of national minimum wage orders extends to the methodology those orders use to "set special national minimum wages" for all those to whom section 294(1)(b)(iii) applies. The second national minimum wage order expressly utilises the SWS to do this for employees with a disability whose productivity is affected. This conforms with the Explanatory Memorandum for amendments made to the *Fair Work Bill* 2008.[39] In describing the operation of what became section 287(3), the memorandum stated that it was not intended that exceptional circumstances should exist in order to set wages for all those in a class employee for whom a special national minimum wage order could be made. Examples are cited. The example of relevance to these proceedings is where the tribunal provides for "a method for calculating wage rates for disabled workers that takes *account of productive capacity*" (emphases added). The FWC has so provided.

34. It is curious that the Commonwealth rejects the jurisdictional significance of productive capacity in relation to the "special" minimum wages it contends section 153(3)(b) contemplates but omits to mention that this was the intended frame of reference for special national minimum wages fixed by order, although both forms of wage are subject to the same minimum wage objective. The paradoxical reasoning is unexplained. The AED's construction harmonises section 153(3)(b) with section 294(1)(b)(ii) (and section 287(3)).

B.4.2 The existing state of the law

The DD Act

35. The existing state of relevant law is relevant context. Those who are the subject of section 153(3)(b) are protected from unlawful discrimination by the DD Act. Those who are the subject of section 153(3)(b) also have the benefit in their employment (whether in ADE or open employment) in the portable benefits available under the *National Disability Insurance Scheme Act* 2013 (the **NDIS Act**).

36. The Commonwealth contends in paragraph [34] that section 47(1)(c) (and it is presumed (d) also) of the DD Act provides no real assistance in determining the proper construction of section 153(3) of the FW Act. The apparent basis for this is twofold. First, the Commonwealth says it was unable to identify any authority that construed section

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[39] Supplementary Explanatory Memorandum of the Fair Work Bill 2008, [73]

47(1)(c). This being so, it argues that the reference to "capacity" in that section should not be read as "productive capacity." Second, it contends that the purposes of the FW Act could be achieved without recourse to section 47(1)(c). Both propositions are absurd and invite the FWC to deviate from proper principle.

37. The first proposition is unsound. It denies the word's ordinary meaning[40] *and* the legislative history of the section. The FWC has been provided with the explanatory memorandum to the *Disability Discrimination and Other Human Rights Legislation Amendment Bill* (item 2 of the List of Authorities) as well as the Productivity Commission's *Review of the Disability Discrimination Act.*[41] The Explanatory Memorandum to the aforementioned Bill makes clear that amendments introduced into the DD Act through it implemented recommendations contained in the Productivity Commission's Review.[42] Under the heading "capacity based wages for people with disabilities," the Review said this:[43]

> Under section 47(1)(c) of the DDA, it is not unlawful to discriminate against a person with a disability by paying them a capacity (or productivity)-based wage, as long as this wage is consistent with an Award, a certified agreement or an Australian workplace agreement, and the person would otherwise be eligible for the Disability Support Pension.
>
> Many workers with a disability who are employed either in the 'open' labour market, or in the 'supported employment' labour market (also known as 'business services' or 'sheltered workshops') receive wages lower than full wages, based on their assessed relative capacity (or productivity). One scheme for assessing relative capacity is the federal Supported Wage System.

38. The second proposition is contrary to the High Court's dictum in *Project Blue Sky*. Casting aside section 47(1)(c) or (d) of the DD Act, and presumably also section 45(2)(b) of that Act,[44] results in dissonance. Further, it is absurd and irrational to construe section 153(3)(b) as if it were lawful for the FWC to include specific provisions in a modern award relating to wages that it would be unlawful for an employer to act upon in

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40 Relevant ordinary meanings of "capacity" are: "In industry, the ability to produce; equivalent to 'full capacity:" Oxford Dictionary. Also, "power, ability, or possibility of doing something:" Oxford Dictionary and Macquarie Dictionary, online editions.

41 Item 27 of the List of Authorities.

42 For instance, see [101] of the Explanatory Memorandum: List of Authorities, page 27.

43 Page 1593 of the List of Authorities. The Commission's recommendation is on page 1595 of the List of Authorities.

44 Having regard to the reasons for that provision disclosed in the extrinsic materials that have been provided to the FWC.

purported compliance with that instrument. This is so whether considered under the DD Act directly or through section 351(1) and (2) of the FW Act.

39. Likewise, if viewed according to the singular purpose posited by the Commonwealth for section 153(3)(b), it is absurd and irrational to construe section 153(3)(b) on a footing that invites the FWC to create a discriminatory wages standard that utilises low wages to promote employment for disabled employees if that pathway is, or may be, foreclosed to an employer.

40. It will be recalled that the Commonwealth justifies section 153(3) as a provision that authorises "special" minimum wages as a special measure to create and maintain employment. Whatever may be the position with respect to junior employees and those with training arrangements, the position on this subject for disabled persons has been decisively dealt with by section 45(2)(b) of the DD Act. The effect of section 45(2)(b) is that an AED employer seeking to defend wage discrimination on the footing that it is a special measure to create or maintain employment will fail unless those wages engage section 47(1)(c)(ii) or (d)(ii). This problem doesn't arise for the special wages envisaged for employees with a disability under the second special national minimum wage order because those wages are based on the productive capacity of an individual.

Social inclusion and the NDIS Act

41. One aspect of the fair and relevant minimum safety net described in section 134(1) is "the need to promote social inclusion through increased workforce participation." The phrase "social inclusion" is not defined by the FW Act. However, section 3 includes it as one of the overarching objects of the FW Act. The specific objects of the Act inform this idea. Objects of particular significance are section 3(a) and 3(e) of the FW Act, which respectively speak of compliance with international labour obligations and the protections the Act intends to confer against unfair treatment and discrimination. Those objects as well as the "social inclusion through increased workforce participation" element of the modern awards objective in section 134(1)(c) are harmonious with objects and principles contained in the NDIS Act which is of course a Commonwealth law that deals with a relevant aspect of DSP qualification, namely the nature and extent of Commonwealth support for an individual with significant disability to participate in employment if they have such a goal. This also bears favourably for ADE employers on the "employment costs" element of section 134(1)(f).

42. The NDIS Act deals with the social and economic position of disabled persons. Objects of that Act include to "in conjunction with other laws" give effect to the *Convention on*

the Rights of Persons with Disabilities, support the independence and social and economic participation of people with disability as well as facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability.[45] Declaratory principles of that Act that bear on social inclusion are, "people with disability be supported to participate in and contribute to social and economic life to the extent of their ability"; "people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals in the planning and delivery of their supports"; "people with disability have the same right as other members of Australian society to respect for their worth and dignity."[46] Further, section 5 of the NDIS Act states that it is an intention of the Parliament (which is obviously the Commonwealth Parliament) that if the Act requires something to be done by or in relation to a person with disability by another person that act or thing is to be done, so far as practicable, in accordance with the principles contained in section 4 as well as some additional principles set out in the section. One of the things the Act requires is the creation of plans devised to give effect to the goals, objectives and aspirations of an individual disabled participant. The development of those plans are subject to the principles set out in section 31.

43. A plan must be underpinned by the right of the participant to exercise control over his or her life, advance inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations and maximise the choice independence of the participant.[47] A National Disability Insurance Scheme plan enables an individual disabled participant to align their goals and aspirations with the necessary and reasonable supports considered appropriate to support them. The evidence demonstrates how extensively the National Disability Insurance Agency supports ADE employment and employment choice. The practical ways in which the Agency can do this are broad and extensive. Those methods include job customisation, foundational skills for work, direct supervision and supports to manage complex behaviours or complex needs at the workplace.[48] it does so is apparent in the evidence of Ms Mitra to the Disability Royal

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45 Section 3(a), (c) and (f) of the NDIS Act

46 Section 4(2), (4) and (6) respectively.

47 Section (31)(g), (h) and (i) respectively.

48 Witness statement of Gerrie Mitra: witness statement of Sunil Kempi (exhibit G): [10] and SK-2, p. 62, [40]-[49].

Commission. ADEs are expected to have a pathway to open employment.[49] That this pathway exists was confirmed directly by Mr Teed.[50]

44. In a practical way, the aforementioned objectives and principles are reflected in the evidence of Gerrie Mitra to the Disability Royal Commission, whose evidence is before the FWC. She said:

> The change to NDIS funding was designed to facilitate and promote opportunities for participants to have greater choice of employment, enabling them to use their supports in employment funding in any employment setting.[51]

45. Nothing in the NDIS Act or the evidence of the way support funding is provided to workers employed by ADEs views workforce participation as a function of lower wages or of lower worth.

The Convention on the Rights of Persons with Disabilities

46. It is an express object of the Commonwealth law embodied in the NDIS Act that it give effect to the *Convention on the Rights of Persons with Disabilities*. In relation to work, the social inclusion conceived of by the human rights declared in the Convention are contained in Article 27, read with Article 5, which protects and enhances the rights of those with disability to undertake remunerative work.[52] The AED has already drawn attention to Article 27(1)(b), which is the right to protection of the "rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work," and how it aligns with other provisions of the FW Act as well as the DD Act. However, Article 27 also includes an overarching right of persons with disabilities "to work, on an equal basis with others; including 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" and a particular right to promotion of the "acquisition by persons with disabilities of work experience in the open labour market."

47. Quite apart from the way the Convention is deployed in the NDIS Act, as an international treaty to which Australia is signatory, section 153(3)(b) is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with

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49 Viva vice evidence of Gerrie Mitra: witness statement of Sunil Kempi (exhibit G): [10] and SK-2, p. 22, lines 35-48. See also her statement, p. 61, [38].

50 Transcript, PN427-430. Mr Teed described ADEs as increasingly a "transition through to ultimately open employment in a safe and supported way."

51 Witness statement of Sunil Kempi, SK-2, p. 64, [58]. The employment supports category of NDIS is funding is greater than what might be expected of an employer: p. 61, [42], see also [44].

52 McCallum Report, pp. 12-13.

established rules of international law. In the face of constructional choice, ambiguity is not to be approached in a narrow way. Obviously, if a conforming construction is excluded by the statute, the statute must apply.[53] However, for the reasons that the AED has given in its written and oral submissions, a conforming construction is not excluded by section 153(3)(b). To the contrary, the AED construction gives effect to the human rights recognised in the Convention in a manner that accords with Australian domestic law. From this standpoint, the AED's construction enhances social inclusion. It also enhances social inclusion in the manner recognised by FWC authority and aligns workforce participation with the nature and portability of support available under the NDIS Act.

48. In these proceedings, the Commonwealth has recognised the link between the human rights recognised by the *Convention on the Rights of Persons with Disabilities* and section 153(3)(b). On 9 March 2018, Sharon Stuart, Acting Group Manager, Disability, Employment and Carer's Group wrote to the presiding member, the Vice President, for the purposes of this proceedings. In this letter Ms Stuart said:

> The Department would like to see any new wage setting arrangements protect the interests of the 20,000 people with disability currently employed in ADEs. The Department will closely consider any decision of the Commission with a view to ensuring that any changes to policy settings promote the rights of people with disability, including the right to work, and are consistent with Australia's domestic and international legal obligations, including relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities* and the *International Covenant on Economic, Social and Cultural Rights*.

49. Ms Stuart also recognised the importance of the National Disability Insurance Scheme in assisting those with disability access what she termed "meaningful and gainful employment." In light of the individualised way[54] that scheme operates, it is troubling that the Commonwealth posits a one dimensional, abstract, view of social inclusion that fails to fully take account of developments in the law. It offers no principled, or factual, basis for doing so. The Commonwealth's endorsement of observations that fell from the Full Bench in a Statement ([2018] FWCFB 2196) is likewise troubling. The policy embodied in the NDIS Act puts paid to any global presumption that ADEs can be or

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53 *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144, [247] (Kiefel J) and the authorities her Honour cites. The other members of the Court did not refer to these principles. A Full Federal Court applied her Honour's reasoning in *SZGIV v Minister for Immigration and Citizenshi*p (2013) 212 FCR 235 [59] (the Court).

54 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).

should be viewed as employers of last resort. The evidence of commercial imperative is no less compelling for ADE employers than another other Australian employer. So far the AED has not identified another authority that has elevated employer viability to the status of "foremost consideration" in considering what the level of minimum wages ought to be included in an award that gives effect to a protective safety net.

50. It is also curious that the Commonwealth embraces as a legitimate objective the ability of ADEs to continue to provide the benefits it refers to in paragraph [55] but says nothing further about the position expressed by Ms Stuart in 2018. When called upon by the Vice President to explain the purpose of a letter sent to the FWC by the then Secretary of the Department, Kathryn Campbell, on 8 November 2017, Ms Stuart said:

> The letter was intended to reassure supported employees, their families and carers, and ADEs that the Department's policy development would seek to support, as far as reasonably possible, the ongoing viability of the supported employment sector.

51. Despite this statement, the Commonwealth continues to hedge. It offers no commitment to implementing the recommendations of the ARTD report. By sleight of hand, its treats the social benefits associated with ADE employment as a wages issue that transfers any perceived viability risk to employees. The Commonwealth's position is thus exposed as self-serving. Worse, the Commonwealth now urges the FWC to consider less discriminatory alternatives as a fairness consideration but offers no suggestions as to how this should be done other than through the maintenance of the wages status quo for ADE workers and an "at large" construction of section 153(3)(b). Yet the Commonwealth has produced records that demonstrates the SWS was used extensively by ADE employers in the year ended 2022.

B.4.3 Response to specific constructional submissions

52. It is necessary to deal with three constructional arguments pressed by the Commonwealth.

B.4.3.1 The asserted impairment of work value

53. *First*, is the Commonwealth's contention in paragraph [28] that a narrow construction may limit the FWC's ability to discharge its ability to be satisfied that minimum wages are justified on work value grounds. The submission is wrong.

54. The Commonwealth says that work value reasons are separate considerations to the employee's productive capacity. This is true. This acceptance however does not advance the Commonwealth's argument.

55. The concept of "work value" in its industrial meaning and in its statutory emanation in section 156(3) is concerned with the particular ***kind of*** work that is performed. None of the statutory work value reasons has anything to do with the kind of worker who does work or their output of work. As section 47(1)(c)(ii) and (d)(ii) of the DD Act and the eligibility rule of the SWS demonstrates, for this category of employee whose impaired work capacity is a feature of their class for FW Act purposes, the output of a "particular kind of work," here basic unskilled work, by an individual will be less than the output of an unimpaired person or someone with a different kind or level of impairment. The shorthand for this effect is productive capacity.

56. Section 153(3)(b) allows the FWC to adjust an employer's award obligation so that it only *pays* for the performance of the work of a particular kind (valued in accordance with its value as work) that the individual is able to produce in their employment. The AED's construction of section 153(3)(b) thus allows for a relevant distinction to be recognised that:

    (a) arises at an individual level from the effects of an individual's disability;

    (b) "provides for" a term that obliges payment for the work the disabled person performs and the employer absorbs. Thus clause D.4.1 of Schedule D to the Award presently stipulates that employees will be "paid the applicable percentage of the relevant minimum hourly rate of pay."[55]

57. The distinction referred to in (b) above is evident in the text of section 47(1)(c)(i) and (d)(ii) of the DD Act which refer to a wages obligation: specifically, the "payment" and what is "payable."

58. None of this constitutes an impediment or limitation on the FWC's obligation to value work. If the work is packing things into boxes it is this activity that falls for assessment according to the settled meaning of "minimum wages," taking into account the allocation of national productivity reflected in the national minimum wage. This valuation occurs regardless of who performs the work and has no regard to the status of the employer.

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[55] See also D.10.3, which states: "the employee must be paid at least 12.5% of the relevant minimum hourly rate of pay for each hour worked during the trial period."

59. But in any event, the FWC has recognised that work value in its statutory form can, and does, take account of, and remedy. the causes of discrimination that have distorted the assessment of value in respect of disadvantaged social groups.[56] Doing so, gives effect to the obligation in section 578(c) of the FW Act and is consistent with the objects stated in section 3(a) and 3(e) of the FW Act that favour compliance with international labour obligations and protections against unfair treatment and discrimination. Doing so also provides for a range of fair minimum wages for, relevantly, employees with a disability, as stipulated by the minimum wages objective, on the footing that distortions produced by discrimination are usually to be regarded as unfair.

B.43..2 The Commonwealth's argument that section 150 is to be read subject to 153(3)(b)

60. *Second*, the Commonwealth's contention in paragraph [32] that section 150 must be read subject to section 153(3)(b) results in an odd and disharmonious constructional outcome. The FWC should reject it.

61. It is incongruous to presume that those drafting section 150 somehow overlooked a provision in the same subdivision, three sections along, yet failed to say expressly what the Commonwealth now contends for as a matter of construction. There is no need to read those provisions in the way contended for by the Commonwealth. The two provisions can be read harmoniously, each giving effect to harmonious goals that are consonant with the need recognised in section 578(c) of the FW Act and the other parts of the FW Act referred to in paragraph 59. However, the Commonwealth's submission also demonstrates misconception.

62. As said above, section 153(3) is an exception, not a source of power. It is to be read together with section 153(1). Section 153(1) is beneficial. It would be inconsistent with its beneficial purpose to simply put it to one side as if had no work to do in construing section 153(3). Reading these provisions together supports a strict view of the section and of the work "merely" does in that provision. A confined and limited view of what it excuses avoids undoing the work section 153(1) performs in the statutory scheme. This interpretation is bolstered by the presence of section 150 in the same subdivision and exposes how these provisions can be construed toward achievement of beneficial, protective, goals in respect of persons who are, the Commonwealth accepts, disadvantaged.

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[56] *Re 4 Yearly Review - Pharmacy Industry Award* (2018) 284 IR 121 at [168] (item 8 of the employee parties list of authorities materials, page 320) citing the Full Bench in the *Equal Renumeration Decision* 2015 (2015) 256 IR 362 at [292].

B.4.3.3 The Commonwealth's section 161 argument

63. *Third*, is the Commonwealth's contentions about section 161 of the FW Act. Those contentions demonstrate that the Commonwealth has missed the AED's point.

64. Section 161 (and through it section 46PW of the *Australian Human Rights Commission Act 1986*) has constructional importance regardless of whether it is to be viewed, as the Commonwealth contends, as a further protective mechanism for review. Indeed, the Commonwealth's suggestion that its purpose is to protect against unlawful "acts" on the "but for" basis referred to in paragraph [39] rather emphasises the AED's point. The "but for" condition in section 161(3) recognises that the FWC's review is an abstract one, as distinct from one that arises from a particular act constituted by a particular employer paying wages other than capacity based wages.[57]

65. The Commonwealth also observes that a term precluded by section 136(2) has no effect due to section 137. This is true. This does not affect the contextual significance of section 161 though. The very basis for the exercise of the removal power contained in section 161(3) draws attention to, and confirms, the significance the FW Act gives to Commonwealth anti-discrimination law in relation to modern awards and the functions the FWC performs in relation to these instruments. It implicitly recognises that the *prima facie* position is that an award term that falls foul of the DD Act is still subject to the statutory command in section 44 of the FW Act unless removed.

66. The Commonwealth's concluding argument that the further protective regime represented by 161 would operate "notwithstanding the term of the award complies with section 153" is an odd submission for the Commonwealth to make. In seeking to reconcile section 161 with section 153(3), the Commonwealth appears to suggest that it would be open for the FWC to include a term in an award that required (or might have the effect of requiring) an employer to act unlawfully by observing the wages because section 161 is available to remove it if the FWC is called upon to do so by a referral made under section 161(2)(b). This attributes a perverse intention to the legislature.

67. It is neither necessary or attractive to construe section 153(3) as if it would permit the FWC to include a term that does, or might, result in unlawful conduct. Such a construction invites the FWC to ignore the state of the law and is quite inconsistent with

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[57] An employer who seeks to engage the defences in section 47(1)(c) or (d) of the DD Act must prove that it has done an act in direct compliance with a fair work instrument.

FWC's obligation to "ensure" a fair and relevant safety or its obligation to take account of the need to help prevent and eliminate discrimination.

68. Additionally, the Commonwealth's statutory approach would undercut section 150. It will be recalled that this section prohibits inclusion of an objectionable term. This requires assessment at the threshold. As the AED explained in its jurisdictional submissions in chief, an "objectionable term" is one that permits, has the effect of permitting, or purports to permit a contravention of Part 3-1 of the FW Act[58] (thus the term would still be objectionable even if as a result of section 137 it had no effect). "Permits" means "authorise," in the sense of "give permission to or opportunity for."[59] It cannot be correct to construe section 153(3)(b) as if it permitted inclusion of a term that would permit or authorise an employer to contravene section 351(1), having regard to section 351(2) and (3)(ab), in a way that the DD Act does not excuse. That results in dissonance within the FW Act itself.

69. However, a view of section 161 as a further protective measure has, it may be accepted, greater resonance once it is appreciated that if, through inadvertence or a change in the law embodied in, relevantly the DD Act, a term in an award falls foul of the DD Act, the FWC is armed with the power to remove it.

B.4.4 Consequences of the Commonwealth's "plain" meaning

70. A consideration of the consequences of a particular construction is an incident of the purposive approach to construction. It gives effect to the interpretative preference stated by section 15AA(1) of the *Acts Interpretation Act* 1901.[60]

71. The Commonwealth's "plain" meaning construction invites the FWC to read section 153(3)(b) as if it established a zone of discriminatory freedom that displaces all else. The effect would be to sanction discrimination in wage setting principle as well as in wage rate and method. No analysis is offered by the Commonwealth that would explain to the FWC the need, or legal justification, for reading section 153(3)(b) in this way. Indeed, the Commonwealth's argument does not even mention, let alone address, how construing section 153(3) in this way aligns with the FWC's obligation to take into account the statutorily accepted need to help to prevent and eliminate discrimination on the basis of

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58 FW Act, section 12 (definition of "objectionable term").

59 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].

60 *Turner v George Weston Foods Ltd* [2007] NSWCA 67, [55]-[56] (the Court).

physical and mental disability.[61] Instead, the Commonwealth offers "fairness" as a potential, discretionary, control on the content of a discriminatory term that, on the Commonwealth's construction of section 153(3), the FWC *could* include.[62]

72. It does not make sense to attribute to the legislature an intention for section 153(3) that authorises the inclusion of terms that discriminate at large on the subject of minimum wages for employees with a disability (or juniors or those under training arrangements), and then assume that the FWC may desist from doing so if it thought those terms unfair by reference to idiosyncratic views of what constitutes "unreasonable, disproportionate or unnecessary." Such a construction is not consonant with the general approach of the FW Act[63] or the specific provisions relevant to modern award content. Indeed, the Commonwealth's approach conflates the anterior requirements that apply to whether a permitted term should be included in a modern award at all, which is governed by section 136(1), with the considerations that apply to whether particular content must be excluded, which is governed by section 136(2).

73. A term that is unreasonable, disproportionate or unnecessary to achieve a legitimate goal is unlikely to meet the necessity test stipulated by section 138. That being so, the Commonwealth's hypothesised term fails at the threshold. There is no need to go further. The issue posed by section 153(3) is quite different. It is engaged at a different point and presumes the necessity and other inclusion requirements of the FW Act have been met.

74. Disconcertingly, the Commonwealth associates its fairness approach with an assessment by the FWC about whether a less discriminatory alternative is available that would also achieve a postulated objective, albeit it disavows this frame of reference for the purposes of authority. This puts the question the wrong way around. The objective is framed by the provisions of the FW Act that govern what can and should be included in an award on the subject of minimum wages. If "legitimate objective" is viewed according to these provisions, the less discriminatory criterion advanced by the Commonwealth supports

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61 FW Act, s 578(c). The elimination objective reflects Article 2 of the *Discrimination (Employment and Occupation) Convention 1958* adopted by the General Conference of the International Labour Organisation on 25 June 1958, which states: "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." An objective of the FW Act is to promote national economic prosperity and social inclusion for all Australians including by section 3(a) providing workplace relations laws that are fair for 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."

62 Commonwealth Submission, [57].

63 See for instance *Wills v Marley* (2020) 299 IR 253 at [46] (the Full Bench).

the AED's construction. Instead, the "legitimate objective" the Commonwealth favours is limited to the maintenance of ADE employment. The Commonwealth does not however identify how this singularity of purpose aligns with section 153(3)(b), section 134(1) or section 284(1). In any event, the Commonwealth's fairness argument fails for five additional reasons.

75. *First*, authority is against the Commonwealth. Multiple Full Benches have confirmed that considerations of fairness justifies uniformity of treatment when it comes to fixing the minimum wage base,[64] not different treatment. The subject matter of section 153(3) is of course minimum wages. That concept is settled. Indeed, section 284(e) of the FW Act intends that all those referred to in section 153(3)(a) should have the benefit of that statutory concept by way of the range minima (something that is typical of the classification terms of modern awards) rather than, for instance, one rate of pay prescribed per category: i.e. age, disability or training arrangement. This implicitly rejects the WorkChoices approach that contemplated a separate classification.

76. The qualifier "fair" in section 284(e) gives further, emphatic, effect to the foundational basis for the uniformity inherent in the idea of a minimum wage in Australian industrial law. Echoing the observations of Gleeson CJ in *Electrolux Home Products v Australian Workers Union* (2004) 221 CLR 209 at [8], it is difficult to conceive of a scenario in which Parliament was thinking of minimum wages differently in the various provisions of the FW Act when it used that expression uniformly throughout the legislation.[65]

77. *Second,* whilst it is true that "fairness," as it appears in section 134(1) (but not section 284(e)), has been construed as evaluative of <u>both</u> employees and employers, the level of modern award wages is associated with the need for those wages to bear a proper relationship to the value of the <u>*work performed*</u>.[66] This is an output measure. The "proper relationship" is established by application of the settled meaning of "minimum wages," taking account of the rate of the national minimum wage as currently set in a national minimum wage order.[67] That rate for the same cohort of employee is set by the method prescribed in the second special national minimum wage order. Further, whilst expressed in the context of gender undervaluation, the FWC has recognised that work value can take account of, and remedy, discrimination that has distorted value for disadvantaged

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64 See the authorities referred to in footnote 48 of the AED's jurisdictional submission in chief, some of which are items 11 and 12 of the List of Authorities.

65 See also at [81] (McHugh J); [162] (Gummow, Hayne and Heydon JJ); and [251] (Callinan J).

66 Penalty Rates Case, [119].

67 The latter is a statutory command: section 135(2).

social groups.[68] This undoubtedly recognises and "helps" to prevent and eliminate discrimination in accordance with the obligation contained in section 578(c) of the FW Act.

78. *Third,* "Fairness" is also to be read with "relevant." A fair and relevant safety net is one that "accords with community standards and expectations."[69] Quite apart from what the principles of statutory construction require, it would be incongruous indeed if community standards and expectations did not include giving effect to the human rights of disabled people established by the *Convention on the Rights of Persons with Disabilities* and ILO conventions or the protections from discrimination embodied in law. Additionally, community standards and expectations would include the changed function of awards[70] as protective (protective of employees[71]) instruments made exclusively by the FWC who must perform its functions in accordance with the statutory commands in section 577 and 578 of the FW Act.

79. *Fourth*, relevant statutory indicia in the FW Act tells against unqualified discrimination. The objects of the FW Act views national prosperity and social inclusion in a way that takes account of Australia's international labour obligations (section 3(a)) and protection against unfair treatment and discrimination (section 3(e)). This is also apparent from sections 153(1) itself, section 150, section 351(1), (2)(a) and 3(ab) and section 161. Additionally, as has been mentioned, the FW Act requires the FWC to take account of the need to help to prevent and eliminate discrimination on grounds that include disability (s 578(c)). An elimination obligation also forms part of Australia's international labour obligations under the ILO's *Discrimination (Employment and Occupation) Convention 1958*.[72]

80. In reference to an elimination object contained in the *Equal Opportunity Act* 1984 (WA), Brennan CJ and McHugh J said in *IW v City of Perth* (1997) 191 CLR 1 at 11-12[73] that:

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68 *Re 4 Yearly Review - Pharmacy Industry Award* (2018) 284 IR 121 at [168] (item 8 of the employee parties list of authorities materials, page 320) citing the Full Bench in the *Equal Renumeration Decision* 2015 (2015) 256 IR 362 at [292].

69 Penalty Rates Case, [120] drawing upon the explanatory memorandum to the FW Act.

70 Penalty Rates Case, [129]-[131].

71 Penalty Rates Case, [123].

72 See footnote 61 herein.

73 See also Dawson and Gaudron JJ at 22 and Kirby J at 58.

> Consequently, the provisions of the Act should as far as possible be given a construction that would eliminate discrimination on the ground of impairment (emphasis added).

81. It is true that the words "so far as possible" reflected the statutory language. The FWC's section 578(c) obligation to take account of the need to ***help*** to prevent and eliminate discrimination is not however materially different and is harmonious with the constructional principle recited by their Honours. A practical exposition of approach in relation to an ADE wages tool previously sanctioned by the Award is contained in the reasons of Katzmann J in *Noijn v Commonwealth* (2012) 208 FCR 1 at [268]:

> The BSWAT may be fair in its application to some disabled employees. Powerful evidence was given in these cases, however, that 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 such a way as to eliminate as far as possible its inequitable aspects (emphasis added).

82. *Fifth*, the way that the Commonwealth posits the less discriminatory alternative criterion is reminiscent of the approach to alternatives postulated by Phillips JA in *State of Victoria v Schou* (2004) 8 VR 120 at [27], [32], [37]. His Honour's observations were made in the context of the reasonableness element of indirect discrimination, as that concept stood in the Victorian *Equal Opportunity Act* at that time. Buchanan JA agreed, opining at [47] that the reasonableness of a requirement under the Act at that time was not concerned with modifications to a general requirement to "accommodate one person's special needs." The notion that a postulated alternative must meet the same end and the same employer need, or that the particular special needs of someone are irrelevant to whether a requirement is reasonable, or, in the way advanced by the Commonwealth, is "fair," is implicitly rejected, in the case of disability, by the re-enactment in 2010 of the *Equal Opportunity Act* to include a positive duty to make reasonable adjustments for an individual and the amendments made to the DD Act that also did so, albeit in different terms. The DD Act expressly embraces the notion of an adjustment that produces a different end in aide of a different objective, namely to avoid disability based detriment. This change is closer to the views of Callaway JA in *Schou* at [43]-[44], who viewed the inflexibility of the requirement imposed in *Schou* as a synonym for discrimination.

C The Disability Support Pension

83. The Commonwealth does not appear to have appreciated that the AED principally draws upon the DSP qualification criteria in aide of its construction of section 153(3)(b). This purpose is apparent from paragraph [21] of the AED's jurisdictional submissions in chief.

84. By way of brief recapitulation, both of the work criteria for qualification (the SWS and continuing inability to work (**CITW**)) focus attention on work capacity of the category of persons who are the subject of section 153(3)(b) of the FW Act. As stated in paragraph [41] of the AED's jurisdictional submission in chief, recognising this aligns the exception in section 153(3)(b) with the DD Act, the SS Act and *Noijn v Commonwealth* (2012) 208 FCR 1. It also aligns with the Convention.

85. It is true however that the AED also submitted that the "gateway requirements" in proposed clause B.1.1 would themselves have distorting effects for DSP eligibility in respect of both the SWS and the CITW criteria. Insofar as the CITW is concerned, this contention requires qualification. Dealing then with each in turn.

C.1 The effect of the proposed approach on SWS eligibility

86. The AED disagrees with the Commonwealth's submissions in paragraphs [64]-[65] about SWS participation. Those submissions overlook the SWS eligibility rule, which is extracted in paragraph [28] of the AED jurisdictional submission in chief.[74] Respectfully, eligibility hinges on duties or tasks for the class of work for which the employee is engaged under the award, not the worker's productivity in the performance of assigned duties or tasks. It is eligibility that governs participation.

87. The Commonwealth expects that most employees engaged under the Award in Grades A and B will undergo SWS assessment. The SWS contemplates two assessments: eligibility and then, if eligible, productivity. SWS assessment will inform both. As designed however, Grades A and B creates an unnecessary risk to eligibility as the AED explains in paragraph [31] of his jurisdictional submission in chief. The FWC will be mindful that the SWS is available in ADE employment and is widely used.[75]

C.2 The effect of the proposed approach on CITW

88. In *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Harris* (2010) 218 FCR 274,[76] which the Commonwealth refers to and relies upon from paragraph [77], Greenwood J construed the phrase "any work" in section 94(2) of the SS Act in a way that the AED accepts, for the purposes of this proceeding,

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74 For ease of reference, the rule is: "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."

75 In final submissions a document was handed up to the Full Bench that summarised information produced to the FWC by the Commonwealth, Exhibit 67.

76 Commonwealth Submission, [77].

excluded from this concept at least the predecessors of ADEs. If his Honour's reasoning is applied to ADEs, the Grade A and B Terms would not, in respect of the CITW, result in the distorting effects referred to in paragraph [31] of the AED's jurisdictional submissions in chief. Nevertheless, this does not render the CITW irrelevant for four reasons.

89. *First*, whereas the SWS assessments envisaged by the Commonwealth can supply information that satisfies each aspect of the SWS (eligibility and productivity), CITW is highly individualised and complex.[77] The phrase "independently of a program of support" in section 94(2)(a) of the SS Act cannot be divorced from the other words in the sub-section or the other elements of the section as a whole, as Greenwood J's reasons in *Harris* demonstrate. It is apparent that, unlike the SWS, the focus of a CITW is whether solely by reason of impairment the person is prevented from working (whether the work is skilled or unskilled) [78] at or above the minimum wage without retraining and without support to prepare, find or maintain employment.[79]

90. A person can still qualify for a DSP with a CITW even if they have capacity to perform work that attracts full award wages, provided they need support funded by the Commonwealth to do so.[80] The National Disability Insurance Scheme provides support that is portable and not tied to the employer.[81] By itself this supports the uniformity and consistency of treatment inherent in the settled meaning of "minimum wages." Equality of treatment across employers gives effect to elements (a), (f) and (g) of section 134(1) and in respect of (c) promotes social inclusion, including by avoiding wage competition at the safety net level as between ADE employment and other employment. Such competition has no place in the safety net envisaged by section 134(1).

91. *Second*, *Harris* further supports productive capacity as a jurisdictional criterion. The legislative history of the SS Act recounted by Greenwood J demonstrates that the inclusion in 2005 of amendments to section 94(2) were intended to introduce a work

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77 For instance, see stage 1 of the test described by Greenwood J in [14] and then the combined effect of the stages at [17]. See also [28]. Plainly the sufficiency referred to by his Honour in [32] is person specific.

78 *Harris*, [64], [71].

79 *Harris*, [26].

80 *Harris*, [84], [89]-[90]. A "designated provider" is expansively defined in section 5(1) of the *Social Security (Active Participation for Disability Support Pension) Determination* 2014: List of Authorities, page 107.

81 Ms Mitra's evidence to the Disability Royal Commission was that "The change to NDIS funding was designed to facilitate and promote opportunities for participants to have greater choice of employment, enabling them to use their supports in employment funding in any employment setting:" witness statement of Sunil Kempi, (Exhibit G), SK-2, p. 64, [58].

capacity test to ascertain whether an individual had the capacity to work for full award wages without support.[82] A person with supportable capacity is the target of the CITW. Recognition that work capacity is the focal point for CITW adds to the jurisdictional considerations referred to in paragraphs [21], [27], [33] and [34] of the AED's jurisdictional submissions in chief. It supports a wage standard aligned with productive capacity for those who qualify for the DSP because of a CITW.

92. *Third*, Greenwood J's construction of the statutory term "work" (section 92(5)) as connoting a "normal" or "open" workplace has the effect that supported employees working on an ongoing basis in ADEs would not fall within the "maintain" limb of the defined term, "program of support."

93. The phrase "program of support" is defined by section 94(5) of the SS Act as follows:

> "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.

94. Of course a "program of support" may be offered by an ADE. So much is apparent from section 5 of the *Social Security (Active Participation for Disability Support Pension) Determination* 2014[83] which includes ADEs in its list of designated providers. However, a designated provider must still engage with the definition in s 94(5)). When section 94 speaks of "work," it speaks of "work" as that section defines it.[84]

95. To meet the definition, a "program of support," viewed objectively, must be a program to assist persons to either prepare for work, find work or maintain work. Applying Greenwood J's construction in the way posited by the Commonwealth, an ADE could

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82 *Harris*, [86]-[90]. For example, extracts of the Explanatory Memorandum cited by his Honour at [87] for amendments that brought into effect the present form of section 94(1) said: "The current test for disability support pension *assesses a person's capacity to work* for 30 [15] or more hours a week at award wages within 2 years, taking account of the types of activities that may assist a person to increase his or her work capacity. Currently only mainstream training is considered. However, programs that are designed to take account of a person's disability can significantly improve a person's capacity to work (emphasis original)."

83 List of Authorities, page 109.

84 The provision commences with "In this section."

not be viewed as a program designed to "maintain" work in open or normal employment. For example, Mr Wallace's evidence was that in 10 years he had witnessed 3 supported employees transition to open employment, of which two returned to supported employment.[85] Mr Teed viewed the open employment pathway more optimistically.[86] The expectation of the National Disability Insurance Scheme is that ADEs will have a pathway to open employment. Insofar as they do, the transitionary function, as Mr Teed described it in his evidence, could be characterised as a program of support that prepares or finds statutory work.

96. There are several consequences arising from applying *Harris* to "program of support:"

(a) The words "independently of a program of support" in section 94(2)(a) of the SS Act will be read as referring to a program that prepares or finds open employment for the impaired person or that maintains that person in open employment.

(b) The Secretary is unlikely to be satisfied of a CITW, for the purposes of sections 94(2)(aa) or (a), if the disabled employee works on an ongoing basis in supported employment, unless in an activity that satisfies the preparation and finding limbs.

(c) In these statutory circumstances, there is little to commend or justify the fixation of wage rates in this Award on a different basis to every other award.

97. Of course, an ADE employee with a disability still qualifies as an "employee with a disability" by virtue of section 94(1)(c)(i) of the SS Act if he or she is eligible to participate in the SWS. However, as explained in paragraphs 86 and 87 herein, the Grade A and B terms pose an avoidable risk to that eligibility.

98. *Fourth*, there was no inadvertent misconstruction of section 7 of the *Social Security (Active Participation for Disability Support Pension) Determination* 2014[87] as asserted in paragraph [70] of the Commonwealth Submission. Section 7(1)(b) calls up additional criteria, which it does. About this, the AED submitted that all these criteria must be "satisfied in relation to the person and the program of support." This is true. It is also true that each element of section 7(1) must be satisfied. It is perhaps the case that the Commonwealth had in mind the fact that in respect of one element of section 7(1), namely section 7(1)(b), only one of the matters referred to in sections 7(2)(, (3), (4) or

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85 Transcript of Proceedings (AM2014/286, 15 August 2022) PN675 – PN678

86 Transcript, PN427-430.

87 List of Authorities, page 109.

(5) must be satisfied. If so that fact has no bearing on the constructional significance of this provision for the AED's submission. Indeed, consistently with the legislative history recounted by Greenwood J, both sections 7(4) and (5) are linked to the ability of an individual to improve his or her work capacity through continued participation in the program of support.

D. Recommendations of the ARTD Report

99. There is little under this heading to which the AED can respond, save for one matter. It is quite unclear what paragraph [86](a) and (b)] of the Commonwealth Submission intends to convey. It is quite vaguely expressed. For this reason, the AED does not offer a response.

28 September 2022

M. Harding SC